

Book Reviews

Benjamin Allen Coates, ***Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*** Oxford: Oxford University Press, 2016. Pp. 296. £26.49. ISBN: 9780190495954

It was the notorious Weimar and later Nazi jurist Carl Schmitt, who, in an article published in 1932, presented the first fully-fledged analysis of the interrelatedness between US 'imperialism' and contemporary international law.¹ His own German nationalist, anti-Versailles and anti-American agenda led him to unmask the economic dimensions of late 19th- and early 20th-century economic imperialism,² which after 1919 – as Schmitt sensed much earlier than others – could no longer openly maintain the civilized/non-civilized dichotomy. American economic imperialism, in his view, had for that very reason transformed this distinction into the less controversial dichotomy between borrower states (including Germany) and creditor states and continued to deeply intervene in the states belonging to the former category.³ In his 1932 contribution, Schmitt 'admires', envies and critically detects how the USA, in the language of international law, had introduced a set of new imperialist techniques, allowing the USA to portray particularistic economic interests as the pursuit of universal values: first, by the use of the deliberately ambiguous Monroe Doctrine, which in the form of US reservations or treaty clauses had become the content of bilateral and multilateral international law; second, by constructing 'a system of intervention treaties' with Latin American countries, which came both in the form of bilateral treaty law and constitutional law clauses in a number of Latin American countries; third, by promoting an enhanced protection of a 'sanctified' notion of the private property of aliens enshrined in a new doctrine, according to which any expropriation without compensation was illegal; and fourth, by a new doctrine of recognition of governments.⁴ What all of these new techniques of a mainly economically driven imperialism had in common with other classic imperialist techniques, according to Schmitt, was that the USA had made sure that it remained the supreme authority to decide, for instance, whether or not other states had violated the Monroe Doctrine, whether intervention in a Latin American country was lawful or whether a new foreign government would be recognized. For Schmitt, the new US empire was legally constructed mainly through 'vagueness' and 'elastic' concepts, which could be filled and applied flexibly, with the respective concretizing governmental decisions being backed up by the ability of the USA to project economic and military power.

Benjamin Allen Coates, in his fascinating monograph *Legalist Empire*, has now provided the historical research on those international lawyers, corporate players and politicians who shaped the epoch of awakening US imperialism in the early 20th century. What in Schmitt's summarized account appears to be a master-minded, long-term imperialist strategy is analysed

¹ Schmitt, 'Völkerrechtliche Formen des modernen Imperialismus' (1932), reprinted in C. Schmitt, *Positionen und Begriffe* (1940) 162, at 164.

² On Schmitt's anti-American and anti-Semitic agenda in 'Der Nomos der Erde', see Koskeniemi, 'International Law as Political Theology: How to Read "Der Nomos der Erde"?', 11 *Constellations* (2004) 492, at 494.

³ Schmitt, 'Völkerrechtliche Formen', *supra* note 1, at 164.

⁴ *Ibid.*, at 178.

by Coates as a perhaps less coherent result of the ‘sensibilities’ and ‘projects’ of a relatively small group of legal, corporate and governmental US elites during the post-1889 ‘imperial’ epoch, a group Coates calls the ‘legalists’. This group included John Basset Moore, James Brown Scott and, perhaps most importantly, Elihu Root. Displaying a fine sense of irony, the spirited monograph builds on recent historical research that has shown the extent to which ‘lawyers served as lobbyists and officials who ensured that U.S. policy had a pro-corporate orientation’ (at 6). Coates’ general approach to international law is quite close to that of Schmitt when the historian sets out to demonstrate that, for US foreign policy, international law ‘served as a means of expanding power, in part by exploiting the hegemonic potential of international norms’ (at 6).

Coates starts from a matrix of three main 19th-century ideas structuring foreign policy elite discourses in the USA: trade instead of ‘entangling alliances’ (neutrality and commercial expansion), the Monroe Doctrine (anti-colonialism) and the idea of ‘manifest destiny’ or the ‘chosen nation’ dating back to the first Puritan settlers. He emphasizes that the partly contradictory values embodied by these ideas could indeed be reconciled with embracing international law:

Promoting arbitration and the law of neutrality, for instance, served the interests of a commercial power, desirous of avoiding wars with European powers. Legal infrastructure, in other words, could preserve non-entanglement. Second, standing as a champion of international law could, under the proper circumstances, be conceived of, as an American mission to redeem the world. Thus, international law figures more prominently in the history of American foreign relations than we might assume given the country’s reputation as a ‘gunfighter nation’. (at 26)

The ‘legalists’ for Coates were both hard-nosed imperialists and idealist international lawyers. They believed in US exceptionalism and the rule of international law. Empire and international law for Coates formed a ‘congenial’ symbiosis, the essence of which could be detected in the identities of the people shaping the foreign policy discourse in the USA over a period of 30 years.

Legalist Empire is a book about these international lawyers, who also founded and formed new private institutions of global importance, such as the American Society of International Law (ASIL) and the Carnegie Endowment for International Peace. Who were the ‘legalists’ that, according to the monograph, shaped US foreign policy so decisively from the 1890s until the 1920s? Theodore Salisbury Woolsey (1852) and John Basset Moore (1860) are presented as the older, more conservative generation of influential international lawyers that were still wedded to the 19th-century foreign policy matrix (at 34–38). They saw the USA as promoting the rights of neutrals and as a nation that could not compete militarily with Europe’s great powers. Economic expansion in Latin America and other parts of the world required the USA to keep out of major European wars and to promote arbitration whenever the rights of merchants had been infringed upon. Woolsey ‘inherited’ the famous international law textbook from his father Theodore Dwight Woolsey and, like his late father, in 1878, became professor of international law at Yale.

Moore entered the state department as a young solicitor without a university degree and, at first, made a remarkable career as a foreign office international law expert. With the publication of the *History and Digest of the International Arbitrations to which the United States Has Been a Party* in 1898, he also became a highly respected international legal scholar and practitioner, consulting big corporations in all matters international. Only six years younger than Moore was James Brown Scott (1866), who held chairs for international law at various universities and became long-time editor in chief of the *American Journal of International Law* (*AJIL*). The fourth and oldest international lawyer that figures prominently in *Legalist Empire* is Elihu Root (1845), who only at a rather late stage of his career became an international lawyer (at 107ff). He had been one of the most successful New York attorneys and a member of the Republican party before joining the government as war secretary and later as secretary of state under Presidents McKinley, Roosevelt and Taft. All four of the international lawyers at the centre of the book

actively promoted the interests of US governmental and corporate elites for a decisive time during their careers by providing practical legal advice, with Brown Scott being the most 'academic' and Root being the most 'practical' among the 'legalists'.

Coates, in his concise 183-page study, analyses the role of these four men's legal contribution to specific foreign policy events that are connected with the USA's turn to a more openly imperial foreign policy, beginning with the US–Spanish war in 1898, leading to the 'liberation of Cuba' and the occupation of the first fully-fledged US colony in the Philippines (at 39). In an intriguing chapter on this 'rupture' in US foreign policy, Coates traces the internal US discourse that was stirred by the existence of the new Asian colony. Both conservative and progressive voices criticized the move as European-style imperialism by a nation that originally had an anti-colonial identity. Interestingly, many conservative politicians also were afraid of an 'influx of non-white people' from the new colony and promoted an anti-imperialist agenda using racist tropes. Both Woolsey and Moore were sceptical of the benefits of the move to colonialism in the Philippines and Puerto Rico, which they saw as a departure from the classic idea of non-entanglement and of a distinct non-European US identity. It was the Supreme Court of the United States that eventually had to decide in the 'Insular cases' to what extent colonial rule was compatible with the US Constitution and which constitutional rights could be claimed by local populations under US rule (at 41–48).

In 1904 the Court ultimately gave the government and the legislature a free hand in colonial policies by allowing the USA to acquire colonial possessions 'without making them part of the territory of the United States'. This peculiar constitutional status of colonial possessions between a classic protectorate with limited sovereignty and full integration into one's own territory interestingly resembled the legal construction used by another belated colonial power – namely, the German racialized legal notion of the colonial '*Schutzgebiete*' invented in the 1890s and approved by the Reichsgericht. The effect of this 'third' or 'in-between' status in both cases was to create legal flexibility for the colonizers and a denial of citizen rights to the 'non-civilized' under both international law and constitutional law. Coates generally does not compare specific legal techniques and imperial discourses with those in the European powers, which makes it difficult to grasp in what way US imperialism differed from, or simply analogized, European models.

That Root defended President McKinley's imperialist policies during this turn to colonialism is not surprising given his high-ranking governmental positions and his general client-oriented work ethic. Root, as secretary of war and secretary of state in very concrete terms, became the architect and administrator of many of the techniques of US imperialism both in Latin America and the Philippines. Coates describes how Root, as secretary of state, at the time of the famous interventionist 'Roosevelt Corollary' (1904), expanded legal expertise in the state department by hiring more international law experts in order to promote stability for investment in Latin America and prepare cases justifying US intervention abroad (at 116ff). Coates also briefly refers to Root's decisive role in creating intervention treaties with Cuba and Panama. Here, more information on how these intervention treaties worked in practice would have been helpful to assess the effects of this 'imperialist legal technique'.⁵ Root's role as a scholar also remains somewhat under-explored in the book even though he had used his more academic contributions to the *AJIL* in defending the 'Roosevelt Corollary' and as construing the US project as being in conformity with international legal norms.⁶ Relatively detailed is the description of Moore's

⁵ *Ibid.*

⁶ For an attempt to explain this semi-periphery regime on war and intervention created by these contributions in this journals, see von Bernstorff, 'The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State', 29 *European Journal of International Law* (2018) 233.

legal contribution as foreign office legal adviser to the unilateral imposition of the canal project in Panama and his role as a ‘scholar’ in lucrative expropriation cases in Venezuela and the Dominican Republic, in which Moore represented the interests of US corporations before the state department.

Many of the legal techniques for US economic and political expansion thus were pragmatically designed by the White House or members of the Cabinet and legally justified by international lawyers in the state department. The ‘legalists’ contributed as practitioners to these justifications in concrete cases. What is largely absent from Coates’ account is the extent to which international legal scholarship contributed to these concrete imperial techniques and how the literature and international legal doctrine on corresponding issues such as neutrality, law of treaties, *ius ad bellum*, *ius in bello*, non-intervention, law of aliens, recognition and effective occupation developed in the USA compared to other Western powers. Only rarely does Coates refer to the doctrinal content of scholarly contributions in the *AJIL* or other US publications. From reading the detailed account of the inner decision-making processes of the Washington foreign policy machinery, one gets the impression that the ‘legalists’ primarily acted inside the governmental and corporate system. They did what they were extremely well paid for; they provided legal legitimacy to the concrete operations of the political, economic and military apparatus of a young great power, very much like European foreign office lawyers or more ‘client-oriented’ scholars did in London, Amsterdam and Brussels.

Perhaps in Washington, the relationship between legal academia, on the one side, and government and big corporations, on the other, was even more intimate than in other Western capitals. It certainly was more pragmatic and policy-focused than in other European countries, including Germany, France or Italy. In that sense, US international lawyers apparently followed the British tradition of a discipline that understood itself as practice-oriented – as a craft, not as a ‘science’. Coates attributes the pragmatic approach to general ‘sensibilities’ shaped by a certain style of legal formation (at 74). Be that as it may, one of the long-term disciplinary repercussions of 20th century US hegemony and the enormous cultural and political impact of US-style international law on other Western nations after World War II seems to be that also in Europe giving legal advice to governments and corporations and the performance of the role of arbitrator or international judge are generally considered to be the apex of a career as an international legal scholar. The 20th-century rise of the client-oriented scholar is a highly ambivalent story that certainly deserves to be analysed in more depth from a comparative perspective.

Despite its focus on the ‘fixers’ among US international lawyers, the book does not ignore the development of international law as an institutionalized academic profession in more general terms. In a concise chapter, *Legalist Empire* traces from an institutional angle the role of Scott and Root in founding the ASIL. After Scott had become a professor at Columbia University in New York, his ties to the Washington foreign policy elite intensified. Root offered him a position as solicitor in the state department, and Scott, with Root’s support, became the central player in the institutionalization of the US discipline of international law by founding both the ASIL and the *AJIL*. Coates reconstructs in much detail how Scott, supported by the Carnegie Foundation, managed both the society and the journal in their early days (at 66–84). The ASIL’s membership evidenced the 20th-century US-led ‘turn to practice’ in international law by electing Secretary of State Root to become its first president and ‘by counting among its vice-presidents three Supreme Court justices, three former secretaries of state and a future US president’ (at 67). As in all other parts of the monograph, Coates uses archival materials, quoting from internal memos and personal correspondence of his protagonists to sustain his reading of the first years of the *AJIL* and Scott’s handling of its limited financial resources:

The State Department took out 450 subscriptions of the *AJIL*, placing copies in every Embassy, Legation, and Consulate of the United States, and in the process improving the society's financial position. Careful not to upset his patron, Scott monitored the *AJIL*'s editorials: 'We would not like to do anything which might cause the Department of State to criticize our action or cancel its subscription', he explained to a contributor. (at 82)

The last chapters of the book deal with the Hague conferences, Wilson's new administration, World War I and the creation of the League of Nations and the Permanent Court of International Justice (PCIJ). Coates manages to convincingly explain the rationale behind Scott's and Root's unwavering campaign for a permanent international court. It was based on 'selling' the court project to domestic audiences as a US Supreme Court for the world (at 88ff). As such, it would help the USA to keep out of European conflicts (non-entanglement) and would bring salvation to the rest of the world (manifest destiny) by establishing an impartial judicial institution rationalizing international affairs. Given that the court would be left without an enforcement mechanism, the USA, according to Scott, had nothing to fear from such a new institution. Other US internationalists during World War I held this to be unconvincing and founded the League to Enforce Peace, which, instead, was campaigning for a global collective security institution that put more emphasis on collective peace enforcement than on a global court.

As Coates shows, the court project was much more contested within the peace movement, among international lawyers as well as within the administration than one might possibly think from scrolling through the first decade of *AJIL* volumes. With a little help from Carnegie Foundation funds, however, Scott enlisted influential European and Latin American international lawyers and institutions like the Institut de Droit International for his eventually successful court campaign. The monograph makes little of Scott's publications, only briefly mentioning his sustained praise of the Spanish late scholastics and his associated embrace of a more moralist, natural law-based style of argumentation. The book raises this issue without contextualizing it in broader international legal methodological debates of the time in Europe or Latin America. For Coates, the history of the discipline of international law is mainly domestic; his protagonists are almost exclusively contextualized in their national environment, which is not only in line with a recent trend in international legal scholarship but also generally an insightful approach.⁷

Yet, at times, it would have been interesting to compare doctrinal and professional discourses with what happened in other countries and to assess to what extent the 'sensibilities' of the US protagonists were also shaped by British, French, German or Russian academic role models before and after the war. After all, the US foreign policy elites in the late 19th century still considered themselves to be newcomers both amid the great powers and the European dominated discipline. Highly instructive also is the short sketch of the US international law environment in the interwar period with Charles Fenwick, Manley Hudson and Quincy Wright as 'self-styled reformers' appearing on the disciplinary stage (at 169). The gap between traditionalists who promoted commitment to neutrality and non-entanglement (including Moore) and those who favoured accession to the League of Nations and PCIJ membership became deeper.

Coates explains the success of the outlawry movement leading to the Briand Kellogg Pact by the fact that the pact 'presented an alternative to Wilson's League of Nations that both liberal internationalists and unilateralists could embrace' (at 174). While the USA could present itself

⁷ A. Roberts, *Is International Law International?* (2018); see also the *EJIL-Talk!* symposium on this book, at: <https://www.ejiltalk.org/joint-symposium-with-opinio-juris-on-anthea-roberts-is-international-law-international/>.

as a leading supporter of international peace, it had made sure that the new instrument in no way determined or restrained central parameters of its foreign policy, such as the Monroe Doctrine. Coates approvingly cites the historian Charles DeBenedetti, who has portrayed the broad US support for the Briand Kellog Pact as being the result of its marginal political and legal relevance: ‘Conservatives favored its standpat substance, progressives hungered for its millennialist promise, and all appreciated its unflinching nationalism’ (at 174). By combining a minimalist legal and institutional design with idealistic content, the Briand Kellog Pact equally accommodated pacifist, imperialist, nationalist, isolationist and internationalist sensibilities. No wonder then that almost all other nations could ratify it rather light-heartedly, not without, however, entering reservations regarding armed interventions and war in their respective zones of influence.

Legalist Empire is a major contribution to a deeper understanding of a decisive era in US foreign policy. We now better understand when, how and by whom some of the legal techniques of ‘modern imperialism’ were created in the state department and legally justified.⁸ With the book’s focus on a handful of international legal practitioners and ‘client-oriented’ scholars and their contributions to expanding US economic, political and military power, it also further contributes to unsettle the self-image and perception of a discipline that more often than not preferred to see international law and empire in juxtaposition. Even if the role of US international legal scholarship and transnational doctrinal discourse in this whole endeavour remains somewhat under-explored, the book fills a lacuna both in US diplomatic history and in the history of the institutionalization of the US international legal profession.

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Ian Hurd, ***How to Do Things with International Law***. Princeton: Princeton University Press, 2017. Pp. 138. \$29.95, £24.95. ISBN: 9780691170114

The questions of what the rule of law entails and how it manifests on the international stage are the subject of considerable scholarly debate. But in one prominent account, the rule of law is, at bottom, about establishing public norms that constrain the ways in which governmental officials exercise power. What matters here is that there be relatively precise and transparent codes of conduct that are consistently and impartially applied, including against state officials. For example, UN Secretary-General Kofi Annan embraced this account in the following often-quoted statement:

The ‘rule of law’ ... refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,

⁸ Schmitt, ‘Völkerrechtliche Formen’, *supra* note 1.