

2001

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Recommended Citation

Mary E. O'Connell, *Elihu Root and Crisis Prevention*, 95 Am. Soc'y Int'l L. Proc. 115 (2001).

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recently by the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia in *Prosecutor v. Tadić*.⁴

It is a serious historical error to argue that customary laws of war reflected in the Hague Conventions apply only to “international wars” between states and not also to civil war upon recognition of insurgents as “belligerents,” as in the case of the U.S. Civil War. Lieber’s codification was meant to apply to a belligerency but also to reflect law applicable in wars between states. Previously, and thereafter, laws of war were also applicable in wars with Indian nations. Violations in each instance have long been recognized as “war crimes.”

If you have felt a sense of history and dared to participate, perhaps the efforts and determination of Professor Francis Lieber will be an inspiration. They have for many others.

ELIHU ROOT AND CRISIS PREVENTION

by *Mary Ellen O’Connell**

Elihu Root pursued two themes relevant to international law and crisis. He believed firmly in the value of arbitration and adjudication to prevent crisis. He also worked toward the codification and greater specificity of international law so that judges and arbitrators would have more law available to apply in aid of crisis prevention. When crisis had not been prevented, as in the case of World War I, Root did not in fact believe international law—either process or substance—had much to offer. In his view, the Kaiser started World War I because he was bent on hegemony. Arbitration would not stop him, only the use of armed force. Root, therefore, supported early U.S. entry into the war. Once the war ended, he fully supported the establishment of a world court to prevent the next war.

It is only natural that Root supported international adjudication and the rule of law for the peaceful settlement of international disputes. Before becoming secretary of war under McKinley and secretary of state under Roosevelt, Root had spent 1865–1899 practicing law in New York City. He had defended Boss Tweed and the Sugar Trust. The law is what Root knew, and it appealed to his nature. Root was highly intelligent, logical, articulate (often quite witty), conservative, and a realist.¹ He knew law was used to settle disputes between the U.S. states; he thought it should work among fully sovereign states, too.

The fact that Root was a lawyer explains a good deal about him—the shape of the choices he made and why he succeeded with many of those choices. But the fact that he was a lawyer is not the whole story. Many with legal training have keen, analytic minds. Fewer have shared his commitment to the rule of law in international relations. But quite special to Root was his lack of self-seeking. Keeping the country out of trouble—that was his ambition. “‘The main object of diplomacy,’ wrote Root on September 9, 1905, is ‘to keep the country out of trouble.’ Accordingly, he avoided unnecessary drama and stimulated crises. His legal career had trained him to conciliate, not antagonize, to seek reasonable solutions, not spectacular triumphs.”²

⁴ Para. 63 (Aug. 10, 1995).

* Associate Professor of Law, Ohio State University. My thanks to Michael Murphy (J.D. expected 2002) for valuable research assistance.

¹ RICHARD W. LEOPOLD, *ELIHU ROOT AND THE CONSERVATIVE TRADITION* (1954); MICHAEL DUNNE, *THE UNITED STATES AND THE WORLD COURT, 1920–1935*, 20–21 (1988).

² PHILIP C. JESSUP, *ELIHU ROOT* 71 (1938), available at <www.nobel.se/peace/laureates/1912/root-bio.html>.

He thought enhancing the role of law was a reasonable solution. His lack of personal ambition made it possible for powerful individuals like McKinley, Theodore Roosevelt, and Taft to trust him. People believed he truly had the best interest of the country in mind in his search for peace through the law he so revered. As a result, he was trusted to put forth novel ideas, like the resolution of international disputes through compulsory adjudication. He could make his proposals for a world court at the Second Hague Peace Conference and at the Central American Peace Conference. (He won the Nobel Peace Prize for his work toward peace in Central America.) He negotiated twenty-four arbitration treaties, which he actually got through the Senate. He established the International Joint Commission with Canada. He could propose arbitration with Canada to solve the long-standing dispute over fishing off Newfoundland. He was invited in 1920 to help draft the Statute of the Permanent Court of International Justice (PCIJ) and again in 1929 to revise the Statute. He was allowed to take the long view, and he was willing to do so because he was not promoting his own record.³

He never gained the trust or respect of Woodrow Wilson, however. Wilson did not trust, respect, or like Elihu Root. In many ways the men were opposites and, at the time of the crisis of World War I, that fact can only be regretted. Root was notoriously excluded from the American delegation to the Paris peace negotiations. As a result, he did not leave his mark on the central institution for dispute resolution of his era: the League of Nations. A historian of American foreign policy, Richard W. Leopold, explains Wilson's reasons for excluding Root: "Actually, Wilson's motives were simple if not commendable. He was temperamentally unable to work closely with men of stature, and he avoided coadjutors he could not dominate. Root would have been too strong an associate, no matter what his beliefs were."⁴ Jessup adds that Wilson disliked lawyers and that he wanted no outstanding Republicans in the delegation.⁵ Wilson also thought, probably unfairly, that Root had done a miserable job in the summer of 1917 when he sent him to Russia. His mission had been to keep Russia in the war.

Even more important, however, Root had a different vision from Wilson for the post-war world. Leopold believes that if Root had been included, he would have been more amenable to Wilson's ideas and the ultimate shape of the League would have been more realistic, and most important, the United States might well have joined. We can never know if Root's inclusion in the delegation would have made the fundamental difference.

The media expressed the view in 1919 that Root would go to Paris,⁶ and his naming had been expected in Republican circles. "[O]f all Republicans, he was best equipped to deal with foreign statesmen. His prestige as former secretary of state, as judge on the Hague Court, and as recipient of the Nobel Prize, his success in charming Latin America in 1906, and his ingenuity in drafting a world court plan in 1907, all stamped him as an obvious choice."⁷ Colonel House had solicited from Root ideas for a post-war world organization. Moreover, Root had been a senator and retained close friendships and influence in the Senate. But "[a]s for Root's potential influence in winning over the Senate, Wilson, to his sorrow, forgot that entirely."⁸

On the other side of the argument, Root could not bring himself to support important aspects of Wilson's plan. Root did not support the use of force to enforce peaceful settlement. Root recognized and advocated the view that preservation of the peace is an interest of the whole international community.⁹ But Root felt that this part of

³ JESSUP, *supra* note 2, at 50.

⁴ LEOPOLD, *supra* note 1, at 132-33.

⁵ JESSUP, *supra* note 2, at 480; *see also* DUNNE, *supra* note 1, at 21.

⁶ JESSUP, *supra* note 2, at 379.

⁷ LEOPOLD, *supra* note 1, at 131.

⁸ *Id.* at 133.

⁹ JESSUP, *supra* note 2, at 377.

Wilson's plan was too ambitious and that the United States would not be able to honor the commitments required of it.¹⁰ He felt strongly that the United States could not support what emerged as Article X of the Covenant—the commitment “to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League.” Root felt Wilson was promoting this and other ideas with his own legacy in mind, as opposed to what would actually work and what the American people could accept.¹¹

Root preferred a world court as the centerpiece of the post-war order, with a looser conference of states meeting regularly to work out disputes through conciliation.¹² Commenting in 1926, he stressed the essential difference between the work of a conference, which deals with particular situations, and the work of a court, which decides cases but in doing so continually builds up “a body of agreement which narrows the field of controversy between nations and prevents future controversies.”¹³

During the Paris peace talks, Root had written an open letter suggesting amendments to the first draft of the covenant released in February 1919.¹⁴ His suggestions were largely ignored. He wrote in June to Senator Henry Cabot Lodge, a close friend, complaining that nothing had been done “to provide for the reestablishment and strengthening of a system of arbitration or judicial decision upon questions of legal right” or “for the revision or development of international law,” leaving “a program which rests the hope of the whole world for future peace in a government of men, and not of laws, following the dictates of expediency, and not of right.”¹⁵ Root advised the Senate to pass a resolution requesting that the president negotiate with the other powers for the strengthening of a system of international arbitration and for periodical meetings of governments to revise and develop international law.¹⁶

In the end, Root favored U.S. membership in Wilson's League but only on the condition that the United States make major reservations, especially regarding Article X. He did not work strenuously for ratification, however, nor did he exercise influence over Lodge. The Senate failed to ratify the Covenant even with Root's reservations. Writing in 1937, Jessup concluded that Root had been right.¹⁷ The world was not ready for a binding commitment to use force to maintain the peace. But if the United States had been in the League, working to adjust unfair aspects of the Treaty of Versailles, would force have been necessary?

Naturally, Root was an enthusiastic supporter of the Permanent Court of International Justice. In 1920, he was invited by the League of Nations to serve with ten other distinguished international jurists to draft the Statute of the PCIJ. Root and his British colleague Lord Phillimore were responsible for the method of selecting judges, something Root had early identified as a key problem for the success of international adjudication. His method remains substantially the same one used today for the selection of International Court of Justice judges. Root also played a key role in determining the PCIJ's jurisdiction. Root always felt strongly that when states seek out judicial or arbitral settlement, they want an outcome based on law and not on the personal views of the judges as to a just or workable outcome.¹⁸ The PCIJ decided cases on the basis of international law.

¹⁰ *Id.* at 378

¹¹ *Id.* at 381.

¹² LEOPOLD, *supra* note 1, at 133.

¹³ PAN AMERICAN UNION, CODIFICATION OF AMERICAN INTERNATIONAL LAW 52–62 (1926).

¹⁴ DUNNE, *supra* note 1, at 25–27.

¹⁵ *Id.*, at 27; Elihu Root, *Letter of the Honorable Elihu Root to Senator Henry Cabot Lodge Regarding the Covenant of the League of Nations*, 13 AJIL 596 (1919).

¹⁶ Root, *supra* note 15.

¹⁷ JESSUP, *supra* note 2, at 417.

¹⁸ *Id.* at 421.