

TOWARD A MORE AMBITIOUS INTERNATIONAL LAW: AMERICAN ACADEMIC DISCUSSIONS IN THE 1920s.

Hatsue Shinohara

The group of younger scholars of international law in America, whose presence became distinctive around the time of World War One, threw their efforts into reorienting the discipline of international law.¹⁾ Armed with the newly developed notion of a "family of nations," which stressed collective existence, they turned their attention to building a new notion of "law" in international law. If the meaning of "international" was changing from relations between atomistic states to the world seen as a single community, then the next logical step was to reconsider the notion of "law." Could the emerging world order be governed by the old concept of law? This was the question they strove to answer.

The Covenant of the League of Nations and the Washington Conference

Immediately after World War One, American scholars of international law faced the question of how to interpret and evaluate the value of postwar machinery of international relations, such as the Covenant of the League of Nations and the treaties and agreements signed at the Washington Conference of 1921-1922. For those who held a traditional view, the machinery and treaties signified a departure from the established positivistic system of international law. On the other hand, the junior group of scholars agreed with the postwar systems,

but they were not yet equipped with the legal theory necessary to support the machinery. Therefore, the junior group engaged efforts to provide them with theoretical foundations. These two groups presented sharply contrasting views on how to define the scope of law as adopted in the Covenant and other treaties.

Elihu Root and the supporters of the old judicial approach emphasized the international court and criticized the Covenant of the League of Nations. Root's critique was based on the premise that the Covenant was a political document and not a legal one. About Articles 10 to 15 and 19, the heart of the collective framework against military action, he remarked that "these provisions are well devised and should be regarded as free from any just objections, in so far as they relate to the settlement of the political questions." But they were defective, because the scheme abandoned "all efforts to promote or maintain anything like a system of international law or system of arbitration." For Root the positive and specific rules of international law were central, and provisions specifying general guidelines, like Article 10, did not qualify as legal. In his mind political and legal questions were distinct and not reconcilable: "This [the Covenant] is a method very admirable for dealing with political questions; but it is wholly unsuited to the determination of questions of right under the law of nations."²⁾

More specific criticism against the Preamble of the Covenant came from Philipp Marshall Brown, professor at Princeton University, who drew attention to the phrase "understanding of international law." The Preamble stated that international peace should be promoted "by the firm establishment of understandings of international law as the actual rule of conduct among nations." According to Brown, international law was "to be regarded first, as not having clearly understood." Understanding was too vague and did not mean anything concrete in

legal terms. Since this was the only place referring to international law in the Covenant, Brown argued that “by implication the great system of law that has been laboriously built up by judicial action and by firmly established custom and positive consent is seriously slighted in the Preamble.” Brown deplored the inclusion of this phrase as just “a feeble reference” to the understanding of international law, and wrote, “it affronts especially our Anglo-Saxon conceptions of a solid system of law that has grown up by custom and consent.” For Brown the Anglo-Saxon notion of law was “judge made law,” a system of law built upon actual court cases.³⁾

Quincy Wright challenged Brown’s interpretation of the phrase with an “illuminating article”⁴⁾ in the *American Journal of International Law*. According to Wright, the term “understanding” was the crux of the Covenant. Wright argued, through an examination of President Wilson’s usage of the term “understanding” in his books the *Congressional Government* (1908 edition), that “apparently this phraseology was the work of President Wilson.” He pointed out that Wilson preferred the term showing that in the index of the book understanding was made “a special subject, followed by twenty-one page reference.” Wright disclosed that “understanding” was not found in the earlier edition and explained the difference by referring to *Introduction to the Study of the Law of the Constitution* by A. V. Dicey,⁵⁾ which has been published just after Wilson’s first edition. Dicey also used the term “understanding” in his exploration of the legal nature of Constitution. By introducing this concept Dicey analyzed the notion of law in the constitution in two ways: judge-made law “in strict sense law, enforced by courts,” and “constitutional morality,” represented by the concept of “understanding”. Thus, Dicey argued that the Constitution contained a dual notion of law, including specific legal

rules and rules associated with morality.⁶⁾

Wright proceeded to argue that both Wilson and Dicey agreed that "the essence of an understanding is its origin in agreement of assent and its flexibility." Understanding should be distinguished, "on the one hand, from commands of superior authority and on the other from formal and inflexible rules and principles." Wright found the essence of understanding in its flexibility and did notice the danger of such flexibility in law, which might lead to misunderstandings. But international society was in the process of organizing and rules relating to international organization were not yet ready for codification. Since many found a "flexible constitution better than rigid constitutions," Wright contended that the drafters of the Covenant "wisely" saw that the organization of the League could only be prescribed "in the bare outlines." He wrote that "understanding" was the key to the dual nature of the Covenant, "The constitution of the League of Nations is to be build up of understanding in the twilight zone of law and morality, enjoying the regularity of obedience of one and the flexibility of the other, infinitely tenacious yet capable of indefinite adaptations."⁷⁾

Although Brown questioned Wright's assertion about President Wilson, on the whole he accepted the analysis. Brown agreed with Wright's interpretation that "the portion of international law not embodied yet in formal principles of justice, but sanctioned by general assent and dealing especially with the organization of international society."⁸⁾ Still, Brown posed the question of what had happened to the rules of international law that were established as rules before the Covenant. He complained that the drafters of the Covenant "ignored in the main, the great problem of the firm establishment and orderly development of the existing body of international law." Stating that

this issue was not one of “terminology” but involved the grave danger that “the established principle of international law would be obscured,” he warned that “in building up an international organization the vastly more important task of laying its foundation on the bedrock of law would be neglected.” Brown concluded that “this is no mere verbal quibble: the issue is fundamental,” thereby challenging the basis of judicial development.⁹⁾

Another post-World War One framework was the Washington Conference of 1921-1922, originally called because of the need to limit naval armaments among the Powers. Root attended as official delegate and James Brown Scott as technical advisor. Beforehand, Scott wrote that the reasons for calling the conference were issues concerning arms limitations and China and the Pacific. For the questions about the Pacific and Far East there were several precedents, while “for the conference of the nations on the limitation of armament there is but one precedent, the first of the two Hague Conferences was called in 1898 for this purpose.” He hoped the conference would yield a continuation of the Hague conferences, writing “the temple of peace is still in the distance; and the approach to it runs through conferences like the two which have already assembled at the Hague.”¹⁰⁾

The conference fulfilled Scott’s expectation at least partly. For one thing, he was reassured by the question of submarines being put on the agenda. During the war opinions against the laws of war had been preeminent, but the Washington Conference adopted topics concerning the laws of war. The Powers however failed to reach agreement about submarines. Great Britain insisted that they should be regulated and suggested their total abolishment. Meanwhile, the French argued that submarines were essential to preserve her independence, and Italy and Japan stressed that submarines were effective defensive weapons.¹¹⁾

Also, the "Resolution Establishing a Commission of Jurists to Consider Amendment of the Laws of War" was adopted by the United States, the British Empire, France, Italy, and Japan.¹²⁾ This resolution called for a committee to discuss whether the existing rules of international law adequately covered new methods of warfare that had appeared since the Hague Conference of 1907. The resolution reflected the desire to discuss the laws of war within the framework dominant prior to World War One.

Still, the discussion on submarine warfare and the resolution to form a committee of jurists were only a minor part of the Conference. The major achievements included the treaty for naval limitation and the treaties concerning China. At the 1922 meeting of the American Society of International Law (hereafter ASIL) Root entitled his opening address "International Law at the Arms Conference." Reflected his ideas about law, he remarked that the main business of the Washington Conference had been the limitation of armaments and that this was to "reach agreement which would bind the parties by contractual obligation," but not by "obligation imposed by law." In other words, he did not think that the obligations prescribed in the naval treaties and the Nine Power Treaty on China were legally binding. The Washington Conference had not been designed to make regulations for international law, but "while the Washington Conference had no concern with the making of law, it did naturally and effectively as incidental to giving effects to its policy of limiting armament, take quite important steps in the direction of developing and strengthening international law."¹³⁾

The two guest speakers at the session were Westel Willoughby and Frederic Moore, who were officially affiliated with the Chinese and Japanese governments, respectively. Willoughby was a professor of

political science¹⁴⁾ at the Johns Hopkins University and a legal advisor to the Chinese government during 1916-1919, and he was also with the Chinese delegation to the Washington Conference. Willoughby had once been critical of Scott's view that the legal nature of international law lay in its applications at municipal courts.¹⁵⁾ He, like James Wilford Garner, favored dealing with international law in terms of theory rather than cases and he mentioned at the outset that he intended to present the issue in terms of "abstract principles of international law and of international right." The principle involved in the Chinese case was the validity of the Twenty One Demands, which had been signed under threat of force. According to Willoughby, this contradicted the fundamental principle of international law, because "the essential purpose of international law was to maintain international peace and cooperation." Japan's forcing China to sign was against the principle of mutual cooperation. Willoughby also mentioned the right to set tariffs independently and to station troops in another country, and he pointed out that in the matters China was not being fairly dealt with.¹⁶⁾ In the end, he thought the Nine Power Treaty was a "great victory" for China because the principles were laid down "in a formal treaty to which all other Powers with Far Eastern interests are asked to adhere."¹⁷⁾

The presentation by Frederick Moore, who was Foreign Councillor to the Japanese Ministry of Foreign Affairs, followed Willoughby's and gave a quite different perspective. Stating that "much has been said against the Japanese unfairly with regard to their position in the Far East," he proceeded to defend the Japanese position. Whereas Willoughby spoke in terms of the abstract principles of international law, Moore presented the "simple facts" of the situation in China and Japan's interests in China. He described the situation in China as

peculiar and stressed the importance of China for Japan. He mentioned Japan's population problem and the need for raw materials and markets for her products. He even remarked that "the so-called infringements of China's sovereignty have not always been detrimental to China's interests. . . . Indeed, without the British it is doubtful if China proper would be intact today."¹⁸⁾

Perhaps Willoughby went too far in stressing principles and was not clear enough about what the principles were. Harold Quigley of the University of Minnesota also dealt with the questions of principles. Examining many writings on the issue of treaty validity, including works by John Bassett Moore and W. E. Hall, Quigley reached the conclusion that the Twenty One Demands was effective because "the practical unanimity of these authorities is sufficient warrant for rejecting the arguments from *force majeure* on legal, however strong it may be on moral, grounds." Having mentioned "moral grounds", he was also aware that the issue of validity of treaty signed under threat of force could not be defended on moral grounds. Thus he wrote that "the degree to which Japanese activities in Shantung have been found legally justifiable is an indication of gap that still separates law and ethics, revealed when a strong power deals with a weak one."¹⁹⁾ Quigley recognized that there was a gap between ethical values and international law. Both Willoughby and Quigley presented the argument that if international law allowed treaties to be imposed by force it would be incompatible with principles based on morals and ethics.

Wright's comment on the Washington Conference focused neither on the legal aspect of treaties nor on the realities of the situation in the Far East. Rather, he simply grasped its implications for international relations and was successful in assigning a historical role to it. He

noted that there were two types of international conferences, one of which was to "consider general principles or methods for conducting international relations." Of this character were the Geneva Conferences on the Red Cross (1864, 1904) and the Hague Peace Conferences (1899, 1908). The second type were conferences called to settle particular political problems or controversies. These usually took place after wars, as was the case of Congress of Vienna (1815) and of Versailles (1919). But the Washington Conference combined both types. The five power negotiations on the limitation of armaments were of the first type, while the nine power negotiations and the Pacific questions were of the second type.²⁰⁾

With regard to the situation in Far East, he wrote that Chinese sovereignty had suffered "progressive impairments" and judged the Nine Power Treaty positively, writing that "the more important Chinese treaty begins by reiteration of *general principles* (italics added) in respect to China formulated by Mr. Root and resembling the Hay Statements." Wright did not explain fully why these "general principles" were so important, but he argued that the specific resolutions, such as the abolition of extraterritoriality in China, were reached within the framework of the Nine Power Treaty.²¹⁾

More importantly, Wright found implications in the Washington Conference for the development of international organization. Entitling one section of the paper "Association of Nations," he wrote that "the problem of an association of nations, though not on the agenda, lay in the background of conference." The issue was emphasized because disagreement in the United States over the League of Nations had led to the U. S. declining to become a member. According to Wright, President Harding hoped that the conference to limit armaments might furnish a precedent for future conferences, thus creating a loose

association of nations. At the Washington Conference it was decided to set up commissions and hold periodical conferences, though not in connection with any permanent organizations. "Thus, the Washington Conference has brought both the United States and Europe to an increased understanding of the value and necessity of international organization."²²⁾

A Distinction between Political and Legal Questions?

While discussion of the Covenant and the Washington Conference revealed a low regard for morality and for principles in international law, another issue, the relationship between politics and law, was presented by Charles Fenwick of Bryn Mawr College at the 1924 meeting of the ASIL. With this issue he pointed out another deficiency in the prevailing notion of international law. He selected the topic of "The Distinction Between Political and Legal Questions" as the report of the Committee for the Extension of International Law, which had been established in 1923 to consider the future direction of international law. Describing his reasons for bringing up this topic, he said that it was one of the questions "which lay at the threshold of any study of the future development of international law."²³⁾

Before addressing the discussions of Fenwick's committee, it should be noted that the ASIL had a new president in 1924. After sixteen years of Root's presidency, Charles Evans Hughes, Secretary of State from 1920-1924, became the new president. The selection of Hughes was Scott's idea, but Fenwick was opposed. He thought that the president should be selected on the basis of academic merit and not political position. He wrote to Scott, "The Secretary of State has done practically no scientific work in the field of international law, such as should be the ground for selecting a man for the president of the

Society.”²⁴⁾ Scott, however, thought that the Society needed an authoritative figure and replied, “There are, as our French friends would say, ‘titles,’ and for your own information he is not only willing, but will be pleased to accept.”²⁵⁾ Although Scott prevailed over Fenwick this matter, in Fenwick’s session Scott for the first time showed an inclination toward the former’s view of international law.

In addition to Fenwick, Wright, Edwin Borchard and Manley O. Hudson gave talks at the session. Fenwick began on the premise that legal questions had become more important than before, saying that the “history of international relations during the past two centuries shows a gradual enlargement of the field of legal questions and a corresponding narrowing of the field of political questions.” The fact remained, however, that in many cases countries avoided submitting issues to international arbitration on the ground that they were “political questions.” He then analyzed the causes for raising political questions and by passing legal solutions. First of all, international law was based upon customary laws, but some of the leading principles, for example, the equality of states or territorial independence, were still not established as law. Secondly, it was due to “defective organization of the society of nations,” current international society lacked a sense of collective responsibility and in the end states had to defend their interest. Finally each state was the “ultimate arbiter” of its own domestic questions. For example, the admission of immigrants had been regarded as a domestic issue, in spite of the fact that it affected the welfare of other states. In sum, there were many problems that were “not yet ripe for settlement by the adoption of a common rule of international statutory law.”²⁶⁾

Borchard, a professor at Yale Law School, dealt with this issue differently. Instead of looking for reasons in deficient institutions or

laws, he emphasized the willingness of states to treat problems as legal questions. He wrote, "Does it [the answer] not lie less in fundamental nature of the question than in the willingness of the nation to submit it to judicial determination? . . . What is known as a political question becomes a legal question solely because there is a willingness, induced by any one of many considerations counselling self-restraint, to have it peacefully settled." Only when a state convinced that it had "more to lose by war than by a peaceful solution," would it seek a legal solution. Borchard pointed out that it was impossible to make every international question into a legal one, however well the laws and institutions might be established.²⁷⁾

Wright was closer to Fenwick than to Borchard in his stress on law rather than on the intention of the state. He started his talk by referring to Roscoe Pound, a scholar of jurisprudence at Harvard. Pound was known for his idea of "sociological jurisprudence," in which he claimed that law should respond to social needs and not merely be a reflection of abstract principles. Wright also advocated flexibility in law and argued for the need for an "engineering interpretation of law." He remarked that "principles and standards devised by men" should permit "a greater satisfaction of human and social wants." He called for further development of law, because there were many fields not sufficiently covered by law, for example, communications, transit, or the suppression of such things as opium. With the growth of international activity, law needed to change to respond to the needs of society.²⁸⁾

The last speaker, Hudson of Harvard Law School, went even further and denied the practical possibility of distinguishing political and legal issues. He cited the example of the Corfu Crisis of 1923, in which three Italians had been killed near the Greek frontier. Italy judged that

killing had been done by Greeks and demanded indemnity. Hudson asked, "Is there any rule in international law which can decide the amount of indemnity?" He contended that there was an "interconnection of legal and political phases" and concluded that it would not be easy to separate them. Proceeded to discuss the problems involved in applying the law at the Permanent Court of International Justice (PCIJ), he remarked, "I find it very difficult to find any legal principles or any legal standards according to which the PCIJ might have proceeded to determine the amount of the indemnity payable by Greece or Italy."²⁹⁾

During the discussion that followed, many interesting and sometimes opposing points were raised. Admiral William Rodgers pointed out the futility of law itself, saying, "Against national interests of great states municipal and international law are alike powerless." Most comments, however, were not so pessimistic about the role of law. Garner and Wright supported Hudson's position. Garner said that "it is quite futile to attempt to define or classify legal and political differences," while Wright remarked, "I should go further and say that perhaps there is no line at all."³⁰⁾

The effectiveness of the PCIJ was also questioned during the discussion. Those who favored the traditional notion of law held that the PCIJ would be strengthened by the further development of international law. Philipp Marshall Brown argued that "you cannot agree to submit to an international court a question for which there is no rule of law." Howard Kingsbury, a practicing lawyer, however, mentioned the utility of the Permanent Court of Arbitration, which had been established at the First Hague Conference in 1899. The PCIJ was to advance a step beyond that by applying the rule of law to international questions. Yet, because of the deficiency of international

codes and the difficulty in judging the legal issues, Kingsbury suggested that the Court of Arbitration served better in actual conflicts than the PCIJ. Hudson showed interest in this opinion, and surprisingly even Scott, who had been the most vocal advocate of the establishment of the international court, supported it. He remarked, "Mr. Hudson will not tax me with attacking the PCIJ. . . for a court of international justice has been for many years one of the reasons for my existence." Scott hoped that there would be many ways to settle problems and looked for a separation of functions: "the greater the number of remedies we have, the fewer the disputes we are likely to have outstanding." Scott's remarks were significant, especially in so far as he admitted that the international court could not be as omnipotent as he had thought for long time.³¹⁾

Wright criticized Brown's definition of law as being too narrow, noting that the sources of international law should not be confined to treaties or codes or other written documents. "It seems to me," Wright continued, "that we can resort to general principles so long as we apply them with a legal spirit." Hudson's concluding remark also made this point; "We are using the same word, law, but we mean very different things by it." Echoing Wright, he argued for flexibility and enlargement of international law. While words like "pure justice" or "strict law" had been used, he did not think that international law should be conceived as "something that is handed down to us, full-grown and full-blown, so that its content is never to be varied or changed as we face our varying problems." He concluded, "Let us not limit ourselves to an application of strict law. Let us view our task as that of making an intelligent and effective use of the materials that have been handed on to us, in the interest of the society which we serve."³²⁾

On the whole, the ASIL supported the denial of a distinction between the political and legal questions. In negating the distinction, the argument inevitably led to a disregard of the strict notion of law and included its expansion in order to serve social needs with reference to principle and standards.

While the ASIL discussed the intermediate relationship between political and legal questions in terms of legal theory, the issue also came up when the Conference of the Teachers of International Law discussed the instruction of international law in 1925. The initiative to resume this Conference, which had been held once in 1914 and then discontinued, came from the American Political Science Association (APSA) and not from the ASIL, but the many active members of the ASIL were also members of the APSA. At the Round Table on International Affairs at the December 1924 meeting of the APSA, the suggestion was offered and enthusiastically received to "have a conference of teachers of international law and related subjects in Washington in connection with the next annual meeting of the ASIL." This motion was supported by twenty-one professors, including Borchard, Fenwick, Garner, and Wright.³³⁾

At one session of the Teachers' Conference, some scholars mentioned the difficulty of separating international law from other related subjects. Quigley, from his experience, noted that it was hard to distinguish law from policy. When he taught specific rules of international law, he also had to explain American foreign policy. In the discussions following Quigley's paper, Pittman Potter of the University of Michigan remarked, "Keep them distinct," while Hudson reaffirmed his position by discounting the need to distinguish sharply between law and politics. He stated, "I find myself tending in the opposite direction, to say that the thing that has been needed in our

international law has been emphasis on its very relation to policy," and suggested the creation of an "international social science," which would bring subjects relating to international affairs together. One participant from a small college also noted that it was difficult to separate international law from other related subjects, especially at a college where a great variety of courses on international subjects was not offered.³⁴⁾

Opinions against the case-method were expressed. Garner said that too much reliance on the case-method had the "danger of giving the student a one-sided, national view of what international law is." Hudson also remarked, "I cannot bring myself to impress upon my students the definiteness and positive character of the rules of international law. . . . Rather, it is principles and standards to which we resort." The definiteness and positive character of international law had been stressed at the 1914 Conference. Eleven years later, the opinions against the case-method constituted the majority and, as Hudson stated, principles and standards were regarded as most important when teaching international law.³⁵⁾

Several resolutions were adopted with regard to enhancing the study of international law. One concerned the special desirability of providing instruction in international law. A part of this resolution noted that "the Conference favors the development of undergraduate courses in international relations including the trade and economic relations as well as in international organizations." This reflected the opinion that instruction at colleges should not be limited to international law and that general courses on international relations should also be offered. On the other hand, Resolution IV stated the desirability of instruction in international law for advanced degrees in political science and history. It was recommended that at graduate

institutions international law be taught even to students who were not law majors. These two resolutions called for an expansion of the curriculum dealing with international law at universities and colleges.³⁶⁾

Yet, there was harsh debate over whether the Conference of the Teachers of International Law should take any positive and concrete steps to popularize international law. When a proposal was made to set up the machinery by which international law professors could be sent to institutions where there was no instruction and to provide the necessary funds for such arrangements, Hudson voiced his vehement opposition, "I wish we as teachers of international law could get rid of the desire to vulgarize our subject." He did not think that "Tom, Dick, and Harry ought to be taught international law," but he did think it necessary for "Tom, Dick and Harry to have some ideas about international relations" because "knowledge of little international law is much more dangerous." Ellery Stowell of the American University responded that it was important to widen the base of international law. In the end, the resolution was dropped, but they adopted a resolution supporting the desirability of teaching international law at summer school. Wright remarked, "The summer school is the home of the high school teacher." While Hudson thought of popularization as slipping into the propaganda of the peace movement and wanted the study of international law to be science, Wright and Stowell embraced the idea that the teaching of international law itself would enlighten the public.³⁷⁾

A Happy Synthesis : From Theory to Practice

While vigorous discussions on the definition of law were taking place at the ASIL and the Conference for the Teachers of Internatio-

nal Law, some scholars produced progressive theories compatible with their views of international law. One had to do with the limitation of sovereignty. Borchard contributed an article entitled "Political Theory and International Law" to a book edited by Charles Merriam.³⁸⁾ His premise was that while in the social sciences theory most often followed practice this was not true for the scientific development of international law, particularly in the case of national sovereignty, where "the supporting theory lagged behind." He pointed out that national sovereignty was detrimental to international law, writing, "the theory of sovereignty. . . proved one of the most severe handicaps and dangers to the growth of a rational system of international relations." There was a gap between the theory of the seventeenth century and the reality of the twentieth century. In the seventeenth century, transactions among nations were few and the idea of absolute sovereignty of states was appropriate. But in the twentieth century, when some sort of international organization existed and there was a tendency toward internationalism, national sovereignty became an obstacle to the sound development of international law. Borchard stressed that national sovereignty was not absolute in international society, claiming that "certainly no state in the international community is bound by its own will alone; on admission into the community of nations, it accepts and must accept the whole body of rules known as international law."³⁹⁾

Garner also chose the issue of sovereignty for his Presidential Address to the APSA on December 29, 1924. In line with Borchard, yet more explicitly, Garner argued that the notion of sovereignty was effective only within national boundaries and that its power ended "at the frontier." When a state tries to enforce its will outside its borders, "it is limited by the rights of other states and of their nationals, to say

nothing of the rights of the society of states as a whole.” This limitation was enforced “through the principle of international responsibility,” one of the foundations of international law upon which all civilized states act in their relations with one another. Thus the notion of sovereignty was criticized because it “no longer corresponds with the facts of international life or practice, and indeed [is] incompatible with the existence of a society of states.” Garner argued the freedom in the international conduct of nations was already limited by the existence of many multilateral conventions, and that “in the place of an ‘anarchy of sovereignty’ we have a society of interdependent states, bound by law possessing a highly-developed solidarity of interests.”⁴⁰⁾

Around this time Fenwick and Garner, the most vocal advocates of new international law, published their views on international law. In *International Law* in 1924 Fenwick’s ambitious view of international law was laid out in the preface. Pointing to the current impotence of international law, he wrote that while international law had successfully regulated a large number of the less important interests of the states it had failed in regulating the most acute problems of the international community. In the future, though, “the existing rules of international law may be tested by the general conceptions of justice prevailing within individual states, and conclusions may thus be drawn for the constructive amendment or *enlargement of law* (italics added).”⁴¹⁾ As for the Covenant of the League of the Nations, he believed that “[the] system of the balance of power was impliedly, if not formally, repudiated in the collective responsibility assumed by all members of the League for the future peace of the world.” Yet he was cautious about the effect of the Covenant on international law, explaining that “it is difficult if not impossible to determine at the

present moment how far the fundamental character of international law as it existed in 1919 has been changed by the establishment of the League of Nations.”⁴²⁾

Garner went beyond Fenwick in his bold interpretation of the Covenant in *Recent Developments in International Law*, a book based on lectures he had given at the University of Calcutta in India in 1922.⁴³⁾ He wrote that “the effect of the Covenant has been to alter some of the fundamental bases on which international law has heretofore rested.” The Covenant established a new conception of international duty, “shifted emphasis more and more from the right of states to obligations and responsibilities,” and exalted “the idea of interdependence and solidarity at the expense of nationalism and independence.” He also noted that many of the stipulations of the Versailles Treaty “fall within the category of what Oppenheim calls ‘law making’ treaties.”⁴⁴⁾ In particular, Articles 11 and 16 introduced a new principle in international relations of collective responsibility, which was “reinforced by the application of physical sanctions.” More importantly, he wrote, “under Article 10 the so-called right of conquest would seem to be abolished” because the League condemned “external aggression” against the territorial integrity and political independence of all members.⁴⁵⁾ With regard to the binding force of those provisions on non-signatory countries, Garner was optimistic. Although admitting that the new principles were “of course principles which only the members of the League of Nations have agreed to recognize to apply,” he wrote that “since the membership of the League now embraces more than fifty states . . . they may almost be said to constitute a part of the public law of the world.” From a strictly positivist view, his usage of “almost said” or “seem to be abolished” was too casual and certain to cause problems. In addition to his frequent usage of the term

“principle” and his bold statements about the legal effects of the Covenant, he used the term “international law” and “policy” as almost interchangeable synonyms. For instance, when he wrote that “other new principles of international law or of policy which may be said to find recognition in the Covenant are. . .” he seems not to have strictly distinguished international law and policy.⁴⁶⁾

Hudson emerged as a spokesman by presenting papers on new developments in international law.⁴⁷⁾ Like Garner, he visited Calcutta University in 1927, and the lecture was published as a book, *Current International Co-Operation*. He was not hesitant to urge a limited role for the World Court (PCIJ): “we must see the role of courts as it is, and the truth seems to be that the serious international differences cannot be pressed into legal questions.” Therefore, it was important that besides the court “the international community should have other agencies to deal with the disputes which only lend themselves political adjustment.”⁴⁸⁾ He stressed the significance of conference method, newly established as a practice of the League of Nations and “numerous international conventions” such as the International Labor Conventions.⁴⁹⁾ Hudson agreed that these multilateral agreements had not been “ratified by all states, not even by all members of the League of Nations, but [that] they might serve as the guideline, as exemplified by the Declaration of Paris of 1856.”⁵⁰⁾ He continued, “It would be improper to treat all multipartite conventions as having the same value as law-making measures; but it would be equally improper to deny them any value as such.”⁵¹⁾ Here, again, Hudson echoed Garner’s observations on the effect of such treaties.

Criticism of Garner, Fenwick, and Hudson came from John Bassett Moore, a positivist and a compiler of the Moore’s *Digest of International Law*, an eight-volume collection of cases and statutes. While

reviewing the book, *A Handbook of Public International Law* by T. J. Lawrence he argued that some writers had overemphasized the effect of the lawmaking treaties. Lawrence, a British scholar whose argument resembled that of Oppenheim, had died in 1915 but the book continued to be published. Moore was critical of a recent edition of the book that included instruments like the Peace Treaty of Versailles and the Washington Treaties of 1922 for the limitation of naval armaments in the category of law making treaties.⁵²⁾ In Moore's opinion, those treaties were not universally binding because the number of the signatories was limited. Lawrence had written, "We may speak of Law-Making Treaties as forming a statute-book of the laws of nations. Most of them are very recent, and none go back beyond modern times. The existence of such *corpus juris* is a new and most significant development in the evolution of an organized society of nations."⁵³⁾ Moore did not support this view and contended that writers on international law should be as careful as writers on municipal law "to keep within the range of legal ideas and legal terminology." And he concluded, "If international law is to be restored to legal position which it formerly enjoyed, those who essay to expound it must keep within the realm of legal conceptions."⁵⁴⁾

If Moore's criticism was that of a positivist who wanted to keep the range of law narrow, another came from Nicholas Spykman of Yale University, a realist from the field of international relations who would later, in the 1930s, become known as an advocate of geopolitics. At the 1927 meeting of the ASIL, Spykman pointed out the confusion between reality and ideals in the discussions presented by the advocates of new international law. He remarked, "I want to plead with you to be a little more theoretical when you are practical and to be a little more practical when you are theoretical. . . . For ten minutes I was sure we

were discussing what the rules are, and the next ten minutes I was lost because we were discussing what the rules ought to be.”⁵⁵⁾ The members were not unmindful of this kind of criticism. At the Teachers’ Conference of 1925 Carl Christol of the University of South Dakota posed the question of “whether the teachers of international law should limit their discussions strictly to the law as it is pretty generally recognized or should go beyond that and the consider the question as to what law ought to be.” He stated his preference for the latter because “international law was still formulating,” and they should participate in its formulation.⁵⁶⁾

The opportunity for scholars of international law to have a role in the actual process of formulating international law came from the League of Nations in 1925, when it began a program of codifying international law and asked societies of international law all over the world for their technical help. The Director of the Legal Section of the League sent a letter to the ASIL to ask for its collaboration.⁵⁷⁾ The ASIL was requested to consider what the problems of international law were and what kind of agreements would seem to be most desirable. The ASIL appointed a special committee to consider the problem, consisting of Borchard, Brown, Fenwick, Stowell, Wright, Jesse S. Reeves and Arthur K. Kuhn.

At the 1926 meeting of the ASIL, the issue of codification was discussed. Garner stated that “the progress of international law has lagged behind the development of international relations,” and that codification was the most important and practical means for it to catch up. Hudson again suggested that in some questions codification should be “loose,” for example, with regard to the difference between domestic and international problems. He remarked, “for my part, I should depreciate any attempt to put that difference into cold language

that would perpetuate itself." It was better to leave them "undetermined," so that future progress could deal with it better. While the League had suggested such concrete topics for codification as nationality, territorial waters, and so on, Fenwick argued that "it is the general principles of codification that we most need to discuss." He wanted to codify such general principles as the equality of states and international comity.⁵⁸⁾

The League's request for professional help authorized scholars to discuss what they thought international law ought to be. Without a definite idea of law the future process of codification would be nothing more than a recollection of customs and old rules, just the positivistic strategy that they had been fighting against. Since the war international lawyers had argued for changes in international law, and they saw codification as a chance to actually change the code. This was also the time when new international legislation appeared. As Garner, Wright, and Hudson had discussed, many fields of international activities required new legislation. Postwar experience showed that much new international legislation had been established, such as regulation of air traffic or regulation of the opium trade, most of which under the auspices of the League. The scholars' recognition of progress in international law also derived from their observation of the actual process of making new laws.

Under these circumstances, scholars of international law thought they were entitled to discuss what international law ought to be. Rather than indulging in purely abstract discussions they had good reason to expect that their discussions and writings would yield concrete results. It was a time when international society was setting rules and intellectual and professional help was expressly called for.

Conclusion

These younger international lawyers were not content with ideas of pure justice or the mere judicial settlements of international problems. This attitude is reflected in the evaluation of the role of the World Court. Even though the creation of the World Court had been a long-standing dream of scholars of an earlier generation, the members of the ASIL who were active in the 1920s believed that the Court could only play a limited role. Even Scott came to accept this and noted that the Court could carry one function in international society.

Although the phrase "enlargement of law" was seen in their discussions and writings, even advocates of this term did not clearly explain what it meant. The enlargement of law had several dimensions. First of all, it was associated with "law-making" treaties. These were not new, but after World War One the growth of multilateral conventions in many fields only confirmed the soundness of the concept. If majority of the states agreed on, for example, the abolition of the slave trade, then this agreement would certainly have some effect on the rest of the world.

Secondly, these international lawyers accepted the Covenant of the League of Nations as a constitution of international society, which not only prescribed concrete legal rules but also contained a code of morality. Encouraged by this and probably helped by their critical attitude toward positivism, some international lawyers, notably Garner and Willoughby, sought to define the principles of international law. Their definitions were not precise; they could include ethical and moral rules, or international comity and responsibility. However vague the content of those principles might be, though, it is interesting to note that they regarded the principles found in international law as

practically applicable in foreign relations. This was the case in their discussions on the regulation of Japanese immigrants to the United States, after Congress passed a law to prohibiting Japanese immigration in 1924. Garner stated that Japanese government could “invoke the doctrine of equality of states . . . as a principle of international law.”⁵⁹⁾

Particularly clear in Hudson and Wright’s arguments were a stress on flexibility and a readiness to adapt to changes. Their frequent references to Roscoe Pound indicates that they were influenced by his thesis of “sociological jurisprudence.”⁶⁰⁾ Echoing Pound’s premise that law should respond to social needs, Hudson and Wright argued that international law, too, should adapt to the needs of a changing world.

And finally, the enlargement of law led to the question of whether a distinction between political and legal issues, between policies and international law, was necessary or even possible. The general discussions at the ASIL favored the view that any clear distinction between the two was futile. When collaboration with the League on the matter of codification was discussed, a question was posed about the danger of getting involved in the League’s political activities. Fenwick answered, “Get into the politics of the League. . . . Every effort to codify international law leads you inevitably into political activities of the world.”⁶¹⁾ Fenwick and his supporters came to realize that law-making was not isolated from policies, and they were willing to play their roles in the world. What kind of international law did they hope to achieve? Not judge-made laws, certainly. Nor just an international law that reflected one country’s policies. Wright Fenwick, Garner, Hudson, and those who supported the progressive views of international law wanted something much more comprehensive. They were aiming at establishing an international order, through

which the welfare of international society could be better achieved. They wanted a framework of fair, peaceful, and prosperous relations among nations.

1. For the emergence of this younger generation of international lawyers, see Hatsue Shinohara, "The Rise of a New International Law in America," *Japanese Journal of American Studies* 5 (1994, forthcoming).
2. Elihu Root to Will H. Hays, March 29, 1919, *American Journal of International Law* (hereafter, *AJIL*) 13 (1919) : 586-7.
3. Philip Marshall Brown, "The Understandings of International Law," *AJIL* 13 (1919): 738-741.
4. See James W. Garner, *Recent Developments in International Law* (Calcutta: University of Calcutta, 1925), 402, footnote 1.
5. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1889).
6. Quincy Wright, "The Understanding of International Law," *AJIL* 14(1920): 572-574.
7. *Ibid*, 575-580.
8. *Ibid*, 569
9. Brown, "The Understanding of International Law," *AJIL* 15 (1921): 69-70.
10. Jamen Brown Scott, "Conference on the Limitation of Armament and Problems of the Pacific," *AJIL* 15(1921): 504-5, 510.
11. See *Conference on the Limitation of Armament: Washington, November 12, 1921-February 6, 1922* (Washington: G. P. O. 1922), 474-592; "Conference of the Limitation of Armament: Report of the American Delegation," Senate Document, No.125, 67th Cong, 2nd Sess., *AJIL* 16(1922): 185-189.
12. "Resolutions Establishing a Commissions of Jurists to Consider Amendment of the Laws of War," *Conference on the Limitation of Armament*, 1640.
13. Root, "International Law at the Arms Conference," *Proceedings of the American Society of International Law* (hereafter cited as, *Proceedings, ASIL*) (1922): 1-12.

14. For a brief account on Willoughby's position in the study of Political Science, see Dorothy Ross, *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991), 280-281.
15. See Willoughby, "Legal Nature of International Law," *AJIL* 2(1908): 365.
16. Willoughby, "Principles of International Law and Justice raised by China at the Washington Conference," *Proceedings, ASIL* (1922): 19-24.
17. Willoughby, *China at the Conference* (Baltimore: Johns Hopkins Press, 1922), 336, 342-343.
18. Frederick Moore, "The Far Eastern Settlement of the Conference of Washington," *Proceedings, ASIL* (1922): 26-36. Moore also gave a paper on Japanese policy at the Conference on China held in September 1925 at Johns Hopkins University. See *American Relations with China: A Report of the Conference held at Johns Hopkins University, September 17-20, 1925, with supplementary materials, and arranged to be of use to discussion groups, current even's clubs, and university class* (Baltimore: Johns Hopkins Press, 1925). Also present at this Conference were Willoughby and Sao-ke Alfred Sze.
19. Harold Scott Quigley, "Legal Phases of the Shantung Question," *Minnesota Law Review* 6(1922): 382-3, 394.
20. Quincy Wright, "The Washington Conference," *Minnesota Law Review* 6(March 1922): 291.
21. *Ibid*, 294.
22. *Ibid*, 295-298.
23. *Proceedings, ASIL* (1924): 43.
24. Fenwick to Scott, February 16, 1924, Papers of the American Society of International Law (hereafter cited as Papers, ASIL), the American Society of International Law, Washington D. C.
25. Scott to Fenwick, March 3, 1924, Papers, ASIL.
26. Fenwick, "The Distinction between Legal and Political Questions," *Proceedings, ASIL* (1924): 44-50.
27. Borchard, "The Distinction between Legal and Political Questions," *ibid*, 50-57.
28. Wright, "The Distinction between Legal and Political Questions with

- Especial Reference to the Monroe Doctrine," *ibid*, 57-67.
29. Hudson, "Legal and Political Questions," *ibid*, 126-132.
 30. "Discussion," *ibid*, 72-3,74,141.
 31. *Ibid*, 79, 134-5, 138-9.
 32. *Ibid*, 141, 145.
 33. Edward Dickinson to George Finch, January 5, 1925, Papers, ASIL.
 34. Quigley, "The Scope, Organization and Aim of Courses in International Law in Relation to Other Courses in International Subjects," *Proceedings, Second Teachers*, 9-11, 12, 13.
 35. "Discussion by others," *ibid*, 32, 39.
 36. "Resolutions and Recommendations of the Conference," *ibid*, x-xi.
 37. "Discussion of Resolutions and Recommendations of the Conference," *ibid*, 142, 143, 148.
 38. Charles E. Merriam. ed. *A History of Political Theories: Recent Times* (New York: Macmillan, 1924).
 39. Borchard, "Political Theory and International Law," *ibid*, 120-139.
 40. James W. Garner, "Limitations on National Sovereignty in International Relations," *The American Political Science Review*, 19(1925): 2, 3, 6, 16-18.
 41. Fenwick, *International Law* (New York: The Century Co, 1924), vi-vii.
 42. *Ibid*, 30, 46, 56,
 43. Garner was elected to the Tagore Professorship of Law at the University of Calcutta. He was the first American to receive the appointment. See miscellaneous newspaper clippings in Papers of James Wilford Garner, University Archives, University of Illinois, Urbana, Illinois.
 44. Law-making treaties are treaties that have the possibility of serving as legal standards. Lasa Francis Oppenheim, a British scholar, emphasized this notion. See Oppenheim, *International Law* 3rd ed. (London: Longmans, Greens and Co, 1920), 16-22
 45. Garner, *Recent Developments in International law* (Calcutta: University of Calcutta, 1924), ix, 397-8.
 46. *Ibid*, 401-402, footnote 2, 401.
 47. In addition to the address, "The Contemporary Development of International Law" before the American Branch of International Law

- Association at its annual dinner January 9, 1925, before the Cornell University College of Law, March 30 and 31, 1925, and before the Bar Association of the City of New York, February 16, 1928. Each address was published respectively, "The Outlook for the Development of International Law," *American Bar Association Journal* 11(1925): 102-107, "The Prospect for International Law in the Twentieth Century," *The Cornell Law Quarterly* 10(1925): 419-459, "The Development of International Law since the War," *AJIL* 22(1928): 330-350.
48. Hudson, *Current International Cooperation* (Calcutta: The Calcutta University, 1927), 95.
 49. Hudson, *ibid*, 125; "The Development of International Law since the War," 339-341.
 50. The Declaration of Paris regulated the rules of maritime neutrality. This was originally signed by seven countries, but later most other countries also signed. As a result, it was seen as universal international law.
 51. Hudson, *Current International Cooperation*, 128.
 52. John Bassett Moore, "Post-War International Law," *Columbia Law Review* 27(1927): 406-7.
 53. T. J. Lawrence, *A Handbook of Public International Law*, tenth ed. by Percy H. Winfield (London: Macmillan, 1927), 32.
 54. Moore, "Post-War International Law," 411.
 55. "Discussion," *Proceedings, ASIL* (1927): 71.
 56. "Discussion of Resolutions and Recommendations of the Conference," *Proceedings, Second Teachers*, 142.
 57. Van Hamel to the Chairman of the ASIL, April 1, 1925, Papers, ASIL.
 58. "The Function and Scope of Codification in International Law," *Proceedings, ASIL* (1926):28; "General Discussion," *ibid*, 41, 55-6.
 59. "Discussion," *Proceedings, ASIL* (1924): 74.
 60. Hudson and Wright referred to Pound's article, in particular, "Philosophical Theory and International Law," in *Bibliotheca Visseriana* 1(1924). See for instance, Hudson, "The Prospect of International Law in the Twentieth Century," 421; Wright, *Proceedings, Second Teachers*, 95.
 61. "General Discussion," *Proceedings, ASIL* (1926): 55-56.