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the Executive Council rather than the Executive Committee. As James Brown Scott put it in 1930, "If a resolution is moved, it is referred to the Executive Council and considered, and then left over to the subsequent [business] meeting, and in the meantime it has already entered upon its eternal slumber."[13] There are good reasons for this, including doubts about whether adopting such resolutions would have any real impact. However that may be, the effect has been to close one possible avenue by which the Society might conceivably have influenced public opinion.

The *Journal* was another avenue conceived by the Society's founders. But virtually from the outset, the *Journal* has not been written for popular consumption. It was naive to think, as James Brown Scott did, that including nontechnical editorial comments in the *Journal* would attract general readers. The *Journal* quickly became the leading scholarly periodical in the international law field, a position it retains today. Incisive scholarship can of course affect policy making, but not because it speaks directly to the public.

From the beginning, the Society has had dual objects: fostering the study of international law, and promoting the establishment (and maintenance) of international relations on the basis of law and justice.[14] Arguably, it has had a greater measure of success regarding the former object than the latter, at least if we look at the scorecard as of today. Even in the early years, when faith in international law as an instrument of peace was at its zenith, the Society preached largely to the converted. But the converted included such influential people as Elihu Root and Charles Evans Hughes, both of whom were active and interested Presidents of the Society. Precisely because they, and some others like John Bassett Moore and Robert Lansing, were both active in the Society and influential, the Society probably had a greater impact on governmental decision making in its early years than it has in recent times. These people—Root, Hughes and their peers—could influence policy directly.

In addition, because they were public figures, they attracted the attention of the leading newspapers on the East Coast, which reported their pronouncements on international law just as they reported their other pronouncements. The newspapers' interest trickled down to the pronouncements of lesser known figures at ASIL Annual Meetings, as well. For many years the Washington and New York press covered the Annual Meetings. The resulting publicity presumably went some distance toward promoting the establishment of international relations on the basis of law and justice, thus helping the Society achieve one of its purposes. World War I got in the way, but the Society bounced back. It did so with less zeal than before for international law as a guarantor of peace, but with an expanded view of what international law is and could be, not only in matters of war and peace, but also in matters of everyday international relations.

One cannot expect too much of law. Perhaps Root and Scott did. If their successors had a somewhat more modest view of the capacity of international law, they nevertheless kept the torch from dying out and in the process examined and clarified international legal processes in war and peace. If one takes a realistic look at what law and legal institutions can do best, the record of the ASIL is not bad.

Charles Evans Hughes as International Lawyer

*By Richard D. Friedman**

In 1884, Charles Evans Hughes qualified as a member of the New York bar at age 22. After seven years of practice in New York City, in precarious health, he took a respite

[13] James Brown Scott, Remarks as Toastmaster at the Annual Banquet, 24 ASIL Proc. 243, 244 (1930).

[14] Originally, the second of these objects referred only to the establishment of international relations on the basis of law and justice. The words "and maintenance" were added later to the Society's Constitution.

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and became a law professor at Cornell. Two years later, his health restored, he returned to his metropolitan practice. He remained there in relative obscurity until he was 43, in 1905, when he was appointed counsel to a legislative committee investigating local utilities. A far more renowned investigative assignment for the Armstrong Insurance Commission soon followed that catapulted Hughes to national fame. In 1906 he received, unsought, the Republican nomination for Governor of New York and defeated William Randolph Hearst in the general election. In 1910, President Taft appointed him an Associate Justice of the Supreme Court, and six years later he received—again unsought—the Republican Presidential nomination. He lost an extremely close election to the incumbent, Woodrow Wilson, and returned to New York to practice law. In 1921, President Harding appointed him Secretary of State. After four years in that position under Harding and his successor Calvin Coolidge, he returned to his New York law practice. In 1929, he became a judge of the Permanent Court of International Justice; even while at the Hague, he continued to participate in his New York law practice,[1] returning to it full time after the Court's session. He was in his office in 1930 when President Hoover announced his nomination for Chief Justice of the United States. He served in that capacity until 1941, finally retiring—and remaining in Washington.

As this recital suggests, opportunities for public service came to Hughes unbidden, though not unwelcome, and almost by chance. At the center of his intellectual being, as at the center of his career, was not politics or diplomacy, but the law. He shared and embodied the Progressive faith that the law could be a tremendously potent force for good. Indeed, to a great extent, the law replaced the religion he had learned from his minister father. I believe that Hughes was basically a positivist—he recognized law as a human creation, not an inevitable product of nature—but at its finest, the law represented to him reason based on fundamental principles as applied to a given factual situation.[2]

Mark Sullivan captured a good deal of Hughes' nature in his tart comment that Hughes "believed in God but believed equally that God was on the side of the facts,"[3] and Hughes certainly believed that he was on the side of both the facts and God. As another journalist, Richard V. Oulahan, suggested, Hughes assumed that "he and the facts alone were competent to find the correct solutions" to any problem,[4] and though he really seems to have been a remarkably upright person, a rather strong streak of sanctimoniousness ran through his character.[5]

Hughes' basic attitude toward the law was that an optimal solution could be found to almost any situation by an exercise of reason as applied to the facts and the fundamental governing principles. This view was consistent in the various roles he played. Some years ago, I spoke of Hughes as Associate Justice as being a "Governor on the Bench," because

[1] Author's interview with Hon. Edmund L. Palmieri, May 29, 1975. Judge Palmieri was Hughes' law clerk at The Hague.

[2] Hughes seemed to believe that constitutional and statutory law recognized as much as created fundamental rights. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (speaking of the right of employees to organize and select representatives for collective bargaining and self-protection: "That is a fundamental right."); *Bailey v. Alabama*, 219 U.S. 219, 239 (1911) ("those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law.").

[3] MARK SULLIVAN, OUR TIMES 54 (1930).

[4] Quoted in BETTY GLAD, CHARLES EVANS HUGHES AND THE ILLUSIONS OF INNOCENCE: A STUDY IN AMERICAN DIPLOMACY 98 (1966).

[5] For a trivial, but rather amusing, illustration of this quality, consider Hughes' explanation of why he grew a beard: He had never learned to shave himself, and going to the barber daily took too much time. 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 88–89 (1951). Then compare an early picture of Hughes, revealing a moderately receding chin, with any picture of him in maturity, bearing the bristling beard that in later years was said to make him resemble "a Victorian child's image of Almighty God," CURRENT BIOGRAPHY, 1941, at 417.

his opinions from his first judicial term are so infused with a sense of Progressive activism.[6] But one might equally describe Governor Hughes as a "Judge in the Executive Mansion," because even in politics he acted in a markedly judicial manner. Some of his veto messages as Governor read very much like judicial opinions. One of the most characteristic incidents of his administration arose when he had to decide whether or not to remove a borough president—not, incidentally, for corruption, but for maladministration. Hughes held a public hearing, listening to the testimony, questioning witnesses, even making admissibility decisions. He eventually ruled that the officer ought to be removed.[7] Similarly, his approach to administrative law, particularly when he was Chief Justice, is characterized by an attempt to shape it within a judicial mold.[8]

Hughes was sufficiently a realist, and he was sufficiently sensitive to nuances that he did not simply apply his domestic views in the international sphere. But in several respects, his approaches and attitudes in the two realms were of a piece. Perhaps most fundamentally, he accorded a crucial place to the law's role in international as well as domestic matters. Indeed, the importance of international law is a strong theme recurring throughout his pronouncements on foreign affairs. I suspect that Hughes' natural tendency in this respect was reinforced by the fact that, until he ran for President at age 54, he did not have any significant involvement in international matters—except for having filled in for one year as an international law teacher at Cornell for a colleague on sabbatical.[9] Remarkably, he served simultaneously as President of the American Bar Association and of the American Society of International Law, while still Secretary of State. In his capacity as Secretary, "law was the language that [he] spoke."[10] Indeed, he said "unhesitatingly"—and with at least a dollop of seriousness—that the Secretary should be a lawyer, otherwise the Solicitor's office of the Department of State would "put it over him" and "[i]t would be difficult for him to function as the representative of the President in the proper discharge of the duties of his office."[11]

Hughes recognized that, in international as in domestic matters, not all questions were capable of being treated as legal ones. But he framed the overall goal of international relations as the achievement of justice. It was not adequate, he said, to speak of peace as the ultimate goal: "We wish to have the peace, not of the lowest forms of life, but of the highest, with its inescapable longings and strivings. Peace is but an opportunity, and our chief concern is justice." Within this framework he easily fit the view, which he traced

[6] Note, *Governor on the Bench: Charles Evans Hughes as Associate Justice*, 89 HARV. L. REV. 961 (1976).

[7] An extensive collection of clippings on this incident may be found in the New York Public Library under the heading "Ahearn" in Vol. 1 of the series of scrapbooks prepared by Robert H. Fuller, Hughes' Secretary when he was Governor.

[8] See, e.g., *United States v. Morgan*, 298 U.S. 468, 481 (1938) (asserting "a duty akin to that of a judge": "The one who decides must hear."). Note his speech to the American Law Institute in 1938, reported in the *N.Y. Times*, May 13, 1938, p. 8, speaking of the "helpful influence" of the "judicial tradition" in guiding the action of administrative agencies, and insisting that

> the spirit which should animate that action must be the spirit of the just judge. . . . Administrative agencies . . . will [succeed] to the extent that they perform their work with the recognized responsibility which attaches to judges and with the impartiality and independence which is associated with the judicial office. . . . [D]eliberation, fairness, conscientious appraisal of evidence, determination according to the facts, and the impartial application of the law—these are the safeguards of society.

[9] 1 PUSEY, *supra* note 5, at 100.

[10] Charles Cheney Hyde, *Charles Evans Hughes, Secretary of State*, in 10 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 233 (Samuel Flagg Bemis ed., 1928).

[11] ASIL PROC. 139 (1925).

to Grotius, that "war to defend the right or to punish a guilty state" ought not be condemned.[12]

Hughes' emphasis on justice as the chief criterion for the conduct of foreign affairs has been criticized as naive.[13] In my view, the more justifiable object of criticism is the same quality of sanctimoniousness he displayed in other contexts. I believe he was cognizant, at a relatively high level of consciousness, that not merely the force of his reason, but also the economic and military might of his nation, increased American ability to achieve its international goals.[14] So he was not hesitant to use American power; but he always managed to persuade himself that it was being used in a just cause.[15] Cognitive dissonance would have made it difficult for him to acknowledge the degree to which self-interest underlay the use of power.[16]

Hughes' piety notwithstanding, there is much to be said for the view of those sympathetic to Hughes who have found nobility in his emphasis on international justice.[17] He contributed to an international atmosphere in which disputes—both mundane and potentially war-making—were more likely to be resolved according to legal principles and procedures.[18] And, as I will discuss later, his approach was largely responsible for one of the most stunning accomplishments in the history of diplomacy.

Hughes recognized justice as a "pleasing ideal" in the abstract, but one hard to make concrete. Nevertheless, in the international realm as in the domestic, he believed there

[12] *The Development of International Law* [hereinafter, Hughes, *Development*], in 19 ASIL PROC. 3–4 (1925). See also his 1923 speech *The Pathway of Peace*, in the volume of the same name (1925), at 16 ("All things are possible if nations are willing to be just to each other.")

[13] GLAD, *supra* note 4, at 94–95, 160, 211. ("In equating the positive law and the mores of his day with reason and justice, he avoided many difficulties. He never had to consider the possibility that law and custom might sometimes codify the interests of the stronger. . . . [T]he relationship of power to the definition of policy was never in the forefront of his mind. . . . His basic assumption—that the evolution of reason means the overcoming of special interest and force—blinded him to the positive role that power plays in the development of legal and political institutions. . . . Nor was he aware of the extent to which all specific international arrangements depend on the structure of power, including the potential for using force. . . .").

[14] Thus, Hughes understood that the restraints that free peoples "may be willing to place upon themselves will always be subject to such conditions as will leave them able to afford self-protection by force," and so the outlawry of war "implies a state of mind in which no cure is needed." Hughes, *Development, supra* note 12, at 3–4.

[15] Note, for example, his speech to the 1928 Pan-American Conference in opposition to a proposed resolution that "no state has the right to intervene in the internal affairs of another." Report of the Delegates of the United States of America to the Sixth International Conference of American States (1928), at 13–15.

[16] See GLAD, *supra* note 4, at 181 ("Hughes was not so pure as he claimed to be. He was in many ways a flexible, a politic man, though he found it difficult to admit this, especially when the admission might indicate that he had elevated personal or partisan interest above the general welfare."). Probably the most important manifestation of Hughes' sanctimonious quality in the international sphere was his defense of Harding's refusal to seek entry into the League of Nations, and of his own decision not to resign from the Cabinet in protest. Hughes maintained that his was the only defensible course of action, see 2 PUSEY, *supra* note 5, at 431–34—even though he had joined other leading Republicans in urging the election of Harding as the best way to ensure entry into the League subject to mild reservations.

[17] See Hyde, *supra* note 10, at 235 ("The outstanding quality of the man, which his previous experience had served to intensify, was his passion for justice. . . . None believed him callous to any plea based on a denial of justice, or insensible to any equitable demand. The members of diplomatic corps looked upon him as their friend and counselor and were almost prepared to accept him as their judge."); 2 PUSEY, *supra* note 5, at 618 ("Hughes' passion for justice was no less in evidence in his foreign policy than in his work on the supreme bench. . . . That high moral attitude . . . lifts Hughes into the select company of our best and wisest molders of foreign policy.").

[18] See, e.g., his message to the Norwegian Minister, Feb. 26, 1923, 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1923 (1938), at 626 [hereinafter Hughes, *Norwegian Arbitration Message*], acquiescing in an arbitral award because of the United States Government's "devotion to the principle of arbitral settlements even in the face of a decision proclaiming certain theories of law which it cannot accept."

were enough shared norms to give substance to the concept.[19] In part because he believed that international and domestic law had a common base, and in part because of simple provincialism, Hughes perceived a substantial degree of continuity between the two. Common-law notions such as due process, just compensation, and the distinction between law and equity crept into his discussions of international law as if they were so obviously universal that there could be no doubt that they applied there.[20] And as Chief Justice, he would sometimes refer by analogy to principles of international law.[21]

In the international domain, as in the domestic, Hughes was a judicial enthusiast. He recognized the value of arbitration panels, and in two notable cases he served as lead arbitrator, showing his characteristic zest for delving deep into the facts of a dispute.[22] But as early as his acceptance speech of the Republican Presidential nomination in 1916, he urged American participation in a permanent world court.[23] And he pressed this theme repeatedly over the years. Eventually, he sat on the Permanent Court of International Justice, an appointment he accepted in part to boost American support for the court. Although Hughes' service on the court was too brief and insufficiently individualized to enable one to draw strong conclusions, it appears that, as in the domestic arena,[24] he tended to take an expansive view of the jurisdiction and the substantive competence of courts, including in this context the competence to decide issues of domestic law.[25]

Hughes recognized that international courts were not a panacea—that they would not command confidence if they were operating on too blank a slate. And so he urged other means of developing international law, by legislation, by conference, and by what might be thought of as an internationalized version of the American Law Institute, aimed at a "restatement" of established principles. But he regarded the role of the international judiciary as essential to this development.[26]

It is notable in light of all I have said that Hughes' greatest contribution to international law did not come in a judicial forum, but that his role had judicial aspects to it. I am referring to the Washington Naval Disarmament Conference of 1921. Hughes' conduct in connection with the Conference was very characteristic. In preparing for it, he determined a basic principle—maintenance of relative existing strength—that would appear fair to the Great Powers, and then he immersed himself in the facts of the world's navies until he and his associates had developed a comprehensive plan. He then adopted the remarkable negotiating strategy of announcing the plan in some detail, complete with ship names and tonnage figures, at the beginning of the Conference—and sticking to it, with elaborations

[19] Hughes, *Development, supra* note 12, at 4.

[20] See, e.g., Hughes, *Norwegian Arbitration Message, supra* note 18, at 627 (arguing that "[d]ue process of law applied uniformly . . . suffices to meet the requirements of international law," and treating "just compensation" as an aspect of due process).

[21] See, e.g., *United States v. Bekins*, 304 U.S. 27, 52 (1938).

[22] See 2 PUSEY, *supra* note 5, at 546–549, for a description of Hughes' work in arbitrating boundary disputes between Peru and Chile and between Guatemala and Honduras; note also the detailed resolution of the latter dispute, in Guatemala-Honduras Special Boundary Tribunal, Opinion and Award (1933).

[23] N.Y. TIMES, Aug. 1, 1916, p. 6.

[24] See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932).

[25] See PCIJ, Ser. A, No. 20 (Case of Serbian Loans) (1929) (joining majority over dissents contending that the court had no jurisdiction, that the issues were not of a juridical nature, and that the case was concerned only with domestic law); No. 21 (Case of Brazilian Loans) (1929) (similar; joining majority over dissent contending that the court should decline jurisdiction, leaving the matter to direct agreement or arbitration); No. 22 (Free Zones of the Upper Savoie and the District of Gex) (joining majority over a dissent contending that the court was rendering an improper Advisory Opinion). The inferential significance of these cases is bolstered by the fact that Hughes was a member of every drafting committee during his term on the court. 2 PUSEY, *supra* note 5, at 644.

[26] Hughes, *Development, supra* note 12, at 6–7, 12–13.

and relatively minor departures, until the treaty was signed. He negotiated, of course, but to a great extent what he did was to enforce his judgment—and his success was attributable in great part to the Powers' confidence that his judgment was just.[27] Hughes, it was said, had sunk more battleships in a few minutes than "all the admirals of the world . . . in a cycle of centuries."[28] Such an achievement makes even a heavy dose of sanctimoniousness far easier to tolerate.

American Judicial Internationalism in the Twentieth Century

*By Michael Dunne**

The first issue of the *American Journal of International Law* appeared in January 1907. Its contents provide an appropriate starting point for these remarks. In an editorial introduction, Secretary of State Elihu Root, then acting as President of the newly formed American Society of International Law, stressed the growing need that all people in all countries "should have a just conception of their international rights and duties."[1] In a much longer exposition to the first Annual Meeting of the ASIL, Root pursued this theme with an analysis of the contemporaneous controversy over the San Francisco public school system and its treatment of Asian children. At the heart of Root's exposition was the complex question of the relationship between domestic (state and local) law and the federal treaty power. In the same volume, a former Secretary of State, Richard Olney, published his ideas on "The Development of International Law"; in his remarks, Olney carefully defended the original Monroe Doctrine, while allusively distinguishing and disapproving the recent Roosevelt Corollary. (These were paradoxical words from the framer of the 1895 fiat directed to the British over the Venezuelan boundary dispute.) A final example comes from the "Prospectus" of the ASIL adopted in January 1906. In the brief preamble to the ASIL Constitution, Elihu Root, James Brown Scott and their cosignatories instanced—with appropriate references to *The Paquete Habana* decision[2]—the federal constitutional provisions making international law "our law." And as allusively as Olney hinted at Theodore Roosevelt, Root and his colleagues hinted at the domestic and foreign implications of the Spanish–American War, the Treaty of Paris (1898) and the subsequent American–Filipino War. In the words of the ASIL Prospectus, the great political and diplomatic changes at the turn of the century had demonstrated "the fundamental importance of a correct understanding of those principles of International Law which our country is called upon to observe in its foreign relations, and to administer a municipal law in our domestic tribunals."[3]

The Spanish–American War of 1898 prompted one of the many "great debates" on American foreign policy. For contemporaries, the issue was whether the United States was emerging to "world power" status with implications for the abandonment of isolationism.[4] That the issue was not conclusively resolved is shown by the more intense but

[27] See Glad, *supra* note 4, at 272; 2 Pusey, *supra* note 5, at 481.

[28] See Glad, *supra* note 4, at 270; 2 Pusey, *supra* note 5, at 471; Hughes' speech at the opening of the Conference is reprinted in his volume The Pathway of Peace 20 (1925).

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[1] Elihu Root, *The Need of Popular Understanding of International Law*, 1 AJIL 1 (1907).

[2] 175 U.S. 677, 700 (1900).

[3] 1 AJIL 1, 130–33, 273–86, 418–30 (January–April, 1907).

[4] Archibald Cary Coolidge, The United States as a World Power (1909). For a recent study, with a wide-ranging bibliography, see Joseph Smith, The Spanish-American War: Conflict in the Carribbean and the Pacific, 1895–1902 (1994).