

# The Ambivalent Shadow of the Pre-Wilsonian Rise of International Law

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## Abstract

The generation of American international lawyers who founded the American Society of International Law in 1906 and nurtured the soil for what has been retrospectively called a 'moralistic-legalistic approach to international relations' remains little studied. A survey of the rise of international legal literature in the United States from the mid-nineteenth century to the eve of the Great War serves as a backdrop to the examination of the boosting effect on international law of the Spanish American War in 1898. An examination of the Insular Cases before the US Supreme Court is then accompanied by the analysis of a number of influential factors behind the pre-war rise of international law in the United States. The work concludes with an examination of the rise of natural law doctrines in international law during the interwar period and the critiques addressed by the realist founders of the field of 'international relations' to the 'moralistic-legalistic approach to international relations'.

**Keywords:** American Society of International Law, Peace-Through-Law Movement, Harvard Law Library: League of Nations, President Woodrow Wilson, Pre-Wilsonianism

*Any dinosaurian beliefs that creative and analytical  
are contradictory and incompatible modes  
are standing in the path of a meteor;  
They are doomed for extinction*

Richardson L. and Adams St Pierre, E.  
"Writing: A Method of Inquiry" in N. Denzin and  
Y.S. Lincoln (eds)  
*Handbook of Qualitative Research* (2005) p.962

## 1 Introduction

International lawyers have made much of certain dates and some international lawyers have made much of

highlighting that such was indeed the case.<sup>1</sup> The year 1919 exemplifies this phenomenon where the elevation of a certain date as well as a reflective examination and, often, dispute of the symbolism that it has acquired for international law as a field of intellectual inquiry appear united. There is no lack of arguments for such a fixation with great dates of international law as the emblematic porticos for specific periods in the history of international law or, by the same token, for the reflective critical examination and the accompanying *disputatio* of their acquired symbolism in standard periodisations of the field.<sup>2</sup> The great epochal date often acts as a shortcut to evoke an event which was deemed so fundamental in the reconstruction of the memory of international law to itself so as to be able inaugurate a new stage in a long narrative of intra-disciplinary progress.<sup>3</sup> Peace treaties, in particular, have spawned an extensive international legal-historical literature around them.<sup>4</sup> Their presence is, indeed, a recurrent one within the category of what M. Koskenniemi has termed 'stereotypical context-breaking events'.<sup>5</sup> These are regularly found as symbolic turning points in the classic periodisation of the history of international law.<sup>6</sup> The year 1648, the date of the Peace of Westphalia that put an end to the Thirty Years' War, stands, perhaps, as the most representative illustration of what S. Beaulac has termed an aetiological

1. See, respectively, D. Kennedy, 'Primitive Legal Scholarship', 27.1 *Harvard International Law Journal* 1, at 1 (1986) and D. Kennedy, 'The Move to Institutions', 8 *Cardozo Law Review* 841, at 841 (1987) and their respective opening sentences 'International legal scholars have made much of 1648', and 'The discipline of international institutions has made much of 1918'.
2. For a reflection on the potential of applying new methodologies for international legal history to be able to develop its own periodisations as different from earlier periodisations emerged from the history of international relations and diplomacy, see, introductorily, W. Butler, 'Periodization and International Law', in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, at 379-439 (2011).
3. For the examination of the 'assumption that Humanity's past is evolutionary and international law is an agent of social progress' as one of the assumptions of a dominant style of historical argument in international law work, see T. Skouteris, 'Engaging History in International Law', in D. Kennedy and J.M. Beneyto (eds.), *New Approaches to International Law, The European and American Experiences*, at 99-121 (2011).
4. On Peace Treaties; see e.g. R. Lesaffer (ed.), *Peace Treaties and International Law in European History. From the Late Middle Ages to World War One* (2004).
5. M. Koskenniemi, 'Vitoria and Us. Thoughts on Critical Histories of International Law', *Rg-Rechtsgeschichte, Legal History* (2014) (forthcoming – on file with the author).
6. The classic example is W.G. Grewe, *The Epochs of International Law*. Translated and revised by M. Byers (2000).

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myth<sup>7</sup> in international law on account of the seminal quality acquired by the date of 1648 as the European geopolitical origin for a modern (or classical) law of nations circumscribed in its application to the rights and duties of the sovereign states in their external relations. The year 1919, the date of the Treaty of Versailles,<sup>8</sup> also belongs within this category of great momentous ‘stereotypical context-breaking events’ in the history of international law. Sharing the aetiological myth-quality within the discipline of 1648, the year 1919 has also been characterised as the great portico for the ‘foundational period of contemporary international law’.<sup>9</sup> This is specially so because, Versailles, with its partial ‘return to a concept of just peace’<sup>10</sup> on account of the punishing measures which were imposed upon Germany, and the establishment, in its wake, of the League of Nations which included an innovative ‘mandate system’,<sup>11</sup> often overlaps in the memory of the discipline with the establishment of the first universal international institutions of permanent character in the supranational sphere. The year 1919 opened, indeed, the way for an interwar period which, a century after the beginning of ‘the Great War’ that prompted ‘the move to institutions’,<sup>12</sup> maintains its contemporary relevance for our own day and age where the proliferating institutionalisation and juridification of the supranational sphere occupies most of the international legal scholars’ works and reflections.<sup>13</sup> The move to international institutions in the aftermath of the First World War was, needless to say, the offspring of uncountable events as well as of a myriad of economic, political, social as well as legal and philosophical genealogies.<sup>14</sup> Woodrow Wilson is yet, perhaps, one of the figures the public at large – including non-international lawyers – would most immediately associate with the Treaty of Versailles and the foundation of

the League of Nations. Indeed, uncountable volumes have been penned on Wilson’s Fourteen Points Speech<sup>15</sup> and on his personal commitment to the drafting of the Covenant of the League of Nations at the Versailles Conference. Wilson’s ultimate failure to persuade the US Congress to join the League of Nations has also been abundantly documented.<sup>16</sup> Moreover, the symbolic role of Wilsonianism in the genealogy of liberal internationalism and idealism in international relations as well as its critical examination in the context of American foreign policy remains up to this day a matrix for multiple analysis, reflections and voluminous studies.<sup>17</sup> Yet for all of Wilson’s conspicuous championing of the cause of international law and international institutions since 1917, the fact remains that an excessive focus on the main actors of stereotypical context-breaking events in international law – a focus which, moreover, has often adopted a de-historicised normative perspective in the works penned by international lawyers – tends to cast to the margins of such an intra-disciplinary history the study of a number of other factors which often nurtured the soil for the international legal views, positions and actions of their protagonists. Therefore, to construct new alternative narratives, which identify and highlight alternative events in the chronology of international law, may help provide a new breadth and texture to the historical background of the great historical caesurae predominant in today’s standard chronologies and periodisations of the history of international law. Experimenting with alternative approaches also contributes to a post-Cold War ‘turn to history in international law’ which, for the last 15 years, has profoundly enriched and deepened a new generation of international legal scholars’ reflective understanding of the complex historical layers and multilayered intellectual sour-

7. See Beaulac, Stéphane, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden, Brill 2004).
8. Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919) (1919) 225 CTS 188.
9. A. Paulus, ‘The International Legal System as a Constitution’, in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009) 109, at 112.
10. R. Lesaffer, ‘Peace Treaties and the Formation of International Law’, in B. Fassbender and A. Peters (eds.), *Handbook of the History of International Law* (2012), 71-94, at 91.
11. On the mandate system and how this ‘exerted considerable power in the formation and transformation of non-European nations and states during the interwar period’, see, e.g. the series of contributions to a recent symposium F. Johns, T. Skouteris & W. Werner (eds.), ‘The League of Nations and the Construction of the Periphery’, 24 *Leiden Journal of International Law* 4, at 797 ff (2011).
12. See D. Kennedy, ‘The Move to Institutions’, 8 *Cardozo Law Review* 841, at 841 (1987) (*id.* note 1).
13. See M. Koskenniemi, ‘History of International Law, World War I to World War II’, *Max Planck Encyclopedia of Public International Law* (2011) (highlighting, among others, ‘how most of today’s basic international legal doctrines and institutions received definite shape in the 1920s and 1930s’).
14. On the methodological role of context in the history of international law, see M. Koskenniemi, ‘Vitoria and Us. Thoughts on Critical Histories of International Law’, *Rg-Rechtsgeschichte Legal History* (2014) (forthcoming – in file with the author). See also A. Orford, ‘On International Legal Method’, 1 *London Review of International Law* 1, 166, at 170-74 (2013).

15. W. Wilson, ‘Speech on the Fourteen Points’, Congressional Record, 65th Congress 2nd Session, 1918, at 680-81, including the famous Point 14, ‘A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike’.
16. The volume of materials is monumental. See, for instance, the bibliography on the League of Nations collected by the University of Indiana’s League of Nations’ Photo Archive available at: <[www.indiana.edu/~league/othersites.htm](http://www.indiana.edu/~league/othersites.htm)> (last accessed September 2014).
17. For a selected bibliography of President Wilson’s different facets, including foreign policy, see, e.g. <[www.presidentprofiles.com/Grant-Eisenhower/Woodrow-Wilson-Bibliography.html](http://www.presidentprofiles.com/Grant-Eisenhower/Woodrow-Wilson-Bibliography.html)>. Among the number of organisations highly active in American foreign policy which are related to Wilson’s presidency, see, e.g. ‘The Council On Foreign Relations’ founded in 1921 (accessible at: <[www.cfr.org/about/history/](http://www.cfr.org/about/history/)>) or The Woodrow Wilson International Center for Scholars (founded in 1964) (accessible at: <[www.wilsoncenter.org/](http://www.wilsoncenter.org/)>) (last accessed September 2014).

ces that inform the continuities and discontinuities of their own discipline.<sup>18</sup>

More than a decade before the Versailles' Treaty and of Wilson's championing of international law and institutions in the last stages of the First World War, the prestige of international law in the United States was on the rise. By then, a pre-Wilsonian generation of international lawyers had already planted the seeds of what, in the aftermath of the Second World War, would become, retrospectively, decried as the 'moralistic legalistic approach to international relations'.<sup>19</sup> Indeed, many of those who, in 1906, founded the American Society of International Law (ASIL) subscribed to a series of paradigmatic elements, which came down to attaining a series of concrete objectives. These converging objectives, which 'were pursued' – according to Boyle – 'in a roughly contemporaneous manner because of their highly interdependent and mutually supportive nature'<sup>20</sup> included 'the creation of a general system for the obligatory arbitration of disputes between states (...) the establishment of an International Court of Justice (...) and the codification of important areas of customary international law into positive treaty law'.<sup>21</sup> Although this set of goals, which would later on be indicted as part of the 'apparently fantastic constructions of a legalism or idealism that had been oblivious to the 'realities' of power in the international world'<sup>22</sup> was far from being the exclusive programmatic aspiration of the pre-Wilsonian generation of US international lawyers, their work in favour of these internationalist goals contributed to nurture the intellectual international legal soil on the eve of the Great War in the United States and, undoubtedly, inspired the post-Great War establishment of the League of Nations.

In order to survey the influence of this pre-war generation of American international lawyers and its place in the genealogy of international legal thought in the first third of the twentieth century as contributors of what E.H. Carr would term the 'foundational stones of a new utopian edifice'<sup>23</sup> of the League of Nations, this work reviews a series of factors that shaped the establishment of the American Society of International Law. Important among these factors was 'the experience of the Uni-

ted States during its war with Spain in 1898' to which, according to Boyle, 'the birth of both the ASIL and its journal can be attributed to'.<sup>24</sup> A review of the political facet of the imperialist/anti-imperialist divide that followed the Spanish American War in 1898 shall, then, lead to a brief examination of the Insular Cases decided by the Supreme Court of the United States between 1901 and 1904. Furthermore, a review of the influence of the religious-inspired peace movement's support for the juridification of international disputes and a brief survey of the evolution of international legal literature in the United States from the mid to the late nineteenth century will help situate the foundation of the American Society of International Law against the background of the intellectual tradition against which it emerged. After a brief examination of the context of the foundation of ASIL, including by reference to the role in its foundation of the rise of prestige of the field of international arbitration during the nineteenth century, abridged consideration is given to two features of the American civic-legal culture. It will be, indeed, shown that the civic identity-building role of law and the importance of public opinion in the United States were, along with the peace movement, influential factors behind the orientation of this pre-First World War generation of American international lawyers. Moreover, a reference to the early efforts of the American Society of International Law to spur the study of international law in American law schools during the early 1900s is illustrated by a little-known bibliographical episode that took place at Harvard Law School. This historical episode evidences not only the rising prestige of international law immediately before the First World War in the United States, it also exemplifies how the Spanish American War affected the cultivation of international law in exactly opposite ways in the United States and Spain as the dawn of the 'American Century' coincided with the sunset of the first empire in history in which the sun never set. Finally, the conclusion reflects on the influence of the moralistic-legalistic approach to international relations during the interwar years in particular in connection to the resurgence of natural law doctrines during this period. The conclusion also touches upon the incisive critique to which this legalistic-moralistic approach was made the object by the founding fathers of the field of 'international relations' during the Second World War and its immediate aftermath.

18. On the 'historical turn' or 'turn to history' in international law, see, e.g. R.C.H. Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in M. Craven, M. Fitzmaurice & M. Vogiatzi (eds.), *Time, History and International Law*, Martinus Nijhoff, 27-41, M. Koskenniemi, 'Why History of International Law Today?', *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 4, 61-66 (2004). For the influence of critical theory in its development, see, e.g. B. Galindo and R. George, 'Force Field: On History and Theory of International Law', *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 20, 86-103 (2012) and I. De la Rasilla Del Moral, 'International Law in the Historical Present Tense', *22:3 Leiden Journal of International Law*, 629-49 (2009).

19. See F.A. Boyle, *Foundations of World Order, The Legalist Approach to International Relations (1898-1922)*, at 22 (1999).

20. *Ibid.* at 22.

21. *Ibid.* at 22.

22. M. Koskenniemi, 'History of International Law, World War I to World War II', *19 Max Planck Encyclopedia of Public International Law* (2011).

23. *Id.* 26.

24. See Boyle (above).

## 2 The 1898 Spanish American War: A Leap Forward for International Law in the United States

The advance of international law in the United States during the first decade of the 1900s owes volumes to the outcome of the 1898 Spanish American War. This resulted in the acquisition for the United States of the last remnants of the Spanish Empire in Puerto Rico and Cuba in the Caribbean and of the Philippines and Guam in the Far East. The '*Desastre de Cuba*', as Spaniards still refer to it, meant the definitive leap forward for the United States from the 'manifest destiny' of continental expansion from the Thirteen Colonies throughout the nineteenth century<sup>25</sup> towards a new overseas empire and the consolidation of its policies of informal empire building through the construction of spheres of regional influence. Indeed, throughout the nineteenth century, the United States had been building both internal and external channels of territorial expansion and fashioning spheres of regional influence overseas. Internally, there has been a previous process of imperialist continental expansion in fulfillment of the country's conspicuous 'manifest destiny' at the expense of Native American nations.<sup>26</sup> This expansionist policy had, as Gathii has highlighted, been privileged in legal terms by the Marshall Court's contribution to the 'emergence of a jurisprudence that, strongly, favored the view that conquest and discovery give conquerors a legitimate title to the territory of native Americans'.<sup>27</sup> Externally, the United States had, likewise, been developing the guidelines of an informal empire throughout the nineteenth century as showed by its participation in an extended network of 'unequal treaties'.<sup>28</sup> The daybreak of the new American Empire at the dawn of the twentieth Century bore also witness of the rise of elite corporate law firms which were to become central agents in the transnational em-

nation of the 'American mode of production of law'<sup>29</sup>. A new breed of leaders took the reins of the US' foreign policy establishment when the United States transitioned from a semi-peripheral Western country into an imperial power with ultramarine territories.<sup>30</sup> Movement between private international legal counseling (for clients such as the United Fruit Company) and 'public service' in the 'foreign policy establishment' would become a dominant feature of the new management of international legal relations. Indeed, most of the new leading figures in America have been trained in law during a period when, as Boyle has noted, the 'U.S. foreign policy was, simultaneously, striving to reconcile the demands of a newly launched imperialism with the tenacious pull of a traditional deep-seated isolationism'.<sup>31</sup> These contributors to the pre-Wilsonian rise of international law understood well that the commercial universalism of the American tradition required a new enthusiasm for international law.<sup>32</sup> The 'large-scale co-optation of the skills of American international lawyers (...) by all branches of the American government'<sup>33</sup> which ensued this strategic realisation was, furthermore, accompanied by efforts to foster the gradual extension of international law to the legal curriculum at the time of the growing professionalisation of US law schools. At a post-1898 war moment of American 'imperial thrust', this underlying corporate commercial international mindset, combined with the boost known as the scientific development of international law, would play an important role in contributing to overcome 'the traditional U.S. idea that colonialism was inconsistent with U.S. legal and moral values'.<sup>34</sup> During the 1900s, such an imperial drive, that served as background to developments in the field of international law in the United States, came about through the gradual enforcement of an 'open door policy' in the Far East and, also, by means of an active US participation in the Caribbean and Latin-American affairs under the cloak of the Monroe doctrine which was to be completed by international police power which self-reasserted itself as the right of the United States to intervene in Latin America in cases of 'flagrant and chronic wrongdoing by a Latin American Nation' in its Roosevelt Corollary in 1904.

The political and judicial phases of the aftermath of the Spanish American War contributed to the development

25. See D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 17 *Quinnipiac Law Review* 99, at 106 (1997) (summarising how 'there was manifest destiny, slavery, civil war and a new nation coming of age, sorting out its internal issues of sovereignty, statehood and federalism, and coming into its own internationally in an imperial and commercial age').
26. Seeas introduction, K. Coates, 'North American Indigenous Peoples' Encounters', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of International Law* (2012), at 787-810.
27. J.T. Gathii, *War, Commerce and International Law* (2010), at 139.
28. See e.g. F.B. Sayre, 'The Passing of Extraterritoriality in Siam', 21 *American Journal of International Law*, at 70-80 (1927) (providing an example of the repetition of substantially the same fiscal provisions of an Anglo-Siamese Treaty of 1855 containing no time limit and only modified with the consent of both parties in the respective treaties of Siam with the United States (1856), France (1856), Denmark (1858), Portugal (1859), The Netherlands (1860), Germany (1862), Sweden (1868), Norway (1868), Belgium (1868), Italy (1868), Austro-Hungary (1869) and Spain (1870)).

29. Or 'Cravathism'; see, interestingly, D. Trubek, Y. Delazay, R. Buchanan & J.R. Davis, 'Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas', 44 *Case Western Reserve Law Review* 407, at 423 (1993-1995).
30. See, e.g. a modern classic such as E. Hobsbawm, *The Age of Empire, 1875-1914* (1989) at 68 (noting that 'at the turn of the century, the USA followed international fashion by making a brief drive for a colonial empire of its own').
31. See F.A. Boyle, *Foundations of World Order, The Legalist Approach to International Relations (1898-1922)* (1999), at 22.
32. M. Koskeniemi, 'Book Review of Mark Janis: The American Tradition in International Law', 100 *American Journal of International Law* 266 (2006).
33. Boyle *id.*, above at 17.
34. Y. Dezalay and B.G. Garth, 'Law, Lawyers and Empire', in M. Grossberg and C.L. Tomlins (eds.), 3 *Cambridge History of Law in America The Twentieth Century and After* (1920) 718, at 724.

of a new approach and orientation in the international legal academia of the United States in the first decade of the twentieth century. The political phase took on a symbolic character in a country that had historically prided itself on having become self-constituted through a successful anti-colonial enterprise and had boasted of the seminal anti-imperialist character of its 1776 Declaration of Independence. The anti-colonialist and anti-imperialist moral fabric of the American identity was, therefore, seen to be at stake in the divergent perspectives adopted by the imperialist and anti-imperialist camps in the aftermath of the Spanish American War of 1898. This Gordian knot was cut by the US Senate, which ratified the 1899 Peace Treaty of Paris by a narrow margin. On the other hand, the 1900 Presidential Elections confirmed, with an even greater margin than in 1896, the popular support for the Republican government of President McKinley that had waged the war against the remnants of the Spanish Colonial Empire. However, if the political question posed by the war had been resolved by the effects that the rise of popular nationalism which has accompanied the war have had upon the polls, the juridical phase of this debate presented itself as a more complex one. The legal phase had to bring new light to the old question of the 'right to acquire territory and the status of the territory once acquired'<sup>35</sup> which was a topic which had often preoccupied the Supreme Court throughout the nineteenth century. However, given the overseas nature of the new possessions in the Caribbean and Pacific Oceans acquired by the United States through the Treaty of Paris in 1899, and because of the different cultural, linguistic and racial characteristics of the inhabitants of the newly conquered territories to the citizenry of the American Union, the situation before the Supreme Court's Justices was new. These differences lurked behind an array of political postures that were, in their turn, embedded in different legal perspectives. Balancing this set of legal perspectives would put in place new and lasting arrangements regarding the status of the new overseas possessions and their relationship to the United States. Indeed, soon after the war, the *Fuller Court*,<sup>36</sup> in

what has come to be known as the *Insular Cases*,<sup>37</sup> was confronted to the legal question of whether the US Constitution should 'follow the flag'. The answer to this question, which was triggered by the much narrower question to know whether the Congress could impose a tariff on the commerce between the mainland and the former Spanish colonial islands, was intrinsically connected with the way in which the US constitutional doctrine had developed to respond to the aggrandizement of the US territory during the nineteenth century. Given the silence of the Constitution on the matter, debates between Federalists against the Jeffersonian support for the application of the implied powers doctrine had traditionally revolved, around the 'congressional interpretation of the power of Congress with respect to territories'.<sup>38</sup> A series of nineteenth century cases, including those dealing with the annexation by treaty of Louisiana (1803) and Florida (1819) or the annexation by joint resolution of Texas, had resulted in an amalgam of determined and undetermined issues concerning territoriality. These issues, including custom tariff matters, arose again in a new light in 1901. More importantly still, the *Insular Cases* offered the Court its first opportunity to examine fundamental questions regarding the Constitution's 'geographic scope'. While until then, for the Supreme Court there had been 'little need to explore the outer boundaries of the Constitution's geographic reach',<sup>39</sup> the Congress' decision to discontinue its previous practice of extending constitutional rights to the new territories by statute confronted the Supreme Court now for the first time with the question to know 'whether the Constitution, by its own force, applies in any territory that is not a state'.<sup>40</sup> The final 'doctrine of territorial incorporation' inaugurated in the *Insular Cases* differentiated between the application of the Constitution to incorporated territories destined for statehood – where it applies in full – and to unincorporated territories – where it only applies in part.<sup>41</sup> The *Insular Cases* became, by this token, a step in the chain of what would later become a 'functional approach' to 'the selective application of constitutional limitations to the U.S.

35. J.E. Kerr, *The Insular Cases. The Role of the Judiciary in American Expansionism* 15 (1982).

36. An examination of the insular cases from the perspective of those sitting on the US Supreme Court bench can be found at King, W.L. Melville Weston Fuller, *Chief Justice of the United States 1888-1910* (1950), at 262-77.

37. The *Insular Cases* is a denomination which is primarily understood as the series of cases submitted to the Court in 1900 and judged in early 1901. Other cases that are generally included in this category dealing with the status of the newly acquired overseas possessions were submitted between 1903 and 1905 and another dozen cases decided over a 20-year period would further test the 1901 rulings. Perhaps the two most significant cases argued were those of *DeLima v. Bidwell* and *Downes v. Bidwell*. Cases: *De Lima v. Bidwell* (1901), *Goetze v. United States* (1901), *Armstrong v. United States* (1901), *Downes v. Bidwell* (1901), *Huus v. New York & Porto Rico S.S. Co.* (1901), *Dooley v. United States* (1901), *Fourteen Diamond Rings v. United States* (1901), *Hawaii v. Mankichi* (1903), *Kepner v. United States* (1904), *Dorr v. United States* (1904), *Rasmussen v. United States* (1905), *Dowdell v. United States* (1911), *Ocampo v. United States* (1914), *Balzac v. Porto Rico* (1922).

38. J.E. Kerr, *The Insular Cases. The Role of the Judiciary in American Expansionism* (1982), at 5.

39. The Supreme Court refers to the Insular Cases in the recent case: *Boumediene v. Bush* 128 S. Ct. 2229 (2008).

40. *Id.*

41. *Id.*

government outside its sovereign territory'.<sup>42</sup> At the time, however, the issue of the Constitution's extraterritorial application fitted within a U.S. 'rationalization of colonialism as being a first step – in what was going, nonetheless, to prove itself a very long road – towards self-government,<sup>43</sup> thus accounting for the transposition of the legal-colonial scaffolding of the British Empire's model of 'parliamentary imperial sovereignty'<sup>44</sup> to the Philippines which would only become a fully independent state in 1946 while the legal status of Guam and Puerto Rico is that of 'an unincorporated territory of the United States'<sup>45</sup> up to this day.

Although the rise of international law in the United States after the Spanish American War of 1898 took place against the background of a nineteenth century long period of territorial expansion at the expense of Native Americans and did clearly benefit from the dawn of a new corporate commercial US imperialism and from a series of geostrategic colonial considerations which I have introductorily surveyed, a distorted historical image would emerge should the pre-Wilsonian rise of international law in the United States become detached from a brief account of a number of other concomitant factors. Among the latter ranks, firstly, the fact that the US literature on international law was gaining momentum at the turn of the twentieth century.<sup>46</sup> This development relied on a long evolution of the history of international law in the United States which is often traced back to the publication in 1836 of Henry Wheaton's *Elements of International Law*. This was the first book in English language to wear which was by then the still relatively recent neologism that had been coined by Jeremy Bentham<sup>47</sup> in 1789. In the wake of the independence of the American republics from Spain,<sup>48</sup> the university teaching of international law also emerged comparatively earlier in the United States than – some exceptions notwithstanding<sup>49</sup> in Europe in the nineteenth century. The first courses of international law in

the United States were taught in 1846 at Yale by Theodore D. Woolsey, who would also go on to publish in 1860 his 'Introduction to the Study of International Law',<sup>50</sup> the earliest textbook by an US author.<sup>51</sup> During the American Civil War, Harvard Law School (in 1863) and Columbia Law School (in 1865), under the magistrum of Francis Lieber, had already followed suit by offering courses on international law. From the *antebellum* period dates, however, the influential drive of the tradition of the American Christian peace movement for the establishment of mechanisms for the peaceful settlement of international disputes. By then, Benthamite ideals<sup>52</sup> in line with the enlightened idealism of Abbé de Saint-Pierre, J.J. Rousseau and I. Kant appear ingrained in the 'pacifist' religious imagination of a series of early supporters of the international court movement in the United States. The importance of their precursor role on the path that would eventually lead, in the aftermath of the First World War, to the first attempt of transposition with permanent character to the international plane of the institutions that are more readily associated with the rule of law and the doctrine of separation of powers in domestic settings has been highlighted by a number of authors.<sup>53</sup> According, for instance, to M. Janis, the US Christian peace movement was rooted in the pacifist testimony of the Quakers<sup>54</sup> and other peace churches. It was heralded by pacifists such as N. Worcester, the author of *A Solemn Review of the Custom of War* in 1814, and W. Ladd, the author of *Essay on a Congress of Nations* in 1840 who became the President of the American Peace Society after the consolidation of the various peace societies throughout the country. Other peace activists and 'religious utopians who flourished between 1815 and 1860 in America'<sup>55</sup> include D.L. Dodge and E. Burritt.<sup>56</sup>

After the American Civil War (1861–1865), Bentham's work continued to exert a great influence on the late nineteenth-century penchant for the codification of the science of international law in the United States. The application of the utilitarian method to international law was embodied in authors who joined the codification project such as Francis Lieber, whose codifying efforts on the international law in armed conflicts had binding

42. See G. Neuman, 'The Extraterritorial Constitution After Boumediene v. Bush', 82 *Southern California Law Review* 259 (2009).

43. J.E. Kerr, *The Insular Cases: The Role of the Judiciary in American Expansionism* (1982), at 112 *id.*, above.

44. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1915), at 101. See his analysis of the Colonial Laws Validity Act of 1865.

45. Unincorporated territory is a legal term of art in US law denoting an area controlled by the government of the United States 'where fundamental rights apply as a matter of law, but other constitutional rights are not available'. See, e.g. US Insular Areas Application of the US Constitution, United States General Accounting Office, Report to the Chairman, Committee on Resources, House of Representatives (1997), at 24.

46. See further Raymond and Frischholz, at 827, quoted above.

47. J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1789).

48. For the early rise of international law in Latin America in the 1820s and for the establishment of the first chairs of international law in Europe and in Spain in the early 1840s, see I. De la Rasilla, 'El estudio de la historia del Derecho internacional en el corto siglo XIX español', 23 *Rg – Rechtsgeschichte, Legal History*, at 48-65 (2013). A slightly adapted English version from the Spanish original one can be consulted as I. De la Rasilla, 'The Study of the History of International Law in the Short Spanish Nineteenth Century', 13 *Chicago-Kent Journal of International and Comparative Law* 2, at 122-50 (2013).

49. *Ibid.*

50. T.D. Woolsey, *Introduction to the Study of International Law* (1860).

51. See J.M. Raymond and B.J. Frischholz, above at 818.

52. See M.W. Janis, 'Jeremy Bentham and the Fashioning of International Law', 78 *American Journal of International Law* 405, at 405 (1984). See also M.W. Janis, 'The Quest for an Ethical International Law', 109 *West Virginia Law Review* 571 (2006-2007).

53. See M.W. Janis, *America and the Law of Nations 1776-1939* (2010), at 72. (For this author 'the international courts of today are the offspring of nineteenth-century American utopians, religious enthusiasts by and large untrained in the law.')

54. In 1947 the Religious Society of Friends (Quakers) was, as a worldwide religious group, awarded the Nobel Peace Prize.

55. Those interested in the peace movement roots in the United States can consult M.W. Janis, *The American Tradition of International Law, Great Expectations, 1789-1914* (2004), at 72-91.

56. For a longer excursus on E. Burritt, see M.W. Janis, 'North America: American Exceptionalism in International Law', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of International Law* (2012) 525, at 537-40.

effects on the US Army,<sup>57</sup> and were to influence subsequent codification efforts at the Hague Conferences in 1899 and 1907, and David Dudley Field, an earlier champion of the codification of international law in the United States who published the 702 articles of his *Draft Outlines of an International Code*<sup>58</sup> in 1872. If Benthamite ideals of ‘common and equal utility of all nations’ filtered into international law, these were to become complemented by the very understanding of law as a science, which went global<sup>59</sup> in the mid-nineteenth century. American ‘Classical Legal Thought’<sup>60</sup> reflected, indeed, the adaptation of the new legal science to the peculiar traits of the American legal landscape of the mid-late nineteenth century while in the international legal field, the development of the positivist method, codification and the quest for the clarification of the sources of the international legal order became influenced by the development that natural sciences had been experiencing since the mid-nineteenth century. In response to this scientific impulse, and on the basis of the precedent set by Cadwalader,<sup>61</sup> Wharton published his *American Digest of International Law* in 1886.<sup>62</sup> Moreover, the new conception of law as a science also influenced the slow transformation of the study of international law as a university discipline in the United States. The spread of a growing preference for the ‘case method’ as a method of legal instruction in the wake of its establishment at Harvard Law School under Langdell extended itself to new didactic methods for the study of international law. In 1886–1887, Freeman Snow offered the first case-method-based course in international law at Harvard Law School. Snow was also the author of the first casebook on international law published in the United States in 1893. With this book, Snow attempted to fill the gap of what he perceived to be the only drawback of the case method as a system of instruction in international law vis-à-vis traditional lectures and textbooks; this, according to Snow, was the ‘difficulty of finding the necessary materials in a convenient form’.<sup>63</sup> The pioneer casebook on international

law by Snow (1893),<sup>64</sup> and Bassett Moore’s six volumes on *International Arbitrations* (1898)<sup>65</sup> are also representative of the escalating attention in the United States to international legal practice by the time of the Spanish American War. In the post-1898 period the detailed scientific positivistic attention to state practice inaugurated by Wharton’s efforts<sup>66</sup> was continued by the eight volumes of the new *American Digest of International Law* edited by John Bassett Moore<sup>67</sup> in 1906 as well as by a series of treatises on international law by American authors. Works such as the one that had been published by George Grafton Wilson and George Fox Tucker<sup>68</sup> in 1901 were to be republished in different editions and re-editions over the following decades. This treatise-type work was complemented by a series of specialised works on topics of direct interest to the management of the foreign policy management realm like the one published in 1902 on the treaty-making power of the United States by Charles Henry Butler.<sup>69</sup> Among Snow’s students at Harvard Law School was James Brown Scott whose own collection of international law cases, which was published in 1902, ‘for 25 years would be the dominant work in the field throughout North-America’.<sup>70</sup> Scott would also become during the 1900s, the animating spirit behind the foundation of the *American Society of International Law* and the first general editor of the *American Journal of International Law*. He would also become, some years later, a US legal advisor in the drafting of the Versailles Treaty and the Statute of the Permanent Court of International Justice. James Brown Scott, who was portrayed by M O Hudson, American judge at the Permanent Court of International of Justice, as the man who ‘fathered and fostered the development of international law during its greatest period of history’,<sup>71</sup> has also been saluted by Raymond and Frischholz as the person who ‘more than any other individual was responsible for the existence of the (American) Society and its Journal’.<sup>72</sup> Paradoxically, perhaps, for a man who had enlisted in the Spanish American

57. US Adjutant-General’s Office, General Order No. 100: instructions for the government of armies of the United States in the field. prepared by L.L.D. Francis Lieber, and revised by a board of officers (1863).
58. D.D. Field, *Draft Outlines of an International Code* (1872). That is soon after J.G. Bluntschli had published his influential code in 1868. See J.G. Bluntschli, *Das Moderne Völkerrecht* (1868). For a commentary, see M.W. Janis, *The American Tradition of International Law, Great Expectations, 1789-1914* (2010), at 118-122.
59. See, magisterially, D. Kennedy, ‘Three Globalizations of Law and Legal Thought’, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006), at 19.
60. See the classic D. Kennedy, *The Rise & Fall of Classical Legal Thought: With a New Preface by the Author, ‘Thirty Years Later’* (2006).
61. J.L. Cadwalader, *Digest of the Published Opinions of the Attorneys General, and of the Leading Decisions of the Federal Courts with Reference to International Law, Treaties and Kindred Subjects* (1877).
62. A Digest of the International Law of the United States taken from Documents issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General (F. Wharton, ed.) (1886).
63. F. Snow, *Cases and Opinions on International Law with Notes and Sylabus* (1893), at iii.

64. *Id.*
65. J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898).
66. M.W. Janis, *The American Tradition of International Law, Great Expectations, 1789-1914* (2010), 122-24, at 124.
67. J.B. Moore (ed.), *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and other International Agreements, International Awards, the Decisions of Municipal Courts and the Writings of Jurists, and especially in Documents Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys General and the Decisions of the Courts, Federal and State* (1906).
68. G.G. Wilson and G.F. Tucker, *International Law* (1901).
69. C.H. Butler, *The Treaty-Making Power of the United States* (1902).
70. J.B. Scott, *Cases on International Law: Selected from Decisions of English and American Courts* (1906). Republished again in 1906 and later in 1922. It was dedicated to the memory of F. Snow because the book had begun as ‘a revision of the late Dr. Snow’s (1893) Cases and Opinions on International Law’. See further, R.D. Nummerger, ‘James Brown Scott: Peace Through Justice’, 41-42 (PhD diss., Georgetown University, 1975 (on file at Harvard Law Library)).
71. M.O. Hudson, ‘Portrait of Dr. James Brown Scott,’ *Harvard alumni bulletin*, XXIII, 419 (1931).
72. J.M. Raymond and B.J. Frischholz, *id.* at 824

War, J. Brown Scott also became, in the interwar period, the greatest and lasting influential champion, of Francisco de Vitoria as the founding father of international law.<sup>73</sup>

### 3 The 'Scientific' Rise of International Law and the Foundation of American Society of International Law

The establishment in 1906 of the American Society of International Law<sup>74</sup> (ASIL) and the beginning of the publication of its journal in 1907 gave a great boost to the discipline of international law as an epistemological community in the United States. As the first section briefly examined, the ASIL was born against the background of a US' expansionist-imperial drive, which having reached the limits of the 'manifest destiny' of continental expansion, had triggered in its quest for overseas expansion, the annexation of a number of group of islands in the Pacific in the 1890s, including Hawaii in 1898, and has led to the Spanish American War in 1898. The first section also offered a brief survey of the evolution of international legal studies in the United States in the nineteenth century while highlighting the influence of the works of a number of international lawyers who belonged to the American peace movement,<sup>75</sup> long-standing campaigners for mechanisms for peaceful international dispute settlement.<sup>76</sup> This second section shall, in turn, examine the influence of other three concomitant factors behind the pre-Wilsonian rise of international law in the United States. These shall include, firstly, a reference to the worldwide boost undergone by the field of international arbitration during the nineteenth century, a phenomenon to which the foundation of ASIL is, as it will be shown, intrinsically associated. This second section also passes review to

both the US domestic culture of legalistic rule and to the early twentieth century liberal hope in the beneficial effects over the shaping of law and public policy of an informed and educated public opinion which are both aspects relevant to the so-called 'moralistic-legalistic' label which, as noted in the introduction, Boyle highlighted as a defining feature of the US international lawyers of this generation.<sup>77</sup> The second section concludes by stressing how the belief in the beneficial effects that an informed public opinion could have on the conduct of foreign policy led to an *avant-la-lettre* academic campaigning in the first years of ASIL in favour of the bolstering of the teaching and study of international law in US law schools. It also examines the activist leading role of James Brown Scott in connection to this and other activities addressed to foster a greater knowledge of international law in the United States and elsewhere during the period.

The successful history of the field of international arbitration during the nineteenth century, and in particular its role as a means of international dispute settlement for the United States, was going to play, indeed, a decisive role in the foundation of the American Society of International Law in 1906. The US Jay Treaty in 1794 (536 awards between 1799 and 1804) had been early identified by J. Basset Moore 'as the turning point in international arbitration fortunes'. Furthermore, the series of cases decided by the 1868 United States-Mexican Mixed Claims Commission and the successful outcome of the 1871 Treaty of Washington<sup>78</sup> to arbitrate the *Alabama claims* together with the dozens of subsequent new cases submitted to arbitration in the following decades, established the reputation of international arbitration among US legal elites. By 1899, the rise of prestige of international arbitration had seen its first institutional outcome in the form of the Permanent Court of Arbitration (which, famously, was never permanent and nor was it a court) which materialised at the 1899 Peace Conference in the Hague and for which Andrew Carnegie – one of the ASIL's founding members – had already in 1903 agreed to build the Peace Palace, future site of the Permanent Court of International Justice in the Hague. In fact, the very foundation of the American Society of International Law stemmed from the Lake Mohonk Conferences, which had been held annually since 1895 on the topic of international arbitration as a dispute settlement mechanism between governments. The Report of the Eleventh Annual Meeting of the Lake Mohonk Conference on International Arbitration<sup>79</sup> (1905) contained the Kirchwey Resolution which was approved by the Business Committee<sup>80</sup> to establish

73. See further J.B. Scott, *The Spanish Origins of International Law. Francisco de Vitoria and his Law of Nations* (1932) and J.B. Scott, *The Catholic Conception of International Law. Francisco de Vitoria, Founder of the Modern Law of Nations, Francisco Suarez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations* (1934).

74. J.M. Raymond and B.J. Frischholz, 'Lawyers Who Established International Law in the United States, 1776-1914', 76 *American Journal of International Law* 802, at 824 (1982) *id.* (noting that 'no other single factor has contributed more to the study, the open discussion, the understanding, and the development of international law in the United States than this organization').

75. R.D. Nurnberger, 'James Brown Scott: Peace through Justice', 8 (PhD diss., Georgetown University, 1975).

76. In fact, the "first international court to be established on this planet was the Central American Court of Justice, created by the Central American Peace conference held at Washington D.C. in 1907 under the chairmanship of Elihu Root (who was, by then, the United States Secretary of State)" William E. Butler, 'James Brown Scott and the American Institute of International Law, New Introduction', in J.B. Scott, *The American Institute of International Law. Its Declaration of the Rights and Duties of Nations* (2010) iii, at xvi. (This Court fell out of existence on 17 March 1918, when its 10-year term lapsed.)

77. See F.A Boyle, *Foundations of World Order, The Legalist Approach to International Relations (1898-1922)* (1999), at 22.

78. Treaty of Washington, May 8, 1871, 12 Bevans 170, 143 Consol. Treaty Ser. 145.

79. See, e.g. F.I. Kirgis, *The American Society of International Law's First Century, 1906-2006* (2006), at 2.

80. See further 'History of the Organization of the American Society of International Law', *Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)*, Vol. 1 (19 and 20, 1907), at 23-39.



the American Society of International Law and the launching of the first periodical in English devoted to the interests of international law in the United States. A committee of seven to research the project further was then established under the leadership of James B. Scott with the support of a stellar group of elite officials and academics who were critical of the ‘unscientific’ character of the peace movement.

Indicative of how important international law was perceived to be in the United States at the beginning of the twentieth century is that the ASIL sprung up, indeed, from the heart of the political ‘establishment’ of that day and age. The founding group included the, by then, incumbent US Secretary of State, as the first President of ASIL (a post that Elihu Root would hold for 18 years). It also comprised three Supreme Court Justices (including Chief Justice Melville Fuller) as vice-presidents of the new society; two former US Secretaries of States; a very large-scale philanthropist Andrew Carnegie (who funded the construction of the Peace Palace); and even the future US President (1909–1913) and then Supreme Court’s Chief Justice (1921–1930), W. Howard Taft who was by then Secretary of War and had previously gained experience in colonial rule as the first Governor General of the Philippines between 1901 and 1904.<sup>81</sup> The constituent assembly of the Society took place in New York City on 12 January 1906, and the first issue of the American Journal of International Law (AJIL) was published in 1907. The AJIL became the first periodical ‘devoted exclusively or indeed generally to the exposition and development of international law’ to be published in English language in the United States. Its release helped to stimulate the production of international legal literature and to re-channel the previously dispersed international legal publications from other law reviews. Moreover, its influence would extend beyond the domestic US settings. The AJIL would in fact be also translated into Spanish and distributed in Latin American quarters between 1912 and 1922 until a new generation of Latin American journals of international law (notably the *Revista Mexicana de Derecho Internacional* (from 1919) and the *Revista Argentina de Derecho Internacional* (from 1920)) saw the light around the same time the Versailles Treaty was being signed in Paris.<sup>82</sup>

The foundation of the American Society of International Law in 1906 coincided with the heyday of positivism in international law. The Kirchwey Resolution itself had stressed the ‘scientific character of international law that should serve as the focus for the peace movement’.<sup>83</sup> This scientific spirit marked an enduring de-politicisation of the peace movement in exchange for scientific

international legal ideas. This development has been aided by the rise of the ‘scientific’ method<sup>84</sup> across the social sciences in the nineteenth century. As it happened in other fields of social sciences, the rise of the scientific legal method jumped on the bandwagon of the development that, since the mid-nineteenth century, natural sciences had been experiencing. This was the period of industrial revolution and breakthroughs in physics, biology, medicine, zoology and technical-applied sciences in transport and communications. The prestige of ‘science’ also contributed decisively to the rise of positivism in international law<sup>85</sup> through the importation of burnished categorical modes of thought to bear scientifically against the influential ‘Austinian challenge’ that, since early in the nineteenth century, had influentially presented international law as ‘positive international morality’.<sup>86</sup> Classificatory schemes were designed<sup>87</sup> to be set against the disorder of international relations in order to identify the actual behavior of sovereign states and the actual laws that those states created through their conduct. In the wake of the spread of codification, ‘this scientific methodology favored, then a movement toward abstraction – a propensity to rely upon a formulation of categories and their systematic exposition as a means of preserving order and arriving at the correct solution to any particular problem.’<sup>87</sup> The scientific approach was increasingly seen as a precondition for the manageable progressive development of international law. The spirit of the progressive view channeled through positivism is captured by Lassa Oppenheim, the author of the most influential treatise in the English language of the early twentieth century,<sup>88</sup> writing in the by then just barely launched American Journal of International Law (AJIL) in 1908 ‘for the knowledge of realities enables the construction of realizable truths, in contradistinction to hopeless dreams’.<sup>89</sup>

The aspirational equation of peace-and-justice with the scientific international law embodied by the legal-universalist high-mindedness of the new organisation would, however, soon be combined with a strict ‘Americanness’ in the works of the organisation. Although the

81. *Ibid.*

82. The Spanish translation of AJIL was subsequently replaced by *Revista de Derecho Internacional* which was published under the aegis of the American Institute of International Law. See further J.B. Scott, ‘The Revista de Derecho Internacional’, 16 *The American Journal of International Law* 437 (1922).

83. See ‘History of the Organization of the American Society of International Law’ (above n. 79)

84. See representatively L. Oppenheim, ‘The Science of International Law: Its Task and Method’, 2 *American Journal of International Law* 313, at 333 (1908) (Writing in the second volume of the American Journal of International Law, Oppenheim stressed that ‘The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and researcher may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law-making conventions’).

85. Conceived as the study of international law in force as this emanates from the absolute sovereign will of the State. Vid., e.g. generally, A.T. y Serra, *Historia de la Filosofía del Derecho y del Estado. Idealismo y positivism*, 3rd edn. (2004). In English, also by a Spanish author, see M. García-Salmones, *The Project of Positivism in International Law* (Oxford University Press 2013).

86. J. Austin, *The Province of Jurisprudence Determined* (1832).

87. A. Anghie, ‘Finding the Peripheries. Sovereignty and Colonialism in Nineteenth Century International Law’, 40 *Harvard International Law Journal* 1, at 21 (1999).

88. L. Oppenheim, *International Law* (2 Volumes) (1905/1906).

89. L. Oppenheim, ‘The Science of International Law: Its Tasks and Method’, 3 *American Journal of International Law* 333, at 355 (1908).

founders of ASIL were, as we have seen, the intellectual inheritors of a nineteenth century peripheral idealistic tradition, they were also the elite members of a rising semi-peripheral Western country which after having extended and consolidated its own domestic frontiers through continental expansion largely at the expense of American indigenous peoples during the nineteenth century, had just, experienced its own transition into an imperial power with overseas territories.<sup>90</sup> The early influence of the rise to a foreign policy generation of ‘lawyers qua lawyers’ who reached the apex of their influence in shaping US foreign policy during the Progressive Era (1890s to 1920s) is, perhaps, shown by how the programme of the first annual meeting of the Society on 19–20 April 1907 included a reception by the President of the United States of the members of the Society at the White House. This lego-instrumentalist nationalist bias was, from the onset, conveyed by the organisation’s ‘particular interest in what came to be called the Foreign Relations Law of the U.S. and in international law issues of particular interest for the U.S.’<sup>91</sup> This underlying nationalist drive in the works of the new American epistemological community must, however, be put in connection with how in Europe, at the time of the foundation of ASIL, the climax of positivist international legal theories had led to the almost ‘absolutist’ theoretical justification of the state’s freedom to bind itself externally to international legal obligations. Indeed, since the late nineteenth century, the rise of ‘scientific’ method<sup>92</sup> which supported the nation-state building project in the age of imperialism,<sup>93</sup> had gone hand in glove with the partial disbandment of natural law doctrines in international law. By the latest stages of the European ‘long nineteenth century’<sup>94</sup> in a European scenario of competing powers with overseas empires and burgeoning nationalist passions which was ineluctably heading towards the First World War, international legal theorists saw international law in marked voluntarist-dualist terms either as the ‘state’s external

law’, as a ‘law of coordination’, presided over by E. Kaufman’s principle of ‘*nur, der, der kann, darf auch*’,<sup>95</sup> as a product, in Jellinek’s description, of the state’s ‘self-commitment or self-limitation’<sup>96</sup> or else, as conceptualised by Heinrich Triepel, as a common will resulting from normative agreements (*Vereinbarung*)<sup>97</sup> in which the domestic and international legal orders remained separated as two distinct different legal systems.<sup>98</sup> Despite the dominance of dualist approaches on the international legal theoretical front, this period also witnessed the emergence of some positivist monist theories of international which accorded, none the less, the normative supremacy to municipal law over international law, as well as the experimentation with the refashioning of dualist theories, prominent among which was Dionisio Anzilotti’s normativist approach<sup>99</sup> that fixed *pacta sunt servanda* as an a priori assumption in order to surpass strict voluntarism.

The nationalist bias in the development of international law earlier on channeled by ASIL did, however, not interfere, with the fact that one of the main focuses of development of the earlier ASIL’s works was the devising of peaceful means of international dispute settlement. These goals included, as noted by Boyle, ‘the creation of a general system for the obligatory arbitration of disputes between states (...) the establishment of an International Court of Justice (...) and the codification of important areas of customary international law into positive treaty law’.<sup>100</sup> It is because of their championing of this scientific development of peaceful international legal mechanisms that this pre-Wilsonian generation has been characterised as belonging to the ‘moralistic-legalistic approach to international relations’ which is a term originally used by realist scholars in the aftermath of the Second World War to characterise the approach to international relations adopted by the interwar generation of international lawyers. Two characteristic features of the American culture in the twentieth century also helped to foster the establishment of the American Society of International Law and to shape the approach of the pre-Wilsonian generation of international lawyers. The first of them is the US domestic culture of legalistic rule. The second one is the early Twentieth Century’s liberal hope on the beneficial effects of an informed and educated public opinion over the shaping of law and public policy. This hope in the beneficial effects that an informed public opinion might have on the conduct of foreign policy served as a rationale for a strong campaigning in favour of the bolstering of the teaching and study of international law in the US law

90. See E. Hobsbawm, *The Age of Empire, 1875-1914* (1989), at 68 (noting that ‘at the turn of the century, the USA followed international fashion by making a brief drive for a colonial empire of its own’).

91. *Ibid.* at 17. See as representative of this tendency, C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922).

92. L. Oppenheim, ‘The Science of International Law: Its Task and Method’, 2 *American Journal of International Law* 313, at 333 (1908). Writing in the second volume of the *American Journal of International Law*, Oppenheim stressed that ‘The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and researcher may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law-making conventions.’

93. On the history of international law in Latin-America, see e.g. L. Obregón, ‘The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America’, 23 *Wisconsin International Law Journal* 145, at 148 (2005) and e.g. A.B. Lorca, ‘International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination’, 47 *Harvard International Law Journal* 1, Winter (2006).

94. See E. Hobsbawm’s *Conspicuous Trilogy: The Age of Revolution, 1789-1848* (1962), *The Age of Capital, 1848-1875* (1975), and *The Age of Empire 1874-1914* (1987).

95. ‘Only the one who can, may also’ E. Kaufmann, *das wesen des völkerrechts und die clausula rebus sic stantibus* 151 (1911).

96. See M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law* (2002), at 198.

97. H. Triepel, *International Law and National Law* (1899).

98. H. Triepel, ‘Les rapports entre le droit interne et le droit international’, *Recueil des Cours de l’Haye* 73 (1923).

99. G. Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’, 3 *European Journal of International Law* 123 (1992). See also, D. Anzilotti, *Corso di diritto internazionale*, 3rd Ed. (1928).

100. *Ibid.* at 22.

schools. This initiative was early on channeled through the recently constituted ASIL.

First, the first characteristic feature which influenced the pre-Wilsonian generation of international lawyers was US domestic culture of legalistic rule. According, indeed, to the classic theorist of British constitutionalism, A.V. Dicey's writing in the early 1910s, 'the main reason why the U.S. has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation'.<sup>101</sup> This culture of legalistic rule, captured in the conspicuous *non sub homine sed sub deo et lege*, and the related predominant role that lawyers played in the US domestic realm and in shaping public opinion and ideas on national policy would be transposed to the framework of international affairs through a new generation of 'lawyers qua lawyers'. The projection of the creed that America was a government of laws, not of men<sup>102</sup> would become a blank check for a generation of lawyers who became the new elite intelligentsia entrusted with governing the international realm. The result of balancing the anti-colonial spirit of the *Declaration of Independence* with the domestic cultural legalist approach was that the American imperial project soon found itself wrapped in a legalist approach to international relations that would culminate in the Wilsonian promotion of international law and the development of international organisations for the rest of the world. The second feature of the American culture that influenced the emergence of the legalist approach to international relations among the elite intelligentsia at the turn of the twentieth century was the confidence in the positive role of public opinion which was held to be particularly strong in its effects on the American political landscape. According to another external observer of the United States in this epoch, J. Bryce – Regius Professor at Oxford and highly influential British Ambassador to the United States (1907–1913) – echoing a liberal disposition also prevalent in the United Kingdom at the time, which stressed the positive effects of an informed democratic public opinion in fostering progress in public policy and law,<sup>103</sup> in 'no country is public opinion so powerful as in the United States'.<sup>104</sup> 'Towering over presidents and state legislatures, over conventions, and the vast machinery of party, public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it',<sup>105</sup> the almost colossal quality that Bryce attributes to public opinion in the United States finds an echo in the first ever article published in the *American Journal of International Law*. Under the title 'The Need of Popular Understanding of International Law', the first President of the

ASIL, and by then also the 38th US Secretary of State, Elihu Root wrote:

The increase of popular control over national conduct, which marks the political development of our time, makes it constantly more important that the great body of the people in each country should have a just conception of their international rights and duties. (...). Of course it is not to be expected that the whole body of any people will study international law; but a sufficient number can readily become sufficiently familiar with it to lead and form public opinion in every community in our country upon all important international questions as they arise.<sup>106</sup>

The goal of reaching out to the lay person in order to plant the seeds for the dissemination in the popular conscience of the need to abide by international legal principles in the ordered management of the state's foreign relations was one of the rhetorical factors that led to an early campaigning in favour of the bolstering of the teaching and study of international law. Indeed, among the declared goals of the ASIL was that of stimulating interest in international law studies among representatives of US Law Schools. This is the goal that was further spurred by J.B. Scott's position as the Director of the International Law Division of the Carnegie Endowment for Peace. J. Brown Scott, the ultimate hero of the foundation of the American Society of International Law, was portrayed by the ASIL's journey-co-traveler as 'our mentor, our engineer, our constant supporter from the beginning'.<sup>107</sup> Praise, bordering on eulogy, is a recurrent trait in almost any portrayal that his coetaneous offered of the J.B. Scott who was also nominated six times for the Nobel Peace Prize and became the recipient of seventeen honorary degrees, including one by Salamanca University where Francisco de Vitoria had been Prima Professor of Sacred Theology four centuries earlier. Indeed, other than being the first Editor-in-Chief of the *American Journal of International Law* between 1907 and 1924, and a constant contributor to his pages, this so portrayed as 'behind the scenes leader'<sup>108</sup> of the American academia of international law during the first third of the twentieth century, was also a powerful engine behind the establishment of international law in American law schools.

This educational drive was consistent with Brown Scott's creed that the path to peace was a 'process of education, not a process of treaty making and treaty breaking (...) winning over one generation, winning over other generation, until justice shall be the great interest of the world'.<sup>109</sup> Yet despite J.B. Scott's extensive campaigning and activist role for the internationali-

101. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1915).

102. Boyle, *id.* (1999) at 17

103. See representatively, A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (1905).

104. J. Bryce, *The American Commonwealth* (1888), with an introduction by G.L. McDowell, 909 (1995).

105. *Id.* at 923.

106. E. Root, 'The Need of Popular Understanding of International Law', 1 *American Journal of International Law* 1 (1907).

107. W.I. Hull, quoted by R.D. Nurnberger, 'James Brown Scott: Peace through Justice', 63 (Phd Diss., Georgetown. University, 1975).

108. R.D. Nurnberger (1975) at 8.

109. J.B. Scott, *International Organization: Executive and Administrative, Proceedings of the American Society of International Law* 105 (1917).

sation of legal education both domestically and abroad, international law in American law schools remained almost marginal in the first half of the twentieth century. The first endowed chair of international law at Harvard Law – the Bemis professorship in international law – had been established in 1898 and, by 1907, only ten law schools in the United States offered international law.<sup>110</sup> This status quo was not greatly affected by the holding of the First Conference of Teachers of International Law (1914) organised by the ASIL. The ASIL ‘earnestly requests all law schools which now offer no instruction in international law to add to their curriculum a thorough course in that subject’ or the ASIL’s other calls which ‘urged the American Bar Association to take action towards the inclusion of international law among law school subjects and those required for admission to the bar’.<sup>111</sup> Moreover, it should be noted that J.B. Scott allied his institutional efforts to bolster the teaching of international law in the first half of the twentieth century with the spreading of a particular type of international legal education. He, who has been educated at Harvard in the prime of its new Socratic case method, also became in 1906 (until 1915) the first general editor of the American Casebook Series. J.B. Scott wrote in the preface to the first volume of the collection he had promoted, a strong argument in favour of the Harvard method.<sup>112</sup> His profession of faith in the case method continued unaltered throughout the years. In the updated edition of his own *Cases on International Law* (1922) released in the framework of the American Casebook series, Scott argued for the greater availability of foreign material in the following terms: ‘it is devoutly to be wished that members of the profession in foreign countries (...) produce collections of cases, not only for the benefit of the profession to which they belong, but also for the purpose of instruction in the law schools, universities, and other seats of learning in their respective states’.<sup>113</sup>

The case method approach and the underpinnings of classical legal thought that accompanied it, found a cor-

ollary in 1910 when Scott also became the first President of the American Society for the Judicial Settlement of International Disputes. A staunch defender of international law as part of American domestic law, in his author’s preface, Scott stressed that the idea underlying his *Cases on International Law* was ‘that international law formed a part of the common law of England and that, as such, it passed to the United States with that law of which it formed a part’.<sup>114</sup> After serving as a technical delegate for the US government at the second Hague Conference, J.B. Scott will go on to publish his authoritative book *The Hague Conferences of 1899 and 1907*. In this work, Scott builds on the domestic judiciary analogy, and traces parallels between the Roman court system of justice, the development of the US federal judiciary system, and the progress of permanent bodies of international dispute settlement on the international stage.<sup>115</sup> By the outbreak of the First World War, in 1914, the US Bureau of Education published a report declaring the triumph of the new system of university legal education which put legal practice at its heart in the United States: ‘today the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country’.<sup>116</sup> Meanwhile, held in 1925, the Second Conference of Teachers of International Law reported that a study of 110 law school catalogues showed 65 carrying no course in international law, and 45 offering some kind of a course. This report added that ‘a contemporaneous survey of the 61 schools then members of the Association of American Law Schools gave 31 as offering the subject and 30 not teaching it’.<sup>117</sup>

## 4 The Spanish Ghosts of Harvard International Law Library

The second section has briefly examined the effects over the establishment of the ASIL of the role of international arbitration during the nineteenth century as well as the influence that the US domestic culture of legalistic rule and the early twentieth century liberal hope in the beneficial effects that the shaping of law and public policy had in promoting the development of international legal education in the United States at the height of the case method. The third section, in its turn, continues to stress the importance accorded by the pre-Wilsonian generation to the promotion of international legal education in the United States by showing, first, how as soon

110. C.N. Gregory, ‘The Study of International Law in Law Schools’, 2 *American Law School Review* 41, at 45 (1907).

111. See *Proceedings First Conference of Teachers Of International Law. Proceedings of the American Association of Professors of International Law* (1914) (noting ‘Resolved, That, in recognition of the growing importance of a knowledge of international law to all persons who plan to devote themselves to the administration of justice, and who, through their professional occupation, may contribute largely to the formation of public opinion and who often will be vested with the highest offices in the State and nation, this Conference earnestly requests all law schools which now offer no instruction in international law to add to their curriculum a thorough course in that subject’). Held in 1925, the Second Conference of Teachers of International Law reported that a study of 110 law school catalogues showed 65 carrying no course in international law, and 45 offering some kind of a course’. This report added that ‘a contemporaneous survey of the 61 schools then members of the Association of American Law Schools gave 31 as offering the subject and 30 not teaching it’. *The Second Conference of Teachers of International Law and Related Subjects Held in Washington, April 23-25, 1925*, 19 *American Journal of International Law* (1925).

112. W.E. Mikell, *Cases on Criminal Law Selected from Decisions of English and American Courts* (1908).

113. J.B. Scott, *Cases on International Law* (1926), at xvii.

114. *Id.* at xii.

115. J.B. Scott, *The Hague Conferences of 1899 and 1907* (1909).

116. United States Bureau of Education, prepared by the American Bar Association’s Committee on Legal Education in 1914, quoted in W.R. Vance, *Preface to the American Case Book Series* (1922).

117. See the second conference of teachers of international law and related subjects held in Washington, 23-25 April 1925, 19 *American Journal of International Law* (1925).

as 1911 (*i.e.* barely 5 years after the establishment of the ASIL) Harvard Law School realised the need of disposing of the best possible array of research materials on international law. This very little known, yet highly illustrative episode shows how the world's greatest bibliographical treasure of international law and auxiliary sciences of its time and age ended up on the shelves of Harvard Law Library on the eve of the First World War. This historical episode bore witness of the early influence of the pre-Wilsonian generation of international law in fostering the academic prestige of international law the United States in the 1900s. Moreover, this episode is also extremely symptomatic of the unstudied cultural act of silent heritage that took place between the moribund Spanish Empire and the United States after the Spanish American War. This brief recounting, for the first time in English language, of both the Spanish and American sides of the story of the extraordinary library of the Marquis de Olivart is also addressed to show that daring into a narrative style beyond the trodden paths of the often overlapping standardised histories of international law is one of the methods that the historian of international law can resort to in order to illuminate little-known aspects of the past and offer new angles of approaching the study and evolution of international law. This section concludes with a return to the multifaceted figure of J. Brown Scott up to his participation in the drafting of the statute of the permanent court of international justice which stands in itself as the symbolic culmination of many of the intellectual efforts of the nineteenth century and early twentieth century's generations of international lawyers.

The story, for our purposes, of the library of the Marquis d'Olivart begins barely 3 weeks after the *Titanic* sank, in mid-April 1912, not far away from the frozen coasts of New Scotia. Around that date, Roscoe Pound, who since 1910 had been the Story Professor of Law at Harvard Law School, probably uttered a triumphant laugh on being presented with his copy of a Bostonian journal established in 1889.<sup>118</sup> The cause of the likely rejoicing of the future longest-serving dean of Harvard Law School (1916–1936) were two identical half-length standing figures – one facing right and the other left – shaking hands portrayed on the cover of the May issue of *The Green Bag – An Entertainment Magazine for Lawyers*. Indeed, the manoeuvres of Pound, the founder of 'sociological jurisprudence',<sup>119</sup> had been decisive in creating the felicitous circumstance which had led to the photomechanical prints of the severely business-suited, moustached and bespectacled figure of a Spanish aristocrat, immortalised on the cover of the *Green Bag* in 1912, by courtesy of the *Boston Herald*. Beneath the photograph a caption read: 'The Marquis de Olivart

shaking hands with himself, a picture which gave him much enjoyment'.<sup>120</sup>

Some months earlier, the section devoted to the 'Analysis of Leading Events of the Legal World'<sup>121</sup> of the 1911 December issue of *The Green Bag* had reported the purchase in October 1911 by Harvard University of the 'library that has long been regarded as the most complete collection of works relating to international law and diplomacy'.<sup>122</sup> The news of the fabulous contents of the Marquis de Olivart's collection was given in the interior pages of the May issue under the heading 'The Acquisition of the Olivart Collection by Harvard Law School'.<sup>123</sup> According to *The Green Bag's* account, the Spanish bibliographical treasure Harvard University had acquired comprised nearly '60,000 volumes', and 'upward of 15,000 titles' including '1,550 volumes in Latin, some of them dating back to the 15th century'.<sup>124</sup> The Marquis de Olivart, writing in the 1927 updated edition of his *Treatise of International Law* (one of Spain's earliest and leading works in the field through it several editions since 1887) considered that his over a quarter century-long compilation of bibliographical materials had been the 'most practical and real service' he had given to the "discipline that I have made my life's profession."<sup>125</sup> By then, Olivart's dream of a '*Cosmopolis* of the science of international law'<sup>126</sup> was resting on the shelves of Harvard Law Library where it was being preserved and augmented. Although the merits of the acquisition of Olivart's collection are still attributed

118. *The Green Bag*, cover (1889).

119. See generally D.M. Rabban, *Law's History American Legal Thought and the Transatlantic Turn to History* (2013), at 423-469.

120. Xxiv, A.W. Spencer (ed.), *The Green Bag, An Entertaining Magazine For Lawyers* 220 (1912).

121. Xxiii, A.W. Spencer (ed.), *The Green Bag, An Entertaining Magazine For Lawyers* 665 (1911).

122. *Ibid.*

123. Xxiv, *The Green Bag* 233 (1912).

124. *Ibid.*

125. Ramón de Dalmau y de Olivart, *El Derecho internacional público en los últimos veinticinco años* (1927).

126. *Id.*

to Dean Pound's 'sensitive antennae',<sup>127</sup> the concrete circumstances of its Scarlet Pimpernel-like purchase in Madrid are still covered by a centennial veil of scholarly mystery and no account of the Spanish side of the story has been available in English language until now. The Olivart Collection came just in time for it to be included in the list of more than five hundred libraries of the United States and Canada that *The Law Library Journal* published in 1912. There, the 150,000 volumes of Harvard Law School represented triple the contents of the second best university library in North America. The closest to it in terms of volumes was a library of one of the American Bar Associations that held 96,000 books. Not even the Library of the US Congress and of US Supreme Court, with 145,000 volumes, could dispute Harvard Law School's reputation, which has remained irrefutable ever since, of possessing the largest academic law library in the world.<sup>128</sup> The origins of how the Marquis de Olivart's collection came to provide Harvard University with such a lasting distinguished honour began in 1898 when the Marquis offered his library to the Spanish Ministry of the State.<sup>129</sup> Difficult negotiations ensued, but Olivart insisted as *conditio sine qua non*

that the collection remained united, and that guarantees for its conservation, extension and regular updating, with him occupying the position of curator, were established. The Spanish Ministry's final acceptance of Dalmau's requirements took place in 1902 and a commission to organise the gradual extension and regular updating of the library with Dalmau holding a consultative vote was set up. Moreover, the Marquis was made legal advisor to the Spanish Ministry of Foreign Affairs so "that when examining certain international questions, the absolute legal criterion concerning them may be established"<sup>130</sup>.

However, this tribute by the Spanish government to the late nineteenth century rise in prestige of scientific positivism in international law soon evaporated: promises were not turned into deeds; the brand new bibliographical commission did not convene for 2 years; the library was left in a state of abandonment; and the Marquis' well-paid advisory position was suppressed and replaced with another post of lower rank at 10% of his previous salary. In view of this, Dalmau requested that his collection, which was languishing in the attic of the Ministry, be restituted to him, and so it was accorded in 1905. However, in 1911, a new spur of patriotism apparently led the Marquis to offer again his library to the Spanish government 'half-price its actual value'. By then, the extraordinary fame of his library, established by the 'Catalogue of a Library of International Law and Auxiliary Sciences', published in 1899 had been further enhanced by Dalmau de Olivart's publication of its own 'Bibliography of International Law Catalogue of a Library of International Law and Auxiliary Sciences' (including diplomacy, politics and history) published in Paris in several volumes (1905–1910). Again, Dalmau requested of the Ministry a series of conditions relating to the preservation, extension and updating of the collection, the concession of a foreign diplomatic post, and the granting of another noble title. The pre-agreement drafted by the Marquis himself was contained in a letter addressed to José Canalejas, the President of the Spanish Council of Ministers (1910–1912). It was divided in two parts. The first part was entitled 'public agreement' and dealt with aspects related to the preservation, extension and updating of the library. The second part, or 'private agreement', which was to remain secret, elaborated in detail on the remainder of the conditions established by Dalmau. On the 31st July 1911, both parts of the contract were accepted by the Spanish government. However, on seeing that the agreement was not being implemented, Olivart addressed several letters to the Spanish Prime Minister, José Canalejas. The last of these containing an ultimatum was sent the evening before a final agreement between the agent commissioned by Harvard, Dr. Lichtenstein, and the Marquis was reached. In his correspondence to Canalejas, Dalmau stressed that Harvard's offer was becoming more 'pressing'. Canalejas answered that letter the very same

127. A.E. Sutherland, Jr., 'One Man in His Time', 78 *Harvard Law Review* 7 (1964) (Attributing Pound with possessing 'sensitive antennae that kept him in touch with many countries'.) Note, however, that Sutherland's account does not mention Pound's agent by name. Instead, Sutherland simply notes 'Pound immediately employed a book-buyer in Germany to go to Spain to acquire Olivart's Library for the Law School'. Roscoe Pound's own account of the course of events refers in retrospect only by name to Dr. Lichtenstein's role in the Olivart operation by noting how in the spring of 1913 an opportunity to acquire 'an adequate library of South American law books came when Dr. Lichtenstein, who had served so well the school in buying Olivart's library, went to South America for a year'. Earlier, he had only indirectly referred to Dr. Lichtenstein as 'a skillful book buyer in Paris'. R. Pound, 'The Harvard Law Library', V *Harvard Library Bulletin* 290, at 295 (1951). But, in a more accurate narrative, Sutherland's anonymous 'German book-buyer' transforms himself into a US academic holding a Ph.D. in German History from Harvard University in 1907 whose Jewish origins had seemingly relegated him to a role as scholar librarian at Northwestern University. According to the interesting account of Lichtenstein's later pioneering role as acquisition agent for American libraries in South America and his related bibliographical vicissitudes and adventures in 1911–1912, by the time of the acquisition of the Olivart collection, Dr. Lichtenstein had indeed been 'granted a leave of absence from Northwestern to undertake another European tour for Harvard and ranged widely over the Continent'. R.D. Wagner, 'Walter Lichtenstein in South America: Books, Voyages, and the End of a Career', 23 *Libraries & Culture* 295, at 325 (1988). Ralph D. Wagner characterises Dr. Lichtenstein as one of the 'few tragic figures of library history' for his expulsion due to his German sympathies and accusations of him being a German spy from American academic circles after the First World War (*ibid.* 322). Ralph D. Wagner's reference to the Jewish lineage of Dr. Lichtenstein as a likely impediment to achieving a teaching position in East Coast universities is based on Coolidge to Lichtenstein, 28 March 1908, Coolidge Papers, Harvard University Archives. Yet thanks to him, 'Harvard gained a nearly complete set of South American statutes' and most of its collection of South American history books as well as Olivart's library, the most complete international law collection of its time and age. Dr. Lichtenstein definitively left academia (1880–1964) in the aftermath of the First World War and ended his career in 1946 as the Vice-President of the First National Bank of Chicago.

128. *The Centennial Story of the Harvard Law School (1817-1917)* 86-122, at 109-10 (1918).

129. The Ministry of the State is the former denomination of the Spanish Ministry of Foreign Affairs and Cooperation.

130. A.B. Altemir, 'El marquès d'olivart i el dret internacional (1861-1928)', *societat internacional i aportació científica* 84-94 (2000).

night, arguing that a final decision on the matter could not be taken within the deadline imposed by the Marquis. The price of 57,500 French francs was paid in gold coin on 27 October 1911 by Harvard University and the books were shipped to the United States. The Marquis continued to defend his unstained patriotism in a letter he addressed to the President of Harvard University and its Harvard Law Librarian on 29 April 1912, where he claims that his offers to the Spanish government were 'gratuitous and generous'. In Roscoe Pound's own published account of Dr. Lichtenstein's manoeuvres appears, however, the following note: 'we were told afterward that, hearing some rumor that the *Cortes* was considering a measure to prohibit the exportation of great libraries and collections of books and manuscripts out of Spain,<sup>131</sup> the buyer employed a transportation agency to box up the whole library at once, and had it shipped to France before the law could be enacted and the government could interfere'.<sup>132</sup> Roscoe Pound was probably unaware of the details of the Spanish side of the story of the Marquis de Olivart's library; neither did he probably know of the correspondence conducted by the Marquis with Prime Minister Canalejas. It is also uncertain whether Pound knew about the diplomatic contacts held by the US Embassy in Madrid at the request of Harvard University with the Spanish government over the former's intention to acquire Dalmau's library or, as the Marquis hinted in his later correspondence, of the negative answer that these inquiries had received from the Spanish government. In April 1912, while Dalmau de Olivart was being banqueted in the United States in the company of professors Fiore and Lange, a photographer from the Boston Herald took the picture of the Marquis that was to appear, altered by the magic of photomechanical ingenuity, on the cover of the May issue of *The Green Bag*. On 12 November 1912, the anarchist Manuel Pardiñas assassinated the reformist José Canalejas as the Spanish Prime Minister paused on his morning walk in *La Puerta del Sol* to study the volumes on display in a bookseller's shop window.

Exactly a month before the Marquis de Olivart appeared on the cover of the May issue of the *The Green Bag*, a portrait of James Brown Scott appeared decorating its April issue.<sup>133</sup> The piercing intellectual-looking eyes, glittering below a balding head, with a hand resting on an open volume of his, were accompanied by an article penned by Robert Lansing<sup>134</sup> (1864–1928). Lansing, who would soon become the 42nd US Secretary of State (1915–1920) praises in it James Brown Scott's labours up to that day in the service of the cause of internationalism, which he defines as 'the application to the relations between nations of the altruistic idea which per-

meates society'.<sup>135</sup> The covers of the April and May issues of *The Green Bag* remain mute witnesses of the relationship between the greatest collection of international law works gathered by a national of the moribund empire, which had been deprived of its last relics by the 1898 Spanish American War, and the man who inspired by that war, had founded the *American Society of International Law* and, in doing so, helped to lay the foundations for the American orientation in the field of international law throughout the early twentieth century. J.B. Scott remained faithful to a natural law leaning in international legal studies throughout his career. According to Scott, 'From justice nations must derive their rules of law. And this is so, although they may affect to consider themselves the source instead of the agent whereby the principles of justice, expressed and made visible in rules of law, enter the minds and the thoughts of men before they pervade the practice of nations'.<sup>136</sup> This moralistic-legalistic approach would bring him closer and closer to a classic Spanish tradition of international law that Brown Scott did himself much to reconstruct. He did so in his role as Editor-in-Chief of the collection of *Classics of International Law* from 1906 until 1940 and as the director of the international law division of the Carnegie Endowment. The educational efforts of Brown Scott were, nonetheless, the background context of other academic-diplomatic activities. Among the posts he held in this capacity are those of solicitor-general of the US State Department between 1906 and 1911 during a period when the United States extended its interests and activities internationally by joining a number of international institutions such as the International Institute of Agriculture in 1906 and by participating in the drafting of many international conventions 'ranging from the International Red Cross to telecommunications, from the acquisition of military bases to the establishment of rules and procedures for the extradition of criminals' or the suppression of the white slave traffic.<sup>137</sup> J. B. Scott served also as a US technical delegate to most of the major international conferences, including the Second Hague Peace Conference<sup>138</sup> as well as at the negotiating table and drafting committee of the Treaty of Versailles and the Statute of the Permanent Court of Justice. The international codification spirit of the early age shall find its ultimate embodiment in 1920 in Article 38 of the Statute of Permanent Court of International Justice which establishes what, since then, has been considered as the (informal) system of sources of international law.<sup>139</sup> Some years

135. *Id.*, at 170.

136. J.B. Scott, *Cases on International Law* (1926), at xvii.

137. See further S. Legg, 'The Life of Individuals as Well as of Nations': International Law and the League of Nations' Anti-Trafficking Governmentalities', *Leiden Journal of International Law* 25, at 647-64.

138. J.B. Scott, *The Hague Conferences of 1899 and 1907* (1909).

139. See interestingly T. Skouteris, 'The Force of a Doctrine', in F. Johns, R. Joyce & S. Pahuja (eds.), *Events: The Force of International Law* 69-80. As any general textbook of international law shows the question to know what the actual sources of international law – by all means, an evolving category – continues to occupy international legal scholars up to the present day in never-ending debates.

131. In fact, by the contemporary standards of Law 16/1985 of 25 June on the Spanish Historical Patrimony (Articles Title VII, Chapter I (Arts. 48 to 58) and Art. 5) Harvard University would be complicit to the crime of plunder of the Spanish Historical Patrimony.

132. R. Pound, *The Harvard Law Library*, v. *Harvard Library Bulletin*, 290, 295 (1951).

133. 24 *The Green Bag* 170 (1912).

134. R. Lansing and J.B. Scott, 24 *The Green Bag* 170, at 176 (1912).

later, this list contained in Article 38 was identified by H.L.A. Hart as the necessary ‘rule of recognition’<sup>140</sup> which existence allowed international law to be considered ‘law’ against the Austinian challenge that had long bequeathed it with the label of ‘positive international morality’<sup>141</sup> throughout the long nineteenth century.

## 5 After the Great War(s): Conclusion

The end of the First World War witnessed the emergence of a ‘reconstructive doctrine’<sup>142</sup> in the field of international legal theory. The focus of this doctrine was the binding nature of international legal obligations and it was accompanied by the resurrection of natural law doctrines. The resurgence of natural law doctrines in the wake of the establishment of the League of Nations is consonant with the fact that the new supranational institutionalist faith of many interwar international lawyers required a revamped universalist aspiration. Indeed, during the post-war period in the European doctrine, the gradual restoration of natural law presented itself under different guises and it was often argued against the excesses of the earlier attraction of nationalism to interstate positivism. This re-conceptualised natural law orientation ranged from the solidaristic legal sociology of biological taints of Georges Scelle with his theory of ‘*dédoublement fonctionnel*’<sup>143</sup> to the theories put forward by precursors of international human rights law such as Hersch Lauterpacht for whom ‘the establishment and the binding force of international law as a whole’ are both ‘grounded in a factor superior to and independent of the will of states – a factor which gives validity to the law created by the will of the states. That superior rule is the objective fact of the existence of an interdependent community of states’.<sup>144</sup> In some quarters, such as in Spain, the cradle of Francisco de Vitoria, a neo-naturalist renewal allied itself with a neo-scholastic orientation<sup>145</sup> of quasi-national features that had begun to re-emerge alongside the first Spanish scientific generation of international lawyers in the last third of the nineteenth century.<sup>146</sup> This return to the Spanish classics would end up associated to a medievalist turn in

international legal scholarship after the Spanish Civil War.<sup>147</sup> The very founder of the American Society of International Law, James Brown Scott, aware of the need to provide a moral foundation to the universal aspiration embodied by the League of Nations, and as representative of ‘a turn to international institutions’ which, as Koskenniemi<sup>148</sup> has well explained, was at the time a replacement of ‘formal imperialism’, would champion Francisco de Vitoria<sup>149</sup> as the founder of international law in a series of works. In 1932, J. Brown Scott published *The Spanish Origins of International Law: Francisco de Vitoria and his Law of Nations* and in 1934 he wrote *The Catholic Conception of International Law* which wore a manifesto subtitle: ‘*Francisco de Vitoria, Founder of the Modern Law of Nations. Francisco Suarez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations*’. In Spain, one of Scott’s greatest allies in the recovery of the works of the Salamanca School in the interwar period was Camilo Barcia Trelles.<sup>150</sup> Catholic conservative prominent scholars, such as Le Fur in France,<sup>151</sup> also followed on the footsteps of a classic natural law tradition. Alfred Verdross’ work would gradually depart from his earlier formal theoretical orientation to legal philosophy so as to put the universal Spanish tradition at the service of the axiological foundation of the international community and through the notion of an international constitution, at the service of binding character of international law.<sup>152</sup> In the aftermath of the Second World War, some of these interwar theoretical concepts would nurture the seeds of constitutional approaches to the international

140. See H.L.A. Hart, *The Concept of Law* (1961).

141. J. Austin, *The Province of Jurisprudence Determined* (1832).

142. See M. Koskenniemi, *From Apology to Utopia the Structure of the International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005).

143. Scelle, ‘Le droit constitutionnel international’, in *Mélanges Carré de Malberg* (1933), 503.

144. H. Lauterpacht, *International Law. Collected Papers* (1979) at 58. See further, P. Capps, ‘Lauterpacht’s Method’, 82 *British Yearbook of International Law*, at 248-80 (2012).

145. J. Stunz, ‘Natural Law Thinking in the Modern Science of International Law’, 55 *American Journal Of International Law* 951, at 958-69 (1961).

146. See further, I. De la Rasilla Del Moral, ‘El estudio de la historia del Derecho internacional en el corto siglo XIX español’, 23 *Zeitschrift des Max-Planck-Instituts für Europäische Rechtsgeschichte*, 1-18 (2013).

147. See further, I. De la Rasilla Del Moral, ‘The Fascist Mimesis of Spanish International Law and Its Vitorian Aftermath, 1939-1953’, 14 *The Journal of the History of International Law* 2, at 207-36 (2012).

148. See M. Koskenniemi, ‘Nationalism, Universalism, Empire: International Law in 1871 and 1919’, Columbia University (2005), available online at: <[www.helsinki.fi/eci/Publications/talks\\_papers\\_MK.html](http://www.helsinki.fi/eci/Publications/talks_papers_MK.html)> (last accessed September 2014) (noting that ‘Where pre-war lawyers had seen two types of “international” relations, those between European or “civilised” States and those between European and civilised on the one hand and “Oriental” nations on the other, the post-war generation saw just one single field of “the international” that was at the same time “universal” and to be administered by a machinery that could also not be anything but “universal”’) at 42.

149. See further I. De la Rasilla Del Moral, ‘Francisco de Vitoria’s *Unexpected Transformations and Reinterpretations* for International Law’, 15 *International Community Law Review*, at 287-318 (2013).

150. See C.B. Trelles, ‘Francisco de Vitoria et L’Ecole Moderne du Droit International’, XVII *Recueil Academie Droit International* (1928). *Idem*, F. Suarez (1548-1617): Les Theologiens Espagnols du XVIIe Siècle et L’Ecole Moderne du Droit International, *Academie Droit International*, 43 (1933). Rcardi, (1933) Fernando Vazquez de Menchaca, L’Ecole Espagnole du Droit International du XVIIe Siècle, *Recueil Academie Droit International*, 433 (1939).

151. Le Fur, la theorie du droit naturel depuis le xviième siecle, *Recueil de cours de l’Academie de la Haye* xvii 263 (1927).

152. Vid. M. Elósegui, ‘La influencia de Kelsen y Verdross en el pensamiento jurídico de Legaz Lacambra sobre el Derecho internacional en el periodo de entreguerras’, in Y. Gamarra and I. De la Rasilla (eds.), *Historia del pensamiento iusinternacionalista español del siglo XX* (2013).



legal order among European international legal scholars in the wake of the UN Charter.<sup>153</sup>

Meanwhile, the impact of sociological jurisprudence and, later, of legal realism on the tenets of 'classical legal thought'<sup>154</sup> led in the United States that had not joined the League of Nations, to a different climate than the one prevailing in Europe during what has been defined as the 'foundational period of contemporary international law'.<sup>155</sup> The American pre-war doctrine shall be later decried together with the interwar years' dominant European reconstructive doctrine as part and parcel of a 'legalistic-moralistic approach to international relations'<sup>156</sup> by a post-Second World War influential retrospective realist interpretation that bitterly decried the 'apparently fantastic constructions of a legalism or idealism that had been oblivious to the "realities" of power in the international world'.<sup>157</sup> In the United States, this realist critique contributed to a 'new practical spirit, an orientation to process and policy at once contextual, purposive and functional'<sup>158</sup> which was diagnosed as a cure to the ailments and the abstractly idealised legalism of international law. It was also inspired by 'new philosophies of action' given to 'social engineering' that allowed what Roscoe Pound called 'the cosmological romance of some closed metaphysical system'<sup>159</sup> became now, very much in the image of the evolution of US domestic legal theory, the object of a functional critique of international law in terms of social ends.<sup>160</sup> The parallel course followed in the US is showed by the fact that the 'demand that orthodox international legal science transforms itself into a functional, result-oriented approach was in full sway by the time the World War II began'.<sup>161</sup> In fact, since the outbreak of the Second World War, this orientation would be marked in fire by the constitution *pace* E.H. Carr and H. Morgenthau's realist writings and of others, like G. Niemeyer,<sup>162</sup> of international relations as an academic field.<sup>163</sup> These teachings blended to give place to a 'post-war sensibility realism' that allied itself with the

new predominant position of a single Western dominant great power sweeping away the earlier formalist 'scientific' tendency that had tried to isolate the sphere of international law 'from ethics and mores' as well as 'from the social sphere, comprehending the psychological, political and economics fields and sociology'.<sup>164</sup>

E.H. Carr's sobering work sought to illustrate how 'a primitive or utopian stage of the social sciences'<sup>165</sup> identified with the nineteenth-century 'assumptions of Benthamite rationalism'<sup>166</sup> was the ultimate responsible for the crisis in international politics in the second and third decades of the twentieth century. According to Carr, these utopian 'half-discarded assumptions', and this 'one-sided intellectualism'<sup>167</sup> became the 'foundational stones of a new utopian edifice'<sup>168</sup> that was ultimately epitomized by the League of Nations that Carr defines as a 'transplantation of democratic rationalism from the national to international sphere' which was "full of unforeseen consequences".<sup>169</sup> However, Carr's work amounts to more than as a realist indictment of utopianism epitomised by the League of Nations. For Carr, indeed, 'the charge is not that human beings fail to live up to their principles (...) What matters is that these supposedly absolute and universal principles were not principles at all, but the unconscious reflections of national policy based on a particular interpretation of national interest at a particular time'.<sup>170</sup> Carr's deep critique echoes Waltz's mocking description of an attitude of '*pacta-sunt-servandism*' by 'writers, especially those from countries interested in the maintenance of the peace settlement' that tried to treat it as 'the cornerstone of international society'<sup>171</sup> in the inter-war years. Carr's realist method in the field of international relations was to found a first extension, circumscribed to international law, in Morgenthau's critique in 1940 of Geneva's negative metaphysicists<sup>172</sup> who, 'not unlike the sorcerers of primitive ages, attempt to exorcise social evils by the indefatigable repetition of magic formulae'.<sup>173</sup> Morgenthau's sketch of a functional theory of international law,<sup>174</sup> which for some is to be considered the 'central nemesis of orthodox international law',<sup>175</sup> set the ground for a policy-oriented jurisprudence to become the predominant method in the US academy from the 1950s onwards. Morgenthau himself founded the 'realist' or power politics school of interna-

153. On the emergence of this interwar trend in Europe, see e.g. as an introduction I. De la Rasilla Del Moral, 'At King's Agramant Camp – Old Debates, New Constitutional Times', 8 *International Journal of Constitutional Law* 3, at 580-610 (2010).

154. See D. Kennedy, *The Rise & Fall of Classical Legal Thought: With a New Preface by the Author, 'Thirty Years Later'* (2006).

155. A. Paulus, 'The International Legal System as a Constitution', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009) 109, at 112.

156. See G.F. Kennan, *American Diplomacy: 1900-1950* (1951), at 79-89.

157. M. Koskenniemi, 'History of International Law, World War I to World War II', 19 *Max Planck Encyclopedia of Public International Law* (2007).

158. *Id.*, at 21.

159. R. Pound, 'Grotius and the Science of Law', 19 *American Journal of International Law* 685, at 689 (1925).

160. S.J. Astorino, 'The Impact of Sociological Jurisprudence on International Law in the Interwar Year Period', 34 *Duquesne Law Review* 277, at 293 (1996).

161. *Id.*, at 291.

162. G. Niemeyer, *Law Without Force: The Function of Politics in International Law* (1941).

163. M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law* (2002), at 413-509.

164. H. Morgenthau, 'Positivism, Functionalism and International Law', 34 *American Journal of International Law* 260, at 267 (1940).

165. *Id.*, at 5.

166. *Id.*, at 26.

167. *Id.*, at 27-28.

168. *Id.*, 26.

169. *Id.*, at 28.

170. *Id.*, at 87.

171. *Id.*, at 181

172. H. Morgenthau, 'Positivism, Functionalism and International Law', 34 *American Journal of International Law* 260, at 267 (1940).

173. *Id.*, at 260.

174. *Id.*, at 273.

175. S.J. Astorino, 'The Impact of Sociological Jurisprudence on International Law in the Interwar Year Period', 34 *Duquesne Law Review* 277, at 293 (1996).

tional political science<sup>176</sup> where international law is portrayed as 'a primitive type of law primarily because it is almost completely decentralized'.<sup>177</sup> Morgenthau retraced his own intellectual tradition to theorists of 'power politics' through the likes of Thucydides, Machiavelli and Hobbes in 'a theory in Western political philosophy' against what he portrayed as 'the legalist-moralist approach to the conduct of international relations during the interwar period'.<sup>178</sup> After two World Wars, the failure of the League of Nations as an international security organisation to deliver international peace and security generated a hard-nosed realist critique of what became portrayed as an abstractly idealised legalism of international law in the interwar period. This realist critique has partially overshadowed the place in the genealogy of international law in the twentieth century of the generation who founded the *American Society of International Law*. Born out of the ashes, as we have seen, of the 1898 Spanish American War, and influenced by the US experience with the newly acquired overseas territories,<sup>179</sup> the pre-Wilsonian generation's role was that of instrumentally channeling the peripheral "imperial thrust" of an emerging great power by projecting a nuanced version of the peculiarities of the United States own domestic legal system and form of government to the international plane. Despite its historical coincidence, in the early twentieth century with the gradual reversion of long-standing dynamics of outer-European exclusion,<sup>180</sup> this generation would initially evolve against the background of what still remained, before the Great War, a barely institutionalised Western Eurocentric international legal system. One hundred years after the beginning of the First World War, one of the historiographical challenges before international lawyers is that of producing alternative historical narratives that can serve to identify and highlight alternative events in the history of international law. This can contribute to add a new breadth and texture to the historical background of the great historical caesurae in today's standard normative chronologies and periodisations of the field and, thus, contribute to a greater reflective understanding of the complex historical layers and multilayered intellectual sources that inform the continuities and discontinuities of interna-

tional law as a discipline.<sup>181</sup> The centenary of the First World War provides us with a new occasion to reflect, with a greater benefit of hindsight, on the times and legacy of an almost forgotten generation of international lawyers, who like James Brown Scott believed that 'the stream is, indeed, everywhere colored by the soil through which it reaches the sea, but the sea itself is international'.<sup>182</sup> Our memory of this generation's ("instrumentally") legalistic and ("imperialistically") moralistic approach to international relations is what today one might be tempted to call the ambivalent shadow of the Pre-Wilsonian rise of international law.

176. H. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (1948).

177. *Id.*, at 211.

178. F.A. Boyle, 'The Law of Power Politics', 4 *Law Forum* 901, at 906 (1980) (Arguing in favour of 'a thorough refutation of the realist hypothesis that international law is irrelevant to international politics').

179. See, Boyle *id.* (1999) at 22. See references to the role played by some of the founders of the ASIL regarding the Philippines in A. Anghie, *Imperialism, Sovereignty and International Law* (2005), at 279-85.

180. See the discussion of the Hague Conference 1907 and the Versailles Treaty from the perspective of the opposition between sovereign equality and legalized hegemony provided in Chapter V of G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), at 132-64.

181. On the 'historical turn' or 'turn to history' in international law, see, e.g. R.C.H. Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in M. Craven, M. Fitzmaurice & M. Vogiatzi (eds.), *Time, History and International Law*, Martinus Nijhoff, at 27-41, M. Koskeniemi, 'Why History of International Law Today?', *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 4, at 61-66 (2004). For the influence of critical theory in its development, see, e.g. B. Galindo and R. George, 'Force Field: On History and Theory of International Law', *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 20, at 86-103 (2012) and I. De la Rasilla Del Moral, 'International Law in the Historical Present Tense', 22:3 *Leiden Journal of International Law*, at 629-49 (2009).

182. J.B. Scott, *Cases on International Law* (1926), at xvii.