American Foreign Policy toward International Law and Organizations: 1898-1917

Francis A. Boyle

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American Foreign Policy Toward International Law and Organizations: 1898-1917*

FRANCIS A. BOYLE**

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I. INTRODUCTION

A. Political Realism

A cardinal tenet of the "realist" or power politics school of international political science is that international law and international organizations are "irrelevant" to conflicts between states over matters of vital national interest. These conflicts comprise issues of international politics which concern the very survival of nation states, the international system and the human race itself. Considerations of international law do not and should not intrude into such areas. However, when such considerations do intrude, it should only be to the extent that they serve as a source of ad hoc or ex post facto justifications for decisions based on antinomial factors such as Machiavellian power politics and national interest. In the realists' view of international relations, international law is devoid of any intrinsic significance within the utilitarian calculus of international political decision making. International law, morality, ethics, ideology and even knowledge itself are mere components in the power equation. They are devoid of significance or prescriptive worth, and when deemed necessary for the vital interests of the state, such components are subject to compulsory service as tools of power. Since there are no barriers to the acquisitive nature of nation-states beyond their own inherent limitations, members of the realist school assert that an analysis of international relations must concentrate exclusively upon the dynamics of power politics.

The reasons for the realists' negative perception of international law are more the product of metaphysical speculation than of solid empirical research. The nations of the world are said to survive precariously in the Hobbesian state of nature, where life is "solitary, poor, nasty, brutish, and short." In this state of nature there exists no law or justice, no conception of right or wrong, and no morality. There is only a struggle for survival in which every state is at war against every other state. The acquisition of power, at the


expense of other states, is a fundamental right and a fundamental fact of international politics. Sheer physical survival in the Machiavellian world of power politics, totalitarianism and nuclear weapons must be the litmus test for the validity of man's political, philosophical, moral and legal presuppositions. International law therefore becomes irrelevant to any matter of importance in international relations. Moreover, international law will not become relevant to international politics in the foreseeable or even distant future.

Statesmen who disobey the "iron law"\(^4\) of power politics at the behest of international law invite destruction at the hands of aggressors. Such statesmen facilitate the destruction of third parties which cannot realistically hope to remain neutral in a serious conflict between major powers. Historically, whenever considerations of international law have entered into attempted solutions for the problems of international politics, the probability that violence, war, defeat, death and destruction would ensue has dramatically increased. The primary case in point was President Woodrow Wilson's approach to international affairs after the outbreak of the First World War.

**B. Legalism-Moralism**

On January 8, 1918, President Wilson delivered an address to a joint session of Congress in which he set forth the war aims and peace terms of the United States for ending the Great War.\(^5\) This speech contained the fabled Fourteen Points, the last of which laid the cornerstone for the League of Nations, which was the ill-fated predecessor to the United Nations. In that speech, Wilson emphatically decreed the death of Machiavellian power politics and all its essential components: the balance of power, secret diplomacy, trade barriers, armament races and the denial of self-determination. These principles of Machiavellian power politics must be completely replaced by a different system of international relations based upon antithetical operational dynamics: international organizations and law, collective security, open diplomacy, free trade, freedom of the seas, arms reduction and disarmament and national self-determination. A new era of world history dawned with the League of Nations; the old world of power politics was left behind as an evolutionary stage of barbarism to which, like Rousseau's state of

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\(^4\) See H. Morgenthau, In Defense of the National Interest 144 (1951).

\(^5\) See President Wilson's State Papers and Addresses 464-72 (A. Shaw ed. 1918).
nature, mankind would never return.

Unfortunately, the world of power politics returned two decades later. The political realists placed the blame for the Second World War on Wilson and those Western statesmen who adopted his allegedly "legalist-moralist" approach to the conduct of international relations during the interwar period. These leaders had condemned the techniques of power politics in favor of an antipower politics approach to international relations. However, the opposite should have been done. The Treaty of Versailles and the Covenant of the League of Nations were not the perfect incarnations of truth, justice and peace as represented by the leaders of the Allied and Associated Powers. They were mere instrumentalities of power politics designed by the victorious nations of the First World War to secure and perpetuate, with the maximum possible degree of legal and institutional coercion, the favorable political, economic and military status quo after the Great War. The Treaty of Versailles was imposed vi et armis, in contravention of Wilson's express promises given to induce surrender. The peoples of the world had been sorely deluded by the ideological rhetoric deceptively employed by their leaders to fan the flames of patriotic fervor to hasten the war to its successful conclusion.

If the victors of Versailles intended to keep their ill-gotten gains, they had to be willing to employ military force against a vengeful Germany whenever the latter attempted to resist the terms of the so-called peace. But the Western democracies lacked the requisite Nietzschean will to fight to preserve their dominance. They preferred to trust in their own illusions by putting their faith into such meaningless pronouncements as Wilson's Fourteen Points, the Kellogg-Briand Pact and its corollary, the Stimson Doctrine; into

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10. The Stimson Doctrine was a reaction to the Japanese invasion of Manchuria. It was articulated in a January 7, 1932 note to Japan and China which stated that the United States refused to admit the legality of the situation and would not recognize any treaty between those two nations which, inter alia, impaired the territorial integrity of China. See
such ineffectual organs of the League of Nations as the Council, the Assembly, and the Permanent Court of International Justice; and into such vapid and useless legalist-moralist doctrines as neutrality, disarmament, arbitration, the codification of international law and the formulation of a definition of aggression. Perhaps most egregiously of all, the Western democracies believed in the existence of a beneficent world public opinion that would guide the world on its path toward peace.

If Western statesmen had been attentive to the historical imperatives of power politics, and not seduced by the chimerical allurements of international law, the Second World War might never have occurred or would have occurred in the middle 1930's when the devastation would have been minor in comparison to that which actually transpired. Western statesmen could have fought the war on their own terms and at the time of their own choice, not those of their natural adversaries.

The political realists then argued that the United States, faced with a communist threat in the aftermath of World War II, must repudiate its deeply-ingrained legalist-moralist approach to international relations in favor of pure Machiavellian power politics to survive its confrontation with the Soviet Union. In order to avoid a suicidal Third World War, the Western democracies must not repeat the same near fatal mistake they made after the termination of the First World War, i.e., reliance upon the fictitious and fatuous strength of international law and organizations to preserve world peace. Thus arose the political realists' fascination with George Santayana's hackneyed saying: "Those who cannot remember the past are condemned to repeat it."11

C. The Legalist Approach to International Relations

Just as those who cannot remember the past are condemned to repeat it, those who misinterpret the past are just as likely to repeat it. Contrary to the underlying assumptions of contemporary international political scientists, the American legalist approach to international relations did not begin during or immediately after the outbreak of the First World War, but well before. This historical oversight has led political scientists to commit the grievous analyti-

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cal error of confusing and compounding positivist international legal studies with the pursuit of international morality. This error has created some legalist-moralist strawman warranting condemnation for the Machiavellian “sins of princes” supposed above. Consequently, throughout the twentieth century, a modern legalist approach to international relations has been established to function in a manner diametrically opposed to a moralist attitude toward world politics.

This self-conscious distinction between law and morality by turn-of-the-century American international lawyers was explicitly intended to surmount the objections of John Austin, who denied the existence of international law as real “law” and maintained instead that international law represented nothing more significant than the “rules of positive morality.” In the late nineteenth and early twentieth centuries, American international lawyers were vigorously engaged in the task of sharply distinguishing a “scientific” or “positivist” approach to the study of international law from its Grotian natural law heritage and proclivities. These lawyers were desirous of at last repudiating those elements of their Grotian past which partook of preaching international morality under the guise of an international law that was piously represented as the incarnation of natural law. International legal studies had to step irrevocably forward into the twentieth century by developing an actual “science” of public international law based upon a positivist approach which was antithetical to the content and methodology of outmoded natural law and natural right theories. This continued reliance upon such amorphous concepts by international lawyers gratuitously provided ammunition for philosophical assault to Austin’s omnipresent proteges.

At the outset of the twentieth century the classic paradigm for international legal positivism, which still dominates the profession after seventy-five years, was expounded in the second volume of

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15. From an international legal positivist perspective, the McDougal-Lasswell jurisprudence of international law is atavistic because of its self-proclaimed value orientation. See Irrelevance, supra note 1, at 206-14. This author has developed a “functionalist” ap-
the *American Journal of International Law* by the renowned Lassa Oppenheim, Whewell Professor of International Law at the University of Cambridge.¹⁶ A "positive" method required a foundation built upon the recognized rules of international law as set forth in the customary practice of states and in the formal conventions concluded between them, instead of upon philosophical speculations about some nonexistent law of nature. The facts of international life must never be distorted by the hypotheses about what international law "ought" to be. A true international legal positivist must, therefore, perform seven tasks in order to promote the "science" of public international law: (1) exposition of existing rules of law; (2) historical research; (3) criticism of existing law; (4) preparation of codifications; (5) maintaining the distinction between old customary and new conventional law; (6) fostering international arbitration; and (7) popularization of public international law, since public opinion can indeed influence governments in its favor.

The positivist method did not preach that international law should never concern itself with the promotion of moral values. Rather it was premised on the admitted assumption that international legal positivism, as opposed to the Grotian natural law tradition, constituted the superior means to progress toward attainment of the Aristotelian "final cause" of international legal studies—preservation of peace among nations to the greatest degree possible under the given historical circumstances. Positivist international legal analysis was more conductive to reaching an agreement among states over the current and proposed rules of international behavior than the dogma of Grotian natural law morality, which invariably masked perceived national interests and was subject to national prejudices. Consequently, international legal positivism could better serve to ameliorate the unavoidable conflict between states in international relations. Thus, in the first part of the twentieth century, war, imperial conquest and the threat and use of force were accepted facts of international life to which the rules of public international law were quite readily accommodated.¹⁷ International law

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was not yet perceived as the means by which these manifestations of interstate violence could be eliminated. Rather, international law was seen as a means to reduce their incidence, mitigate their fury and limit their scope as to protect neutrals and prevent the development of a worldwide conflagration. International law was never perceived as a transcendent end unto itself but only as a means to achieve the ultimate goal of peace in the human situation.  

From the perspective of a turn-of-the-century international legal positivist, Austin committed a serious methodological error when he mistakenly assumed that international law functioned in a manner similar to that of municipal law. At the time, there was a clear cut distinction between the two systems: international law was essentially a system of customary law, while, by contrast, municipal law was characterized primarily as a system of statutory law. Consequently, the operational features of each system should be fundamentally different, and therefore, the standards used to evaluate each system must be different. This approach, taken by the positivists, is corroborated by the literature of contemporary international political science which examines the so-called level-of-analysis problem, namely, that the functional dynamics of international relations in comparison to domestic affairs are so basically dissimilar that they cannot properly support the delineation of useful comparative analogues.

According to these early international legal positivists, Austin's position that international law was not really law but only positive international morality also misperceived the essence of the "sanction" behind municipal law. Instead of perceiving municipal law as the result of effective domestic public opinion, Austin considered coercion and punishment as the effective forces. Yet, without considering the power of public opinion, the phenomenon of customary law, whether international or municipal, cannot be accounted for, except, perhaps, by the fictive maxim that what the sovereign permits he also commands. Since there exists no Hobbesian sovereign in international relations, customary international law binds states because they are deemed to have consented to be bound by the general customs and usage of international intercourse. As such, the ultimate sanction for international law is community public opinion.

865 (1914); Editorial Comment, Peace Through the Development of International Law, 8 AM. J. INT'L L. 114 (1914).


which includes fear of war and its correlative: pressure to resort to war. This explicit or implicit consent of states to be bound by international law also binds their respective citizens since international law is incorporated into their domestic legal orders. Citizens are thereby bound by the rules of international law in their mutual relations with each other and with foreigners.\footnote{International legal positivists have traditionally favored the "dualist" over the "monist" argument in favor of a non-hierarchical relationship between international law and municipal law. International law is not superior to municipal law or vice versa. The two phenomena co-exist with each other as interdependent and interpenetrated systems. \textit{Cf.} The Paquete Habana, 175 U.S. 677, 700 (1900); Wright, \textit{Conflicts of International Law with National Laws and Ordinances}, 11 \textit{Am. J. Int'l L.} 1 (1917); but see Starke, \textit{Monism and Dualism in the Theory of International Law}, 17 \textit{Brit. Y.B. Int'l L.} 66, 75-78 (1936).}

The blossoming of a community of such internally and externally law-abiding nations by means of a constantly increasing degree of interaction and interdependence throughout the world can create a truly global public opinion that will serve as the ultimate sanction of international law.\footnote{See Root, \textit{The Sanction of International Law}, 2 \textit{Am. J. Int'l L.} 451 (1908); Scott, \textit{The Legal Nature of International Law}, 1 \textit{Am. J. Int'l L.} 831 (1907); see also Nys, \textit{The Development and Formation of International Law}, 6 \textit{Am. J. Int'l L.} 1, 4, 20 (1912); Reeves, \textit{The Influence of the Law of Nature upon International Law in the United States}, 3 \textit{Am. J. Int'l L.} 547 (1909) (no great influence). \textit{But see} Lansing, \textit{Notes on Sovereignty in a State}, 1 \textit{Am. J. Int'l L.} 105 (1907) (Austinian position); Willoughby, \textit{The Legal Nature of International Law}, 2 \textit{Am. J. Int'l L.} 357 (1908) (critique of Scott).} Explained in somewhat more tangible terms, the real sanction behind international law is the exclusion of a state violating its principles from the benefits of cooperating with other states and international agencies with respect to vital concerns of national interest. The task of the "new diplomacy" incumbent upon international lawyers is to establish a framework for cooperation among nations in which substantial advantages can be obtained by joint state action that cannot otherwise be realized by states acting in isolation from each other. This web of international legal ties should become so strong that no state would consider disrupting it by resorting to war; or in the unfortunate event that war remains a temporary feature of the international system, many of these legal and institutional patterns of relations can persist to survive and function despite the outbreak of violent hostilities.\footnote{See, e.g., Stowell, \textit{Plans for World Organization}, 18 \textit{Colum. L.Q.} 226 (1916).} An example of the demands of international intercourse is the Universal Postal Union, which requires the cooperation of all states and is not subject to the veto power of any one state. Although nations are exceedingly reluctant to give such an agency more power, it is in this
direction that the future development of international relations will best proceed toward the achievement of world peace.\textsuperscript{23}

As another step toward achieving world peace, at some point in the distant future a world federal state could come into existence organized according to the functional model of the United States, whereby the nations of the world would each accept a semi-sovereign status analogous to that of states in the union.\textsuperscript{24} Presumably a world federal law would thereafter govern the relations between states. This would require the creation of some form of world government with sufficient legislative, judicial and executive power to promulgate, adjudicate and, if necessary, enforce international law against recalcitrant states in a manner that would not precipitate a general condition of global warfare. Since each state had already consented to be governed, the punishment of the culprit would be generally accepted as the established means to enforce the law.\textsuperscript{25}

In many respects, this turn-of-the-century "legalist" analysis of international relations constitutes the genuine precursor of the contemporary "functional-integrationist" school of post-World War II international political science.\textsuperscript{26} International positivism attempted to overcome the Hobbesian doctrine that the will of the sovereign is the source of all law and its corollary that where there is no sovereign there is no law. However, international legal positivism succumbed to another variant of the same fiction: the notion that sovereign consent is the sole basis for legitimacy in international relations. At the start of the twentieth century reliance upon the concept of sovereign consent, manifested in customary and conventional international law, was useful to combat the Austinian denial of international law as real law. Theoretically, sovereign consent was a tangible factor whose presence could be determined by objective criteria and thus avoid allegations of preaching Grotian


\textsuperscript{24} Cf. W. Hull, \textit{The Two Hague Conferences and Their Contributions to International Law} 496-500 (1908).


\textsuperscript{26} See \textit{Irrelevance}, supra note 1, at 196-98.
natural law morality under the rubric of public international law. Nevertheless, toward the end of the twentieth century, stubborn adherence to sovereign consent to the exclusion of all other principles for legitimization has created a stark predicament for international legal positivism. Today the nations of the world are striving to develop a system of international relations not based upon the notion of sovereign consent because this provides an inherent veto power over the creation of new rules as to each one of the participants. Rather, such a notion must be replaced by the principle of consensus founded upon reciprocal expectations of state behavior. There is nothing sacrosanct about sovereign consent as the basic legitimizing principle of international law and politics. However, an analogy may be drawn to the beliefs of the social contract theorists such as Hobbes, Locke and Rousseau who considered the consent of the citizen to be the essential basis for political legitimacy within modern civil society which would undercut the effect of the medieval Christian Church in Western political philosophy.27 This analogy presents the analysis from another perspective: while the principle of citizen consent still operates in the desired fashion within the municipal affairs system, within the system of international relations sovereign consent has rapidly proven to be increasingly unworkable.

The early international legal positivists explicitly embraced the classic Machiavellian dichotomy between the "is" (effectual truth) and the "ought to be" (imaginary truth) of world affairs.28 These positivists chose to classify international law as effectual truth and Grotian natural law morality as imaginary truth. This categorization of law as an effectual truth instead of an imaginary truth received tacit support from Machiavelli himself.29 To an international legal positivist, the effectiveness of any system of law must depend upon the existence of some source of underlying power, whether military, political, economic or ideological in nature. Criticism of international legal positivists because of their supposed ignorance of or disregard for the realities of power by international political scientists demonstrates the political scientist's complete unawareness of the positivist's Hobbesian and Machiavellian premises.

This article will establish that the attitude of American international lawyers toward the role of international law and international

27. See Power Politics, supra note 12, at 931-56.
29. Id. at 7 (need for good laws); id. at 21 (fighting by means of law).
organizations in world politics during the crucial period of 1898 to 1917 was not naive, idealistic or utopian. Rather, their attitude was acutely realistic and relatively sophisticated in their comprehension of the dynamic interrelationship between power and law in international affairs. These turn-of-the-century American international lawyers, whether as teachers, scholars and polemicists or, as many of them were, government officials, diplomats and statesmen, did not shrink from advocating the forceful exercise of American power around the globe. As a group they were too prone to support and encourage the United States government in the planning and execution of its imperialistic endeavors: they formulated arguments and rationalizations in favor of such imperialistic policies in terms of the rules of international law and the requirements of maintaining international peace and security. At the beginning of this century, Americans in general demonstrated a marked tendency to believe international law to consist of whatever the immediate satisfaction of their national self-interests necessitated, and in this regard American international lawyers were not essentially different from their intensely nationalistic compatriots. Apart from a few expressions of regret or dissent, American international lawyers as a group mounted no significant criticism of the overall conduct of American imperialist foreign policy from the perspective of those supposedly sensitive to the needs of a truly international legal order.

During this period, the United States Department of State co-opted many American international lawyers because of their critical relevance to the management of the complex difficulties resulting from the conduct of an American foreign policy that was simultaneously striving to reconcile the inexorable demands of a newly launched imperialism with the tenacious pull of a traditionally deep-seated isolationism. Thus it was from within the United States governmental foreign policy establishment that turn-of-the-century American international lawyers brought to bear their unique perspective of international relations directly upon the policy formulation process. In fact, American international lawyers exercised a more profound influence upon the formation of American foreign policy during the interim between the Spanish-American War and the First World War than they have as a group at any time before or since. Therefore, it is to that historical era, and not the interwar

period, that this study must turn in order to delineate the paradigmatic elements of the classic American "legalist" approach to international relations.

II. AMERICAN FOREIGN POLICY TOWARD INTERNATIONAL LAW AND ORGANIZATIONS

A. American Legalism as a Reaction to the Spanish-American War

The single most formative event in the development of a distinctively "legalist" approach to international relations in the United States was the 1907 publication of the first volume of the American Journal of International Law under the auspices of the newly founded American Society of International Law. This was the first periodical devoted exclusively to international law in the English-speaking world. American scholars and practitioners of international law thereby created a central forum from which to articulate an essentially legalist analysis of international relations that was purposefully intended to be different from the approach taken by political scientists. The birth of both the American Society of International Law and its Journal can be attributed to the experience of the United States during its war with Spain in 1898. The sudden and decisive victory in the Spanish-American War stimulated an increased awareness of international affairs throughout the country and generated a need within the American international legal community to organize a publication which expressed the legal attitudes toward America's new and far-flung international relations.

Prior to the Spanish-American War, the United States had not subsisted totally within the cocoon of isolationism from the rest of the world spun by Washington's Farewell Address and the Monroe


Doctrine. The country had engaged in at least two formal international wars with significant hemispheric consequences: the War of 1812 and the Mexican War of 1846. The War of 1812 can be broadly interpreted as an attempt by the new government to assert its recently won independence from Great Britain. The Mexican War of 1846 was an imperialist enterprise designed to fulfill the country's so-called "manifest destiny" of complete continental expansion and resulted in the seizure of the southwestern section of the United States. The numerous expeditions against the American Indians also fit neatly within the category of continental imperialist expansion, though it was argued that since Indian occupation was not entitled to any respect, their subjugation did not qualify as an act of imperialism. The net effect of these disputes upon their contemporaneous global political environments, however, was relatively insignificant when compared with the astounding ramifications for the United States and the world at large ensuing from the Spanish War of 1898.

The crumbling Spanish Empire was almost instantaneously dissolved, and the United States of America assumed its imperial mantle in Cuba, Puerto Rico, Guam and the Philippines. The acquisition of Cuba and Puerto Rico situated the United States in the heart of the Caribbean from where it could control the gateway to the isthmus of Central America. From this position it was almost inevitable that America intervene in Colombia to secure the independence of Panama in order to construct the canal. The acquisition of Cuba and Puerto Rico also led to the promulgation of the Roosevelt Corollary to the Monroe Doctrine to justify United States economic receivership for the Dominican Republic, and led to

34. See J. Richardson, I A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205 (Farewell Address) and 776 (Monroe Doctrine) (1911).
35. Cf. Editorial Comment, Tripoli, 6 AM. J. INT'L L. 149, 155 (1912) (Mexican-American War was unjust and unjustifiable).
39. See 9 Richardson, supra note 34, at 7353, 7375-79. The Roosevelt Corollary
military occupation of Cuba pursuant to the Platt Amendment. These developments paved the way for the subsequent history of persistent imperialist interventions by the United States into the affairs of Central American and Caribbean countries that has plagued United States foreign policy toward the region adjoining the Panama Canal for the past three-quarters of a century.

On the other side of the world, the decision to take over the Philippines propelled the United States directly into the affairs of the Orient. Since the major powers of Europe had already staked out their respective colonial claims in the Far East, the takeover of the Philippines indirectly involved the United States in the European balance of power. American efforts to preserve and extend its geopolitical and economic position in that region of the world, especially the maintenance of its "open door" policy with regard to China, ultimately set the stage for serious and prolonged friction with Japan. This friction culminated in Pearl Harbor and American involvement in the Second World War forty years later.

In the pre-World War I era of international relations, the major philosophical dilemma confronting American international lawyers was the reconciliation of the United States' course of world imperialism, commenced by the Spanish-American War, with the traditional ideals of American foreign policy. Traditional American foreign policy was based upon the inalienable rights of the individual, the self-determination of peoples, the sovereign equality and independence of states, noninterventionism, respect for international law, and the peaceful settlement of international disputes. Such principles were clearly contrary to America's imperialistic activities. Within the American international legal community there

alleged a United States right to intervene into the domestic affairs of Central American and Caribbean countries. Its justification was that United States administration of the public finances of these nations was necessary to prevent intervention (which was violative of the Monroe Doctrine) by European nations. See infra notes 372-77 and accompanying text.

40. Army Appropriation Act, ch. 803, art. III, 56th Cong., 2d Sess., 31 Stat. 895, 897 (1901). The Platt Amendment was imposed on Cuba as a condition for independence. Indeed, its terms were incorporated into the Cuban constitution. It required Cuba not to enter into any treaties that might impair its sovereignty and not to incur debts beyond its ability to repay. More importantly, the Platt Amendment gave the United States the right to maintain naval bases in Cuba and the right to intervene in Cuba when American interests were deemed to be in danger. See L.C. Gardner, W.F. LaFeber, T.J. McCormick, Creation of the American Empire at 252, 274 (2d ed. 1976). For a general discussion of the Platt Amendment, see infra notes 401-11 and accompanying text.

did exist a minority anti-imperialist sentiment which espoused the "neutralization" of United States colonial territories similar to Belgium in order to remove them from the extant zone of international contention. However, the majority accepted that American imperialism, like war, was an irreversible fact of international life which must be dealt with on its own terms. In the majority's opinion, imperialism could be reconciled with American ideals through recognition that the true purpose of American imperial policy, unlike that of Europe, must not be territorial aggrandizement and economic enrichment, but the ultimate achievement of the American dream of freedom, independence, dignity and equality for all the peoples living within the current American imperial domain. These objectives could be secured in a manner consistent with America's expansive definition of its national security interests by pursuing a foreign policy that actively promoted international law and international organizations.

B. American Legalism as a Rejection of the European Balance of Power System

Near the turn of the century, American analysis of European politics transpired through the conceptual prism of the "balance of power"—a phenomenon perceived to be the operative determinant of international relations between the states of the Old World. By contrast, the United States was still believed to occupy the fortunate position of "splendid isolation" vis-à-vis the machinations of Machiavellian power politics on the Continent that it had held throughout the nineteenth century by virtue of the British navy. The European balance of power system had extended its tentacles to worldwide dimensions by including within its grasp the decaying Ottoman Empire, Africa, the Near East, Central Asia, India, and

42. See Wicker, Some Effects of Neutralization, 5 Am. J. Int'l L. 639, 652 (1911); Winslow, Neutralization, 2 Am. J. Int'l L. 366 (1908).
45. See, e.g., Editorial Comment, The Baltic and the North Seas, 2 Am. J. Int'l L. 646 (1908); Editorial Comment, The Dissolution of the Union of Norway and Sweden, 1 Am. J. Int'l L. 440 (1907); Editorial Comment, The Integrity of Norway Guaranteed, 2 Am. J. Int'l L. 176 (1908) (purpose is to keep Russia out of Western Europe). See also Editorial Comment, The Fortification of the Aland Islands, 2 Am. J. Int'l L. 397 (1908).
46. See Editorial Comment, Mediation in the Turko Italian War, 6 Am. J. Int'l L. 463 (1912) (favors mediation by great powers); Editorial Comment, The Basis of Mediation in the
Southeast Asia, China, Japan and the Pacific. Only the Monroe Doctrine and the Roosevelt Corollary had prevented Europe from reasserting its stranglehold over Latin America. Moreover, despite Europe's presence in the Far East, the American sponsored Open Door Policy, which guaranteed the exploitation of China for all, was perceived as a way of maintaining the balance of power for the region. The rest of the world was duly consigned to the unhappy fate of becoming the arena for intense rivalry and periodic conflict over territory between the major imperial powers of Europe and Japan. In this worldwide struggle for colonies the rules of international law were not applicable except to the extent that they accorded some semblance of legitimacy and order to the process of imperial subjugation. This was accomplished by recognizing the existence of formal legal statuses known as “protectorates” or “condominiums” over conquered territories. Consequently, the hegemonial position of an imperial power could be accepted by one of its cohorts. Nevertheless, during this period of colonial conquest, the formation of new international institutions for the peaceful settlement of interstate disputes could ameliorate the imperial rivalries among the great powers that were not worth a systemic war.

In spite of strong support of an interventionist American for-
eign policy in the Western Hemisphere in the aftermath of the Spanish-American War, most American international lawyers did not believe the United States should radically depart from the sage advice of Washington's Farewell Address. The United States had both the luxury and the duty to abstain from choosing sides between the contending alliance systems in Europe since such a decision could easily precipitate America into war over another state's interests. Indeed, with the disintegration of the Ottoman Empire and the revival of the Balkan Question by the Austrian annexation of Bosnia and Herzegovina in 1908, it seemed that Serbia would soon be the focus of a monumental struggle between Russia and Austria-Hungary and their respective allies. In the event of a general war in Europe, the United States could protect its newly-won possessions in the Far East and its hegemonial position over Latin America through isolationism. In addition, the international laws of neutrality would permit American merchants to profit handsomely from increased trade with both sides of European struggle.

By accepting the policy of isolationism in peace and neutrality in war, vis-à-vis the European balance of power system, American international lawyers did not invariably espouse inaction by the United States in world politics. The legalist opinion was to the contrary, in that it was considered vital for the United States to pursue a foreign policy which actively promoted international law and international organizations. Such a foreign policy was expressly intended to prevent a general European war that could easily involve America, as that which occurred in 1812. This task could be accomplished by a policy which encouraged the transformation of the modus operandi of the European balance of power system from the constant threat and use of force to reliance upon new rules of international law and new institutions for the peaceful settlement of international disputes. The United States occupied the ideal diplo-

50. See Editorial Comment, Macedonian Railways and the Concert of Europe, 2 Am. J. Int'l L. 644 (1908) (end of Austro-Hungarian/Russian entente); Ion, The Cretan Question, 4 Am. J. Int'l L. 276 (1910); Schelle, Studies on the Eastern Question (pt. 1), 5 Am. J. Int'l L. 144, 174 (1911) (violation of Treaty of Berlin by Austria and Bulgaria was flagrant breach of international law); id. (pts. 2 & 3) at 394, 680; Editorial Comment, The Balkan Situation, 2 Am. J. Int'l L. 864 (1908) (violation of Treaty of Berlin); Editorial Comment, The Balkan Situation, 3 Am. J. Int'l L. 688 (1909) (Austrian annexation of Bosnia-Herzegovina will be countered by renewed Russian support to southern Slavs). See also Editorial Comment, Edward VII, 4 Am. J. Int'l L. 662, 664 (1910) (fear of Anglo-German war).

51. See, e.g., Scott, America and the New Diplomacy, Int'l Conciliation, Mar. 1909, at 4-5.
matic position to implement such a policy to prevent a European war. America had maintained its traditional isolationism from the great power politics which did not directly concern its own interests. America's pristine detachment from the European powers reduced the inevitable suspicions that often accompany and defeat major diplomatic initiatives from their outset. America could most safely and effectively protect both itself and the world at large from the scourge of future battles not by wielding the dangerous weapons of power politics and participating in the European balance of power system, but rather by preserving its distance and thus its perspective for leadership in the development of international law and international organizations.

C. The American Legalist War Prevention Program for World Politics

Given the inherent limitations of the United States' commitment to isolationism in peace and neutrality in war, the pre-World War I American legalist approach to international relations was as activist and globalist as could reasonably be expected under such historical conditions. As a whole, American international lawyers moved considerably farther and faster toward internationalism than most of their isolationist foreign policy establishment colleagues. This was due to their sincere belief in the overriding need for America to initiate a war prevention program for the great powers of Europe on the basis of international law and organizations. As it took shape and matured over the twenty year span from 1898 to 1917, the elements of the American legalist approach to international relations developed the following concrete objectives: (1) the creation of a general system for the obligatory arbitration of disputes between states; (2) the establishment of an international court of justice; (3) the codification of important areas of customary international law into positive treaty form; (4) arms reduction, but only after and not before, the relaxation of international tensions by means of these and other legalist techniques and institutions; and (5) the institutionalization of the practice of convening periodical conferences of all states in the recognized international community. An additional element of this American legalist program was

52. See, e.g., Editorial Comment, The Fourteenth Lake Mohonk Conference, 2 AM. J. INT'L L. 615 (1908); de Sillac, Periodical Peace Conferences, 5 AM. J. INT'L L. 968 (1911); Hershey, Convention for the Peaceful Adjustment of International Differences, 2 AM. J. INT'L L. 29 (1908); Editorial Comment, Joint Resolution to Authorize the Appointment of a Commis-
to strengthen the well-established international legal institution of neutrality and the humanitarian laws of armed conflict. This would serve to further isolate the bulk of the international community, especially the United States, from some future war which might still erupt between the great powers of Europe in spite of enactment of these preventive legalist devices.

Theoretically, the five steps listed above were to be achieved seriatim, since each stage was to some extent dependent upon fulfillment of the prior goal. However, in practice these legalist objectives were pursued in a roughly contemporaneous manner because of their highly interdependent and mutually supportive nature. Furthermore, realization of the fifth stage would have represented the first step toward the creation of a rudimentary form of a world legislature which, when joined with an effective world court, would have comprised two-thirds of the branches required for the institution of a world government patterned after the legislative, judicial and executive departments of the United States. Nevertheless, not until after the outbreak of the Great War in 1914 did the majority of the American international legal community devote much time, effort or resources to promoting the foundation of some executive "league to enforce the peace," equipped with an effective international police force and necessarily accompanied by some degree of progressive disarmament by the great powers. Such a visionary goal was endorsed by some American international lawyers as a desirable destination for the long-term evolution of international relations. Yet, prior to the Great War, there seemed to exist a general consensus that such a scheme must not be allowed to detract from the im-

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55. See, e.g., KUEHL, supra note 25, at 91-95 (W.J. Bartnett, Justice David J. Brewer, John Bassett Moore, Joseph C. Clayton).
mediate realization of the far more practicable agenda outlined above. Moreover, there was no desire or intention on the part of these early twentieth century American international lawyers to surrender any degree of United States sovereignty to some type of supranational government.

Although admittedly far-reaching, this American war prevention program based on international law and organizations seemed to stand more than a plausible chance for eventual success at the turn of the century. This was due to the relative homogeneity of the system of international relations in the pre-World War I era, at least in comparison to the endemic heterogeneity so characteristic of the post-World War II period. Publicists and statesmen of this earlier epoch actually thought in terms of the existence of a real international community of states. This world community basically consisted of the countries of Europe, North America, South and Central America, the Ottoman Empire and Japan. The rest of the world was viewed essentially as an arena for intense colonial competition among the great powers. This inevitable imperial conflict rendered even more vital the institution of the foregoing mechanisms.

All of these nations participated in the same system of international political and economic relations and were subject to the same corpus of European public international law. All of the major actors, except Japan, shared a similar cultural heritage schooled in the Old Testament, Greece, Rome, medieval Christendom, Renaissance and Reformation, the European Enlightenment, the Industrial Revolution, and the French Revolution and Napoleonic Wars. This cultural heritage also included the tradition of a “concert” of European powers which determined matters of world politics by mutual consent and negotiated agreement throughout the nineteenth century. The American legalist war prevention program for interna-

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56.  See supra text accompanying note 52.
57.  See, e.g., Kuehl, supra note 25, at 134-37, 144-45, 161.
60.  The great powers of Europe formally admitted Turkey to the European public international law system by the Treaty of Paris of 1856. See Evans, The Primary Sources of International Obligations, 5 AM. SOC'Y INT'L L. PROC. 257, 265-67 (1911).
61.  Although not formally admitted like Turkey, Japan was generally considered “one of the Great Powers that lead the Family of Nations” by virtue of its military victory over China in 1895. See L. Oppenheim, 1 INTERNATIONAL LAW: PEACE 34 (R. Roxburgh 3d ed. 1920).
tional relations intended to build upon this solid foundation of cooperation, shared experiences, cultural similarities and interdependent national interests to create an even more stable and secure world order for the twentieth century and the dawn of mankind's next millennium. It was not a pipedream but a practical program that could successfully be implemented in the near future through vigorous American leadership that would bring forth a reasonable degree of enlightened self-interest on the part of the great powers of Europe.

1. A system for the obligatory arbitration of international disputes

During the late nineteenth and early twentieth centuries many men of great practical experience in world politics genuinely believed that the institution of an effective system for the obligatory arbitration of international disputes could constitute a viable substitute for recourse to war by states. However, the problem of creating a workable "sanction" for international arbitration still existed. Such a sanction would have to be something more than just the same world public opinion which buttressed obedience to international law in general. Yet in regard to international arbitration, considerations of national self-interest and security had invariably led to the submission of disputes to arbitration in the first place. Consequently, the record of compliance with arbitral decisions expectedly was, and still is, quite good. In the unlikely event of non-compliance it was incumbent on neutral third parties to undertake diplomatic, political or economic measures short of war or the use of force against the recalcitrant state sufficient to induce obedience to an arbitral award. The period of international relations from 1898 to 1917 was the zenith of the modern international arbitration movement. There proved to be no need for serious concern with the problem of enforcing arbitral awards since states which resorted to arbitration dutifully complied with awards for reasons of enlightened and rational self-interest.

a. the First Hague Peace Conference

Tsar Nicholas II of Russia initiated the First Hague Peace Con-


63. See Dumas, Sanctions of International Arbitration, 5 AM. J. INT'L L. 934 (1911).
The United States accepted the Russian Tsar's invitation of August 24, 1898, to attend this international peace conference to consider the reduction of armaments and the maintenance of general peace. Although America was then still technically at war with Spain, the invitation was accepted on the basis of an explicit Russian assurance that the war would not be discussed at the conference. Article 7 of the Russian Foreign Minister's circular note of December 30, 1898, setting forth a proposed program for the conference, called for the "acceptance in principle" of the usage of good offices, mediation and "optional arbitration for such cases as lend themselves to it, with a view of preventing armed conflicts between nations."

Despite the rejection of the Olney-Pauncefote Treaty of Arbitration with Great Britain of 1897 by the United States Senate, Secretary of State John Hay enthusiastically endorsed this proposition and instructed the American delegation to the First Hague Peace Conference to propose a plan for the foundation of a permanent international tribunal organized along the lines of the United States Supreme Court. According to this plan, each signatory state would have one representative on a permanent tribunal that would always be open for the filing of cases by signatories or other states wishing to have recourse to it. The contracting nations were to submit to the tribunal all questions of disagreement between them, except those questions which related to or involved their political independence or territorial integrity.

While at the conference, however, the American delegation

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65. See Basis for Establishment of Peace, Aug. 12, 1898, United States-Spain, 30 Stat. 1742, T.S. No. 343 1/2.

66. Telegram from Ethan Hitchcock to William Day (Sept. 3, 1898), 1898 FOREIGN REL. U.S., supra note 64, at 542-43.


70. See 2 SCOTT, supra note 53, at 15.
concluded that a provision calling for the obligatory arbitration of disputes, even with these exemptions, would prove unlikely to secure the assent of the other participants. Consequently, they requested and received permission from the State Department to delete the obligatory nature of the proposed tribunal's jurisdiction.\footnote{See Davis, Hague I, supra note 64, at 137-38.} The American plan that was eventually presented to the conference provided that all differences between signatories could be submitted by the common consent of interested nations to the judgment of the international tribunal, whose award must then be accepted by the parties.\footnote{See I The Proceedings of the Hague Peace Conferences: Translations of the Official Texts at 833, Annex 7 (J. Scott ed. 1920) [hereinafter cited as Hague I Proceedings].} In spite of this change, the First Hague Peace Conference preferred a British plan calling for the selection of a panel of judges who would be in session only when actually required for litigation.\footnote{Id. at 813, Annex 2, B.} This British proposal formed the basis for the subsequently adopted plan for the Hague Permanent Court of Arbitration (PCA). Nevertheless, several elements of the American plan found their way into the PCA,\footnote{White, Low & Holls, Report to the American Commission to the International Conference at The Hague Regarding the Work of the Third Committee of the Conference (July 31, 1899), reprinted in 2 Scott, supra note 53, at 52.} and eventually the American scheme for a permanent and standing international tribunal for the peaceful settlement of interstate disputes would be revived and later adopted in principle at the Second Hague Peace Conference.

At the First Hague Peace Conference of 1899, there was no support for a general multilateral pact calling for the obligatory arbitration of all disputes, or even politically significant disputes, between states.\footnote{See General Report of the Commission of the United States of America to the International Conference at The Hague (July 31, 1899), reprinted in 2 Scott, supra note 53, at 17, 24.} Germany adamantly opposed the conclusion of a general multilateral pact calling for the obligatory arbitration of certain categories of disputes possessed of relatively inconsequential political significance.\footnote{See Hague I Proceedings, supra note 72, at 767-72; Davis, Hague I, supra note 64, at 158-64; Hull, supra note 24, at 297-311; 1 Scott, supra note 53, at 319-30.} Even the United States insisted upon the omission from a Russian list\footnote{See Hague I Proceedings, supra note 72, at 799, Annex 1, A, art. 10.} of proposed subjects suitable for obligatory arbitration international conventions relating to rivers, to interoceanic
canals and to monetary matters. In deference to the principle of the sovereign equality of states, the Hague Peace Conferences operated upon the basis of unanimity. German opposition to the principle of obligatory arbitration of disputes thus proved determinative. Consequently, the First Hague Peace Conference had to content itself with the establishment of the purely voluntary system of arbitration known as the Permanent Court of Arbitration which, among other procedures, was instituted by its 1899 Convention for the Pacific Settlement of International Disputes.

The Permanent Court was, and still is, not a real "court" of arbitration. Rather it consisted of a list of distinguished jurists appointed by the contracting powers to the Convention. From this list, parties to a dispute could, if they so desired, choose an arbitrator or panel of arbitrators to settle the dispute in accordance with a fixed set of procedural rules established by the Convention. This list was comprised of four persons selected by each contracting power for a term of six years.

In the event the parties could not agree upon the composition of the arbitration tribunal, each party was to appoint two arbitrators, who together would choose an umpire. If the votes were equal, the choice of the umpire was entrusted to a third power selected by common agreement of the parties. If such an agreement was not reached, each party selected a different power and the

83. This provision was carried over into article 45 of the 1907 Convention for the Pacific Settlement of International Disputes, and amended to provide that only one of these appointed arbitrators could be the party’s national or chosen from among the persons selected by it as members of the PCA. See Hull, supra note 24, at 387-89.
choice of the umpire was made in concert by such powers.\textsuperscript{85} This arbitration tribunal then assembled on the date fixed by the parties and ordinarily met at The Hague.\textsuperscript{86}

Pursuant to article 31, resort to the Permanent Court required the parties in dispute to conclude a separate agreement, i.e., the \textit{compromis}, in which the subject matter of their difference, as well as the extent of the arbitrators’ powers, would be clearly defined. Article 15 stated that arbitration was to be “on the basis of respect for law” and article 48 authorized an arbitral tribunal to declare its competence in interpreting the \textit{compromis} as well as other treaties invoked in the case “and in applying the principles of international law.” The applicable law could also be specified by the parties themselves in the \textit{compromis}.\textsuperscript{87}

Under article 16, the contracting powers recognized that in questions of a legal nature, especially interpretation or application of international conventions, arbitration was the most effective and the most equitable means of settling disputes which diplomacy had failed to settle. Under article 17, the arbitration convention was applicable to disputes already in existence as well as disputes that might arise in the future. The Permanent Court was competent to arbitrate all such cases unless parties agreed to institute a special tribunal.\textsuperscript{88} The jurisdiction of the Permanent Court could also be extended to include disputes between noncontracting powers or between contracting and noncontracting powers if they so agreed.\textsuperscript{89}

Parties to an arbitration bound themselves “to submit loyalty” to any arbitral award.\textsuperscript{90} Conversely, the award itself bound only

\textsuperscript{85} This provision was carried forward into article 45 of the 1907 Convention, which in addition provided that if within two months time these two powers could not come to an agreement, each of them would present two candidates taken from the list of PCA members, exclusive of members selected by the parties and not being nationals of either of them. The umpire would be determined by the drawing of lots among the candidates. Thus under the procedure of article 45, the umpire would probably, though not necessarily, be a national from a third state. So under the 1907 Convention it was probable that three out of five members of the arbitration panel would be non-nationals of the parties in dispute, which was not the case under the 1899 Convention. This development was said to represent a distinct advance because such a composition would guarantee impartiality in the rendering of the award. \textit{See} Hull., \textit{supra} note 24, at 389-90; Scott, \textit{supra} note 53, at 282-84.


\textsuperscript{87} See Scott, \textit{supra} note 53, at 298.

\textsuperscript{88} Convention for the Pacific Settlement of International Disputes art. 21, 32 Stat. at 1789, \textit{reprinted in} 1 Am. J. Int’l L. at 115 (Supp. 1907).

\textsuperscript{89} Id. art. 26, 32 Stat. at 1791, \textit{reprinted in} 1 Am. J. Int’l L. at 118 (Supp. 1907).

\textsuperscript{90} Id. art. 18, 32 Stat. at 1788, \textit{reprinted in} 1 Am. J. Int’l L. at 114 (Supp. 1907).
those parties which concluded the *compromis* unless a third state formally invoked its right of intervention recognized by article 56 when a question of interpreting a convention to which it was a party was involved. The award was to be given by a majority of votes, accompanied by a statement of reasons, and signed by each member of the tribunal.\(^9\) The award put a definite end to the dispute, without appeal, unless the parties reserved in the *compromis* the right to demand the revision of the award.\(^9\) This right of revision was insisted upon by the United States delegation at the First Hague Peace Conference, and was later successfully defended from assault by the United States delegation at the Second Hague Peace Conference.\(^9\)

The 1899 Convention for the Pacific Settlement of International Disputes established an International Bureau at The Hague to serve as the record office for the Permanent Court.\(^9\) The Bureau was under the direction and control of a Permanent Administrative Council composed of the diplomatic representatives of the contracting powers accredited to The Hague and the Netherlands Minister for Foreign Affairs.\(^9\) The expenses of the Bureau were to be borne by the contracting powers in the portion fixed for the International Bureau of the Universal Postal Union.\(^9\) Each party to an arbitration paid its own expenses and an equal share of those of the tribunal.\(^9\)

According to article 27, in the event a serious dispute threatened to break out between contracting powers, other contracting powers considered it their duty to remind the former that the Permanent Court was available to them. Moreover, such a reminder could not be considered as an unfriendly act of intervention.\(^9\) In regard to this provision, the American delegation felt it necessary to make a declaration at the First Hague Peace Conference that nothing in the Convention should be construed to require the United States to depart from its traditional policy of non-entan-

\(^9\) 1 *Scott*, *supra* note 53, at 300-01 & n.1.
glement in the affairs of another state, i.e., Washington's Farewell Address, nor to relinquish its "traditional attitude toward purely American questions" namely, the Monroe Doctrine.99 In the Second Hague Peace Conference's revisions of the 1899 Convention for the Pacific Settlement of International Disputes, the text of article 27 was carried over into a new article 48. The language was supplemented by a provision providing that in the event of a dispute between two contracting powers, one of them could address a note to the International Bureau at The Hague which contained a declaration of its willingness to submit the dispute to arbitration. The Bureau was required immediately to inform the other power of the declaration.100 The American delegation to the Second Hague Peace Conference renewed the reservation made in regard to article 27 of the 1899 Convention by applying it to article 48 of the 1907 Convention.101 Nevertheless, this change in article 48 prompted one influential American international lawyer to predict the progressive creation of an International Bureau of Good Offices and Mediation in the not-too-distant future.102

b. the Hay Arbitration Conventions

Despite defeat of the proposal at the First Hague Peace Conference for a general pact for the obligatory arbitration of some disputes, article 19 of the 1899 Convention sought to encourage obligatory arbitration by reserving the right of contracting powers to conclude general or special treaties of obligatory arbitration among themselves. Although article 19 was not considered significant at the time of its adoption, between the First Hague Peace Conference of 1899 and 1908, some seventy-seven arbitration treaties were concluded by the various countries of the world. All but twelve of these arbitration treaties provided for some sort of reference to the Permanent Court.103 Such references were generally subject to reservations concerning certain categories of disputes, typically excluding from arbitration matters involving a state's independence, vital in-

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102. See 1 Scott, supra note 53, at 286 n.1.
terests, honor, sovereignty or the rights of noncontracting parties. One treaty between Norway and Sweden uniquely provided that the Permanent Court itself was to resolve the question of whether a dispute involved the parties' vital interests.

Pursuant to article 19 of the 1899 Convention, between November 1904 and February 1905, Secretary of State John Hay signed a series of arbitration treaties on behalf of the United States with eleven foreign governments (including France, Germany and Great Britain) calling for the reference of differences "which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties" to the Permanent Court of Arbitration, subject to the usual exemptions from obligatory arbitration. The substantive provisions of the Hay arbitration treaties were modelled upon the arbitration treaty concluded between Great Britain and France on October 14, 1903, the first to be negotiated with reference to article 19 of the 1899 Convention. However, the Hay arbitration treaties referred to the compromis required by article 31 of the 1899 Convention by use of the word "agreement." This terminology could have permitted the President and Secretary of State to conclude an arbitral compromis with the foreign government by the simple exchange of diplomatic notes, without having to obtain further advice and consent from the United States Senate. In order to protect its constitutional prerogatives in the area of international agreements, the Senate, in giving its advice and consent to the ratification of ten of the Hay arbitration treaties, formally amended them by substituting the word "treaty" for "agreement." The Senate thereby explicitly required any arbitral compromis to be

104. See Wehberg, Restrictive Clauses in International Arbitration Treaties, 7 AM. J. INT'L L. 301 (1913). But see Cavalcanti, Restrictive Clauses in Arbitration Treaties, 8 AM. J. INT'L L. 723 (1914).


106. See, e.g., Arbitration Convention, Nov. 23, 1904, United States-Portugal, art. 1, in 3 Unperfected Treaties, supra note 68, at 487, 488.


108. This provision was typically found in article 2 of the treaties. See, e.g., Arbitration Convention, Nov. 23, 1904, United States-Portugal, art. 2, in 3 Unperfected Treaties, supra note 68, at 489.

submitted to the Senate for its advice and consent.\textsuperscript{110} In this form the Hay arbitration treaties were deemed unacceptable for ratification by President Theodore Roosevelt, who considered the Senate amendment to be tantamount to their rejection.\textsuperscript{111} From the perspective of the foreign contracting state, a treaty calling for the obligatory arbitration of disputes possessed little more than symbolic value if the arbitral process could not even commence unless and until the Senate had given its advice and consent to the \textit{compromis}. The new Senate amendment had effectively eviscerated the Hay arbitration treaties by reducing the American obligation of arbitration to the level of a mere agreement to agree. In addition, Roosevelt considered the Senate amendment to constitute an infringement upon the President's freedom to negotiate and conclude international agreements relating to arbitration.\textsuperscript{112}

c. \textit{the Second Hague Peace Conference}

Despite this second major setback in the United States Senate for the principle of obligatory arbitration, the United States went to the Second Hague Peace Conference of 1907 prepared to support the conclusion of yet another general treaty for the obligatory arbitration of disputes along the lines of the unratified Hay arbitration treaties as amended by the Senate.\textsuperscript{113} By this time, Germany had dropped its objection to the principle of obligatory arbitration, but now insisted that the proper approach should be the negotiation of a series of bilateral arbitration treaties between interested states instead of the conclusion of a general multilateral pact.\textsuperscript{114} Germany stridently opposed the adoption of an Anglo-American project which called for the conclusion of a general pact of obligatory arbitration applicable to differences "of a legal nature and, primarily, those relating to the interpretation of treaties existing between two or more of the contracting nations" and to a specified list of subjects

\begin{itemize}
\item \textsuperscript{110} \textit{See} 3 Unperfected Treaties, \textit{supra} note 68, at 487-88.
\item \textsuperscript{111} \textit{See} Davis, \textit{Hague II}, \textit{supra} note 107, at 116-18.
\item \textsuperscript{112} \textit{Id.} at 116-18.
\item \textsuperscript{113} \textit{See} Editorial Comment, \textit{The Second Peace Conference of The Hague}, 1 \textit{Am. J. Int'l L.} 944, 951 (1907); Editorial Comment, \textit{A New General Arbitration Treaty with Great Britain}, \textit{supra} note 109, at 457. For Root's Instructions to the American delegates, see 2 Scott, \textit{supra} note 53, at 181, 189-90.
\end{itemize}
without the typical reservations. Consequently, the Second Hague Peace Conference had to content itself with the adoption of an unanimous declaration merely accepting the principle of obligatory arbitration and declaring that differences "relating to the interpretation and application of international conventional stipulations, are susceptible of being submitted to obligatory arbitration without any restriction." Thus, in regard to the Permanent Court of Arbitration, the 1899 Convention for the Pacific Settlement of International Disputes was not materially altered by its 1907 revision.

**d. the Root Arbitration Conventions**

The wording of this 1907 declaration on obligatory arbitration was chosen specifically to enable those nations favoring compulsory arbitration to conclude special treaties on the subject among themselves outside the framework of the Hague Conferences. Pursuant to this recommendation, Secretary of State Elihu Root promptly negotiated a series of twenty-five general arbitration treaties on behalf of the United States. These treaties followed the model of the unratified Hay arbitration treaties as amended by the Senate. However, common article 2 of the Root arbitration treaties specifically provided: "It is understood that on the part of the United States such special agreements [i.e., the compromis] will be made by the President of the United States, by and with the advice and consent of the Senate." Although the addition of this compromise language affirmed the independent role of the President in the negotiation and conclusion of arbitration agreements, it nevertheless represented a return to the Senate position on the need for its advice and consent to the compromis. Consequently, all of the Root arbitration treaties were ratified by the Senate and twenty-two

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115. See 1 Scott, supra note 53, at 352-74.
121. See List of Arbitration Treaties and Conventions Submitted to and Acted upon by the Senate, S. Doc. No. 373, 62d Cong., 2d Sess. 2605, 2606 (1912). See also Dennis, The Arbitration Treaties and the Senate Amendments, 6 Am. J. Int'l L. 614 (1912); Editorial
eventually entered into force.\textsuperscript{122}

After Roosevelt refused to ratify the amended version of the Hay arbitration treaties, Root persuaded the President that there was indeed some political and legal merit to be gained for the United States by becoming a party to arbitration treaties of this nature.\textsuperscript{123} Once ratified, the Root treaties could not be treated as illusory by the United States Senate because, having already given its advice and consent to arbitration treaties, the Senate had formally committed itself in advance to ratify some form of arbitral \textit{compromis} that was acceptable to a foreign contracting party in the event of a dispute.\textsuperscript{124} Furthermore, since the United States had pledged to arbitrate, the power of both domestic and international public opinion would be sufficient to compel the Senate into giving its advice and consent to a \textit{compromis}.

From the perspective of the foreign state, the language of the Root arbitration treaties referred to the \textit{compromis} as an "understanding" instead of a formal "amendment" or "reservation" on the part of the United States to the convention. Consequently, a foreign contracting party was entitled to construe this "understanding" as an obligation by the United States to arbitrate under the terms of the arbitration convention in accordance with the fundamental principle of international law decreeing \textit{pacta sunt servanda}.\textsuperscript{125} As far as the foreign state was concerned, obtaining the advice and consent of the Senate to the arbitral \textit{compromis} was a purely internal matter occasioned by the peculiarities of the United States Constitution that was devoid of any international legal significance. The United States was bound to arbitrate disputes irrespective of any domestic constitutional difficulties that might be created by Senate obstinacy over the \textit{compromis}. Hence, an interpretation of the Root arbitration treaties to be international legal nullities was mistaken. These treaties represented a set of definite agreements to arbitrate, not chi-

\textsuperscript{122} Comment, Senator Root and the Nobel Peace Prize, 8 AM. J. INT'L L. 133 (1944); Editorial Comment, The Pending Treaty of Arbitration Between the United States and Great Britain, 6 AM. J. INT'L L. 167 (1912); Editorial Comment, The Treaties of Arbitration with Great Britain and France, 6 AM. J. INT'L L. 460 (1912).

\textsuperscript{123} See P. Jessup, 2 ELIHU ROOT 79-82 (1938); R. Leopold, ELIHU ROOT AND THE CONSERVATIVE TRADITION 56-59 (1954).

\textsuperscript{124} Cf. Editorial Comment, A New General Arbitration Treaty with Great Britain, supra note 109, at 457 (comment on Hay conventions).

\textsuperscript{125} Compare RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 124 comment c with § 147 comment d(e).
merical agreements to agree. Public international law imposed a perfect equality of fixed obligations in this regard on both contracting parties. To conclude otherwise would depart from the elementary doctrine of international law and politics which proclaimed the sovereign equality of states.

e. the abortive plan for a compulsory compromis

One innovative feature of the 1907 Convention for the Pacific Settlement of International Disputes was the inclusion of a provision calling for the compulsory conclusion of a *compromis* by the Permanent Court of Arbitration in the event the parties in dispute could not agree upon the terms of reference. This procedure for a compulsory *compromis* applied under severely restrictive conditions. However, despite its opposition to a general treaty of obligatory arbitration, even Germany favored the device of a compulsory *compromis* to overcome the alleged constitutional prerogatives of the United States Senate, which, in Germany’s opinion, constituted a derogation from the fundamental principle recognizing the sovereign equality of states.\(^{126}\) Article 53 of the 1907 Convention gave the PCA the competence to settle the *compromis* envisioned by the new article 52 if the parties agreed to have recourse to it for this purpose. Furthermore, the PCA was empowered to draw up the *compromis* upon the request of only one of the parties if all attempts to reach a diplomatic settlement had failed and if an extant general arbitration treaty provided for a *compromis* in all disputes and did not explicitly or implicitly exclude the settlement of the *compromis* from the competence of the PCA. However, the PCA was without power to set forth a *compromis* if the other party declared that in its opinion the dispute did not belong to the category of disputes which could be submitted to compulsory arbitration, unless the treaty of arbitration conferred upon the arbitration tribunal the power of deciding this preliminary question. The same was true in the case of a dispute arising from contract debts claimed of one power by another power as due its nationals, for the settlement of which the offer of arbitration had been accepted, unless such acceptance was conditioned on the conclusion of the *compromis* in some other way. Nevertheless, despite this slight advance for the principle of the obligatory arbitration of disputes, the United States, in ratifying the 1907 Convention, excluded from the competence of the Permanent

\(^{126}\) See 2 HAGUE II PROCEEDING, *supra* note 114, at 47, 52-53.
Court the power to formulate a *compromise* under all circumstances unless expressly provided otherwise by treaty.\(^{127}\)

\(f\). the golden age of international arbitration

Prior to the outbreak of the First World War in 1914, an entire series of precedentual or serious international disputes were submitted to the Permanent Court of Arbitration at The Hague: *Pious Fund Case (Mex. v. U.S.)*;\(^{128}\) *Venezuela Preferential Case (Ger., Gr. Brit. and Italy v. Venez.)*;\(^{129}\) *Casablanca Case (Fr. v. Ger.)*;\(^{130}\) *Grisbadarna Case (Nor. v. Swed.)*;\(^{131}\) *North Atlantic Fisheries Case (Gr. Brit. v. U.S.)*;\(^{132}\) *Orinoco Steamship Company Case (U.S. v. Venez.)*;\(^{133}\) and the *Savakar Case (Fr. v. Brit.)*.\(^{134}\) During this pe-

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period, the United States played the role of mid-wife in bringing the Hague Permanent Court of Arbitration to life.

From the perspective of maintaining international peace and security, the most significant of the Hague Court's arbitrations proved to be the *Venezuela Preferential Case* and the *Casablanca Case*. Pressure by President Roosevelt to refer the controversy which involved a Venezuelan default on its public debts to arbitration contributed to the successful termination of ongoing military hostilities conducted by Germany, Italy and Great Britain in an effort to forcefully collect their respective nationals' claims against the Venezuelan government. The actions by these countries threatened to draw the United States into the conflict in order to protect Venezuela from this anticipatory breach of the Monroe Doctrine. In view of the militaristic tenor of the times, the Casablanca incident of 1908 was universally considered to have concerned the honor of France and Germany. Consequently, its nonresolution by means of The Hague Court might have easily resulted in hostilities between the parties, and subsequent escalation into a general systemic war in Europe due to their respective memberships in competing alliance systems. Thus, despite its congenital defects, The Hague Permanent Court of Arbitration contributed to the termination of one concerted military operation and to the prevention of one war. As a result, history must judge it to have been a phenome-


137. For a succinct recapitulation of the history of the Triple Alliance and Triple Entente, see *THE NEW COLUMBIA ENCYCLOPEDIA* 2787, cols. 1-3 (W. Harris & J. Levey eds. 1975).

2. The foundation of an international court of justice
   
   a. the theoretical basis

   At the time of the decisions in the Casablanca Case and the North Atlantic Fisheries Case by the Permanent Court of Arbitration, heated public controversies arose over the propriety of the allegedly "compromise" nature of these arbitral awards. On such grounds, American international lawyers argued that the main shortcoming of international arbitration was its tendency to assume the form of an essentially political process of negotiation and compromise on the basis of expediency rather than the judicial procedure of impartial adjudication of rights and duties in strict accordance with the rules of law. It was felt that the states of the international community genuinely preferred the clear-cut decision and strict impartiality in determination of their rights and duties that supposedly could be afforded by some international court of justice over all nations instead of the essentially political process of partiality and compromise practiced by an international arbitration tribunal whose members were chosen by the parties in dispute themselves.

   This international court of justice would operate in a manner functionally analogous to the Supreme Court of the United States when deciding questions arising between citizens of the different states, or between foreign citizens and citizens of the United States.

   The procedure for the Permanent Court of Arbitration was also analogized to article 9 of the American Articles of Confederation of 1781, which created a process of arbitration for the solution of disputes among the states. The Articles of Confederation was super-

139. See Editorial Comment, The Casablanca Arbitration Award, supra note 130, at 701; Editorial Comment, Statement by the President of the Tribunal That the North Atlantic Fisheries Award Was a Compromise, 5 AM. J. INT'L L. 725 (1911); Editorial Comment, Was the Award in the North Atlantic Fisheries Case a Compromise?, 6 AM. J. INT'L L. 178 (1912).


141. See e.g., Editorial Comment, Fourth Annual Meeting of the American Society for Judicial Settlement of International Disputes, 8 AM. J. INT'L L. 129 (1914); Editorial Comment, The American Society for the Judicial Settlement of International Disputes, 4 AM. J. INT'L L. 930 (1910).


143. ARTS. OF CONFEDERATION OF 1781, art. IX. See 1 SCOTT, supra note 53, at 460-64; Scott, The Proposed Court of Arbitral Justice, 2 AM. J. INT'L L. 772 (1908).
seded by the United States Constitution which replaced in 1789 this arbitral procedure by extending the federal judicial power to controversies between two or more states and by vesting original jurisdiction in the Supreme Court to adjudicate such controversies.\textsuperscript{144} This successful evolution of dispute settlement techniques for semi-sovereign political entities provided a useful precedent for the development of international dispute settlement tribunals.\textsuperscript{145} As in the American judicial system, the existence of an international court of justice would permit the development of binding precedential decisions that could guide the future deliberations of the court and create a stable framework of legal expectations among states conducive to the peaceful settlement of their disputes. Because of their ad hoc nature, arbitral awards were not intended to possess precedential significance. Therefore, only by means of an actual world court could a systematic jurisprudence of international legal decisions effectively evolve.

\textit{b. arbitration versus adjudication}

American international lawyers considered international arbitration inferior to international adjudication. In doing so, however, these lawyers failed to understand that the remarkable success of arbitration in the peaceful resolution of international disputes before the First World War was due to the arbitration's political dimension. For example, in a dispute between two private parties brought before a municipal court of law, there is usually one clear-cut winner and one clearcut loser. By contrast, an international panel of arbitration could oftentimes creatively fashion its award upon a purposefully flexible \textit{compromis} so that two sovereign states in dispute could each believe they had prevailed. During the course of an international conflict, for reasons of both domestic and international public opinion, a government might prefer arbitration over adjudication for a number of reasons. One such reason is based on a subjective cost-benefit analysis that it is preferable to sustain a high probability of not losing everything and only winning something by means of arbitration than it is to run a substantially greater risk of losing everything even though there is the possibility of winning everything by means of adjudication. According to the litera-

\textsuperscript{144} U.S. Const. art. III, § 2.

ture of contemporary international political science, in the analysis of international conflict as a zero-sum game, rational government decision makers will tend to pursue a strategy that minimize risks over one that maximizes gains.\textsuperscript{146} Hence, states would prefer arbitration over adjudication.

The more settled the rules of international law are, the more likely the party in a dispute with the stronger legal position will prefer and insist upon adjudication instead of arbitration. Therefore, the Golden Age of modern international arbitration quite expectedly occurred in the pre-World War I era of international relations when the European system of public international law was essentially customary instead of conventional, and when an actual world court did not yet exist. Conversely, in the aftermath of the war, with the establishment of the Permanent Court of International Justice in 1921 and the acceleration of the movement for the progressive codification of international law in the 1920's and early 1930's,\textsuperscript{147} international arbitration as a technique for the peaceful settlement of serious disputes predictably declined in material significance as a means of securing international peace and security. This was precisely the result intended by the United States when it sponsored a plan for the foundation of an international court of justice at the Second Hague Peace Conference. Consequently, it would not be proper to criticize The Hague Permanent Court of Arbitration for undergoing an eclipse in its effectiveness as an institution for the peaceful settlement of international disputes after the First World War.

c. the plan for a court of arbitral justice

Following in the footsteps of the unsuccessful American plan for a world court originally introduced at the First Hague Peace Conference, the United States delegation to the Second Hague Peace Conference was instructed by Secretary of State Elihu Root to propose the formation of an actual international court of justice. Such a court was intended to be judicial in nature and function in contrast to the arbitral proceedings of the Permanent Court of Arbitration. However, it was envisioned that the present PCA could, as


far as possible, constitute the basis of the court.\textsuperscript{148} When it finally emerged from the proceedings of the Second Hague Peace Conference, the American plan for an international court of justice called for the institution of a Court of Arbitral Justice (CAJ) consisting of an as yet unspecified number of judges appointed in an unspecified manner for a term of twelve years.\textsuperscript{149} The CAJ was not designed to replace but rather to coexist with the PCA\textsuperscript{150} so that states would remain free to choose between the two institutions. However, the Americans believed that states would prefer adjudication over arbitration since the former institution more nearly coincided with the states' vital national security interests in creating a more effective system for the peaceful settlement of international disputes.

CAJ judges and alternates were to be appointed by the contracting parties from among persons enjoying the highest moral reputation in their respective countries. Such individuals must fulfill the conditions required for appointment to high judicial officers or be jurists of well-known competency in matters relative to international law. Often, CAJ judges were to be selected from among the members of the PCA.\textsuperscript{151} A CAJ judge could not exercise judicial functions in any case in which he had taken any part in rendering a decision of a court of his nation, a court of arbitration or a commission of inquiry, or where he had acted in the hearing of a case as counsel or attorney for one of the parties.\textsuperscript{152} No judge could appear as agent or counsel before the CAJ, the PCA, a special tribunal of arbitration or commission of inquiry, or act for any of the parties in any capacity during his term of office.\textsuperscript{153}

Against the objections of the United States delegation,\textsuperscript{154} there was no prohibition on a CAJ judge sitting in a case that involved his state of nationality. However, a member of a CAJ special delegation could not exercise his duties when the power which appointed him, or of which he was a national, was one of the parties in dis-

\textsuperscript{148} See 2 Hague II Proceedings, supra note 114, at 1016, Annex 76, art. VI.
\textsuperscript{150} Court of Arbitral Justice Draft Convention, supra note 149, art. 1, reprinted in 2 AM. J. INT'L L. at 29 (Supp. 1908).
\textsuperscript{151} Id. art. 2.
\textsuperscript{152} Id. art. 7.
\textsuperscript{153} Id.
\textsuperscript{154} See Davis, Hague II, supra note 107, at 264-70.
Every year the CAJ was to elect a special delegation of three judges with the competence to hear arbitration cases coming under article 17 if the parties agreed upon applying the summary procedure described in Title IV, Chapter 4 of the 1907 Convention for the Pacific Settlement of International Disputes. This special delegation also had the competence to constitute itself as an international commission of inquiry in accordance with Title III of that Convention if authorized by common agreement of the parties in dispute.

CAJ judges were to receive a fixed annual salary, a per diem allotment and travelling expenses. These sums were to be paid by the International Bureau of the Permanent Court of Arbitration at The Hague, with the contracting powers paying the CAJ's expenses at the request of the PCA’s Administrative Council. Judges were prohibited from receiving any compensation for performance of their duties from their own government or that of another power. The International Bureau was to serve as the record office for the CAJ, and the Administrative Council was to perform the same functions toward the CAJ as it did toward the PCA.

The CAJ was to assemble in session every year beginning in June and lasting until the end of the year, though provision was made for the calling of an extraordinary session. Unlike the Permanent Court of Arbitration, only the contracting powers were given access to the Court of Arbitral Justice since they alone were to bear its general expenses. All decisions of the CAJ were to be arrived at by a majority vote of the judges present. The judgment of the CAJ had to give the reasons on which it was based, the names of the judges taking part in it and had to be signed by the president and the registrar of the court. Each party had to pay its own costs

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156. Id. art. 18.
157. Id. art. 9.
158. Id.
159. Id. art. 10.
160. Id. art. 13.
161. Id. art. 12.
162. Id. art. 14.
163. Id. art. 21.
164. Id. art. 31.
165. Id. art. 27.
166. Id. art. 28.
and an equal share of the costs of the trial.\textsuperscript{167}

Title II of the Draft Convention spelled out the jurisdiction and procedure of the Court of Arbitral Justice. Article 17 gave the CAJ jurisdiction in all cases brought before it by virtue of a general or special arbitration agreement.\textsuperscript{168} There was no provision similar to the so-called "Optional Clause" to the Protocol of Signature Relating to the Permanent Court of International Justice (PCIJ) of December 16, 1920. Under the Protocol of Signature of the PCIJ, states could accept beforehand, ipso facto and without a special convention, the compulsory jurisdiction of the PCIJ in certain classes of legal disputes between signatories in conformity with article 36(2) of the PCIJ Statute.\textsuperscript{169} Thus, by comparison, in the absence of a separate agreement, the CAJ was designed to possess no general form of compulsory jurisdiction over legal disputes between parties to its convention.

However, like article 53 of the 1907 Convention for the Pacific Settlement of International Disputes concerning the Permanent Court of Arbitration, article 19 of the CAJ Draft Convention provided the "special delegation" with the competence to draw up the \textit{compromis} envisioned by article 52 of the former 1907 Convention if the parties agreed to remit the case to the CAJ. Furthermore, the special delegation was empowered to draw up the \textit{compromis} when application was made by only one of the parties if: (1) the party had unsuccessfully attempted to secure an agreement through diplomatic means, (2) the dispute arose under an extant general arbitration treaty providing for a \textit{compromis} for every dispute, (3) the arbitration treaty did not explicitly or implicitly exclude the exercise of such competence by the special delegation, and (4) the other party did not declare that in its opinion the dispute did not belong to the category of questions to be submitted to obligatory arbitration. This fourth requirement, however, did not apply if the arbitration treaty conferred upon the arbitral tribunal the power to pass upon the subject matter criterion. The special delegation was likewise empowered, subject to the same conditions, to draw up a \textit{compromis} in the case of a dispute arising from contractual debts claimed of one power by another as due to persons subject to its jurisdiction.

\textsuperscript{167} \textit{Id.} art. 29.

\textsuperscript{168} \textit{Id.} art. 17.

\textsuperscript{169} See Protocol of Signature Relating to the Permanent Court of International Justice, Dec. 16, 1920, 2 \textsc{League of Nations} O.J. 14 (1921), \textit{reprinted in} 17 \textsc{Am. J. Int'l L.} 55 (Supp. 1923).
for the settlement of which the proposal of arbitration had been accepted, unless such acceptance was conditioned on the conclusion of the \textit{compromis} in some manner. Germany had advocated this procedure for compulsory conclusion of a \textit{compromis} by the CAJ special delegation as an alternative to the adoption of a general treaty for the obligatory arbitration of disputes at the Second Hague Peace Conference.\textsuperscript{170}

The CAJ Draft Convention did not contain a provision similar to article 38 of the later PCIJ Statute, which directed the PCIJ to apply three primary sources (conventions, custom and "general principles of law") and two subsidiary means (judicial decisions, though without entitlement to the principle of stare decisis except between the parties in regard to that particular case, and the teachings of publicists) for the determination of rules of international law in a case.\textsuperscript{171} Hence there was no recognition of the doctrine of stare decisis in the CAJ Draft Convention. Nevertheless, the Court of Arbitral Justice was ordered to apply the rules of procedure laid down in the 1907 Convention for the Pacific Settlement of International Disputes, except as otherwise modified by the CAJ Draft Convention.\textsuperscript{172} This directive would have incorporated article 73 of the former 1907 Convention authorizing the PCA to declare its competence in interpreting the \textit{compromis} as well as other papers and documents, e.g., treaties, which may be invoked and in applying "the principles of law." However, article 48 of the 1899 Convention, the precursor of article 73, had specifically referred to "the principles of \textit{international} law."

In the final analysis, despite the initial promotion of the idea by the United States at the Second Hague Peace Conference to create an actual world court whose judicial nature was supposed to be fundamentally different from and superior to the political nature of the Permanent Court of Arbitration, the jurisdiction and procedures of the proposed CAJ were almost identical to those of the PCA in all

\textsuperscript{170} See \textit{2 Hague II Proceedings, supra} note 114, at 641. But the competence of the court or its delegation to frame the \textit{compromis}, upon the request of one litigant when a treaty of arbitration exists between the litigants binding them to arbitration, seems to be a long step toward introducing into the law of nations the procedure of a common law court by which a defendant may be brought into court at the insistence of a plaintiff. \textit{1 Scott, supra} note 53, at 453.

\textsuperscript{171} \textit{P.C.I.J. Stat. art. 38 in 2 League of Nations O.J. 391 (1921), 17 Am. J. Int'l L. 57 (Supp. 1923).}

material respects. In theory the primary distinction drawn between the two institutions was the notion that states would choose to submit disputes they believed to be essentially "legal" or "justiciable" in character to the CAJ, while those they perceived to be "political" would continue to be submitted to the PCA. Yet if it had ever come to fruition the CAJ would have emerged as an institution not operationally different from a permanent and standing international tribunal of arbitration. Even its name—Court of Arbitral Justice—indicated the purposefully hybrid nature of an international tribunal designed to blend characteristics of both the arbitral and adjudicative processes.174

The Second Hague Peace Conference recommended the adoption of the Draft Convention Relative to the Institution of a Court of Arbitral Justice. The Draft set forth an institutional plan that ultimately represented a crucial intermediate stage in the evolution of international dispute settlement tribunals. This intermediate stage was between the relatively primitive 1899 Permanent Court of Arbitration and the far more sophisticated 1921 Permanent Court of International Justice. Indeed, in the opinion of James Brown Scott, an American international legal scholar who was intimately involved in the preparation of both the 1907 CAJ Draft Convention and the 1921 PCIJ Statute, the Permanent International Court of Justice "was to most intents and purposes similar to, if not identical with, the draft of 1907."175

d. the stalemate over the selection of judges for a world court

The primary obstacle to the actual establishment of the Court of Arbitral Justice at the Second Hague Peace Conference proved to be an unbreakable deadlock over the manner for selection of judges to the court. Specifically, the smaller states, and especially the Latin American nations, opposed the institution of a system for the selection of CAJ judges among themselves on a rotational basis, while the great powers would each be accorded the right to always have one of their respective appointees sitting on the CAJ.176 Such an

arrangement would have been similar to the system for appointment of judges to the proposed International Court of Prize.\textsuperscript{177} For example, article 6 of a preliminary draft convention for an international court of justice, which was presented by the delegations of Germany, the United States and Great Britain, had provided that judges appointed by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia "are always summoned to sit." On the other hand, judges appointed by the other contracting powers would rotate in accordance with a schedule set out in an annexed table which was based on a mixture of the population, industry and commerce of the appointing states.\textsuperscript{178} Since it made sense for those states with the largest naval fleets to insist on the right always to have an appointee sitting on the International Prize Court, it similarly made sense to the great powers that one of their appointees should continuously be represented on any international court of justice. By their voluntary agreement to institute an actual world court, the great powers would be further restricting their right to use force to settle their international disputes with the smaller states. The smaller states would obtain greater protection from the great powers than otherwise would be the case. Further, a great power would receive no additional protection from other great powers by means of a world court alone. Therefore, since an international court of justice would primarily benefit the smaller states, they should be willing to compromise on the principle of sovereign equality when it came to the appointment of judges.

Of course this entire rationale was based upon the questionable premise that the great powers actually possessed some alleged international legal right to use force to settle their disputes with smaller states. It is not surprising, therefore, that the foremost opposition to a rotational system for appointing judges to the Court of Arbitral Justice came from the Latin American states. It was in these Latin American states that the Calvo and Drago Doctrines were formulated and generally espoused to protect these states from further imperialist encroachments.\textsuperscript{179} The Latin American states, together with representatives from other smaller powers, insisted on recognition of the principles of the sovereign equality of states in the appointment of judges to what was supposedly a real international court of justice for the impartial adjudication of disputes among all

\textsuperscript{177} See infra text accompanying notes 225-31.
\textsuperscript{178} See 2 HAGUE II PROCEEDINGS, supra note 114, at 1031-32, annex 84.
\textsuperscript{179} See Hershey, The Calvo and Drago Doctrines, 1 AM. J. INT’L L. 26 (1907).
members of the international community.\textsuperscript{180} Ironically, it was the United States that had successfully advocated the admission of Latin American states to the Second Hague Peace Conference on the basis of equality despite the fears of a United States controlled voting bloc by those states that had attended the First Conference.\textsuperscript{181} It was these same United States proteges that adamantly refused to compromise on the principle of their sovereign equality when it came to the appointment of judges to a world court project that had originally been sponsored by the United States. The net result was that the Second Hague Peace Conference could only content itself with a recommendation that the signatory powers adopt an annexed Draft Convention Relative to the Institution of a Court of Arbitral Justice “as soon as an agreement shall have been reached upon the selection of judges and the constitution of the court.”\textsuperscript{182} This language was purposefully chosen in the hope that many nations would be willing to ignore the Latin American objections to the appointment procedure and constitute the Court of Arbitral Justice among themselves through normal diplomatic channels in the immediate aftermath of the Second Hague Peace Conference.\textsuperscript{183} This would permit definitive results on the foundation of some international court to occur well before the convocation of the Third Peace Conference, which in 1907 was tentatively scheduled to begin in 1915.\textsuperscript{184}

Pursuant to this intention, the United States suggested to the great powers present at the London Naval Conference of 1908 (Germany, United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, Netherlands and Russia) that the proposed International Prize Court (IPC) be given the jurisdiction and procedures of the Court of Arbitral Justice, and that the 1907 CAJ Draft Convention be utilized by the IPC when so acting for consenting states.\textsuperscript{185} This could be accomplished by adopting an article addi-

\textsuperscript{180} See Hull, supra note 24, at 419-20 (Belgium, Mexico, Serbia, Venezuela, Brazil, Bulgaria, Portugal, Romania and Uruguay). See also 2 Hague II Proceedings, supra note 114, at 1027, 1029 (annex 83 was a Brazilian proposal for absolute equality in appointments to the court).

\textsuperscript{181} See 1 Scott, supra note 53, at 95-101.


\textsuperscript{183} See Report of the Delegates of the United States to the Second International Peace Conference at The Hague, in 2 Scott, supra note 53, at 198, 244-45.

\textsuperscript{184} See J. Scott, An International Court of Justice 69-70 (1916).

\textsuperscript{185} See Identic Circular Note of the Secretary of State of the United States Proposing Alternative Procedures for the International Prize Court and the Investment of the Interna-
tional to a draft protocol concerning the IPC that was then under consideration at the London Naval Conference. This article would permit any signatory of the Prize Court Convention to grant to the IPC jurisdiction to decide any case arising between signatories of the proposed article that was submitted to it in accordance with the procedures of the CAJ Draft Convention of 1907. Article 16 of the CAJ Draft Convention connected these two dispute settlement institutions. Article 16 provided that judges and deputy judges of the CAJ could also exercise the functions of judges and deputy judges of the IPC. The United States pointed out that it was always easier to expand the jurisdiction of an existing institution than to call into being a new one. Nevertheless, the delegates to the London Naval Conference determined that the United States proposal exceeded their powers; hence, no action on this matter was taken there.

The United States continued to pursue the issue through normal diplomatic channels. This American initiative eventually culminated in a meeting of representatives from the United States, Great Britain, Germany and France at Paris in March, 1910, to consider the actual creation of a Court of Arbitral Justice. This court would serve states willing to accept the rotational system of the IPC as the basis for judicial appointments to the CAJ, rather than simply vesting the IPC with the powers and procedures of the CAJ, as was previously proposed by the United States. The Paris Conference resulted in the conclusion of a four-power draft convention for contracting states to put into effect the CAJ Draft Convention recommended by the Second Hague Peace Conference, with the necessary

186. "It is not too much to hope that some day, either by the appointment of the same judges for both courts or by a reorganization, there may be one great international court of justice with a twofold division into civil and prize chambers." 1 SCOTT, supra note 53, at 451.


188. Id. at 74.

189. Supra note 184, at 70.

190. Id. at 74.
additions set out in the former document.\textsuperscript{191}

In this fashion the Court of Arbitral Justice itself could have been created by a limited number of states. According to the four-power plan, the CAJ would be composed of fifteen judges, with nine constituting a quorum. Judges and substitute judges would be appointed by the contracting powers in accordance with the system of rotation established by article 15 of the International Prize Court Convention. This system would have given the eight great naval powers (Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia) the right of always having an appointee sitting on the CAJ, whereas the other contracting powers would have their appointees rotating on the basis of their relative maritime interests. Provision was also made for a noncontracting power to bring an action before the Court of Arbitral Justice and its special delegation upon the former's assumption of an appropriate share of expenses as determined by the Court or its special delegation. The four-power draft convention was to come into effect as soon as eighteen powers were ready to ratify and could furnish to the court nine judges and nine substitute judges capable of actually sitting. This four-power draft convention was further amended by the parties at The Hague in July, 1910.\textsuperscript{192}

In the minds of the representatives of the four powers who wrote the 1910 draft convention, their scheme depended upon the prior successful institution of the International Prize Court, even though the document did not expressly state this condition. The refusal of Great Britain to ratify the Declaration of London and, consequently, the International Prize Court Convention as well, spelled defeat for the four-power plan to institute a Court of Arbitral Justice among even a limited number of states in this manner. Still undaunted, however, Philander C. Knox, Secretary of State to President Taft, requested James Brown Scott—technical delegate of the United States to the Second Hague Peace Conference, former Solicitor for the Department of State, United States representative to the 1910 Paris Conference, and managing editor of the American Journal of International Law—to undertake a mission to Europe for the purpose of initiating negotiations concerning the formation of a Court of Arbitral Justice that was to be independent of the stalled International Prize Court Convention. On November 25, 1912,

\textsuperscript{191} Id. at 91.

\textsuperscript{192} Id. at 94.
Knox approved and signed a memorandum and an identical circular note drafted by Scott to that effect, but they were not issued and the scheme never succeeded.\textsuperscript{193}

With the advent of the Wilson Administration, Scott addressed a personal letter, dated January 12, 1914, to the Minister of Foreign Affairs of the Netherlands suggesting that the Dutch government initiate, through diplomatic channels, negotiations for an agreement between Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia. The agreement was to be for the creation of a Court of Arbitral Justice among themselves and with a provision for its use by noncontracting parties. Scott included with his letter a proposed draft convention along these lines, supporting memorandum he had drafted, the earlier memorandum and circular note to that effect drafted by him and approved by Knox, together with other supporting documentation.\textsuperscript{194} By then, however, the time was fast approaching for the commencement of preliminary work for preparation of the proposed Third Peace Conference. Consequently, Scott's personal efforts concerning the international court were almost immediately overtaken by a formal diplomatic initiative by the United States to plan for the convocation of the next conference.\textsuperscript{195} All further progress in either direction was interrupted by the outbreak of the general war in Europe in the summer of 1914.

\textit{e. the Permanent Court of International Justice}

These pre-World War I labors by the United States to establish an international court of justice were realized in article 14 of the Covenant of the League of Nations. This provision called upon the League Council to formulate and submit for adoption to the members of the League plans for the establishment of a Permanent Court of International Justice. This court would be competent to hear and determine any dispute of an international character and to render an advisory opinion upon any dispute or question referred to it by the Council or by the League Assembly. It was James Brown Scott, now Legal Advisor to the American Commission to Negotiate Peace at Paris, who had successfully urged the inclusion in the League Covenant of a provision calling for the establishment of a Perma-

\textsuperscript{193} \textit{Id.} at 1, 6, 18.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{See infra} text accompanying notes 350-64.
nent Court of International Justice.\textsuperscript{196}

In February, 1920, the Council of the League voted to form an Advisory Committee of Jurists to prepare plans for the Permanent Court of International Justice and to report to the Council.\textsuperscript{197} The Advisory Committee of Jurists proposed to endow the Permanent Court of International Justice with compulsory jurisdiction over four specified categories of disputes. In the late Fall of 1920, however, both the Council and the Assembly of the League of Nations rejected this proposal because of opposition from the great power members of the League.\textsuperscript{198} As a consequence, the Statute of the Permanent Court of International Justice would follow the scheme of the 1907 Draft Convention Relative to the Institution of a Court of Arbitral Justice recommended for adoption by the Second Hague Peace Conference, that omitted any provision calling for the obligatory adjudication of disputes in any case.\textsuperscript{199} Nevertheless, the so-called Optional Clause to the Protocol of Signature for the PCIJ Statute\textsuperscript{200} permitted states to accept as compulsory, ipso facto and without special convention, in relation to another state accepting the same obligation, the jurisdiction of the PCIJ in all or any classes of legal disputes concerning: (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; and (4) the nature or extent of the reparation to be made for the breach of an international obligation.\textsuperscript{201} In the event of a dispute as to whether the PCIJ had jurisdiction, the matter was to be settled by the decision of the Court itself.\textsuperscript{202}

The main problem facing the Committee was the outstanding

\textsuperscript{196} Finch, \textit{James Brown Scott: 1866-1943}, 38 \textit{Am. J. Int'l L.} 183, 202 (1944). \textit{See generally} Coudert, \textit{An Appreciation of James Brown Scott}, 37 \textit{Am. J. Int'l L.} 559 (1943) (Scott was not a positivist but a moralist-naturalist).

\textsuperscript{197} \textit{See Scott, Editorial Comment, A Permanent Court of International Justice}, 14 \textit{Am. J. Int'l L.} 581 (1920).


\textsuperscript{199} \textit{See Editorial Comment, The Permanent Court of International Justice}, 15 \textit{Am. J. Int'l L.} 260 (1921).


\textsuperscript{201} \textit{P.C.I.J. Stat.} art. 36(2), in \textit{2 League of Nations O.J.} 14 (1921), 17 \textit{Am. J. Int'l L.} 57 (Supp. 1923).

\textsuperscript{202} \textit{Id.} art. 36(4).
issue of the selection of judges to a world court in a manner which would preserve the principle of the sovereign equality of states. The long-standing deadlock over this matter was broken by a suggestion of Elihu Root, the American representative on the panel. Rather than appointment by the contracting powers as proposed by the CAJ Draft Convention, he recommended that PCIJ judges be selected by the concurrent action of the League Council and the League Assembly. In addition, he proposed that a joint committee composed of representatives from both bodies be created to resolve any disagreements.\textsuperscript{203} Root received his idea of a two-step procedure from James Brown Scott, who derived it from his analysis of the American system for representation of large and small states in the United States Senate and the House of Representatives, where legislation had to be approved independently by both bodies, and a conference committee would resolve any differences.\textsuperscript{204}

Article 3 of the Statute of the Permanent Court of International Justice provided that the PCIJ should consist of fifteen members: eleven judges and four deputy judges. According to article 4, the members of the PCIJ should be selected by the assembly and by the Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, with provision made for members of the League not represented in the PCA. No national group could nominate more than four persons, not more than two of whom could be of their own nationality.\textsuperscript{205} In no case could the number of candidates nominated be more than double the number of seats to be filled. The Secretary-General of the League would then prepare a list in alphabetical order of all the persons thus nominated, and submit this list to the Assembly and to the Council.\textsuperscript{206} The Assembly and the Council would then proceed independently of one another to select the judges first, then the deputy judges.\textsuperscript{207} Those candidates who obtained an absolute majority of votes in the Assembly and in the Council would be considered elected.\textsuperscript{208} If, after the first meeting held for the purpose of the election, one or more seats still remained unfilled, a second, and, if necessary, a third

\textsuperscript{203} See Scott, \textit{Editorial Comment: A Permanent Court of International Justice}, supra note 197, at 583.
\textsuperscript{204} See Finch, \textit{James Brown Scott: 1866-1943}, supra note 196, at 202-03.
\textsuperscript{205} P.C.I.J. \textit{Stat.} art. 5, in 2 \textit{League of Nations O.J.} 14 (1921), 17 \textit{Am. J. Int'1 L.} 57 (Supp. 1923).
\textsuperscript{206} \textit{Id.} art. 7.
\textsuperscript{207} \textit{Id.} art. 8.
\textsuperscript{208} \textit{Id.} art. 10.
meeting would take place.\textsuperscript{209} If after the third meeting one or more seats still remained unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, would be formed. This joint conference could be formed at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.\textsuperscript{210} If the joint conference was satisfied that it would not succeed in procuring an election, those members of the PCIJ who had already been appointed would, within a period fixed by the Council, proceed to fill the vacant seats by selection from among those candidates who had obtained votes either in the Assembly or in the Council.\textsuperscript{211}

Article 9 of the PCIJ Statute required that not only should all the persons appointed as members of the Court possess the required qualifications, but the whole body should represent the main forms of civilization and the principal legal systems of the world.\textsuperscript{212} Yet the Root-Scott arrangement gave a veto power over the selection of judges to both the great powers represented on the Council and the smaller powers represented in the Assembly. Textually, this procedure did not derogate from the principle of the sovereign equality of states since it did not explicitly guarantee each great power the right always to have a national sitting on the PCIJ. Functionally, however, the arrangement could effectively ensure this outcome because article 4(1) of the Convenant of the League of Nations provided that the Council was always to consist of representatives of the Principal Allied and Associated Powers, i.e., United States, United Kingdom, France, Italy and Japan, together with representatives of four other members of the League selected by the Assembly. Admittedly this procedure ultimately accorded preferential treatment to the wishes of the great powers in the selection of PCIJ judges. But in a defense of his proposal against this objection before the Advisory Committee of Jurists at The Hague, Elihu Root persuasively argued that this slight compromise of the principle of the sovereign equality of states was a fair price for the smaller nations to pay in return for the protection an international court of justice would provide against the

\textsuperscript{209} Id. art. 11.
\textsuperscript{210} Id. art. 12.
\textsuperscript{211} Id.
\textsuperscript{212} Id. art. 9.
great powers. Similar arguments had already been successfully advanced to justify permanent representation by the great powers on the League Council. The experience of the First World War had exerted a chastening influence upon the tendency of minor powers to impede in the name of sovereign equality of states the great powers from implementing organizational approaches to the regulation of international conflict.

The Statute of the Permanent Court of International Justice was unanimously approved by the Assembly of the League on December 13, 1920. The Protocol to establish the PCIJ went into effect on August 20, 1921. Finally, the Court was formally opened at The Hague on February 15, 1922. Judges were elected from all five of the great powers. Their ranks included John Bassett Moore from the United States even though his government had neither joined the League of Nations nor ratified the Protocol of Signature for the PCIJ Statute. Moore's election to the Court was possible because the nominating bodies were the national groupings of the Permanent Court of Arbitration at The Hague, to which the United States belonged, and each national group had to recommend four names, of whom only two could be its own nationals. Elihu Root had declined the offer of a PCIJ position because of age.

The United States never joined the League of Nations and never became a party to the PCIJ Statute because of strident opposition to both organizations consistently mounted by isolationist members of the United States Senate. Even the technical separation of the Court from the League by the device of adopting a Protocol of Signature for the PCIJ Statute, which permitted non-League members to ratify the latter without joining the League, was insufficient to induce the Senate into giving its advice and consent to the Protocol on terms acceptable to its contracting parties. By con-

214. 2 LEAGUE OF NATIONS O.J. 14 (1921); 3 id. at 306 (1922). See Finch, James Brown Scott: 1866-1943, supra note 196, at 203.
216. See Hyde, The Election of Mr. Hughes to the World Court, 22 AM. J. INT'L L. 822 (1928).
218. For the subsequent history of United States efforts to join the Permanent Court, see Note, Message of the President of the United States to the Senate Recommending Participation of the United States in the Permanent Court of International Justice at The Hague,
contrast, with regard to the League of Nations, many members of the American international legal community favored United States participation since the League was perceived as the culmination of the pre-World War I American legalist war prevention program that they had pioneered from the time of the First Hague Peace Conference. On the other hand, a minority of American international lawyers opposed United States membership in the League on the ground that article 10 of the Covenant guaranteed the existence of an essentially unjust European status quo in favor of France against Germany. But in regard to the World Court, the overwhelming majority of the American international legal community was united in its enthusiastic support for United States participation in the PCIJ, even if it did not join the League. For example, Moore accepted the PCIJ judgship even though he opposed United States membership in the League.

United States membership in the World Court would occur only after and as a direct result of the tragic experience of the Second World War. Yet, American international lawyers had quite perceptively envisioned the need for and championed the cause of such organizational solutions to the avoidance and management of international conflict since well before the First World War. Had the habitually obstructionist United States Senate implemented


221. See DAVIS, HAGUE II, supra note 107, at 363.
those constituent elements of the American international legal community's 1898 to 1917 war prevention program for world politics, embodied in the League of Nations Covenant, and thereby ratified the Treaty of Versailles and the PCIJ Protocol of signature, there is a strong possibility that the Second World War might never have occurred.

3. The codification of customary international law

At the turn of the century it was generally believed by American lawyers that any viable scheme for creation of an international court of justice required the contemporaneous codification of customary international law. The reason for this belief was that states would be less willing to submit their disputes to judicial resolution as long as the European system of public international law remained primarily one of customary instead of conventional law. In this regard, the codification of customary international law was also necessitated by the fact that a majority of judges on any international court would undoubtedly be trained in the European Continental tradition, which varied significantly from the Anglo-American heritage in numerous important aspects. This unavoidable arrangement ran a significant risk that the minority of judges from Anglo-American common law countries might be consistently outvoted in court decisions attempting to settle disputed principles of customary international law. Without pre-existing codifications for the various subjects of customary international law, the anticipated principle of majority rule on any international court might predetermine the inevitable demise of the distinctively Anglo-American practice. This phenomenon could produce a subtle transformation in the international status quo which would substantially benefit the Continental states at the expense of the United States and Great Britain. The progressive codification of customary international law was therefore essential to mitigate the consequences of such an imbalance in the composition of any international court. Moreover, codification would encourage the evolution of international dispute settlement from the relatively primitive stage of arbitration to the supposedly more advanced and effective level of adjudication.

Some of these theoretical and practical problems concerning the codification of international law and its crucial importance for the promotion of international adjudication are illustrated by reference to the unfortunate history of the aborted International Prize Court project commenced at the Second Hague Peace Conference by Great Britain and Germany with the active support of the United States.223 At the time, one of the principal achievements of the Second Hague Peace Conference was its adoption of the Convention Relative to the Creation of an International Prize Court.224 The Prize Court would adjudicate appeals from decisions by national prize courts of belligerent captors of neutral and enemy property involving application of the intricate and, at times, unsettled and hotly disputed rules of international maritime warfare law. Formation of the Prize Court was intended to eliminate a chief cause for serious friction between neutrals and belligerents. This friction could impel neutrals to enter the war in order to prosecute their rights against belligerents, as the United States had done against Great Britain in the War of 1812. The IPC was designed to limit the scope of an ongoing war through the techniques, principles and institutions of international law. Alternatively, with the failure of an American proposal at the Second Hague Peace Conference for the creation of an actual world court (Court of Arbitral Justice), the United States viewed the establishment of the Prize Court as an intermediate means for the formation of an international court of justice. As noted above, this would be accomplished by vesting an extant International Prize Court with the jurisdiction and procedures of the proposed Court of Arbitral Justice, thus enabling it to adjudicate disputes between consenting states arising during peacetime. In either event, the implementation of the International Prize Court would have constituted the first step toward the creation of an international court of justice and consequently, an advance in the progressive evolution of international dispute settlement techniques from the supposedly flawed political stage of arbitration to the presumably superior legal stage of adjudication.225


The Prize Court was intended to be a permanent standing tribunal consisting of fifteen judges appointed by the contracting powers for a term of six years. The judges appointed by the eight great naval powers (Germany, United States, Austria-Hungary, Great Britain, France, Italy, Japan and Russia) would be "always summoned to sit" on the Court, while the other seven positions would rotate among judges appointed by the remaining signatories according to their maritime interests. However, during wartime each belligerent would be represented by an appointee. Pursuant to article 3 of the Convention, judgments of national prize courts could be brought before the International Prize Court when they affected (1) the property of a neutral state or individual, (2) an enemy ship captured in the territorial waters of a neutral state when not made the subject of a diplomatic claim by the latter, or (3) enemy property when the seizure was allegedly in violation of a treaty between the belligerents or an enactment by the belligerent captor. The appeal against the national prize court judgment could be based on the ground that it was erroneous either in fact or in law.

When the International Prize Court had jurisdiction under article 3, the national courts could not deal with a case in more than two instances. The municipal law of the belligerent captor would decide whether the case could be brought before the International Prize Court after judgment had been given in the first instance or only after an appeal. If the national courts failed to give a final judgment within two years from the date of capture, the case could be carried directly to the Court.

A belligerent government could not bring suit before the International Prize Court. However, pursuant to articles 4 and 5 of the Convention, an appeal could be brought by a neutral state if the national prize court judgment injuriously affected its property or that of its nationals or if the capture of any enemy vessel was alleged to have occurred within its territorial waters. An appeal could be brought by a neutral individual if the national prize court judgment injuriously affected his property, subject to the reservation that his national government could forbid him to bring the case before the Court or undertake the proceeding in his place. A subject or citizen of an enemy state could also appeal to the Court if the national prize court judgment injuriously affected his property.

226. Convention Relative to the Creation of an International Prize Court, Oct. 18, 1907, arts. 14-16, 4 Unperfected Treaties, supra note 68, at 57.
227. Id. art. 3.
228. Id. art. 6.
court judgment had injuriously affected his property on board a neutral ship or if the seizure was allegedly in violation of a treaty between the belligerents or an enactment of the belligerent captor. Also entitled to appeal were nationals of neutral or enemy states who derived their rights from and were entitled to represent individuals who had taken part in the proceedings before the national court and who themselves were qualified to appeal. Finally, persons who derived their rights from and were entitled to represent a neutral power whose property was the subject of the municipal court decision were also entitled to appeal to the International Prize Court.\(^\text{229}\)

Article 51 made it clear, however, that an appeal to the International Prize Court could only be brought by a contracting power or the subject or citizen of a contracting power or when both the owner and the person entitled to represent him were equally contracting powers or the subjects or citizens of contracting powers.\(^\text{230}\)

One novel feature of the Convention, which was proposed by Germany,\(^\text{231}\) was the grant of standing to bring suit in the International Prize Court to both neutral and enemy individuals, albeit under certain well-defined circumstances. The creation of the right of individuals to appear before an international tribunal on their own behalf represented a radical departure from the reigning international legal positivist doctrine that only states could properly be considered the subjects of public international law endowed with international legal personality, while individuals were merely regarded as objects of international law.\(^\text{232}\) At the Second Hague Peace Conference the inalienable rights of man were accorded a preliminary foothold in the principles of international law and the procedures of international tribunals.\(^\text{233}\)

As far as the United States was concerned, the possibility of direct appeal to the International Prize Court of a decision by the United States Supreme Court raised questions as to the constitutionality of the Prize Court Convention under article 3 of the United States Constitution.\(^\text{234}\) Although debatable,\(^\text{235}\) this objection was

\(^{229}\text{Id. arts. 4-5.}\)

\(^{230}\text{Id. art. 51.}\)

\(^{231}\text{See Hull, supra note 24, at 427-31.}\)

\(^{232}\text{See 1 Scott, supra note 53, at 487-88.}\)


\(^{234}\text{See Brown, The Proposed International Prize Court, 2 Am. J. Int'l L. 476 (1908) (unconstitutional as creating a court of review higher than the United States Supreme Court); Scott, The International Court of Prize, 5 Am. J. Int'l L. 302 (1911) (constitutional}\)
disposed of at the suggestion of Elihu Root by the adoption in 1910 of an Additional Protocol to the Convention which provided that in the event of constitutional difficulties, a contracting party could only be proceeded against in the IPC by a de novo action for compensation. Thus, in such instances, the remedy of restitution set forth in article 8 of the Convention as well as all other vestiges of an appellate nature were eliminated.\(^\text{236}\) In all other matters, the United States was basically willing to follow the lead of Great Britain, the greatest naval power in the world at that time, in the ratification of the Prize Court Convention and the codification of the customary international law of prize.

Pursuant to article 7 of the Convention, in the absence of a treaty, the Prize Court was to apply "the rules of international law" and if no generally recognized rules existed, the Court was ordered to give judgment in accordance with "the general principles of justice and equity."\(^\text{237}\) Because of the composition of the Court, the Anglo-American judges would be in a minority and therefore the United States and Great Britain ran the substantial risk that the common law viewpoint on certain aspects of the law of prize would be replaced by the Continental tradition. Hence, Great Britain adamantly insisted that the international law of prize be codified into a treaty before it ratified the Prize Court Convention.\(^\text{238}\)

As a result of the failure to the Second Hague Peace Conference to codify the law of maritime warfare, Great Britain summoned a conference of representatives of the major maritime powers of the world (Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands and Russia) to meet in London at the end of 1908. The goal of this conference was to determine the generally recognized principles of

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\(^\text{235}\) See 1 Scott, supra note 53, at 473-84.


\(^\text{237}\) Convention Relative to the Creation of an International Prize Court, Oct. 18, 1907, art. 7, 4 Unperfected Treaties, supra note 68, at 57.

international law referred to in article 7 of the Prize Court Convention.\textsuperscript{239} This meeting resulted in the 1909 Declaration of London Concerning the Laws of Naval War.\textsuperscript{240} The Declaration of London built upon the foundations established by an informal compromise on the codification of maritime warfare that had been worked out, but not adopted, at the Second Hague Peace Conference. This compromise dealt with the rules concerning contraband, continuous voyage and blockade.\textsuperscript{241}

The Prize Court Convention, its Additional Protocol, and the Declaration of London all received the advice and consent of the United States Senate.\textsuperscript{242} This approval was readily obtained because a functioning International Prize Court would greatly benefit a state such as the United States, which anticipated being neutral in the event of another general war in Europe. But the American Government was unwilling to deposit its instrument of ratification without the cooperation of Great Britain. This was never forthcoming, however, because the British preferred to consider certain provisions in the Declaration with reference to their potential bearing on a future naval war with Germany instead of on their merits.\textsuperscript{243} Of special concern to the British was the failure of the Declaration of London to consider the question of whether merchant ships could lawfully be converted into warships on the high seas, an issue previously dodged in the Second Hague Peace Conference’s Convention Relative to the Conversion of Merchant Ships into War Ships.\textsuperscript{244} The British stridently refused to recognize an unrestricted right to convert merchant vessels into ships of war on the high seas for rea-


\textsuperscript{241} See Coogan, supra note 238, at 114-17; 1 Scott, supra note 53, at 698-730.

\textsuperscript{242} See Editorial Comment, Approval of the Declaration of London by the United States Senate on April 24, 1912, 6 AM. J. INT’L L. 723 (1912).

\textsuperscript{243} See Editorial Comment, Naval Prize Bill and the Declaration of London, 6 AM. J. INT’L L. 180 (1912).

sons of military expediency. Even more objectionable to the British public was article 24 of the Declaration, which classified foodstuffs as conditional contraband, and therefore, made liable to capture under article 33 if shown to be destined for the use of the armed forces or a government department of an enemy state. The Declaration's failure to classify foodstuffs as free goods not subject to confiscation under article 28 threatened to jeopardize the vital flow of foreign foodstuffs to the non-self-sufficient and isolated British Isles during wartime. Opponents of the Declaration successfully exploited the specter of mass starvation to defeat its ratification by Great Britain.

The Naval Prize Bill of 1911, purporting to amend English law relative to naval prizes of war so as to enable British participation in the International Prize Court Convention, passed in the British House of Commons, but failed in the House of Lords because of public opposition. Since there was no point in proceeding with either the International Prize Court or the Declaration of London without the world's greatest naval power, neither project subsequently came into effect of its own accord. This defeat also doomed the American proposal to vest the International Prize Court with the powers and functions of the proposed Court of Arbitral Justice as well as the four-power proposal to create the CAJ among a limited number of states on the basis of the IPC's rotational system for the appointment of judges.

Nevertheless, a preliminary provision to the Declaration of London stated that the signatory powers agreed that the rules set forth therein “correspond in substance with the generally recognized principles of international law.” This provision created the potential for belligerents in some future naval war to apply the rules enunciated in the Declaration by virtue of their generally recognized status as declaratory of customary international law on the conduct of maritime warfare. Hence, the provisions of the Declaration of London were voluntarily applied by Italy and Turkey to naval operations during their war of 1911. An Italian royal decree required

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246. See Coogan, supra note 238, at 128-36.


observance of the Declaration so far as consistent with Italian law. Turkey, under pressure from Russia, stated that it intended to comply with the Declaration's provisions. This occurred even though Italy was a signatory which had not ratified the Declaration and Turkey was neither a signatory nor an adherent to it.

In a similar vein, the United States revised its naval war code in 1912 to correspond with the Declaration of London. Likewise, in 1913, the British Admiralty espoused the Declaration of London as the heart of its new naval prize manual. With such weighty imprimaturs it was not surprising that at the beginning of the First World War the Declaration of London was generally considered to be the most authoritative enunciation of the laws of war at sea. Thus, shortly after the outbreak of the War, the United States formally suggested to the belligerents that they agree to apply the laws of naval warfare set out in the Declaration of London upon condition of reciprocity. This was necessary to "prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents." In response, Germany and Austria-Hungary agreed to promulgate the Declaration of London and to be bound by its provisions upon condition of reciprocity by the other belligerents. On the other hand, Great Britain, and following its lead, Russia and France, agreed to promulgate the Declaration of London "subject to certain modifications and additions which they judge[d] indispensable to the efficient conduct of their naval operations."

The British qualifications to the Declaration of London


250. See Coogan, supra note 238, at 126 & n.7.

251. Id. at 145.


were so severe as to prompt the United States to rescind its original suggestion as to the Declaration's applicability. Instead, the United States insisted upon American rights and duties under the existing rules of international law and treaties of the United States, irrespective of the Declaration of London. Earning special opprobrium was the British application of the doctrine of continuous voyage to conditional contraband (at first American foodstuffs, then shortly thereafter American raw materials) in violation of article 35 of the Declaration and in contradiction to the longstanding British policy maintaining that foodstuffs were freegoods. Ironically, British insistence upon the later policy had resulted in the defeat of both the Declaration of London and the International Prize Court Convention in the House of Lords.

The belligerents continued to apply their municipally incorporated versions of the Declaration of London for almost two years. As the ferocity of the conflict intensified, however, both sets of belligerents progressively adopted maritime warfare practices that flagrantly contradicted even the most elementary principles set forth in the Declaration of London. These created a vicious cycle of violations, reprisals and counter-reprisals that spiralled into a gross pattern of illegality under the humanitarian laws of armed conflict and rights of neutral states. Eventually, in July, 1916, pure military expedience forced the British and French to announce their intention to withdraw from their earlier adherence to the modified provi-
sions of the Declaration of London. They declared their intention to thereafter exercise their belligerent rights in accordance with existing international conventions on the law of war and with the "law of nations." The Declaration of London was alleged to have become a "dead letter" as far as the remainder of the war was concerned.

This eventual abrogation of the Declaration of London should, in retrospect, be qualified to apply only in a technical legal positivist sense. It must be noted that the principles of the Declaration of London served as a definitional framework of international legal rules surrounding the conduct of hostilities during the First World War. These rules of law provided the foundations of legality or illegality and right or wrong, which shaped the perceptions that conditioned the responses to the war by decision makers in neutral states.

It was generally believed within the United States that the quality and quantity of violations against its neutral rights, partially set forth in the rules of the Declaration of London, by the Allied Powers were of a nature and purpose materially different from, and far less heinous than, those perpetrated by the Central Powers (i.e., destruction of property as opposed to destruction of life and property). Of decisive impact on American public opinion and governmental decision making processes was Germany's indiscriminate destruction of innocent human life through its policy of "unrestricted" submarine warfare against merchant and passenger ships. This policy commenced on February 4, 1915, with Germany's imposition of a war zone in the waters surrounding England


262. For a more complete explanation of the role international law plays in defining the contours of international crises for governmental decision-makers, see Entebbe, supra note 15, at 778-79.


264. See MAY, supra note 263, at 113-301, 387-437.
and Ireland, including the entire English Channel. Under its initial policy, Germany did not assert any intention of destroying neutral ships. However, it did warn of the serious dangers the latter might encounter by traversing the proscribed seas, especially in light of the British practice of misusing neutral flags.\textsuperscript{265} This policy culminated two years later with the German announcement that from February 1, 1917, all sea traffic, including neutral ships, would be stopped with every available weapon, and without further notice, in the designated blockade zones around Great Britain, France, Italy and the eastern Mediterranean.\textsuperscript{266} Such behavior was in express violation of several provisions of the Declaration of London\textsuperscript{267} that were generally considered not only to state the customary international law of maritime warfare but also to embody rudimentary norms of humanitarian conduct.\textsuperscript{268}

Tactically, German submarine warfare could only partially compensate for the surface naval supremacy of Great Britain and her allies, who were then quite successfully imposing an economic stranglehold on all neutral commerce that could possibly be destined for Germany and her allies. It was extremely dangerous for a submarine to forego the security afforded by undetected submersion in order to surface and comply with the rules of the Declaration of London regarding the interdiction by surface warships of enemy or


\textsuperscript{266} See Telegram from the German Ambassador to the United States [Bernstorff] to the Secretary of State [Lansing] (Jan. 31, 1917), reprinted in 1917 FOREIGN REL. U.S., supra note 64, at 97, 100, 101 (Supp. 1917).

\textsuperscript{267} See, e.g., Declaration of London Concerning the Laws of Naval War, Feb. 26, 1909, arts. 48-50, in 4 Unperfected Treaties, supra notes 68, at 12: Chapter IV.—Destruction of neutral prizes.

Article 48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

Article 49. As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

Article 50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

neutral merchant vessels suspected of transporting contraband. Indeed, it had become standard British practice to arm its merchant vessels with defensive weapons sufficient to destroy a thin-hulled submarine should it surface, and also to fly neutral flags on British merchant vessels in order to deceive an enemy submarine commander. Under these circumstances, application of the Declaration of London’s rules of maritime warfare to the conduct of hostilities by submarines would have essentially precluded German submarine warfare. This would have assured Great Britain and her allies of a virtually uninterrupted stream of military and commercial products from neutral states, most particularly from the United States.

Legally, of course, the German government justified its imposition of the war zone decree as a legitimate measure of retaliation for the grievous and repeated British violations of the Declaration of London and generally recognized rules of international law, both of which Germany alleged it had been strictly obeying. In addition, Germany complained that the neutral powers, in order to guarantee their nationals’ right to trade with Germany, had been either unable or unwilling to exert enough pressure upon Great Britain to secure her compliance with customary and conventional laws of maritime warfare and neutrality. The neutral states’ collective failure to effectively prosecute their rights against Great Britain or, in the alternative, their refusal to at least diminish proportionately their own merchants’ sale of weapons, munitions and supplies to Britain worked to the substantial military and economic detriment of Germany.

Notwithstanding the validity of some of the German objections, as far as American public and government opinion were concerned, if the submarine could not be effectively utilized without violating international law, then Germany must eliminate the submarine and not the humanitarian laws of maritime warfare.


271. See Telegram from the German Ambassador to the United States [Bemstorff] to the Secretary of State [Bryan] (Feb. 7, 1915), reprinted in 1915 FOREIGN REL. U.S., supra note 64, at 95 (Supp.).

272. Id. at 96.

273. See Baty, Naval Warfare: Law and License, 10 Am. J. Int’l L. 42 (1916); Editorial
many's persistent refusal to relent and its consequent sinking of merchant ships with substantial loss of life directly precipitated the United States decision to intervene in the war against Germany and later against Austria-Hungary which had endorsed the German practices. As President Woodrow Wilson phrased it in his April 2, 1917 request to a joint session of Congress for a declaration of war against Germany: "The present German submarine warfare against commerce is a warfare against mankind." America's decision to abandon its neutrality and enter the war inevitably spelled defeat for the Central Powers. This proved to be the definitive and most effective "sanction" for Germany's violation of the Declaration of London.

Prior to the League of Nations, warfare was precisely how the European system of public international law was intended to operate. Resort to warfare by one state against another was universally considered the ultimate sanction for a transgressor's gross and repeated violations of a victim's international legal rights. With the benefit of sufficient historical hindsight, therefore, it can be determined that the laws of war at sea, as codified by the Second Hague Peace Conference through the London Naval Conference, were anything but a "dead letter" as far as the First World War was concerned. The United States ultimately fought in the Great War to vindicate the customary and conventional international laws of maritime warfare and neutrality.

Comment, The Controversy Between the United States and Germany over the Use of Submarines Against Merchant Vessels, 9 Am. J. Int'l L. 666 (1915); Scott, The Secretary of State on the Violations of International Law in the European War As They Affect Neutrals, 10 Am. J. Int'l L. 572, 574 (1916).

274. See Scott, Editorial Comment, The United States at War with the Imperial German Government, 11 Am. J. Int'l L. 617 (1917).


278. See, e.g., Brown, War and Law, 12 Am. J. Int'l L. 162, 164 (1918) ("This is truly a war in defense of law"). See also Brown, Editorial Comment, Economic Warfare, 11 Am. J. Int'l L. 847 (1917) (the war demonstrates the futility of a system of international law based upon the balance-of-power, suppression of nationality and denial of self-government).
4. Arms limitation, disarmament and new procedures for the peaceful settlement of international disputes

   a. arms limitation and disarmament

   It was observed somewhat cynically that the real reason for the Russian Tsar's convocation of the First Hague Peace Conference in 1898 was not to achieve "the most effective means of assuring to all nations the benefits of a real and lasting peace, and of placing before all the questions of ending the progressive development of existing armaments." Rather, it was agreed his real motivation was to relieve his government from the external pressures of foreign affairs and defense budgets, thus enabling the Tsarist autocracy to consolidate its internal position against mounting domestic opposition. The United States decided to attend the conference even though the war with Spain rendered "impracticable" its present reduction of armaments. In any event, it contended that its level of armaments were undoubtedly "far below the measure which principal European powers would be willing to adopt." Consequently, Secretary of State John Hay instructed the American delegation to the First Hague Peace Conference to leave the initiative on arms limitation to the representatives of those states for which it possessed some relevance. Generally the United States' delegates did not play a constructive role in the matter of arms limitation at the 1899 conference.

   The First Hague Peace Conference proved totally incapable of adopting any substantive measures concerning the overall limitation or reduction of armaments. Instead, the conference had to con-

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279. Telegram from Count Mouravieff to Ethan Hitchcock (Aug. 12 (24), 1898), reprinted in 1898 FOREIGN REL. U.S., supra note 64, at 541.
281. Telegram from Moore to Ethan Hitchcock (Sept. 6, 1898), reprinted in 1898 FOREIGN REL. U.S., supra note 64, at 543.
283. See DAVIS, HAGUE I, supra note 64, at 110-24; Report of Captain Crozier to the Commission of the United States of America to the International Conference at The Hague Regarding the Work of the First Committee of the Conference and Its Sub-Committee (July 31, 1899), in 2 SCOTT, supra note 53, at 29; Report of Captain Mahan to the United States Commission to the International Conference at the Hague, on Disarmament, Etc., with Reference to Navies (July 31, 1899), in 2 SCOTT, supra note 53, at 36.
284. See DAVIS, HAGUE I, supra note 64, at 110-24.
tent itself with the adoption of an unanimous resolution in favor of restricting military budgets, and of two voeux that governments examine the possibility of an agreement respecting the employment of new types and calibers of rifles and naval guns, an agreement limiting war budgets and land and sea armed forces. These meager results confirmed the conventional wisdom espoused by the majority of the American international legal community that serious proposals for arms limitation and disarmament would only succeed after the relaxation of international tensions by new rules of international law and new institutions for the peaceful settlement of international disputes. To that end, of course, the First Hague Conference proffered its Convention for the Pacific Settlement of International Disputes, which instituted the Permanent Court of Arbitration and other novel procedures for this purpose.

The First Hague Peace Conference adopted three declarations that forbade the use of certain types of weapons, though arms control and disarmament were not their primary purpose. These declarations prohibited: (1) the launching of projectiles and explosives from balloons or similar devices; (2) the use of bullets which expand or flatten easily in the human body; and (3) the use of projectiles whose only purpose was the diffusion of asphyxiating or

286. Id. at 106.
287. Id.
288. See, e.g., 1 Scott, supra note 53, at 61:
The means of warfare and the preparation for war will exist until a substitute for war be proposed which is not only reasonable in itself, but which is so reasonable that its non-acceptance would be unreasonable. It may be that the inter-relation and interdependence of States must be accepted in theory and practice, and that the judicial organization of the world be realized before armies and navies will cease to be used in foreign affairs, and will be confined to protecting commerce and policing the seas.


deleterious gases.\footnote{291} These three declarations specifically stated that they were “inspired by the sentiments which found expression in” the Declaration of St. Petersburg of 1868. This document renounced the use in warfare “of any projectile of less weight than four hundred grams, which is explosive, or is charged with fulminating or inflammable substances.”\footnote{292} In essence, the guiding purpose of the St. Petersburg Declaration was to “reconcile the necessities of war with the laws of humanity.”\footnote{293} Therefore, the motivating force behind the adoption of the three 1899 Hague Declarations was attributable primarily to humanitarian considerations instead of to a genuine desire to limit or reduce armaments that were viewed as militarily significant.

Although Russia attempted to exclude the limitation of armaments from the agenda of the Second Hague Peace Conference so as not to impede its arms buildup in the aftermath of defeat during the Russo-Japanese War of 1904-1905, Great Britain and the United States, among others, insisted that it be considered.\footnote{294} Nevertheless, the Second Hague Peace Conference likewise failed to adopt any substantive measures concerning the overall limitation of armaments.\footnote{295} Upon the motion of Great Britain, supported by the United States, the conference simply confirmed the resolution of the 1899 Conference regarding the limitation of military budgets and declared that it would be “highly desirable” for governments once again to examine seriously this question.\footnote{296} The 1907 Convention Relative to the Laying of Submarine Mines\footnote{297} and the 1907 Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons,\footnote{298} the latter being a renewal of the expired 1899 Declaration, were primarily attributable to humanitarian considerations
and were not generally perceived as genuine arms control measures. The international community made no significant progress on arms limitations until after the First World War. Indeed, the first real progress on the subject did not occur until November, 1921, when the United States initiated a conference of the Principal Allied and Associated Powers (Great Britain, France, Italy, Japan and the United States) at Washington, D.C.\textsuperscript{299}

During the First World War, in addition to the submarine, the other novel instrumentality of modern warfare to make its grisly appearance and to be employed in explicit violation of international law was poison gas. Both sets of belligerents, except for the United States, eventually resorted to the use of poisonous gases regardless of their ratification without reservation of the 1899 Convention prohibiting its use.\textsuperscript{300} The large-scale use of poison gas during the Great War was not, however, appropriately characterized as a failure of the principle of arms limitation and disarmament, but rather as a setback for the development of the humanitarian law of armed conflict. These two concepts, albeit interrelated, are premised upon fundamentally different theoretical bases and are intended to serve distinct purposes. After the world war, the Geneva Protocol of 1925 reaffirmed the 1899 prohibition on the use in war of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices."\textsuperscript{301} It also extended the ban to include the use of bacteriological methods of warfare.\textsuperscript{302} Fifteen years later, the Geneva Protocol was generally observed by all belligerents during the Second World War.\textsuperscript{303}

\textsuperscript{1908}. By its own terms this Declaration applied "for a period extending to the close of the Third Peace Conference." See Hull, supra note 24, at 79-82.


\textsuperscript{302}. Id.

\textsuperscript{303}. Current allegations that the Soviet Union is violating the Geneva Protocol by using chemical weapons in Afghanistan, even if established to be factually and legally correct, should properly be interpreted as a setback for the humanitarian laws of armed conflict, not for the negotiation of arms control and reduction agreements between the two nuclear superpowers. The Reagan Administration seems to be purposely confusing the two issues in order to justify its obstructionist tactics in the INF and START I negotiations. C\textsuperscript{f}. Depart-
b. good offices and mediation

In addition to the creation of the Permanent Court of Arbitration, the 1899 Convention for the Pacific Settlement of International Disputes established the modern practice of third parties offering their good offices and mediation to two states in conflict to achieve a pacific settlement of the dispute. Article 2 provided that in case of serious disagreement or conflict, before resort to arms, the contracting powers agreed, "as far as circumstances allow," to have recourse to the good offices or mediation of one or more friendly powers. Article 3 established the right of states not parties to the dispute "on their own initiative, and as far as circumstances may allow, [to] offer their good offices or mediation to the States at variance." This right could be exercised by third parties even during the course of ongoing hostilities, when the tide of battle was turning against a belligerent. Moreover, the exercise of this right could never be regarded by one of the states in conflict as an unfriendly act of intervention. However, article 7 provided that the acceptance of mediation could not, unless there was an agreement to the contrary, have the effect of interrupting, delaying or hindering mobilization or other measures of preparation for war. If mediation occurred after the commencement of hostilities, it would cause no interruption to the military operations in progress unless there was an agreement to the contrary.

Article 8 was the brainchild of Frederick W. Holls, an international lawyer who was a member of the United States delegation to the First Hague Peace Conference. The Conference created a procedure for special mediation modelled after the choice of "seconds" by individuals about to engage in a private duel. States at variance would each entrust to a third country the mission of entering into direct communication with the other side’s representative. For the period of this mandate, which could not exceed thirty days unless otherwise agreed, the states in conflict would cease all direct communication on the subject of the dispute, leaving all di-

305. "The convention draws no distinction between 'good offices' and 'mediation.' They are considered as identical expression, denoting, it may be, a greater degree of intensity." 1 SCOTT, supra note 53, at 259.
306. See DAVIS, HAGUE I, supra note 64, at 141.
rect communication exclusively to the mediating powers. In case of a definite rupture of pacific relations, the mediating powers were charged with the joint task of taking advantage of any opportunity for peace.

These Hague provisions for the peaceful settlement of international disputes were to bear fruit when President Theodore Roosevelt offered his good offices and mediation to Russia and Japan during their war of 1904-1905.307 Representatives of both belligerents met in the United States and concluded the Peace of Portsmouth on September 5, 1905, terminating the war on terms favorable to Japan, the military victor.308 Roosevelt was awarded the Nobel Peace Prize for the success of this initiative.309

c. international commissions of inquiry

Title III of the 1899 Convention for the Pacific Settlement of International Disputes310 created a voluntary procedure for the formation of an international commission of inquiry. The functions of this commission were to investigate, ascertain and report upon international differences involving neither honor nor vital interests and which arose from disputed points of fact that could not be settled by means of diplomacy.311 International commissions of inquiry were to be constituted by a special agreement between the parties in conflict. This special agreement would define the facts to be examined and the extent of the commissioners' powers.312 Unless otherwise stipulated, the international commissions of inquiry were formed in the manner fixed by article 32 of the 1899 Convention which specified the procedure to be used for the constitution of a PCA tribunal.313 The parties in dispute were obligated to cooperate with the commission "as fully as they may think possible."314 Upon comple-

308. Peace of Portsmouth, Sept. 5, 1905, Japan-Russia, 1 Jap. Tr. 585, 199 Parry's T.S. 144.
312. Id. art. 10, 32 Stat. at 1787.
313. See id. art. 32, 32 Stat. at 1793.
314. Id. art. 12, 32 Stat. at 1787.
tion of its investigation, the commission would communicate a report signed by all its members to the parties in dispute. The report was limited to a statement of the facts and did not possess the character of an arbitral award. The report left the conflicting parties free to determine the effect to be given to it. Nevertheless, the theory behind the procedure was that once the facts had been impartially ascertained, authenticated and communicated to the parties in dispute, a pacific settlement of the conflict on the basis of the commission’s report should be readily forthcoming.

At the suggestion of France, an international commission of inquiry was successfully employed to resolve the Dogger Bank controversy between Great Britain and Russia, which arose out of the Russo-Japanese War. Nonresolution of this dispute could have easily resulted in a very serious conflict between the parties. The successful resolution of the Dogger Bank incident by an international commission of inquiry demonstrated to the entire international community that even disputes concerning the honor and vital interests of states could be peacefully settled by an international commission. This experience led the Second Hague Peace Conference to revise the 1899 Convention for the Pacific Settlement of International Disputes to improve and expand upon the operating procedures for international commissions of inquiry. Hence, two new procedures for the peaceful settlement of international differences instituted by the First Hague Peace Conference proved useful

315. Id. art. 14, 32 Stat. at 1788.
316. Id.
318. See HUDSON, supra note 198, at 40.
319. See HULL, supra note 24, at 474.
320. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, arts. 15-36, 36 Stat. 2199, 2215-30, T.S. No. 536, reprinted in 2 Am. J. Int’l L. 43, 50-57 (Supp. 1908). See HULL, supra note 24, at 288-98. Revised article 12 of the 1907 Convention provided that in the absence of a special agreement to the contrary, international commissioners of inquiry shall be chosen in accordance with articles 45 and 57 of the 1907 Convention, which pertained to the appointment of arbitrators and the selection of an umpire for the Permanent Court of Arbitration. According to article 45 of the 1907 Convention, only one of the appointed arbitrators could be the party’s national or chosen from among the persons selected by it as members of the PCA. In regard to International Commissions of Inquiry, the net result of this incorporation was that after the 1907 revision a Commission would consist of five members, at least two of whom must be strangers to the controversy. See Report of the Delegates of the United States to the Second International Peace Conference at the Hague, in 2 SCOTT, supra note 53, at 198, 208-10.
during the Russo-Japanese War. In the future, mechanisms for the creation of international commissions of inquiry constituted the centerpiece of the Bryan Peace Treaties. In addition, such mechanisms figured prominently in article 15 of the Covenant of the League of Nations, which enabled the Council and the Assembly to discharge such functions in the event of a dispute which was "likely to lead to a rupture" between members and which had not been submitted to arbitration or adjudication.

d. Convention on the Opening of Hostilities

Another procedural innovation concerning international disputes instituted by the Second Hague Peace Conference was its 1907 Convention Relative to the Opening of Hostilities.\(^{321}\) Consistent with the reigning philosophy of the day that war was not illegal but only an unfortunate fact of international life, the Convention did not attempt to regulate the reasons for going to war, but only its modalities. However, hope was expressed that the Convention might create an opportunity for third states to offer their good offices or mediation to the parties in dispute, or to convince the latter to submit the matter for decision by the Permanent Court of Arbitration.\(^{322}\)

The contracting parties agreed that hostilities between them would not begin without explicit notice either in the form of a reasoned declaration of war or of an ultimatum with a conditional declaration of war. The state of war must be made known to neutral powers without delay. Moreover, it was not to be effective as to neutral states for purposes of laws of neutrality until they received notice or if in fact they knew of the state of war. The Convention was intended to apply to both naval operations and land warfare.\(^{323}\)

Prior to this Convention, a declaration of war or an ultimatum that preceded the opening of hostilities was the exception, not the rule, of international belligerent practice.\(^{324}\) This axiom had been demonstrated by the Japanese surprise attack on the Russian naval fleet at Port Arthur in February, 1904, which signalled the state of


\(^{322}\) See Hull, supra note 24, at 263.


\(^{324}\) See Editorial Comment, Historical Extracts Showing When Hostilities Began Without Declarations of War, 2 AM. J. INT'L L. 57 (1908).
the Russo-Japanese War. That experience indicated that the Convention might disfavor a weak power against a strong state, since surprise attacks are generally more advantageous to a weaker nation than to a stronger nation. Consequently, proposals at the Conference to fix a mandatory interval between delivery of the declaration or ultimatum and the commencement of hostilities failed.\footnote{325} The Convention left each signatory state free to establish whatever interval best suited its interests, even though tactically the interval would be so short as to take the enemy by surprise. Nevertheless, at the outset of the First World War, most of the major belligerents dutifully complied in good faith with the terms of this 1907 Convention.\footnote{326}

Indeed, over twenty-five years later, the Japanese government attempted to comply with the terms of the 1907 Convention on the Opening of Hostilities before its December 7, 1941, attack on Pearl Harbor. Japan instructed its diplomatic representatives in Washington to deliver its declaration of war upon the United States shortly before the outbreak of hostilities.\footnote{327} Delays in the extended transmission process from Tokyo resulted in a late delivery of the declaration.\footnote{328} So, against its wishes, the Japanese government ultimately violated the terms of the Convention. According to the bureaucratic perceptions of the United States, the 1907 Convention on the Opening of Hostilities became a significant part of the definitional framework of international legal rules surrounding the Second World War. Japan's sneak attack at Pearl Harbor in explicit violation of international law was to exert a profound impact upon American public opinion toward Japan throughout the war and upon the Allied governments' formulation of their ultimatum for Japan's unconditional surrender or "prompt and utter destruction" enunciated in the Potsdam Declaration of July 26, 1945.\footnote{329} Hiroshima and Na-

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\begin{itemize}
\item \footnote{325} See Stowell, Convention Relative to the Opening of Hostilities, 2 Am. J. Int'l L. 50, 53 (1908).
\item \footnote{326} See Davis, Hague II, supra note 107, at 341-43.
\item \footnote{327} See Memorandum of a Conversation Between the Japanese Ambassador to the United States [Nomura] and the Secretary of State [Hull] (Dec. 7, 1941), reprinted in 2 Foreign Rel. U.S.: Japan 1931-1941, supra note 64, at 786; Memorandum Handed by the Japanese Ambassador to the United States [Nomura] to the Secretary of State [Hull] at 2:20 P.M. on Dec. 7, reprinted in id. at 787.
\item \footnote{328} See R. Butow, Tojo and the Coming of the War 371-87 (1961).
\item \footnote{329} Potsdam Declaration, July 26, 1945, United States-China-United Kingdom, 3 Bevans 1204.
\end{itemize}
gasaki became the ultimate "sanction" for Japan's violation of the 1907 Convention.

The most profound contribution to the maintenance of international peace and security made by the 1907 Convention on the Opening of Hostilities occurred, albeit indirectly, fifty-five years after its adoption by the Second Hague Peace Conference. At the onset of the Cuban missile crisis in October, 1962, a substantial majority of the members of the United States decision-making team established to handle the matter (called the Executive Committee) believed that a "surprise surgical air strike" against Soviet missile sites in Cuba was the only viable course of conduct to take in response to Khrushchev's surreptitious placement of extraordinarily dangerous and threatening weapons short distances off the coast of the continental United States. Notification of a bombardment to Khrushchev or Castro prior to its commencement was ruled out "for military or other reasons."

After hearing general support for launching a surprise attack during the initial deliberations of the Executive Committee, Attorney General Robert Kennedy passed a note to his brother, President John Kennedy, which states: "I know how Tojo felt when he was planning Pearl Harbor." Robert Kennedy adamantly opposed such a "sneak attack" because it was entirely inconsistent with the moral values upon which the United States was supposedly founded and represented around the world: "We spent more time on this moral question during the first five days than on any other single matter." Primarily for this reason Robert Kennedy decided to join ranks with Secretary of Defense Robert McNamara in advocating the imposition of a naval blockade around Cuba, followed by an appeal to the Organization of American States (OAS) for its endorsement.

One major advantage a blockade had over a surprise attack was that a blockade would permit the United States to present a plausible legal justification for its conduct before the OAS and the United Nations in a bid to obtain their support for or lack of opposition to

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331. Id. at 17.
332. Id. at 9.
333. Id. at 15-17.
334. Id. at 17. "We struggled and fought with one another and with our consciences, for it was a question that deeply troubled us all."
335. Id. at 12, 14, 15.
United States action. Additionally, a sneak attack would have been legally indefensible before any international forum.336 Eventually, the blockade alternative prevailed over the surprise attack, and the United States received the unanimous support of the OAS for its quarantine of Cuba.337 In the opinion of Robert Kennedy, "[t]he strongest argument against the all-out military attack, and one no one could answer to his satisfaction, was that a surprise attack would erode if not destroy the moral position of the United States throughout the world."338 Solid Western hemispheric support for the arguably legal United States position before the OAS proved to be a key factor in convincing Khrushchev to withdraw Soviet missiles and bombers from Cuba.

During the historical interim between the Second Hague Peace Conference and the Cuban missile crisis, the 1907 Convention on the Opening of Hostilities successfully performed a complete transposition of governmental attitudes toward the acceptability of sneak attacks and a means of originating hostilities. The Convention had entered into the definitional framework of international legal rules from which modern governmental decision makers consciously and unconsciously derived their conceptions of legality or illegality, right or wrong, justice or injustice. Thus, the 1907 rule shaped the perceptions which conditioned the responses by American decision makers to the Cuban missile crisis fifty years after its creation.

Unanimous and fervid American repugnance to the Japanese sneak attack on Pearl Harbor in 1941 transformed the 1907 Convention on the Opening of Hostilities thereafter into a phenomenon that was far more binding and effective than any principle of international law ever could be—a moral imperative. As far as the United States was concerned, a rule of international law that was qualified and ambiguous at its origin had become, by virtue of time and tragic experience, an absolute moral obligation that must be obeyed even in time of a severe international crisis when the very survival of the state was at stake. As a moral obligation, therefore, the rule of the 1907 Convention was able to head off the initially favored "surprise surgical air strike" on Soviet missile sites in Cuba. Although the 1907 Convention on the Opening of Hostilities was never originally intended or designed to deter or forestall the outbreak of war, its

336. Id. at 23.
337. Id. at 26-27, 35.
338. Id. at 27.
proscription on sneak attacks contributed to the prevention of the third, and perhaps, last world war in October, 1962. For this reason, the 1907 Convention on the Opening of Hostilities has proven to be a monumental contribution by the Second Hague Peace Conference to the maintenance of international peace and security in the post-World War II era.

e. the Porter Convention

The final mechanism for the peaceful settlement of international disputes instituted by the Second Hague Peace Conference was the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. This treaty is commonly referred to as the "Porter Convention" in honor of General Horace Porter, the United States delegate to the 1907 Conference who proposed it on behalf of the American government and who labored so strenuously to obtain its adoption. Pursuant to the terms of the Convention, the contracting powers agreed not to have recourse to armed force for the recovery of "contract debts" claimed from the government of one country by the government of another as being due its nationals. However, this undertaking was rendered expressly inapplicable when the debtor state (1) refused or neglected to reply to an offer of arbitration, (2) accepted the offer but subsequently prevented any compromis from being agreed on, or (3) failed to submit to the award after the arbitration. Such arbitration was to be determined by Part IV, Chapter III of the 1907 Convention for the Pacific Settlement of International Disputes, which pertained to the Permanent Court of Arbitration. Except as otherwise agreed by the parties, the award by the PCA would determine the validity of the claim, the amount of the debt, and the time and mode of payment.

Most significantly, however, the Convention did not contain the

340. See DAVIS, HAGUE II, supra note 107, at 255-58, 284-85; HULL, supra note 24, at 349-70.
341. This term was purposefully left undefined. See 1 SCOTT, supra note 53, at 416-18. Yet it was considered to include public debts. See HULL, supra note 24, at 360-63.
343. Id. art. 2.
usual reservations of vital interests, honor, independence and the interests of third parties for such arbitrations. With the entry into force of the Porter Convention, creditor states had to be willing to submit their nationals' contract claims against debtor states to international arbitration. This requirement created a means whereby fraudulent, spurious or inflated claims could be identified, denied or reduced in an impartial manner. Thus, many undeniable abuses that had previously been perpetrated by the nationals of powerful creditor states would be deterred. Conversely, the Porter Convention established the right of a debtor state to insist upon international arbitration of contractual claims against it by citizens of foreign states. Nevertheless, the implication was clear: should the debtor state be unwilling to adhere to the terms of the PCA arbitral procedure, the creditor state would retain whatever freedom of action it allegedly possessed under customary international law to forcefully collect the debts.

Despite this loophole, subsequent history has proven the Porter Convention a phenomenal success. It virtually put an end to the generally tolerated practice of stronger (invariably European) creditor states threatening, or actually using, military force to collect contract debts owed to their nationals by weaker (typically Latin American or Caribbean) debtor states. Thereafter, the only historically significant use of force for the purpose of recovering governmental debts was the 1923 French and Belgian occupation of the Ruhr after Germany had defaulted. These states justified this action on the grounds that it was permitted by the Treaty of Versailles.

The impetus behind United States' sponsorship of the Porter Convention at the Second Hague Peace Conference came from a 1902 controversy surrounding Venezuela's default on its public debts. Great Britain, Italy and Germany attempted to collect their nationals' claims through the use of military force, which included the blockade of Venezuela's coastline, the capture of its fleet and the bombardment of some forts. On December 29, 1902, Luis M. Drago, Argentine Minister of Foreign Affairs, sent a note to Wash-


ington in which he argued that the United States should insist upon the principle that the public debt of an American state could not serve as a pretext for armed intervention or military occupation of its territory by a European power. This note was the genesis for the Drago Doctrine. The doctrine states that physical force cannot be used to compel the collection of public debt under any circumstances. The doctrine was premised on the theory that nonintervention is a necessary corollary to the freedom, independence and equality of all states in a modern system of public international law. Recognition of such a right to intervene would create a pretext for strong states to intervene against militarily weaker states in order to establish spheres of influence or to advance other imperialist enterprises. Drago also pointed out that for the United States to follow a contrary rule would be tantamount to sanctioning a violation of the Monroe Doctrine.

President Roosevelt was acutely concerned with the potential violation of the Monroe Doctrine arising from European intervention in Venezuela. Unless the United States somehow rectified the situation, an unfortunate precedent for European creditor states' future intervention into the turbulent political and economic affairs of Latin American and Caribbean debtor states could easily be established. Roosevelt, therefore, decided to intervene diplomatically into the Venezuelan dispute. He convinced the creditor states to allow the claims to be settled by a series of mixed commissions. The blockading powers' demand for preferential treatment in the payment of debts was arbitrated by the Permanent Court of Arbitration at The Hague. This peaceful resolution of the Venezuelan debt controversy created a precedent which was eventually enshrined in the Porter Convention of the Second Hague Peace Conference. Of

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Allied Coercion of Venezuela, 1902-1903—A Reassessment, InterAmerican Econ. Aff., Spring, 1962, at 3 (Britain did not intervene to protect bondholders).


348. See Davis, Hague II, supra note 107, at 73-90. The Hague Tribunal upheld the demand by the blockading powers for priority of payment on their claims over those of creditor powers that had not resorted to the use of force. Venezuela Preferential Case (Ger., Gr. Brit. and Italy v. Venez.), Hague Ct. Rep. (Scott) 55 (Perm. Ct. Arb. 1904). See 1 Scott, supra note 53, at 316:

This decision awarding a preference to the blockading powers in the customs of Venezuela has been criticised as a premium on force and war; but if war is legal, and if Venezuela consented to the preferential treatment although under pressure of war, the decision seems good in law, however questionable it may be in morals.
course, the Porter Convention did not go as far as the Drago Doctrine. This was illustrated by the former's failure to, under all circumstances, prohibit the use of force to collect on public debts. Nevertheless, the Porter Convention was claimed to have been a victory for United States foreign policy, in that the conclusion of a multilateral pact essentially designed to protect Latin American states from European intervention was interpreted as an implicit recognition by all signatories of the validity of the Monroe Doctrine.349

5. The Third Hague Peace Conference

The fifth and final element of the American legalist war prevention program for world politics during the 1898-1917 period was the institution of some mechanism for the periodic convocation of peace conferences among the nations of the international community. The purpose of these periodic conferences was to complete, perfect and advance the work of the First and Second Hague Peace Conferences. The First Hague Peace Conference was assembled upon the initiative of Tsar Nicholas II of Russia. Several provisions of its Final Act contemplated the convening of a subsequent conference to deal with a variety of unresolved issues. However, the right to initiate its convocation or the time of such convocation was left open. The outbreak of the war between Japan and Russia over Manchuria in 1904 rendered it awkward, if not politically unfeasible, for the Tsar to assume the initiative in calling for the convocation of a second conference. This raised the general question whether some other state possessed the legal right and should undertake the political obligation to summon another Hague peace conference in default of a Russian diplomatic initiative. In September, 1904, the Interparliamentary Union held its meeting in St. Louis, and adopted a resolution requesting the President of the United States to sound out the states of the world concerning their willingness to attend a second peace conference.350 Shortly thereafter, President Theodore Roosevelt undertook the initiative by issuing a circular note to that effect to the signatories of the First Hague


The note pointed out that at the time the Tsar issued his invitation in 1898 the United States and Spain had not concluded a peace treaty ending their war, and yet the First Hague Conference did not attempt to intervene in the determination of peace terms between them. It was argued that the Russo-Japanese War should likewise not interrupt the world’s progress toward the realization of universal peace and that a subsequent conference would also not seek to interfere with the Russo-Japanese War. With the conclusion of that conflict, however, Tsar Nicholas requested Roosevelt to surrender the initiative for the convocation of the second conference to him, and Roosevelt readily acquiesced. The Second Hague Peace Conference commenced its deliberations on June 15, 1907.

The Final Act and Conventions of the Second Peace Conference were signed on October 18, 1907. Among them was a recommendation that the holding of a third peace conference should take place within a period of time similar to that which had elapsed since the first conference (eight years, or 1915), on the date to be set by joint agreement among the powers. The Final Act also stated that about two years before the probable date of the meeting, it would be desirable for a preliminary committee to be charged by the governments with the duty of collecting various propositions to be considered at the conference, to prepare a program, and to determine the mode of organization and the procedure for the third conference.

It was argued that the language of the Second Hague Peace Conference’s Final Act concerning a third conference was specific enough to indicate that any state represented at the First or Second Hague Peace Conferences could undertake the initiative to convene the Third Hague Peace Conference. Thus, any putative claims that Russia possessed the exclusive right to initiate the third conference were implicitly repudiated. The United States delegation was in the vanguard of the movement to terminate the Tsar’s proprietary interest in calling for the convocation of future Hague Peace

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354. Id. at 28-29.
Conferences.\textsuperscript{356} In preparation for the Third Hague Peace Conference the American Society of International Law decided to devote the entire program of its sixth annual meeting in April, 1912 to the program, organization and procedure of the conference.\textsuperscript{357} Some of the topics discussed were the conclusion of general arbitration treaties, the codification of the laws of naval warfare, the effects of war on international conventions and private contracts, the marine belt and territorial waters, and, of course, the creation of a permanent court of international justice. At this time there was a great deal of optimism expressed by American international lawyers that a plan for the proposed Court of Arbitral Justice could be placed into operation before the convocation of the Third Hague Peace Conference.\textsuperscript{358}

Shortly thereafter, in June, 1912, President Woodrow Wilson appointed an advisory committee to consider proposals for a program for the third peace conference.\textsuperscript{359} In 1913, the nineteenth annual Lake Mohonk Conference on international arbitration adopted a declaration of principles which included a recommendation that the United States Secretary of State urge the nations of the world to form immediately the international preparatory committee for the third conference which was called for by the Final Act of the Second Hague Peace Conference.\textsuperscript{360} However, certain countries objected to a meeting of the third conference before Great Britain had ratified the Declaration of London and the International Prize Court was established. Both of these projects had been rejected by the House of Lords in December, 1911.

On January 31, 1914, Secretary of State William Jennings Bryan dispatched an identical circular note to the United States diplomatic officers in countries which had taken part in the Second Hague Peace Conference. He suggested that officers entrust the duties of the International Preparatory Committee for a Third Peace

\textsuperscript{356} See Davis, Hague II, supra note 107, at 286-88; Kuehl, supra note 25, at 104.
\textsuperscript{357} See Editorial Comment, Sixth Annual Meeting of the American Society of International Law, 6 AM. J. INT'L L. 197 (1912); Editorial Comment, The Sixth Annual Meeting of the Society, 6 AM. J. INT'L L. 729 (1912).
\textsuperscript{359} See Scott, Mr. Bryan and the Third Hague Peace Conference, 8 AM. J. INT'L L. 330, 335 (1914).
Conference to the Administrative Council of the Permanent Court of Arbitration at The Hague (which consisted of the Netherlands Minister of Foreign Affairs and the diplomatic representatives of the contracting powers accredited to The Hague) and that the Third Conference be held in 1915. In light of the various responses received from some of the powers, Bryan issued a follow-up circular note on June 22 revising his prior proposal. He suggested that the Third Peace Conference meet at The Hague in June, 1916, and that the duties of the International Preparatory Committee be entrusted to a committee to be selected by and from the members of the Permanent Court of Arbitration's Administrative Council. Shortly thereafter, on June 26, 1914, the Netherlands invited each of the contracting powers that had participated in the Second Hague Peace Conference to name one member of a preparatory committee. It further suggested that this committee meet in 1915 and consider the questions to be brought before the Third Peace Conference. Two days later, Archduke Francis Ferdinand of Austria-Hungary and his wife were assassinated at Sarajevo by a Serbian nationalist, thus precipitating the First World War. This simultaneity of developments yielded the surprise and suddenness by which the First World War descended upon the great powers of Europe. The 1919 Paris Peace Conference which ended the Great War had to serve in default for the never-realized Third Hague Peace Conference. Yet the longstanding American legalist objective of establishing some means for the periodic convocation of peace conference was achieved and, indeed, far exceeded by the creation of the League of Nations.

III. UNITED STATES FOREIGN POLICY TOWARD CENTRAL AMERICA AND THE CARIBBEAN

The history of American foreign policy toward international
law and organizations from 1898 to 1917 would be substantially incomplete, if not materially misleading, if it did not include a brief analysis of United States attitudes toward Central America and the Caribbean during this crucial period. The United States pioneered and promoted a war prevention program in the Western hemisphere that essentially consisted of the same five legalist elements of its contemporaneous foreign policy toward Europe: arbitration, adjudication, codification, arms limitation and the periodic convocation of regional conferences. Nevertheless, by the end of the nineteenth century, a material difference emerged between United States foreign policies toward the Old and New Worlds. This difference was predicated upon the unavoidable historical fact that the United States, because of its easy victory over Spain in 1898, had become an active participant and the acknowledged predominant power in the politics in the Western hemisphere. Thereafter, the United States quickly acted as if Central America and the Caribbean constituted its rightful “sphere of influence” akin to those carved out by the major European imperial powers on the continents of Africa and Asia. In the Western hemisphere, the United States war prevention program, based upon considerations of international law and organizations, was confronted directly by the political realities of United States imperial power and pretensions. This direct confrontation between two competing, if not antithetical, ideologies for the conduct of international relations created an insoluble set of dilemmas for the United States foreign policy decision-making establishment. For the next three decades the United States would try to cope with the problem of curing political and economic instability in Mexico, Central America and the Caribbean by the crude techniques of actual and threatened military intervention and occupation. This interventionist policy expressly contravened the emotional sentiments, philosophical principles and international legal conventions the United States had actively promoted within the worldwide system of international relations as well as within the separate inter-American system that it was actively seeking to create. The ramifications of this interventionist policy has chronically plagued and hopelessly perplexed United States foreign policy decision making toward Central American and Caribbean countries up to and including the present time.
A. International Law and United States Imperial Policy

1. The Monroe Doctrine

The focal point for all United States foreign policy toward Central America and the Caribbean during this era was the proper interpretation of the Monroe Doctrine. As originally stated by President James Monroe in his message to Congress on December 2, 1823, the doctrine proclaimed that the American continents were no longer considered by the United States to be appropriate subjects for future colonization by any European powers; that the countries of Europe must not seek to extend their political systems to the Western hemisphere; that the United States would not interfere in the affairs of any current European colony or dependency in the Western hemisphere; that the United States would remain neutral in the war between Spain and the newly independent governments of South America, but not to the point of permitting a reimposition of Spanish rule; and, finally, that the United States would continue to obey the dogma of Washington's Farewell Address by preserving its neutrality in the affairs of Europe provided that its rights were not seriously jeopardized.\(^ {367} \)

The Polk Corollary to the Monroe Doctrine subsequently created an additional prohibition, namely, that a European power could not acquire territory in the Western hemisphere by cession from another European power.\(^ {368} \)

At the turn of the twentieth century, American international lawyers quite forthrightly admitted that the Monroe Doctrine had not been elevated to the level of a customary principle of public international law. Rather the Doctrine only expressed an official statement of international political policy by the United States that was tacitly respected by European states for reasons of political, diplomatic, and military expediency.\(^ {369} \) From a United States perspective, the main advantage to this interpretation was that recognition of the Monroe Doctrine, as a matter of policy instead of law, meant that related questions could not properly become the subject of international arbitration pursuant to the various obligatory arbitration treaties and schemes advocated by the United States government.\(^ {370} \)

Despite its commitment to the principle of obligatory arbitration of

367. See 1 Richardson, supra note 34, at 776.
368. See E. McCormak, James K. Polk: A Political Biography 690, 698 (1965).
international disputes, the United States firmly avowed its intention to preserve its ability to unilaterally interpret and act upon the Monroe Doctrine in whatever manner it saw fit. This was said to be essential because the Monroe Doctrine was founded upon the sovereign right of the United States to self-defense, a prerogative that was recognized by public international law. In a system of international relations where war was not outlawed but simply tolerated, the ultimate guarantee for self-defense was not arbitration, but military power. The same axiom must hold true for the Monroe Doctrine.

2. The Roosevelt Corollary

From a Latin American perspective, as originally defined, the Monroe Doctrine was not theoretically objectionable; it was well understood that the Doctrine was in part responsible for the ability of Latin American states to achieve and maintain independence from their European mother countries. The real problem arose from the so-called Roosevelt Corollary to the Monroe Doctrine, announced by the President in his message to Congress on December 6, 1904. Although phrased in general terms to apply to any international delict committed by a Western hemispheric state, the essence of this precept meant that the United States would exercise an alleged right of pre-emptive intervention into the domestic affairs of Central American and Caribbean countries delinquent in the payment of their public debts. It sought to establish in these states a

371. For example, regarding the Monroe Doctrine, the United States made identical reservations to both the 1899 and the 1907 Conventions for the Pacific Settlement of International Disputes as follows: "nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions." See Hague Ct. Rep. (Scott) at civ, cvi (1916).

372. See Drago, State Loans in Their Relation to International Policy, 1 AM. J. INT'L L. 692, 719 (1907). Chandler, The Pan American Origin of the Monroe Doctrine, 8 AM. J. INT'L L. 515 (1914) (tracing efforts made by South American countries to formulate a Pan American policy in which the U.S. would have an active role prior to the enunciation of the Monroe Doctrine); Robertson, Hispanic American Appreciations of the Monroe Doctrine, 3 HISPANIC AM. HIST. REV. 1 (1920) (while engaged in a dispute with England over title to land Venezuela invoked the Monroe Doctrine in May, 1887, and requested the U.S. Secretary of State to promote the settlement of the dispute by arbitration).

373. See 9 RICHARDSON, supra note 34, at 7024, 7053:

Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or importance, to the exercise of an international police power.
United States supervised regime for the proper administration of public finances and debts, thereby forestalling intervention by European creditor states. If deemed necessary, this objective would be accomplished by the forceful seizure and occupation of foreign territory and customs houses by armed United States troops. In effect, the success of the Porter Convention, which greatly limited European intervention into the Western hemisphere for economic reasons, was to a great extent predicted upon the promulgation and enforcement of the Roosevelt Corollary to the Monroe Doctrine. As the Porter Convention reduced the grounds for European intervention into the domestic affairs of Central American and Caribbean countries, the Roosevelt Corollary increased the number of ostensible reasons that purported to justify United States intervention.

From a Latin American perspective, the Roosevelt Corollary was perceived as a unilateral policy of hegemonial imperialism by the United States toward the Western hemisphere similar to the balance of power politics and spheres of influence system pursued by the great powers of Europe. Drago vigorously argued that the United States should not assume the function of a public debt collector for Latin American countries as it was then doing in the Dominican Republic. Latin America was not a United States sphere of influence and the United States had no right to exercise such "international police functions" throughout the region. The Roosevelt Corollary explicitly contradicted the Monroe Doctrine's underlying principles of nonintervention, state equality and sovereign independence. It was therefore argued that these principles were so fundamental to the Monroe Doctrine that they must be applied to international relations between all Western hemispheric states, and especially by the United States in its relationships with Latin American countries. Even former United States Secretaries of State Richard Olney and Elihu Root—the former to President Cleveland, the latter to Theodore Roosevelt—eventually joined in these Latin American protestations and asserted that the true essence of the Monroe Doctrine did not require the United States to become the international policeman of the Western hemisphere or a debt collection agent for the benefit of foreign creditor states and their nationals. On this point they were in full agreement with the positions advocated by notable Latin Americans such as Luis Drago and Ale-

The majority viewpoint among the American international legal community, however, favored Roosevelt’s newly decreed interventionist interpretation of the Monroe Doctrine. With the creation of a United States “sphere of influence” over the Western hemisphere by virtue of its victory over Spain, it was generally believed that the United States must now assume an activist role in “enforcing” the Monroe Doctrine. This would be accomplished by intervention into the domestic affairs of Central American and Caribbean countries that became delinquent in the performance of their international legal responsibilities toward those European states which might seek redress in a manner inconsistent with the Monroe Doctrine. According to this logic, by virtue of the Roosevelt Corollary, the United States would become the policemen for the enforcement of international law in the Western hemisphere.

3. The Panama Canal

At that particular time, the United States felt a special need to play the role of policeman in Central America and the Caribbean because it had recently acquired a supposed “vital national security interest” in protecting the approaches to the proposed Panama Canal. United States marines had assisted in the establishment of the Republic of Panama in 1903 and in the negotiation of the Hay-Bunau Varilla Treaty that year. This granted the United States, in perpetuity, a ten-mile wide canal zone across the isthmus of Panama with all the rights, power and authority therein to be exercised as “if it were the sovereign of the territory.”

376. See Alvarez, Latin America and International Law, 3 AM. J. INT’L L. 269 (1909); Drago, supra note 372, at 714-16.
378. See, e.g., Germanicus, The Central American Question from a European Point of View, 8 AM. J. INT’L L. 213 (1914); Root, supra note 375, at 440.
379. Hay-Bunau Varilla Treaty, Nov. 18, 1903, United States-Panama, art. III, 33 Stat. 2234, 2235, T.S. No. 431. The Clayton-Bulwer Treaty of 1850 between the United States and Great Britain had prohibited either party from ever obtaining or maintaining for itself any exclusive control over an interoceanic ship canal across the Central American isthmus. Clayton-Bulwer Treaty, Apr. 19, 1850, United States-Great Britain, 9 Stat. 995, T.S. No. 122. Later, the Hay-Pauncefote Treaty of 1901 between the United States and the United Kingdom on an interoceanic canal “superseded” the Clayton-Bulwer Treaty without, how-
the recently controversial question whether this peculiar phraseology of article 3 actually meant that the United States was not in law the sovereign over the Canal Zone because at the time the United States was deemed to be the practical sovereign for all essential purposes.\textsuperscript{380} There was, however, some severe criticism of the Panamanian intervention as a serious violation of the fundamental principle of public international law concerning state equality and as an instance where the United States had not, contrary to prior practice, upheld the rights of a weaker nation in its foreign affairs.\textsuperscript{381} Former Secretary of State Richard Olney went so far as to suggest that the United States should have compensated Columbia for the seizure of the Canal Zone.\textsuperscript{382}

On the other hand, some American international lawyers attempted to justify the intervention on the grounds of "permanent national or international interests of far reaching importance"\textsuperscript{383} which presumably permitted a derogation from the basic proscriptions of public international law against military intervention. The majority of United States international lawyers of this era essentially accepted the forceful creation and permanent occupation of a "United States" Panama Canal as an inevitable necessity of geopolitical life that existed beyond the domain of public international law.\textsuperscript{384} This attitude was consistent with their general predilection for concocting transparent legal justifications for United States interventionism throughout the Western hemisphere on such patently

\textsuperscript{380} See, e.g., Note from Secretary of State for Foreign Affairs of Great Britain to United States Ambassador Bryce (Nov. 14, 1912), \textit{reprinted in} 7 \textit{Am. J. Int'l L.} 48, 53 (Supp. 1913) (British recognize that U.S. had become "practical sovereign" of the Canal by virtue of the Hay-Bunau Varilla Treaty).

\textsuperscript{381} See Hicks, \textit{The Equality of States and the Hague Conferences}, 2 \textit{Am. J. Int'l L.} 530, 535, 560 (1908).

\textsuperscript{382} See Olney, \textit{The Development of International Law}, 1 \textit{Am. J. Int'l L.} 418, 426 (1907). The United States eventually paid a $25 million indemnity to Columbia "to remove all the misunderstandings growing out of the political events in Panama in November 1903." Treaty for the Settlement of Differences, Apr. 6, 1914, United States-Columbia, 42 Stat. 2122, T.S. No 661.

\textsuperscript{383} See, e.g., Hershey, \textit{The Calvo and Drago Doctrines}, 1 \textit{Am. J. Int'l L.} 26, 42 (1907). \textit{But see} Root, \textit{ supra} note 375, at 440.

Military interventionism became the keystone of United States foreign policy toward Central America and the Caribbean from shortly after the Spanish-American War until at least a decade after the conclusion of the First World War. Politically, the policy was justified by the Roosevelt Corollary to the Monroe Doctrine. Legally, the policy was justified either by the terms of some treaty or by the asserted right under customary international law for the United States to intervene militarily in order to protect the lives and property of its nationals abroad from dangerous civil conditions allegedly degenerating beyond the control of the host government. Strategically, the fulcrum of United States interventionist foreign policy toward Central America and the Caribbean turned on the Panama Canal that linked the two American coasts and served as the highway for political, military and economic communications between the United States mainland and its recently acquired possessions in the Far East.

4. The Dominican Republic Loan Convention

The formal promulgation of the Roosevelt Corollary to the Monroe Doctrine was precipitated by the situation in the Dominican Republic. The government of the Dominican Republic had literally fallen into a state of international bankruptcy and was faced with the imminent prospect of military intervention by European powers to enforce collection on debts owed to their nationals, thus raising the specter of the volatile Venezuelan debt controversy. Pursuant to a convention concluded between the United States and the Dominican Republic in 1907, the President of the United States was authorized to appoint a General Receiver for the collection and proper administration of all Dominican customs duties revenues.


387. See D. Munro, Intervention and Dollar Diplomacy in the Caribbean 78-125 (1964) [hereinafter cited as Munro, Intervention].

The American receiver was to apply these funds to the orderly payment of interest upon, and the amortization and redemption of, $20 million in new bonds issued and sold by the Dominican Republic. The proceeds of these bonds, together with the customs revenues, were to be paid to the government's creditors, who had already agreed to a substantial reduction in the nominal amount of their claims as part of the financial rearrangement.389

The 1907 Convention with the Dominican Republic did not explicitly grant the United States a right to intervene to secure the discharge of any of these obligations. However, pursuant to article II, the United States could provide the General Receiver and his assistants with "such protection as it may find to be requisite for the performance of their duties."390 In the shadow of the Great War in Europe, on November 29, 1916, President Woodrow Wilson decided to intervene. He placed the Dominican Republic under military occupation over an alleged failure to fulfill the terms of the Convention.391 The marines were withdrawn in 1924, but the customs receivership was not terminated until 1940.392

The Dominican Republic Loan Convention proved to be a rough-and-ready model for the negotiation of economic receivership agreements between the United States and Honduras in 1911 (which was not ratified);393 between the United States and Nicara-

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guatemala in 1911 (not ratified), and again in 1914 (which was ratified); the United States Marines intervened in Nicaragua in 1912, occupied the country until 1925, returned the next year, and finally withdrew in 1933. United States Marines occupied Haiti from 1915 through 1934, though the receivership was maintained until 1947. The Marines landed in Honduras in 1924 and were not withdrawn until the following year. “Dollar diplomacy” and “gunboat diplomacy” were to merge and proceed hand-in-hand in the formulation of United States foreign policy toward Central America and the Caribbean during the first three decades of the twentieth century.

5. Cuba and the Platt Amendment

When a revolution broke out in Cuba during the summer of 1906 the United States, in order to preserve its security interests in the approaches to the Panama Canal, decided to exercise its right of intervention pursuant to article 3 of the U.S.-Cuban Treaty of May 22, 1903 and article 3 to the Cuban Constitution of February 21, 1901. Both of these documents incorporated the terms of the Platt Amendment. The Platt Amendment was the brainchild of then...
Secretary of War Elihu Root, who believed it essential to the protection of the United States strategic position in Panama.\textsuperscript{404} The amendment was imposed upon Cuba as a condition for its independence and the ultimate withdrawal of the United States occupation forces left in the aftermath of the Spanish-American War. The Platt Amendment served as the legal pretext for a repeated series of actual or threatened military and diplomatic interventions into Cuba by the United States.\textsuperscript{405} In fact, the United States actually introduced troops into Cuba in 1906, 1912, 1917 and 1920.\textsuperscript{406} The Platt Amendment was finally abrogated in 1934 as part of President Franklin Roosevelt's good neighbor policy toward Latin America.\textsuperscript{407} The doctrine of intervention enunciated by the Platt Amendment was considered so salutary that it was generally recommended that it serve as a comprehensive basis for the conduct of American foreign policy throughout the Caribbean basin.\textsuperscript{408} One or another of its conditions warranting intervention can be found scattered throughout the various international agreements that the United States government attempted to impose upon the countries of Central America and the Caribbean during this era. The Platt Amendment was to serve as a harbinger of the Roosevelt Corollary to the Monroe Doctrine.

In addition to the Platt Amendment, the Roosevelt Corollary, the right of self-defense and the need to protect the approaches to the Panama Canal, United States international lawyers purported to justify these armed interventions into and prolonged occupations of sister American republics on such specious grounds as "the abate-
ment of an international nuisance" or "in the defense of special rights and the general interests of international law and order." Another superficial rationale espoused by United States international lawyers became the supposed moral obligation of the United States government to rescue the people of such backward nations from their generally despotic, corrupt and inefficient rulers, who threatened to propel the region into a condition of interminable anarchy and chaos. The United States must assist its fellow American people to advance toward a higher level of civilization and self-government in both their international and domestic affairs. Until they reached that stage, however, the fundamental rule of international law dictating nonintervention simply did not apply to protect Central American and Caribbean states from the imposition of what was tantamount to a United States protectorate. The idea that such an allegedly beneficient and altruistic policy might have been motivated principally by considerations of international power politics, military strategy and economic greed was dismissed out of hand by many United States international lawyers.

6. The interaction between United States imperial policy in the Americas and the United States attitude toward Japanese imperial policy in the Far East

The above specious justifications for United States imperial behavior in the Western hemisphere set in motion a deleterious process of interaction between United States foreign policies toward Central America and the Caribbean, on the one hand, and the Far East on the other. This interaction would serve as an ominous prelude to the Japanese sneak attack on Pearl Harbor almost forty years later. United States' acquisitions of Hawaii, Guam and the Philippines in 1898 signalled the opening thrust of American foreign policy into the easternmost rim of the Pacific Ocean basin. Here, the United States soon came into serious conflict with another rapidly expanding imperial power, Japan, flush from recent victories

411. Hughes, supra note 410, at 611.
over China in 1895 and Russia in 1905. The victory over Russia resulted in the creation of a Japanese protectorate over Korea in 1905, and its annexation in 1910. Japan's conquest of Korea was accorded a shortsightedly benign interpretation by United States legal commentators on the other side of the Pacific. They believed that it merely constituted part of Japan's effort to obtain a degree of equality in recognition from the great powers of the New and Old Worlds, thereby assuming its legitimate "place in the sun" with them.\(^{413}\) Of course this quest was similar to the contemporaneous imperial pursuit undertaken by the United States since 1898 over the Western hemisphere and in the Far East, using the purloined Panama Canal, buttressed by the interventionist Roosevelt Corollary, to serve as the strategic link between the twin portions of the American empire. It would have been glaringly hypocritical for American international lawyers to have reproached Japan for likewise exploiting seductive targets of opportunity in its recognized "sphere of influence" on the continent of Asia. Just as the United States was currently engaged in the process of consolidating its hegemonial position in the Western hemisphere, Japan was some-

day destined to become the leader of an Asiatic empire encompassing much of the eastern Pacific basin.\(^{414}\)

Granting Japan imperial deference in the Pacific did not vitiate the fact that protection of United States possessions in the Far East depended upon preventing Japan from obtaining any additional territorial acquisitions on the Asian mainland.\(^{415}\) In particular, the inestimable strategic and economic value of China's territory, population and resources could not fall under the domination of Japan. Nor could China be further balkanized into additional zones of exclusive economic or political control exercised by the great powers of Europe, which had already staked out their imperial beachheads in China and Southeast Asia. Consequently, at the turn of the century the cornerstone of American foreign policy toward the Far East became the preservation of what remained of the territorial integrity and political independence of China.\(^{416}\) These con-

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\(^{413}\) See, e.g., Editorial Comment, The Emperor of Japan, 6 AM. J. INT'L L. 944, 948-49 (1912); Editorial Comment, The Annexation of Korea to Japan, 4 AM. J. INT'L L. 923 (1910). See also Editorial Comment, The International Status of Korea, 1 AM. J. INT'L L. 444 (1907).

\(^{414}\) See also BEMIS, supra note 384, at 493 (Taft-Katsura memorandum).

\(^{415}\) See Hart, Pacific and Asiatic Doctrines Akin to the Monroe Doctrine, 9 AM. J. INT'L L. 802, 816 (1915).

\(^{416}\) See Editorial Comment, Arbitration Treaty with China, 3 AM. J. INT'L L. 166 (1909).
siderations induced the United States to specifically endorse the British government's "open-door" policy toward China. This was designed to ensure equality of treatment for commerce and navigation by all the imperial powers in China within their respective "spheres of influence or interest." 417

The American interpretation of this open-door policy toward China was expanded upon in a July 3, 1900 circular note by Secretary of State John Hay to the various European powers then contemplating the formation of an international expedition for the relief of their legations currently besieged in Peking as a result of the Boxer Rebellion. 418 As stated by Hay, the purpose of United States foreign policy toward China was to ensure the permanent safety and peace of the Chinese empire; to maintain its territorial and administrative integrity; to protect all rights of foreigners under treaty or international law; and to safeguard the principle of equal and impartial trade for all powers throughout China. 419 The principles enunciated in the Hay circular note were eventually endorsed by the major imperial powers in several important conventions concluded between them prior to the outbreak of the First World War. Of primary significance were the agreements of October 16, 1900, between Great Britain and Germany defining their mutual policy in China; 420 the treaty of alliance between Great Britain and Japan of January 30, 1902, 421 replaced by a convention of August 12, 1905, 422 which was revised and extended by another treaty of alliance of July 13, 1911; 423 articles 3 and 4 of the Peace of Portsmouth of September


419. Circular Note to the Powers Cooperating in China, Defining the Purposes and Policy of the United States (July 3, 1900), supra note 418, at 386-87.


5, 1905 between Russia and Japan,\textsuperscript{424} as well as the St. Petersburg Convention between them of July 17(30), 1907;\textsuperscript{425} an arrangement concluded between Japan and France of June 10, 1907;\textsuperscript{426} and finally the Root-Takahira Agreement on Pacific Possessions of November 30, 1908 concluded between the United States and Japan.\textsuperscript{427} Hope was expressed that this general consensus on the Chinese open door policy, together with the Triple Entente between Great Britain, France and Russia, the Anglo-Japanese alliance, as well as the fact that all these states were further interconnected with the United States through a series of bilateral arbitration treaties, might create conditions ripe for a worldwide peace pact that could embrace the continents of Europe, Asia and America.\textsuperscript{428}

7. The Mexican Revolution

With the severance of Mexican sovereign territory north of the Rio Grande by the Treaty of Guadalupe-Hidalgo in 1848,\textsuperscript{429} the primary United States concern in Mexico prior to the First World War was not strategic, but economic in nature. This was dictated by the large amount of American capital invested in Mexico, which was the main repository of United States funds invested abroad.\textsuperscript{430} The security of these investments was irreparably damaged by the outbreak of the Mexican revolution in 1910, which was precipitated by President Diaz's decision to renge on his promise not to seek re-election in that year and the consequent amendment of the Mexican

\textsuperscript{424} The Peace of Portsmouth, Sept. 5, 1905, Russia-Japan, arts. 3-4, XCVIII Br. For. 735, 199 Parry's T.S. 144, \textit{reprinted in} 1 \textit{Am. J. Int'l L.} 17, 18 (Supp. 1907).

\textsuperscript{425} St. Petersburg Convention, July 17(30), 1907, Russia-Japan, 1 Jap. Tr. 606, 204 Parry's T.S. 339, \textit{reprinted in} 1 \textit{Am. J. Int'l L.} 396 (Supp. 1907).


\textsuperscript{428} \textit{See} Editorial Comment, \textit{The Revised Anglo-Japanese Alliance}, 5 \textit{Am. J. Int'l L.} 1054, 1055 (1911).


\textsuperscript{430} \textit{See} Editorial Comment, \textit{Secretary Root's Visit to Mexico}, 1 \textit{Am. J. Int'l L.} 964, 065 (1907).
constitution to permit him to do so. After instigating an armed revolt against Diaz, Francisco Madero was elected president in 1911. On March 14, 1912, a joint resolution of Congress authorized the President to forbid the exportation of arms or munitions of war to any American country in which he should find conditions of domestic violence to exist. Pursuant thereto, President Taft promulgated an arms embargo against Mexico in order to strengthen the Madero government against its internal adversaries.

Nevertheless, Madero was in turn overthrown and murdered in 1913 by General Victoriano Huerta, who ruled without the benefit of a constitutional imprimatur. This defect provided the grounds for the Wilson Administration's refusal to recognize the Huerta regime. Though not without precedent in United States dealings with Latin American states, refusal to accord diplomatic recognition because a government was not established in accordance with its normal constitutional procedures contravened the usual practice of United States diplomatic relations. This practice extended back to President Thomas Jefferson's 1792-93 correspondence with Gouverneur Morris, American Minister to France, in regard to the French Revolution. President Jefferson stated that the United States would "acknowledge [sic] any government to be rightful which if form [sic] by the will of the nation, substantially declared." As subsequently explained by Jefferson, this principle meant that the United States considered every nation to have the right to govern itself by whatever form of institution it desired, to change those institutions as it saw fit, and to conduct its foreign relations through

431. See Editorial Comment, Diaz and Mexico, 5 AM. J. INT'L L. 714 (1911); Editorial Comment, Mexico, 6 AM. J. INT'L L. 475 (1912).
432. See Berbusse, Neutrality-Diplomacy of the United States and Mexico, 1910-1911, 12 AMERICAS 265 (1956) (United States government tacitly supported Madero's insurrection).
435. See DAVIS, FINAN, & PECK, supra note 395, at 174.
436. See Blaisdell, Henry Lane Wilson and the Overthrow of Madero, 43 SW. SOC. SCI. Q. 126 (1962) (acting without approval from Washington, U.S. Ambassador in Mexico supported Huerta in his overthrow of Madero).
437. See Editorial Comment, Mexico, 7 AM. J. INT'L L. 832 (1913).
438. Letter from Thomas Jefferson to Gouverneur Morris (Nov. 7, 1792), in 8 THE WRITINGS OF THOMAS JEFFERSON 436 (Library ed. 1903).
whatever organs it thought proper. For the United States to operate in accordance with some other principle of diplomatic recognition would be tantamount to an act of intervention into the sovereign affairs of another people. By contrast, failure to extend diplomatic recognition to the Huerta regime was calculated by the United States to produce a change of governments in Mexico. Thereafter the Wilson Administration would pursue a policy of non-recognition toward Central American and Caribbean governments not created in accordance with their respective constitutional procedures. This policy was a purposeful instrument of diplomatic intervention supposedly designed to promote peace and stability in the strategic region adjacent to the Panama Canal.

When President Wilson later surmised that the arms embargo had in fact worked in favor of Huerta and against the Constitutionalist Party of Venustiano Carranza, the embargo was lifted on February 3, 1914. However, neither diplomatic intervention nor manipulation of United States neutrality laws were enough to achieve the desired American objective of replacing Huerta with Carranza. This goal was ultimately accomplished, however, by means of forceful American military intervention. The pretext for the intervention was to make amends for a Mexican refusal to offer an unconditional twenty-one gun salute to the United States flag for the arrest and prompt release of United States Marines from the warship *Dolphin* anchored at Tampico. Upon the request of President Wilson, Congress passed a joint resolution on April 22, 1914, giving the President authority to use the armed forces of the United States to enforce his demand for unequivocal amends from the Mexican government over the *Dolphin* incident. An amendment offered by Senator Henry Cabot Lodge to broaden the reasons for the authorization to include the failure of the Mexican government to protect the lives and property of United States nationals during

439. Letter from Thomas Jefferson to Gouverneur Morris (Mar. 12, 1793), in *id.* at 36.
the revolution, was defeated. Congress did expressly disclaim any hostility against the Mexican people as well as the desire to make war upon Mexico. The day before receiving legislative authorization, however, Wilson had already ordered the landing of marines at Vera Cruz to seize the customs house and thereby prevent a shipment of German arms and ammunition from reaching Huerta's forces. This intervention prompted Carranza to declare the seizure an act of hostility, whereupon Wilson decided on April 12 to reimpose the Mexican arms embargo. Two days later, however, at the annual banquet of the American Society of International Law, Secretary of State William Jennings Bryan took the occasion to announce the offer and United States acceptance of the good offices of the envoys from Argentina, Brazil and Chile to mediate the dispute. Huerta accepted the offer the next day.

Meetings between representatives of the various governments were held at Niagara Falls, Canada. The negotiations quickly proceeded beyond mere settlement of the Dolphin incident into consideration of elaborating some modus operandi for full-scale termination of the Mexican civil war. An agreement by Huerta to step aside as part of an overall settlement led to the signature of a protocol on June 24, 1914. It determined that a provisional government would be established in Mexico which would receive recognition by the United States and the three mediating governments. In return, the provisional Mexican government would negotiate for the creation of international commissions for the settlement of claims by foreigners for damages sustained during the civil war "as a consequence of military acts or acts of national authorities." On its face, this restrictive language seemed tacitly to accept the teachings of Carlos Calvo, namely that a government was not responsible for injuries to aliens in time of civil war or internal disturbances, or resulting from mob violence for which the government

444. Amendment Offered by Senator Lodge to H.R.J. Res. 251, 63d Cong., 2d Sess., 51 CONG. REG. 7005 (1914).
445. See Editorial Comment, Mediation in Mexico, supra note 441, at 582; Sellers, Chronicle of International Events, 8 AM. J. INT'L L. 615, 620 (1914).
446. See Editorial Comment, The Eighth Annual Meeting of the Society, 8 AM. J. INT'L L. 597, 608 (1914).
447. Letter from Secretary Dodge to the Secretary of State and Text of Mediation Protocol (June 25, 1914), reprinted in 1914 FOREIGN REL. U.S., supra note 64, at 547; Editorial Comment, Mediation in Mexico, supra note 441, at 584-85.
448. Mediation Protocol art. 2(d), 1914 FOREIGN REL. U.S., supra note 64, at 548.
was not directly responsible. Hence, it represented an American concession to Mexican sensibilities.

By late August, 1914, Carranza had taken the oath of office as the Chief Executive of Mexico, and three weeks later President Wilson ordered the withdrawal of United States troops from Vera Cruz. However, the American pullout was delayed due to the continuation of revolutionary disturbances throughout Mexico. It was not until October 19, 1915, that the United States recognized the Carranza government as the de facto government of Mexico. Nevertheless, Carranza still exerted no real control over the forces of General Pancho Villa, which had consolidated their military position in the northern states of the country. On March 9, 1916, General Villa launched his notorious raid into Columbus, New Mexico in which seventeen American civilians and soldiers were killed. On March 10, President Wilson issued a statement that a military force would be sent at once in pursuit of Villa while, in the process, the United States would maintain "scrupulous respect" for the sovereignty of Mexico. On that same day, in a vain attempt to forestall the inevitable, the Mexican government offered to conclude an agreement with the United States giving each country the reciprocal right for the passage of troops to pursue cross-border bandits upon the territory of the other in the event an incident similar to Columbus recurred. The United States government treated this proposal to negotiate as a formal offer to permit the entry of the United States expedition against Villa and promptly accepted it as such. This interpretation was quickly disavowed by Mexico and, ultimately was coupled with a demand for the immediate withdrawal of United States troops. The Mexican government challenged American military intervention as a violation of its territorial sovereignty that could only be construed as an act of hostility directed against Mex-

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453. Telegram from the Secretary of State to All American Consular Officers in Mexico (Mar. 10, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 484.
454. Telegram from Special Agent Silliman to the Secretary of State (Mar. 10, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 485.
455. Note from Secretary of State to Special Agent Silliman, (Mar. 13, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 487; Note from Mr. Arredondo to the Secretary of State (Mar. 18, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 493.
In response, the United States insisted upon the existence of an alleged right under international law to undertake "hot pursuit" of the Columbus raiders into Mexico. It reasoned that the Mexican government had proven itself totally incapable of preventing depredations against American lives and property launched across the border by Mexican bandit groups. Until the Mexican government could give sufficient guarantees of its willingness and ability to discharge its undeniable obligations under international law in this regard, the United States would continue to act in order to abate what was tantamount to an international nuisance.

In late June, 1916, Mexican troops engaged General Pershing's expedition in combat. This was upon direct order of the Carranza government, which sought to impede the further movement of American troops into the country. The situation could have degenerated into a condition of formal warfare between the two states if cooler heads had not fortunately prevailed on both sides of the border. On July 4, the Carranza government expressed its desire to resolve the dispute peacefully. On July 12, it proposed the formation of a joint commission for the negotiation of a complete settlement to the Columbus affair, including withdrawal of United States forces from Mexico, an agreement between the two states on the reciprocal passage of troops in pursuit of bandit raiders across the border, and an investigation and determination of responsibility for past and future incidents. Later that month the United States accepted the idea of a joint commission, which opened its sessions at New York City on September 4, 1916. This procedure for the creation of a joint commission transpired in accordance with article


457. Note from the Secretary of State to the Secretary of Foreign Relations of the De Facto Government of Mexico (June 20, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 581, 588-91.

458. Id. at 591-92.

459. See Sellers, supra note 452, at 621.

460. Letter from Mr. Arredondo to the Secretary of State (July 4, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 599.

461. Letter from Arredondo to the Secretary of State (July 12, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 601.

462. Letter from Acting Secretary of State to Mr. Arredondo (July 28, 1916), reprinted in 1916 FOREIGN REL. U.S., supra note 64, at 604.

463. See Sellers, supra note 452, at 900-01.
21 of the Treaty of Guadalupe-Hidalgo which created such a device for the noncompulsory arbitration of disputes between the two countries to preserve their peaceful relations.464

On November 24, the members of the joint commission signed a protocol providing for the withdrawal of American forces from Mexico so long as the border was made safe by Mexican troops.465 The protocol was preceded, however, by a statement from the American Commissioners that the United States reserved the right to pursue bandits into Mexico if necessary.466 The Carranza government objected to the additional statement because it would appear to be sanctioning the presence of foreign troops in Mexico.467 Failing to obtain a modification of the protocol the Carranza government refused to ratify it,468 and the joint commission dissolved on January 15, 1917.469 Nevertheless, under the pressure of impending American entry into the European war, President Wilson ordered the withdrawal of United States forces from Mexico on January 28, 1917, and returned the United States ambassador to Mexico on February 17.470 The Wilson Administration finally accorded the Carranza government de jure recognition on August 31, some four months after his election as president under the newly proclaimed Mexican Constitution.471

There was little discussion among American international lawyers of whether the United States raid into Mexico violated the letter, or at least the spirit, of article 21 of the Treaty of Guadalupe-Hidalgo. The general sentiment among American international lawyers was that the United States had a right under international law to enter a foreign state in order to pursue and punish cross-border raiders who had retreated into their own country for refuge


466. Id. at 925.

467. Id. at 927-28.

468. Id. at 932.

469. Id. at 937.


when the territorial government proved completely ineffective at suppressing them.\textsuperscript{472} Yet, it was argued that since the United States had recognized the Carranza government it should not have intervened with troops without the latter's knowledge and express permission.\textsuperscript{473} To take the enforcement of international law into its own hands under these circumstances was deemed to be an act of bad policy on the part of the United States.

\section*{B. The Inter-American System}

Even those American international lawyers who generally supported the interventionist foreign policy of the United States government in Mexico, Central America and the Caribbean during the first three decades of the twentieth century recognized that unilateral intervention by the United States under whatever legal and political justifications was undesirable over the long-run. They further argued that unilateral intervention was far less preferable than some system for collective intervention, when necessary, that was sanctioned by all states in the Western hemisphere to ensure that each state lives up to its international responsibilities.\textsuperscript{474} Such notions, prevalent among American international lawyers of this era, proved to be the motivating force behind the formation of an inter-American system of international legal, political and economic relations that was intended to be distinct from and superior to the European balance of power system.

The American system of international relations purported to be essentially different from, if not antithetical to, the European system of public international law and politics that was irremediably grounded in monarchism, the balance of power, spheres of influence, war, conquest, imperialism and the threat and use of force. Although such policies might also be practiced at times by the United States in its relations with certain Latin American countries,

\textsuperscript{472} See, e.g., Finch, supra note 470, at 404-05.
\textsuperscript{473} See Editorial Comment, \textit{The American Punitive Expedition into Mexico}, 10 AM. J. INT'L L. 337, 338 (1916).
they could never detract from the spirit underlying the Monroe Doctrine and even the rationale of the Roosevelt Corollary. Such a spirit was infused with the principles of sovereign equality, state independence, noninterventionism, peaceful settlement of disputes, mutual cooperation and a fundamental commitment to democracy as the ideal form of government. These philosophical bonds between sister American republics found their common origin in the intellectual ferment of the European Enlightenment and were tempered by the shared experience of wars of independence against Old World mother countries. This similar heritage created a profound awareness that all states in the inter-American region possessed a mutual interest in the advancement of superior rules for international behavior applicable to their own relations. Moreover, they hoped that some time in the not-so-distant future this system could be extended to relations between all states in the international community. For these reasons it was thought possible to create a system of international law and politics in the inter-American region that was governed by a set of principles more exacting, humane, enlightened, liberal and moral than those currently in operation between the states of the Old World. This was especially true when it came to the threat or use of transnational force, notwithstanding the fact that American states might have to continue to adhere to such regressive and bankrupt rules in their relations with non-American states.

Despite its imperialistic foreign policy in the region, the United States did not dissent from the validity of these propositions. Rather it constituted itself as the vanguard for the movement to create a distinctively inter-American system of international law, politics and economics. In this manner, the Manichaean tension between its perceived national interests in the Western hemisphere and its professed moral, legal and political ideals could hopefully be effectively alleviated, if not altogether dissipated. This United States policy of fostering the creation of a formal inter-American system in the Western hemisphere coincided with and reinforced its contemporaneous promotion of international law and organizations as part of a war prevention program for the great powers of Europe and Japan. Simultaneously, the existence of a viable and discrete inter-American system would advance the United States government's perceived vital national security interest of getting and keeping the latter countries out of the affairs of the Western hemisphere for good.
1. The First International American Conference

The start of an organized structure for the inter-American system can be traced to United States Secretary of State James Blaine's November 29, 1881 call for the convocation of a conference of American states. This conference was to be held in Washington D.C., the following year. Its purpose was to discuss means for the prevention of warfare between the American states.475 The project was sidetracked by Blaine's resignation after President Garfield's assassination.476 Nevertheless, upon the initiative of President Cleveland's Secretary of State T.F. Bayard, the First International American Conference would eventually meet at Washington in 1889.477 It was followed by a second conference in Mexico City in 1901, a third conference in Rio de Janeiro, Brazil, in 1906, and a fourth conference in Buenos Aires, Argentina, in 1910. A fifth inter-American conference scheduled for 1914 was postponed because of the world war and did not convene until 1923 in Santiago, Chile. These various conferences and their postwar successors were to serve as the institutional framework for the creation of the inter-American system of international law, politics and economics, which, after the Second World War, culminated in the foundation of the Organization of American States.478

Among other projects,479 the First International American Conference adopted a plan of arbitration for the settlement of disputes among American nations.480 According to article 1 of the model treaty, the American republics adopted arbitration "as a principle of American international law for the settlement of the differences, disputes, or controversies that may arise between two or more of them."481 Article 2 created obligatory arbitration for all controversies concerning diplomatic and consular privileges, boundaries, ter-

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477. See Wilgus, James G. Blaine and the Pan American Movement, 5 HISPANIC AM. HIST. REV. 662 (1922).


479. See 6 MOORE, supra note 107, § 969, at 599-602.

480. See INTERNATIONAL AMERICAN CONFERENCE, 2 REPORTS OF COMMITTEES AND DISCUSSIONS THEREON 1078 (Eng. ed. 1890) (presenting the text of the Model Treaty).

481. Id. art. 1, at 1079.
ritories, indemnities, the right of navigation, and the validity, construction and enforcement of treaties. 482 Article 3 was a general provision that established obligatory arbitration for all other cases "whatever may be their origin, nature or object," subject to the single exception stated in article 4. 483 Article 4 created an exemption from obligatory arbitration for questions which, in the judgment of any nation involved in the controversy, might endanger its independence. In such a case, arbitration would be optional for that nation but obligatory for its adversary. 484

Article 5 provided that all controversies pending or thereafter arising would be submitted to arbitration, even though they originated in occurrences antedating the treaty. 485 Article 6 made it clear, however, that the arbitration treaty could not revive any question concerning which a definite agreement should already have been reached. In these cases, arbitration could be resorted to only for the settlement of questions concerning the validity, interpretation and enforcement of such agreements. 486

Article 8 provided that the court of arbitration could consist of one or more persons selected jointly by the nations concerned and, in the event of disagreement, each nation involved had the right to appoint one arbitrator on its own behalf. 487 Whenever the court consisted of an even number of arbitrators, the nations concerned would appoint an umpire whose only function was to decide all questions upon which the arbitrators might disagree. 488 If the nations in dispute failed to agree upon an umpire, the umpire would be selected by the arbitrators already appointed. 489

The absence or withdrawal of a minority of arbitrators could not impede the majority from the performance of their dispute duties. 490 The decision of a majority of the arbitrators would be final unless unanimity on an issue was expressly required in the agreement to arbitrate. 491 Hence, in accordance with normal arbitral practice, this model obligatory arbitration convention between

482. Id. art. 2, at 1079.
483. Id. art. 3, at 1079-80.
484. Id. art. 4, at 1080.
485. Id. art. 5, at 1080.
486. Id. art. 6, at 1080.
487. Id. art. 8, at 1080-81.
488. Id. arts. 9 & 11, at 1081.
489. Id. art. 9, at 1081.
490. Id. art. 14, at 1082.
491. Id. art. 15, at 1082.
American republics contemplated the conclusion of a separate *compromis* between the parties in dispute which specifically submitted the matter to arbitration.

Article 18 provided that the treaty would remain in force for twenty years from the date of the exchange of ratifications.\(^{492}\) Thereafter it was to continue in operation until one of the contracting parties had notified all the others of its desire to terminate. In the event of such notice, the treaty was to be obligatory upon the party giving it for one year, but the withdrawal of one or more nations would not invalidate the treaty with respect to the other nations concerned.\(^{493}\)

Shortly after the conclusion of the First International American Conference, a formal treaty, almost identical to the wording of this model arbitration convention, was signed by Bolivia, Brazil, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, El Salvador, the United States, Uruguay and Venezuela. The treaty never came into force because its signatories failed to exchange instruments of ratification within the stipulated time.\(^{494}\)

The First International American Conference also took up a proposal by Argentina and Brazil, which provided that acts of conquest should thereafter be considered a violation of the public law of America.\(^{495}\) The United States wanted to condition this principle upon the conclusion of the aforementioned proposed treaty of obligatory arbitration of disputes containing an exemption for matters concerning a state's independence.\(^{496}\) A compromise plan unanimously adopted by the Conference (with the abstention of Chile) recommended to the participants the adoption of the following declarations: (1) that the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law; (2) that all cessions of territory made during the continuance of the arbitration treaty shall be void if made under threats of war or the presence of armed force; (3) that any nation from which such cessions shall be exacted may demand that the validity of the cessions shall be submitted to arbitration and

\(^{492}\) *Id.* art. 18, at 1082.

\(^{493}\) *Id.*

\(^{494}\) *See* The International Conferences of American States 1889-1928, at 40 n.4 (J. Scott ed. 1931) [hereinafter cited as *INTER-AMERICAN CONFERENCES*].

\(^{495}\) *See* 1 Moore, *supra* note 107, § 87, at 290, 292.

\(^{496}\) *International American Conference, 2 Reports of Committees and Discussions Thereon* 1123-24 (Eng. ed. 1890).
(4) that any renunciation of the right to arbitration made under threats of war or the presence of armed force shall be null and void. Since the treaty of arbitration recommended by the Conference never came into force, this inter-American plan to declare conquest illegal did not take effect. Nevertheless, the principle behind this early American ideal for international law and politics would eventually be espoused by the international community in the Kellogg-Briand Pact of 1928. The United States government later sought to effectuate this principle in reference to the Japanese conquest of Manchuria by promulgating the Stimson Doctrine on January 7, 1932, which received the endorsement of the League of Nations two months later. This originally inter-American principle of international law and politics is now expressly recognized by the entire international community in article 2(4) of the United Nations Charter.

In retrospect, certainly the most significant result of the First International American Conference was its recommendation for the participating countries to form an association entitled the International Union of American Republics for the purpose of collecting and distributing commercial information. The Union was to be represented at Washington, D.C., by the Commercial Bureau of the American Republics under the supervision of the United States Secretary of State and to be charged with the care of all translations, publications and correspondence pertaining to the Union. The United States would advance a maximum of $36,000 to the International Union for the expenses of the Commercial Bureau during its first year and a similar sum for each subsequent year of its existence. The United States would in turn be reimbursed by other members in accordance with a table of assessments determined by their respective population ratios. The Union would continue in force for ten years from the date of its organization during which period no member could withdraw, and then for successive periods of ten years.

497. Id. at 1147-48.
498. 7 Moore, supra note 107, § 1084, at 71.
501. U.N. Charter art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

502. International American Conference, 1 Reports of Committees and Discussions Thereon 404-08 (Eng. ed. 1890).
years each, unless a majority of its members should give a twelve-
month notice of their wish to terminate the Union. The Commer-
cial Bureau of American Republics was established in 1890, and when the period of notification expired without any notices of with-
drawal by members, the Bureau continued automatically for an-
other ten years.

The First International American Conference adopted a recom-
mendation to the countries of Europe that controversies between
them and American states be settled by means of arbitration. It
also adopted formal recommendations concerning the adoption
of a uniform (i.e., metrical decimal) system of weights and meas-
ures; the adoption of a common nomenclature for merchandise; the
creation of an intercontinental railway; the adoption of a sanitary
convention; the adoption of the Montevideo treaties for the protec-
tion of patents and trademarks; the adoption of the Montevideo
conventions on private international law, civil law, commercial law
and procedural law; the establishment of steamship service between
the ports of the Gulf of Mexico and the Caribbean Sea, and between
the United States and Brazil; the promotion of maritime, telegraphic
and postal communications between countries bordering the Pacific
Ocean; the establishment of an International American Monetary
Union; the conclusion of commercial reciprocity treaties; the simpli-
fication of port dues; the establishment of an International Amer-
ican Bank; adhesion to the Montevideo treaty on penal international
law and the conclusion of extradition treaties with the United States
of America; the adoption of the Calvo Doctrine as a principle of
American international law; and freedom of navigation on shared
rivers for riparian states. Despite this plethora of formal recommen-
dations, the Reports, Recommendations and Resolutions adopted
by the First International American Conference were silent on the
matter of convening a second conference.

2. The Second International American Conference

Upon the initiative of President William McKinley, a Second

503. See INTER-AMERICAN CONFERENCES, supra note 494, at 36 n.2.
504. 6 MOORE, supra note 107, § 969, at 601.
505. See INTER-AMERICAN CONFERENCES, supra note 494, at 44.
506. See id. at 11-45.
507. This recommendation led eventually to the conclusion of some twenty reciprocity
treaties between the United States and governments in South America, Europe and the West
Indies. See Wilgus, James G. Blaine and the Pan American Movement, 5 HISPANIC AM.
HIST. REV. 662, 707 n.128 (1922).
International American Conference convened at Mexico City from October, 1901, to January, 1902.\(^8\) In response to a related suggestion by the United States,\(^9\) this Conference adopted a protocol recognizing the principles set forth in the three conventions\(^10\) signed at the First Hague Peace Conference "as a part of Public International American Law." The protocol also conferred authority on the governments of Mexico and the United States, which were the only American states in attendance at the First Hague Peace Conference, to negotiate with the other Hague signatories for the adherence of the American states to the 1899 Convention for the Pacific Settlement of International Disputes.\(^11\) At the Second Hague Peace Conference the United States secured the assent of the parties to this 1899 Convention to the adoption of a Protocol permitting the adherence to the Convention of non-signatory states not represented at the First Peace Conference,\(^12\) which assent was required by article 60 of the 1899 Convention. Pursuant to this Protocol, the Netherlands Minister of Foreign Affairs opened a Proces-Verbal to receive the adhesions of the Latin American states to the 1899 Convention.\(^13\) Eventually Argentina, Bolivia, Brazil, Chile, Columbia, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, El Salvador, Uruguay and Venezuela adhered to the 1899 Convention for the Pacific Settlement of International Disputes.\(^14\)

The Second International American Conference also requested the President of Mexico to ascertain the views of the participating governments on the most advanced form of a general arbitration

\(^8\) Moore, supra note 107, § 969, at 602; Wilgus, The Second International American Conference at Mexico City, 11 Hispanic Am. Hist. Rev. 27 (1931).

\(^9\) See 7 Moore, supra note 117, § 1087, at 94.


\(^12\) Protocol of Adhesion to the Convention for the Pacific Settlement of International Disputes, June 14, 1907, in Reports to the Hague Conferences of 1899 & 1907, at 193-94 (J. Scott ed. 1917), reprinted in 2 Scott, supra note 53, at 252.


\(^14\) See Inter-American Conferences, supra note 494, at 62 n.1.
convention that could be drawn up and meet approval, and to prepare a plan for such a convention with the necessary protocols to carry it into effect.\textsuperscript{515} Toward the end of the conference, Argentina, Bolivia, the Dominican Republic, Guatemala, Mexico, Paraguay, Peru, El Salvador and Uruguay signed a convention for the obligatory arbitration of disputes.\textsuperscript{516} Article 1 of this convention bound the parties to submit to arbitration all disputes that existed or might arise between them that could not be settled by diplomacy unless it affected the national independence or the national honor of an interested party as determined by itself.\textsuperscript{517} Article 2, however, made it clear that this exemption did not include any dispute about diplomatic privileges, boundaries, rights of navigation, or the validity, interpretation and fulfillment of treaties.\textsuperscript{518} Article 3 designated the Permanent Court of Arbitration at The Hague as the arbitral tribunal, unless any of the parties preferred the organization of a special tribunal.\textsuperscript{519} Following the 1899 Convention for the Pacific Settlement of International Disputes, article 7 of this 1902 arbitration convention conferred a right upon a contracting power to offer its good offices or mediation to two or more parties in dispute, even during the course of hostilities, without this being considered an unfriendly act.\textsuperscript{520} Likewise articles 13 through 19 of the 1902 convention established a procedure for the creation of International Commissions of Inquiry to investigate and report upon disputes of an international character arising from differences over facts.\textsuperscript{521} The treaty would take effect as soon as at least three of its signatories expressed their approval to the Mexican government.\textsuperscript{522} It was eventually ratified by the Dominican Republic, Guatemala, Mexico, Peru, El Salvador and Uruguay.\textsuperscript{523}

Spurred into action by the Venezuelan debt controversy, the nine signatories of this 1902 Treaty of Obligatory Arbitration were joined by the United States, Columbia, Costa Rica, Chile, Ecuador, Haiti, Honduras and Nicaragua in the signature of a treaty at the

\textsuperscript{515} Id. at 62.


\textsuperscript{517} Id. art. 1.

\textsuperscript{518} Id. art. 2.

\textsuperscript{519} Id. art. 3.

\textsuperscript{520} Id. art. 7.

\textsuperscript{521} See id. arts. 13-19.

\textsuperscript{522} Id. art. 21.

\textsuperscript{523} See INTER-AMERICAN CONFERENCE, supra note 494, at 100 n.1.
Second International American Conference calling for the submission of all claims for pecuniary loss or damage presented by their respective citizens that could not be settled by diplomacy and were of sufficient importance to warrant the costs of arbitration, to the Permanent Court of Arbitration at The Hague.\textsuperscript{524} The treaty was to come into effect for a term of five years after ratification by five of its signatories. This occurred in 1905 as a result of ratification by Guatemala and El Salvador (1902), Peru (1903), Honduras (1904) and the United States (1905).\textsuperscript{525} This 1902 Treaty for the Arbitration of Pecuniary Claims was also ratified by Columbia, Costa Rica, Ecuador and Mexico.\textsuperscript{526} The Third International American Conference of 1906 agreed to celebrate a convention extending the life of the 1902 Treaty for the Arbitration of Pecuniary claims until December 31, 1912.\textsuperscript{527} The 1906 Convention was subsequently ratified by Chile, Columbia, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, El Salvador and the United States.\textsuperscript{528} Later, the Fourth International American Conference of 1910 adopted a Convention on the Arbitration of Pecuniary Claims that would come into force immediately after the expiration of the extended 1902 Treaty in 1913 and remain in force indefinitely.\textsuperscript{529} It was subsequently ratified by Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, the United States and Uruguay.\textsuperscript{530}

Among other projects,\textsuperscript{531} the Second International American Conference also undertook a reorganization of the International Bureau of American Republics.\textsuperscript{532} The management of the Bureau of entrusted to a Board of Directors composed of the diplomatic representatives of the signatory countries accredited to Washington, D.C. The United States Secretary of State was to be its Chairman. The Bureau was also given the explicit authority to correspond with the

\textsuperscript{525} 7 Moore, supra note 107, § 1087, at 95.
\textsuperscript{526} See Inter-American Conferences, supra note 494, at 104 n.2.
\textsuperscript{527} Id. at 132-33.
\textsuperscript{529} See Inter-American Conferences, supra note 494, at 183.
\textsuperscript{530} Arbitration of Pecuniary Claims, Aug. 11, 1910, 38 Stat. 1799, T.S. No. 594. See Inter-American Conferences, supra note 494, at 183 n.1.
\textsuperscript{531} See Inter-American System, supra note 478, at XXII.
\textsuperscript{532} See Second Inter-American Conference, supra note 511, at 248-52.
Executive Departments of the American republics through their diplomatic representatives in Washington.

Continuing the social, economic and humanitarian work of the First International American Conference, the Second Conference at Mexico City adopted a series of resolutions recommendations and conventions on subjects such as the Pan-American Railway and Bank, a customs congress, codes on public and private international law, copyrights, patents and trademarks, extradition, international sanitary policy and a controversial convention on the rights of aliens incorporating the Calvo Doctrine, which the United States refused to sign. Unlike its predecessor, the Second International American Conference did adopt a resolution calling for the convocation of the next conference within five years.

3. The Third International American Conference

Pursuant to the above recommendation, the Bureau of the American Republics determined that the Third Conference of American states would meet at Rio de Janeiro on July 21, 1906. An important matter dealt with at the Third Conference was international arbitration. The Third Conference approved a resolution ratifying its adherence to the principle of arbitration and recommending that the participants instruct their delegates to the upcoming Second Hague Peace Conference to secure the celebration of a worldwide general arbitration convention. At the insistance of the United States, the conference also approved a resolution inviting the Second Hague Peace Conference to examine the question of the compulsory collection of public debts and, in general, the best way to reduce disputes among states of a purely pecuniary nature. This resolution directly led to the adoption by the Second Hague Peace Conference, of the 1907 Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract

533. See Inter-American Conferences, supra note 494, at 63-109.
535. See Inter-American Conferences, supra note 494, at 96-97.
537. See Inter-American Conferences, supra note 494, at 124.
538. Id. at 135-36. See 1 Scott, supra note 53, at 397-400; Hershey, The Calvo and Drago Doctrines, 1 Am. J. Int’l L. 26 (1907).
Debts. The Porter Convention was ratified with reservations by Guatemala, El Salvador and the United States; by Haiti, Mexico and Panama without reservations; adhered to by Nicaragua with reservations; and never ratified by Chile, Cuba, Paraguay, Argentina, Bolivia, Columbia, Dominican Republic, Ecuador, Peru and Uruguay, all of which had signed it, though only the first three of which without reservations. The fact that the Porter Convention did not explicitly prohibit the use of force for the collection of public debts under all circumstances rendered it objectionable to those Latin American governments that fully subscribed to the undiluted version of the Drago Doctrine.

The Third International American Congress continued the life of the Bureau of the American Republics for another ten years and significantly expanded its functions. The Conference also expressed support for the construction of a building to house the Bureau's activities in Washington, D.C. In addition to continuing the work of previous conferences in social, economic and humanitarian matters, the Third Conference adopted a convention calling for the creation of an International Commission of Jurists. The function of this commission was to prepare draft codes of public international law and of private international law "regulating the relations between the Nations of America" for consideration by the Fourth International American Conference. This commission eventually met five years behind schedule in 1912 at Rio de Janeiro. There the commission divided itself into six committees for the preparation of draft codes on subjects such as maritime war, war on land and civil war, international law in times of peace, the pacific settlement of international disputes and the organization of international tribunals, the rights of aliens, and other matters of private international law. The outbreak of the First World War interfered with the deliberations of the commission, though it resumed its work after

540. INTER-AMERICAN CONFERENCES, supra note 494, at 135 n.2.
541. Id. at 125.
These efforts by governmental experts to codify American public and private international law were supplemented by the labors of the First Pan-American Scientific Congress in Santiago, Chile (Dec. 1908-Jan. 1909) and the Second Pan-American Scientific Congress in Washington, D.C. (Dec. 27, 1915-Jan. 8, 1916). The Second Congress was held in conjunction with the annual meeting of the American Society of International Law and the newly founded American Institute of International Law. The latter organization was the brainchild of Alejandro Alvarez of Chile and James Brown Scott, managing editor of the American Journal of International Law, and was designed to consist of national societies of international law in every American republic brought into affiliation with the Institute. On January 6, 1916, the American Institute of International Law adopted its seminal Declaration of the Rights and Duties of Nations that was intended to epitomize the inter-American attitude toward international law and politics. Therein it was recognized that every nation had the rights of existence, independence and equality, territory and exclusive jurisdiction over it, respect of its rights by other nations and, finally, that international law was at one and the same time both national and international. After the First World War, Secretary of State Charles Evans Hughes, speaking before the American Academy of Political and Social Science on the occasion of the centenary of the Monroe Doctrine in 1923, commented favorably upon the American Institute’s Declaration and stated that it was “supported by decisions of the Supreme Court of

545. See Inter-American Conferences, supra note 494, at 144 n.1.
547. See Scott, The Second Pan-American Scientific Congress, 10 Am. J. Int’l L. 130 (1916). For the subsequent history of these Congresses, see Inter-American Conferences, supra note 494, at 185 n.1.
the United States" and "embodies the fundamental principles of the policy of the United States in relation to the Republics of Latin America."

4. The Fourth International American Conference

Pursuant to the terms of a resolution adopted by the Third International American Conference,\(^{552}\) the fourth in the series was held at Buenos Aires, Argentina in 1910. Among other projects,\(^{553}\) the Fourth Conference adopted conventions on copyrights,\(^{554}\) pecuniary claims,\(^{555}\) inventions and patents,\(^{556}\) and trademarks.\(^{557}\) The Fourth Conference continued the International Union, created by the First Conference and continued at the Second and Third, but changed its name to the "Union of American Republics" and renamed its Bureau the "Pan American Union," whose functions were then significantly broadened.\(^{558}\) The Pan American Union was given another ten-year lease on life. The Fourth Conference did, however, adopt a resolution recommending the celebration of a convention that would organize the Pan American Union on a permanent basis.\(^{559}\) This endeavor would eventually culminate at the Ninth International American Conference at Bogata, Columbia in 1948, which adopted the Charter of the Organization of American States.\(^{560}\) With the active participation and leadership of the United States, the structural framework for the inter-American system of international political, legal and economic relationships was soundly built before the outbreak of the First World War in 1914. In the words of one astute and prophetic United States international law professor of that era: "The International Conference of American Republics has assumed a well-defined and dignified position among the great international organizations of the world."\(^{561}\)


\(^{552}\) See INTER-AMERICAN CONFERENCES, supra note 494, at 146.

\(^{553}\) INTER-AMERICAN SYSTEM, supra note 478, at XXIII-IV.

\(^{554}\) Copyright Convention, Aug. 11, 1910, 38 Stat. 1785, T.S. No. 593.


\(^{557}\) Trade Mark Convention, Aug 20, 1910, 39 Stat. 1675, T.S. No. 626.

\(^{558}\) INTER-AMERICAN CONFERENCES, supra note 484, at 172.

\(^{559}\) Id. at 176.

\(^{560}\) INTER-AMERICAN SYSTEM, supra note 478, at XXXII.

\(^{561}\) Reinsch, The Fourth International Conference of American Republics, 4 AM. J. INT'L L.
5. The Central American sub-system

In addition to sponsoring the foundation of a formal inter-American system, which encompassed most of the Western hemisphere, the United States actively supported attempts to create an organized sub-system within its framework that would incorporate the states of Central America: Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. The United States' primary motivation was to establish a zone of peace and stability within the Central American isthmus to protect its strategic and economic investment in the Panama Canal. Since the Republic of Panama was placed under virtual United States protectorate by its 1903 Treaty with the United States,\(^562\) there was no reason to integrate it into schemes for the creation of a separate Central American sub-system of inter-American relations.

When war broke out in 1906 between Guatemala, on the one side, and Honduras and El Salvador, on the other, President Roosevelt and President Diaz of Mexico offered their good offices to settle the dispute.\(^563\) This led to the conclusion of a peace agreement among the belligerents on the United States warship *Marblehead*.\(^564\) Pursuant to the Marblehead peace convention, a conference of Central American states was to be held within two months at San Jose, Costa Rica, for the purpose of celebrating a "general treaty of peace, amity and navigation." This conference did meet at San Jose, but its labors were doomed to failure because Nicaragua refused to participate and instead renewed war with Honduras and stirred up trouble in El Salvador.\(^565\) Mexico and the United States offered their good offices once again, and in September, 1907, the five Central American Republics signed a protocol for the convocation of a Central American Peace Conference in Washington, D.C., later that year.\(^566\)

\(^562\) Hay-Bunau Varilla Treaty, Nov. 18, 1903, United States-Panama, 33 Stat. 2234, T.S. No. 431.

\(^563\) See Munro, Intervention, *supra* note 387, at 143-46.


On December 20, 1807, the five participants in the Central American Peace Conference signed eight conventions: a ten-year general treaty of peace and amity, article 3 of which established the absolute neutrality of Honduras;\(^{567}\) an additional convention to the general treaty establishing the principle of nonrecognition of governments coming to power without popular endorsement by coup d'etat or revolution, the principle of nonintervention in civil wars, and the principle of alternation in power for governments;\(^{568}\) a convention for the establishment of a Central American Court of Justice;\(^{569}\) and conventions on extradition,\(^{570}\) communications,\(^{571}\) the establishment of a Central American Bureau\(^ {572}\) and of a Central American Pedagogical Institute,\(^{573}\) and on the convocation of future Central American conferences.\(^{574}\) Of all these projects, the crowning achievement of the Central American Peace Conference of 1907 was generally deemed to be its successful establishment of the Central American Court of Justice.

The Central American Court was proposed by the United States and basically followed the United States plan for the Court of Arbitral Justice recommended for adoption by the Second Hague Peace Conference.\(^{575}\) The Central American Court possessed compulsory jurisdiction over all controversies or questions, without exception, arising between the contracting powers that could not be settled through diplomacy.\(^{576}\) It therefore bore the distinction of becoming the modern world's first permanently constituted tribunal


\(^{568}\) Additional Convention, id. at 70.


\(^{575}\) See Munro, Intervention, supra note 387, at 154; Anderson, The Peace Conference of Central America, 2 AM. J. INT'L L. 144 (1908).

\(^{576}\) Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, art. 1, 206 Parry's T.S. 78, 80.
for the compulsory adjudication of disputes between states. 577 Similar to the International Prize Court Convention adopted by the Second Hague Peace Conference, the Central American Court was also given jurisdiction over questions which a national of one Central American country might raise against any of the other contracting governments over the violation of a treaty or of an international character irrespective of the wishes of his government, provided he had exhausted local remedies or demonstrated a denial of justice. 578 During its ten years of existence (1908-1918), the court rendered only two affirmative judgments and declared all five claims brought by individuals to be inadmissible. 579 Nevertheless, its first decision, Honduras v. Guatemala & El Salvador 580 is generally credited with having prevented the outbreak of a major war throughout Central America. 581 The successful prevention of one war proved the establishment of the Central American Court of Justice to have been well-worth the effort of its founders. Yet, the Wilson Administration's heedless insistence upon the ratification of the Bryan-Chamorro Treaty with Nicaragua 582 seven years later was directly and deliberately responsible for the destruction of the Central American Court of Justice. 583

The first Central American conference held pursuant to the terms of the 1907 Convention, which was the second in the series started by the Washington Conference, met in Tegucigalpa, Honduras in January 1909. It was followed by another conference at San Salvador, El Salvador in February, 1910. The Second Conference adopted conventions dealing with the unification of currency, the unification of weights and measures, commerce, consular service,

the Central American Pedagogical Institute and the Central American Bureau.\textsuperscript{584} The next conference was held at Managua, Nicaragua, in January, 1912, and continued the momentum toward the unification of Central America with the adoption of seven more conventions dealing with similar functionally related subjects.\textsuperscript{585} This dramatic forward progress toward legal, economic and political integration led to a confident prediction that the realization of a Central American Union was inevitable.\textsuperscript{586} This prediction was partially fulfilled by the signing of the Pact of Union of Central America by Guatemala, El Salvador, Honduras and Costa Rica on January 19, 1921.\textsuperscript{587} Nicaragua failed to join, however, so the plans for the foundation of a Federal Republic of Central America were abandoned.\textsuperscript{588}

IV. AMERICAN NEUTRALITY DURING THE FIRST WORLD WAR

A. The Bryan Peace Plan

On April 23, 1913, President Wilson’s Secretary of State William Jennings Bryan issued a circular note to the governments of the world proposing for their consideration the conclusion of a series of bilateral treaties. The purpose of these treaties was to establish standing international commissions of inquiry for the peaceful settlement of disputes that might arise between the contracting powers.\textsuperscript{589} This “Bryan Peace Plan” built upon the foundations laid by two unratified arbitration conventions between the United States on the one hand, and France and the United Kingdom on the other, which were negotiated by Secretary of State Knox during the Taft Administration.\textsuperscript{590} The Knox treaties would have represented a dis-
tinct advance over the Root arbitration conventions because the former did not contain the typical express exemptions from obligatory arbitration. Article 1 provided that all differences thereafter arising between the parties that could not be adjusted by means of diplomacy, "relating to international matters in which the High Contracting Parties are concerned . . . and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity" shall be submitted to the Permanent Count of Arbitration at The Hague in accordance with the procedures thereof. The parties, however, were allowed to agree to another tribunal in the *compromis*.

In addition, article 2 of the Knox treaties provided for the institution of a Joint High Commission of Inquiry for the Investigation of any controversy between the parties within the scope of article 1 before its submission to arbitration. The commission was also granted the power to investigate any other controversy even if the parties were not agreed that it fell within the scope of article 1. However, either party could postpone such reference to the Commission for one year to give diplomacy an opportunity to adjust the controversy. The proposed Joint High Commission of Inquiry would operate in accordance with the rules of procedure applicable to international commissions of inquiry under the 1907 Hague Convention for the Pacific Settlement of International Disputes.

Article 3 established a novel procedure: in cases where the parties disagreed whether a dispute was subject to arbitration under article 1, the question was to be submitted to the Joint High Commission of Inquiry. If all or all but one of the members of the Commission agreed and reported that the difference was within the scope of article 1, the matter would be referred to arbitration under the Knox Treaty. This provision was particularly unacceptable to the United States Senate, which amended the treaties to provide that

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593. General Arbitration Treaty, United States-France, art. 3, 4 Unperfected Treaties, supra note 68, at 221, 5 AM. J. INT'L L. at 251-52 (Supp. 1911); General Arbitration Treaty,
decisions concerning the "justiciability" of a controversy should be made by the President and the Senate together. Although other amendments were also attached to the Knox treaties by the Senate, in Taft's opinion, article 3 was the heart of the treaties. He therefore decided not to proceed with their ratification.\footnote{594. James Brown Scott called the treaties "about the mushiest and most inconsequential, and therefore the most dangerous things, that have come across our diplomatic horizon for many moons." See Campbell, Taft, Roosevelt, and the Arbitration Treaties of 1911, 53 AM. HIST. 279, 293 (1966).}

In contrast, a typical Bryan peace treaty provided that all disputes between the parties "of whatever nature they may be" that were not subject to arbitration and could not be settled by means of diplomacy, were to be referred for investigation and report to a pre-existing five member international commission of inquiry.\footnote{595. See, e.g., Treaty for the Advancement of General Peace, Sept. 15, 1914, United States-France, 38 Stat. 1887, T.S. No. 609.} As soon as possible after exchange of ratifications of the treaty, one member was to be chosen from each country by its respective government; one member was to be chosen by each government from a third country; and the fifth member was to be chosen by agreement between the two governments but should not be a citizen of either country. Thus, a majority of the commission would be composed of members who were not nationals of parties to the dispute.

In the event of an unsettled dispute, each party had the right to ask the commission to undertake an investigation thereof. The commission was charged with the task of preparing a report within one year after its investigation had commenced, and the report must be adopted by a majority of the commission members. The commission would, as far as possible, be guided by the procedures set forth in article 9 to 36 of the 1907 Convention for the Pacific Settlement of International Disputes, which pertained to the Hague International Commissions of Inquiry.

The parties to the treaty agreed not to declare war or begin hostilities during the investigation and before the report was submitted. In essence this created a one year cooling-off period for the parties in dispute. Thereafter the parties reserved full liberty to act independently on the subject matter of the dispute, presumably including the threat or use of force and war. Nevertheless, the theory behind the Bryan peace treaties was that an impartial investigation and report would be tantamount to a peaceful settlement of the dis-
pute since compliance with the report by the parties would be demanded by their respective domestic constituencies and world public opinion.596

The Bryan peace treaties were not intended to replace, but only to supplement, any general arbitration treaties already in existence between the contracting powers. Consequently, Bryan also had to simultaneously negotiate renewals of the Root arbitration treaties of 1908, which had expired in accordance with their terms after five years.597 Unlike the Root arbitration conventions, however, the Bryan peace treaties did not contain the typical exemptions concerning matters affecting the independence, honor or vital interests of either party or the interests of third states. The international commissions of inquiry possessed jurisdiction to investigate and report upon even those matters generally excepted from the obligatory arbitration. Together the Bryan peace treaties and the renewed Root arbitration conventions covered every possible source of dispute between the United States and another state. They ensured that the dispute would be subject to some mechanism for its peaceful settlement. Thus, they would enable the United States either to refrain from going to war with contracting power or to stay out of an ongoing conflict between other states, provided they were all contracting powers.

During 1913 and 1914, Secretary of State Bryan concluded thirty-one Treaties for the Advancement of General Peace on behalf of the United States, nine of which failed to go into force.598 On August 13 and 20, 1914, almost immediately after the outbreak of the general war in Europe, the United States Senate gave its advice and consent to eleven of the twenty Bryan peace treaties that had thus far been submitted to it for consideration.599 On September 15,
1914, Bryan used the occasion of the signing of the peace treaties with China, Spain, France and Great Britain to utter his conviction that "they will make armed conflict between the contracting nations, almost, if not entirely, impossible." Eventually the United States entered into such treaty relations with all of the major Allied Powers (France, Great Britain, Russia and Italy). However, despite repeated overtures, none of the major Central Powers (Germany, Austria-Hungary and the Ottoman Empire) concluded a treaty with the United States. One legal commentator felt that this would at least prevent war between the United States and any one or all of the Allied Powers over a dispute arising out of the Great War. 

An ominous portent of United States entry into the war was Bryan's resignation as Secretary of State. The resignation resulted from Bryan's disagreement with President Wilson's hard-line approach toward Germany over the sinking of the British passenger


ship Lusitania.\textsuperscript{602} He was replaced as Secretary of State by Robert Lansing, previously Counselor of the State Department and a founding member of the American Society of International Law.\textsuperscript{603} Bryan would have preferred that Wilson propose to Germany the creation of an international commission of investigation along the lines of the Bryan peace treaties. He also urged the United States to warn, if not prevent, American citizens from travelling on belligerent vessels or with cargoes of ammunition, even though they might have the right to do so under the international laws of neutrality. Instead of following his advice, Wilson chose to reiterate a previous American demand for an official disavowal of the Lusitania sinking and other illegal sinkings of merchant ships by German submarines. Additionally the President demanded reparations as well as assurances by the German government that it would prevent the recurrence of similar gross violations of the humanitarian principles of sea warfare by its submarines.\textsuperscript{604} In Bryan’s opinion, Wilson’s approach to the problem was similar in tone and substance to the Austrian ultimatum to Serbia that had started the Great War in 1914. Wilson’s insistence upon Germany adhering to the punctilio of the international laws of neutrality could only propel the United States into Europe’s War.

**B. The Laws of Neutrality**

Since it was not on the Russian agenda, the First Hague Peace Conference did not adopt any conventions on the subject of neutrality per se but rather just a \textit{voeu} to the effect that the next Conference should consider the question of the rights and duties of neutrals in warfare.\textsuperscript{605} Pursuant to the wish, the Second Hague Peace Conference adopted the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land\textsuperscript{606} and the

\textsuperscript{602} Editorial Comment, \textit{The Resignation of Mr. Bryan as Secretary of State}, 9 AM. J. INT’L L. 659 (1915).

\textsuperscript{603} Editorial Comment, \textit{The Appointment of Mr. Robert Lansing as Secretary of State}, 9 AM. J. INT’L L. 694 (1915).

\textsuperscript{604} Telegram from the Secretary of State [Bryan] to the Ambassador in Germany [Gerard] (May 13, 1915), \textit{reprinted in} 1915 FOREIGN REL. U.S., \textit{supra} note 64, at 393 (Supp.); Telegram from the Secretary of State [Lansing] to the Ambassador in Germany [Gerard] (June 9, 1915), \textit{reprinted in id.} at 436 (Supp.).


Convention Respecting the Rights and Duties of Neutral Powers in Naval War. In addition, the 1907 Convention Relative to the Laying of Submarine Mines was primarily designed to protect neutral shipping and the 1907 Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War contained protections for neutral postal correspondence. When the Great War in Europe erupted in the summer of 1914, the United States was a party to these four Hague Conventions.

On the domestic level, United States neutrality legislation dated back to the first Neutrality Act of June 5, 1794. This Act, which had expired after two years, was renewed in 1797 for two more years and was eventually made permanent with amendments by an Act of April 20, 1818. The 1818 Act made it a crime for an American citizen within United States territory to accept and exercise a commission in the military forces of a foreign government engaged in a war against another foreign government with which the United States was at peace; to enlist or to procure the enlistment of another person, or proceed beyond United States territory with the intent to be enlisted in the forces of a foreign sovereign, subject to a proviso for transient foreigners; to outfit and arm a vessel for the purpose of engaging in hostilities on behalf of a foreign sovereign against another foreign sovereign with which the United States was at peace; to outfit and arm a vessel of war for the purpose of committing hostilities on United States citizens or their property; to increase or augment the force of foreign armed vessels at war with

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another foreign government with which the United States was at peace; and, finally, to set on foot any military expedition or enterprise against the territory of a foreign sovereign with which the United States was at peace. The President was authorized to employ the land or naval forces or the militia for the purpose of effectuating the provisions of the 1818 Act, or to compel any foreign ship to depart from the United States waters when so required by the laws of nations or treaty obligations. These fundamental proscriptions of United States domestic neutrality legislation and practice, together with principles drawn from the pathbreaking Treaty of Washington of 1871 between the United States and Great Britain that settled the *Alabama* claims, were eventually to find their way into the two major 1907 Hague neutrality conventions governing land and sea warfare.613

A joint resolution for Congress approved by the President on March 4, 1915, was designed to better enforce and maintain United States neutrality by authorizing the President to direct customs collectors to withhold clearance from any vessel which they had reasonable cause to believe was about to carry certain materials and men to ships of a belligerent nation in violation of United States obligations as a neutral state.614 It was thought that the 1818 Act together with the 1915 joint resolution were sufficient to bring the United States into full compliance with its obligations of neutrality under international law.615 This was not surprising since the United States had historically played a leading role in the development of

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613. Treaty of Washington, May 8, 1871, United States-Great Britain, 17 Stat. 863, T.S. No. 133. The three rules of article 6 provided that:

A neutral Government is bound

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to war-like use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.


the laws of neutrality by obtaining general acceptance of its policy pronouncements on such matters from the countries of Europe throughout the late eighteenth, nineteenth and early twentieth centuries. As the ferocity of the conflict intensified, however, by 1916 the United States felt the need to pass additional legislation to better protect its neutrality from the ravages of the war. Somewhat ironically, these proposed amendments were eventually enacted into law after the United States had abandoned its neutrality and entered the war on the side of the Triple Entente.

Taken as a whole, the laws of neutrality were designed to operate in a system of international relations where war was considered to be an inescapable fact of international life, and yet, in which the outbreak of war between even major actors did not automatically precipitate a total systemic war among all global powers. According to the laws of neutrality, the conduct of hostilities by a belligerent was only supposed to disrupt the ordinary routine of international intercourse between a neutral and the belligerent's enemy to the minimal extent required by the dictates of military necessity. Such arrangements were intended to permit the neutral power to remain out of the conflict, while at the same time they allowed its nationals to take advantage of international commerce and intercourse with all belligerents.

The political and strategic dimensions of the international laws of neutrality were complicated by the fact that they operated upon the basis of a legal fiction. That is, the neutral government was not responsible for any non-neutral acts committed during wartime by its citizens against a belligerent. Generally, a belligerent state could not hold a neutral government accountable for the private activities of the neutral's citizens even if they worked directly to the detriment of the belligerent's wartime security interests.

The laws of neutrality were essentially predicated upon Lock-
eian assumptions concerning the nature of government and its proper relationship to the citizen: namely, that the political functions of government must impinge upon the private affairs of the citizen to the least extent possible. This was especially true in the economic realm where the right to private property and its pursuit were deemed fundamental. 620 Typical of this Lockeian attitude was the prohibition on the confiscation of private property found in article 46 of the Regulations annexed to both the 1899 and 1907 Hague Conventions with Respect to the Laws and Customs of War on Land. 621 In the same category were the futile attempts by the United States at both the First and the Second Hague Peace Conferences to secure agreement upon immunity from capture and confiscation of non-contraband private property during sea warfare. 622

The primary duty of a neutral government was to maintain strict impartiality in its relations with all belligerents. Yet the laws of neutrality specifically denied that the neutral government had any obligation to guarantee that its nationals conduct their affairs with belligerents in a similar fashion, or, indeed in accordance with any but the most rudimentary set of rules. For example, according to the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 623 the territory of neutral powers was "inviolable," 624 and belligerents were forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power. 625 Yet a neutral power was not required to prevent the exportation or passage of arms, ammunition or anything useful to an army or navy through its territory to belligerents. 626 Neither was a neutral compelled to forbid or restrict the use, on behalf of belligerents, of telegraph or telephone cables or wireless telegraph apparatus belonging to it or to

620. See generally Power Politics, supra note 12, at 936-37.
622. See CHOATE, supra note 223, at 74-77; DAVIS, HAGUE I, supra note 64, at 127-28, 133-35, 175-76; DAVIS, HAGUE II, supra note 107, at 138-40, 171-72, 227-33; HULL, supra note 24, at 126-41; Stockton, Would Immunity from Capture During War, of Non-Offending Private Property upon the High Seas Be in the Interest of Civilization?, 1 AM. J. INT'L L. 930, 932-33 (1907) (No!).
624. Id. art. 1, 36 Stat. at 2322.
625. Id. art. 2, 36 Stat. at 2322.
626. Id. art. 7, 36 Stat. at 2323.
companies or private individuals. However, all restrictive or prohibitive measures taken by a neutral power in regard to these matters were required to be applied uniformly to all belligerents. Moreover, this rule was binding on companies or individuals owning telecommunications facilities. The national of a neutral power would not be deemed to have compromised his nation's neutrality by furnishing supplies or loans to one of the belligerents provided: (1) he did not reside in the territory of another belligerent or territory occupied by it, and (2) the supplies did not come from these territories. Article 10 of the Convention made it clear that it could not be considered a hostile act for a neutral power to take measures, even forcible, to prevent violations of its neutrality.

According to the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers in Naval War, belligerents were "bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality." In addition, any act of hostility committed by belligerent warships in the territorial waters of a neutral power was deemed to constitute a violation of neutrality and was strictly forbidden. Similarly, a neutral government could not supply warships, ammunition, or war materials of any kind to a belligerent under any circumstances. However, the neutral government was under no obligation to prevent the export or transit for the use of either belligerent, of arms, ammunitions, or in general, of anything which could be of use to any army or fleet. Nevertheless, the neutral power was required to treat the belligerents equally with respect to any conditions for the entry of belligerent warships or their prizes to its ports, roadsteads or territorial waters. Finally, article 26 of the treaty made it clear that a neutral government's exercise of its rights under the convention could never be considered an "un-

627. Id. art. 8, 36 Stat. at 2323.
628. Id. art. 9, 36 Stat. at 2323-24.
629. Id. art. 18, 36 Stat. at 2326.
630. Id. art. 10, 36 Stat. at 2324.
632. Id. art. 1, 36 Stat. at 2427.
633. Id. art. 2, 36 Stat. at 2427.
634. Id. art. 6, 36 Stat. at 2428.
635. Id. art. 7, 36 Stat. at 2428.
636. Id. art. 9, 36 Stat. at 2428.
friendly act" by any belligerent that was a contracting power.637

Contraband of war shipped by neutral nationals to a belligerent was properly subject to capture and confiscation by the offended belligerent. Yet, in the exercise of this prerogative, the belligerent remained subject to the laws of war at sea and the international law of prize. Historically, the United States, to ensure the economic well-being of its citizens, opposed the imposition of mandatory embargo upon trade in contraband between belligerents and neutral nationals.638 It was later argued that the deterrence of peace time militarism was a residual benefit of this policy. That is, the existence of neutral nations during a war would permit prospective belligerent states not to arm excessively in anticipation of hostilities because of their foreknowledge that, as belligerents, they could readily receive armaments from neutral merchants in the event of war.639 The freedom of neutral nationals to trade with belligerents would create a disincentive for major powers to engage in massive, wasteful and unnecessary arms races between themselves. Accordingly, the international laws of neutrality could contribute to the preservation of world peace. In their advocacy of this argument, however, early twentieth century American international lawyers were attempting to elevate a consideration of expedience into one of virtue.

Without the recognition of a status such as "neutrality" by international law, nonbelligerents would virtually be compelled by circumstances to choose sides in a war so as to maintain political and economic relations with at least one set of belligerents. In theory the neutral state had an economic disincentive to participate in the war. The neutral state could greatly prosper from an increasing degree of only moderately restricted international trade with all belligerents in desperate need for more goods purchased from nationals of the neutral state. Conversely, a belligerent would not act to violate the neutral's rights and those of its nationals to keep the neutral from entering the war on the side of its enemy. Another theory held that since the number and strength of neutral states in a future war would be proportionately greater than those of belligerents, the community of neutral states could impose obedience to the laws of

637. Id. art. 26, 36 Stat. at 2433.
638. See Raymond & Frischholz, supra note 616, at 806-07.
neutrality upon the belligerents.\textsuperscript{640}

In practice, however, these theories were undercut by the fact that each neutral's normal international trading patterns invariably worked to the greater advantage of one set of belligerents during the war.\textsuperscript{641} Thus, the disadvantaged belligerent had to engage in a complicated cost-benefit analysis. It had to weigh the harm caused by a strategic disadvantage in trade against the risk that the neutral power might eventually enter the war against it if neutral commerce were destroyed. Also, instead of acting as part of some international community of neutrals, each neutral state constantly assessed, in accordance with its own calculations of national security, the relative advantages and disadvantages of maintaining its own neutrality as opposed to belligerency on one side or the other. Unless guaranteed by treaty, the violation of one neutral's rights did not obligate another neutral to declare war or even to engage in measures of retortion against the violator.

The United States did not enter the first World War in order to defend the international laws of neutrality in the abstract. This was evidenced by its failure to consider the German invasions of either neutral Belgium or neutral Luxemburg as a \textit{casus belli}. It was only when Germany's gross and repeated violations of American citizens' neutral rights of trade and intercourse with Great Britain seriously interfered with their ability to engage in international commerce and resulted in the large-scale destruction of American lives and property that the United States invoked the sacred cause of neutrality as one of the primary justifications for its intervention into the war.\textsuperscript{642}

Generally, the American international legal community approved this attitude of strict and impartial neutrality taken by the United States at the start of the European War.\textsuperscript{643} Yet, as international lawyers, they could reach no other conclusion but that Germany and Austria-Hungary must assume the full legal responsibility


\textsuperscript{642} See, e.g., Scott, \textit{The United States at War with the Imperial German Government}, 11 AM. J. INT'L. L. 617 (1917).

for the outbreak of the war. In their opinion, the German invasions of neutral Belgium and of neutral Luxemburg, in explicit violation of international treaties, represented reprehensible behavior for which there was no valid excuse. Deserving special opprobrium in the eyes of American international lawyers was the August 11, 1914, speech by German Chancellor Bethmann Hollweg to the Reichstag publically admitting the German invasions of Belgium and Luxemburg to be in violation of international law but arguing that Germany was "[i]n a state of necessity, and necessity knows no law." Later that same day he uttered his notorious statement to the British ambassador that the 1838 treaty guaranteeing the neutrality of Belgium was a "scrap of paper." The need to uphold the rules of international law made it crystal clear to American international lawyers on which side they should personally stand on the war even if their government remained formally neutral. As far as they were concerned, these egregious violations of international law by Germany made continued American neutrality toward the war a highly dubious proposition. Such legalist perceptions would exert a profound impact upon the evolution of the United States' neutralist policy into a stance of "benevolent neutrality" in favor of the Allies and against the Central Powers.

As the intensity of the war heightened and the Allies imposed their stranglehold over commerce shipped from the United States to the European continent, the Central Powers took the position that

644. See Dennis, The Diplomatic Correspondence Leading up to the War, 9 Am. J. Int'l L. 402 (1915).


648. See Editorial Comment, Germany and the Neutrality of Belgium, 8 Am. J. Int'l L. 877, 880 (1914).


the American government was under an obligation to take affirmative measures to rectify the developing imbalance of trade in arms, munitions and supplies that United States nationals were successfully transporting to the Allies but not to them. Both the United States government and the American international legal community were quite emphatic in their rejection of this complaint. If one belligerent was militarily unable to secure the safe passage of neutral commerce to its shores because of the misfortunes of war, that was the belligerent's concern and not that of the neutral government, which possessed the right under international law to permit its citizens to continue trading with the militarily more powerful belligerent. For a neutral government to discriminate in favor of the weaker belligerent to compensate for the military imbalance would constitute an unneutral act that could precipitate a declaration of war upon it by the stronger belligerent. Indeed, it was argued that even if the neutral government were to embargo all trade in contraband of war by its citizens with both sets of belligerents, this affirmative departure from the normal rules of neutral practice during the course of a war could compromise its neutrality.

The United States' insistence upon the international legal right of its citizens to trade with the Allies, no matter how unequal the military situation, played a significant part in the decision by the Central Powers to pursue their policy of "unrestricted submarine warfare." This policy was aimed at destroying this vital neutral commerce, irrespective of the international laws of neutrality and of the laws of war at sea. The United States eventually responded by entering the war to secure those rights of its nationals and thus uphold the international laws of neutrality and armed conflict. Hence consistent with its "legalist" approach to international relations, the United States did not enter the First World War for some nebulous reason such as "upholding" or "restoring" the European balance of power system. Instead, America abandoned its neutrality for the very realistic purpose of redressing these egregious violations of its

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fundamental rights under international law committed by the Central Powers, and, in the usual and most effective recourse sanctioned by the international community at that time: resort to war. The laws of neutrality formed a substantial part of that definitional framework of international legal rules. The wanton violation of these norms by the Central Powers was responsible to a great degree for the decision of the United States to enter the First World War on the side of the Triple Entente. This became the ultimate sanction behind the international laws of neutrality.

Of course, coupled with this legal justification came the political rationalization and propagandistic moralization that by abandoning its neutrality America thereby joined a great universal moral crusade on behalf of the forces of good (i.e., democracy) arrayed against the forces of evil (i.e., autocracy). Autocratic governments were thereafter presumed to be inevitably warlike in nature, and democratic governments inherently peaceful. Therefore, the peace of the entire international community required the utter destruction of autocracy throughout the world and its replacement by democratic forms of government everywhere. In the words of President Woodrow Wilson: “The world must be made safe for democracy.”

In his April 2, 1917 address to a joint session of Congress, Wilson, a lawyer and political scientist, successfully fused the classic American “legalist” approach to international relations with these newly invented “moralist” elements in his request for a declaration of war against Germany. Nevertheless, Wilson’s fusion violated the cardinal tenet of the founders of the American “legalist” approach to international relations, namely, that all such considerations of moralizing should be excluded from the “science” of positivist inter-

656. See also Morrissey, The United States and the Rights of Neutrals, 1917-1918, 31 AM. J. INT’L L. 17 (1937) (U.S. generally did not recant its position on laws of neutrality after it entered the war).


Although Wilson might properly be credited with having founded what contemporary international political scientists call an American "legalist-moralist" approach to international relations, the moralistic elements of Wilsonianism were completely incompatible with the United States international "legalism" that had been developed during the period between 1898-1917. This international "legalism" had been developed by the American international legal community through its scholarly writings and its formulation of foreign policies at the United States Department of State. As classically defined and articulated, American "legalism" was antithetical to Wilson's moralizing about the inherent superiority of democratic forms of government. Both at the time and in retrospect the pre-World War I American international legal community would most appropriately be categorized as staunch "legal realists" who would have been proud to bear such an appellation had it been in vogue then.

The incongruous suppositions underlying the international law of neutrality could not withstand the rigors of twentieth century "total warfare" with its all-encompassing political, military, economic and propagandistic dimensions. The First World War demonstrated the abject failure of the laws of neutrality to perform their intended purpose of constricting the radius of the war. This tragic experience led many American international lawyers to the unavoidable conclusion that in the postwar world, the international community had to abandon neutrality as a viable concept of international law and politics and instead create a system of international relations in which some organization would be charged with the task of enforcing international law against recalcitrant nations. Henceforth, the international legal rights of one state must

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659. See also Fenwick, Germany and the Crime of the World War, 23 Am. J. Int'l L. 812 (1929) (article 231 of the Treaty of Versailles should not be interpreted as imputing moral guilt and criminal responsibility for the war to Germany, for in 1914 there was no clear basis upon which moral responsibility for a particular war could be judged); Myers, The Control of Foreign Relations, 11 Am. Pol. Sci. Rev. 24 (1917) (strong legal realist position); Woolsey, Reconstruction and International Law, 13 Am. J. Int'l L. 187 (1919) (irrespective of idealistic motives, the war was a defense against "evil domination"); Woolsey, The Relations Between the United States and the Central Powers, 11 Am. J. Int'l L. 628 (1917) (after declaration of war upon Germany the United States should await the development of events before ipso facto declaring war upon Austria and Turkey).

be treated as rights pertaining to all states. National security could no longer be a matter of solely individual concern, but rather a collective responsibility shared by the entire international community. Therefore, although the pre-World War I American international legal community did not expend much energy promoting the formation of some executive “international police power,” the experience of the First World War and the failure of the laws of neutrality to protect the United States from the scourge of war induced many of its members to support the foundation of the League to Enforce the Peace.661

In the opinion of many, though certainly not all, American international lawyers, the United States government must at last definitively repudiate its traditional policies of isolationism in peace and neutrality in war to become a formal participant in the new European and worldwide balance of power system. Admittedly, this balance had been wrought by brute military force, but its continued existence could nevertheless be legitimized, if not sanctioned, by the adoption and effective enforcement of the principles set forth in the Covenant of the League of Nations. Therefore, America’s vital national security interest on the one hand, and its professed philosophical and moral ideals on the other, could most successfully be reconciled, and indeed would coincide and reinforce each other, by means of membership in the League.

Despite this majority sentiment, the question of whether or not the United States should join the League and, if so, upon what terms provoked a sharp and irreparable divergence of viewpoints among the members of the American international law community. A vocal minority opposed membership in the League precisely because this step would represent a definitive repudiation of America’s classic position of isolationism in peace and neutrality in war vis-à-vis the European balance of power system that had served American national security interests so well since Washington’s Farewell Address and the Monroe Doctrine. Others argued that whatever the merits of continued American isolationism, the League of Nations as currently proposed was fatally defective because article 10 of the Covenant guaranteed the preservation of an essentially unjust status quo in favor of France and against Germany that was not entitled to


United States support during peace or war. Elihu Root and James Brown Scott took the intermediate position that the United States should join the League but enter a reservation as to article 10. In any event, the fight over the ratification of the Treaty of Versailles split the American international legal community into a pro-League majority and an influential anti-League minority. From this point in time on, it was no longer possible to speak about the existence of one relatively homogenous American "legalist" approach to international relations.

V. CONCLUSION

Today, in the post-World War II era, with the enlightened but uninspiring benefit of historical hindsight, it would be easy, yet simplistic, for international political realists to argue that pre-World War I American international lawyers and statesmen should have foreseen that the worldwide interests of the newly imperial United States demanded their active participation in the European balance of power system after 1898. That such lawyers and statesmen should have anticipated that America had succeeded to the geopolitical position of Great Britain by effectively becoming the "holder" of a worldwide balance of power that now only radiated from and around Europe and that the primary obligation of the holder of the balance was the willingness to abandon its "splendid isolation" when necessary to "restore" the balance in the event the latter was threatened or disrupted. Further, that the moment had come for the United States to countermand its traditional policies of isolationism in peace and neutrality in war by allying itself with the two other major Western democracies, France and Great Britain, in time to forestall the development of a general war in Europe, or else, immediately after its outbreak in 1914, to throw in its lot with the Triple Entente; and, after the war, that America's global interests required it to be willing to guarantee the existence of even an arguably unjust status quo on Europe by joining the League of Nations to maintain world peace.

In retrospect, contemporary political analysts are certainly entitled to raise the general question whether the First World War deci-


663. See Schvan, A Practical Peace Policy, 8 AM. J. INT'L L. 51, 59 (1914).

sively proved that the American legalist war prevention program for world politics was an abysmal failure because it was essentially predicated upon naive, idealistic and utopian assumptions concerning the inherent utility of international law and international organizations. Yet, before this question can be properly answered, it is necessary to consider a different set of questions drawn from an antithetical historical perspective: What if Germany had not objected to the principle of obligatory arbitration at the First Hague Peace Conference, or to the conclusion of a multilateral obligatory arbitration treaty at the Second? What if the Latin American states had not opposed the formation of the Court of Arbitral Justice at the Second Hague Peace Conference over the issue of its composition, which did not impede adoption of the plan for the International Prize Court? What if the House of Lords had not rejected the Declaration of London and the International Prize Court in 1911? What if the nations of the world had proceeded on schedule in 1913 to enter into preliminary preparations for the convocation of the Third Hague Peace Conference in 1915? Would there have been a First World War in 1914 if any one or more of these international legal developments had occurred prior thereto? Could the United States have succeeded at its self-appointed task of remaining out of the war by means of an operative International Prize Court which adjudicated in accordance with a Declaration of London, or by means of a Bryan Peace Treaty with Germany, or at least by virtue of both mechanisms working in conjunction for the peaceful settlement of America’s major wartime disputes with Germany?

The historical record adduced above substantiates the proposition that with a little more support from a few defiant actors at key moments in time, the elements of the pre-World War I American legalist war prevention program for world politics could have fallen into place soon enough to create a reformed structure of international relations in which conditions favorable for the outbreak of a general war in Europe could have been substantially ameliorated. There is no evidence that the American legalist approach to international relations was responsible for the eruption of the war to any extent. Indeed, it is difficult to maintain that the adoption of any one or more of its schemes for international law and organizations would have rendered the First World War more likely to have oc-

665. Cf. A Morrissey, The American Defense of Neutral Rights 1914-1917, at 128 (1939) (the Department of State justified U.S. actions by stating that its relations with Britain were in compliance with the Bryan treaty).
curred. The breakdown of world order in 1914 was definitely not caused by international law and international organizations or by an American legalist foreign policy that promoted them. Rather, a historical argument could be made that the First World War occurred in substantial part because there was too little, and certainly not too much, international law and organizations. When the Great War amongst the European powers finally broke out, it occurred in spite of, not because of, America's efforts to prevent and ultimately confine a feared global conflagration through preemptive implementation of this legalist approach to international relations.

A similar rationale can be developed to refute political realist claims. These claims charge that American reliance upon international law and organizations was somewhat responsible for the outbreak of the Second World War. In the aftermath of the First World War, to the extent that United States nonparticipation in the work of the League of Nations and the Permanent Court of International Justice vitiated the effectiveness of these organizations, and to the extent that their inefficacy can accurately be said to have contributed to the development of historical conditions ripe for the eruption of the Second World War, responsibility for this situation must be placed squarely upon the shoulders of the isolationist members of the United States Senate and their supporters. The foundation of the League of Nations and of the Permanent Court of International Justice was the direct result, if not the ultimate consummation, of the pre-World War I American legalist approach to international relations. Both before and after the First World War, American international lawyers astutely led the way in promoting support for the creation of these organizations, as well as their immediate predecessors, among the states of the international community. It was certainly not their fault that after the Great War the Senate chose to repudiate those fundamental elements of the American legalist war prevention program for world politics that United States international lawyers had meticulously planned and vigorously championed from the time of the First Hague Peace Conference.

During the period between the First and Second World Wars, it was America's innate isolationist tendencies dating back to Washington's Farewell Address that reasserted themselves and triumphed over America's relatively more recent internationalist foreign policies promoting international law and organizations. Thus, the American legalist approach to international relations that was class-
ically defined and articulated from 1898 to 1917 cannot fairly be held responsible for either the First or the Second World Wars. If anything, both world wars occurred in spite of, and not because of, the best efforts by the American international legal community to prevent them through the creation of new rules of international law and new institutions for the peaceful settlement of international disputes.

Indeed, in the aftermath of the Second World War, a profound realization of the extreme dangers of continued American isolationism and of the essential wisdom of the pre-World War I American legalist approach to international relations convinced the United States of the compelling need for it to sponsor and join the United Nations Organization. When the United States Senate grudgingly accepted the compulsory jurisdiction of the International Court of Justice in 1946, the pre-World War I American legalist approach to international relations finally attained its fullest fruition.666 Ever since then American Legalism has substantially contributed to the maintenance of international peace and security and to the prevention of a suicidal Third World War.667

In 1898, the United States purposefully chose to emulate the imperial countries of the Old World by setting out to become a major global power by performing a series of naked acts of military, political and economic expansion. Since that time it has struggled to realize the irreversible consequences of those fateful decisions which directly contradicted several of the most fundamental normative principles upon which the United States was supposed to be founded. During this imperialist era of its history, the promotion of international law and international organizations has usually provided the United States with the means for reconciling the idealism of American values and aspirations with the realism of world politics and historical conditions. The United States' resolute dedication to pursuit of a legalist approach to international relations has proven to be critical for the preservation of America's internal


667. See L. SOHN, CASES ON UNITED NATIONS LAW (2d ed. 1967).
psychic equilibrium, which in turn has historically been a necessary precondition for the successful advancement of its global position.

Both before and immediately after the First World War, as well as immediately after the Second World War, the United States established an excellent track record for pioneering innovative rules of international law and novel institutions for the peaceful settlement of international disputes. Drastic departures from the 1898-1917 tradition of American legalist diplomacy to follow instead a foreign policy based upon isolationism after the First World War or, under the influence of the modern political realists, upon Machiavellian power politics after the Korean War, have only produced a series of unmitigated disasters for the United States government both at home and abroad. One of the primary lessons to be learned from the history of the 1898-1917 era is that the states of the contemporary world, and especially the United States, must grow to possess much more courage and foresight, and much less selfishness and fear when it comes to the promotion of international law and organization as impediments to the development of a suicidal Third World War.668

668. See Irrelevance, supra note 1, at 217-19 & n.67 (opinion of Hans Morgenthau).