

THE CODIFICATION OF INTERNATIONAL LAW

A growing interest among lawyers and statesmen in the possible codification of International Law justifies a brief, if necessarily inadequate, summary of the general issues debated and of the progress which has been made. In preparing this summary it is not intended to support a particular point of view or to advocate some specific procedure but simply to indicate the character of the debate and to point out the value and significance of the organized efforts looking toward codification which are now under way.

There are so many elements of uncertainty, vagueness and inconsistency in the "body of customary rules generally observed by states in their relations with each other" that students have found the law of nations one of the most enticing and at the same time one of the most tantalizing departments of jurisprudence. One likes to think of International Law as a majestic and ancient structure created out of the experience of countless generations and having its foundations set deep in the history of European civilization. Thus viewed it urgently invites a closer inspection. But a detailed study tends to dispel any illusions of grandeur. The temple of international justice on near inspection appears to be rather a storehouse filled with the lumber of the ages—a medley of things new and old showing as yet little evidence of order or purpose. Thus disillusioned, students have divided roughly into two classes—those who would deny the existence of any international law at all and those who with more optimism would seek to reduce this chaotic heritage to some consistent system so that it might prove more useful in this modern closely knit world.

To the latter class the conception of a code of international law has always been alluring. In an exceedingly able article, recently published in the *Journal of the American Bar Association*, former Attorney General Wickersham has sketched briefly but with accuracy a century of effort looking toward the codification of international law, beginning with the suggestions of the Elder

Mill and Jeremy Bentham, and coming down to the present ambitious plans of James Brown Scott and the American Institute of International Law. Mr. Wickersham has proved his practical interest in the subject by accepting the invitation of the League of Nations to membership on the Committee of Experts appointed by the League to study and report on what specific branches of international law and practice are now susceptible of regulation by international agreements. That the previous efforts which Mr. Wickersham mentions have proved of little practical value is by no means conclusive that the present activities looking to modifications and restatements are either misdirected or destined to fail. Much has been learned in a century of experience. Even more significant has been the advance made during the past century in the application of accepted principles of international conduct and the growth of a customary international practice. When Bentham and Mill were writing Africa was indeed the dark continent; the people of South America were just feeling the first thrills of national self-consciousness; the western spaces of North America were still unconquered; Japan was wrapped in her self-imposed seclusion; and China was still meeting with contemptuous superiority the timid advances of western navigators. Any codification of international law at that time would have been essentially an expression of European international life and confined in its operation largely to European problems. One need only study our contemporary world to realize what changes the past century has wrought. Practically the entire continent of Africa has been organized by colony or under mandate. The vast stretches of South America are the home of prosperous and independent commonwealths. The frontier in North America is rapidly disappearing. Japan has attained the status of a great power and holds a permanent place in the Council of the League of Nations. China has but recently been a member of the Council and a Chinese jurist is now a Deputy Judge of the Permanent Court of International Justice.

Even more striking has been the rapid spread of those standards of international conduct and of those methods of international intercourse which through centuries have developed in

the life of the European peoples. The influence of Europe in shaping the rules which today regulate the intercourses of States can hardly be exaggerated. The rigid conventions of diplomatic life in Tokyo or Peking, the consular procedure and practice in every African Colony or Chinese port, the maritime law which rules the conduct of commerce in all the seas have their origin in the traditional practice of Mediterranean City States or in the etiquette of European Courts. Former Ambassador Jusserand in his charming essay on "The School for Ambassadors" reviews some of the numberless diplomatic manuals which appeared in European countries during the sixteenth and seventeenth centuries and points out the influence which they exerted in setting the standards of international manners. It is hard for us to realize how limited was the field for their display. The "Christian Republic," as it is called in the preliminaries of the treaties of Westphalia, comprehended only a portion of Europe. Turkey was not included, of course, nor orthodox Russia. It was not until the Nineteenth Century that European manners and standards as applied to international relations found ever increasing acceptance in other portions of the world. There is an enduring charm in the story of early European and American contacts with the Orient, and there are incidents often humorous, sometimes grotesque, connected with the efforts of sober-minded plenipotentiaries to substitute their settled diplomatic conventions for the venerated traditions of Asia. It was no longer ago than the middle of the nineteenth century that the American Minister-Resident, Townsend Harris, was steadfastly refusing to crawl on his hands and knees into the presence of the Japanese Shogun, and that Lord Elgin was shown the instructions of the Chinese Prime Minister which stated that "there being a particular sphere allotted to every official on the establishment of the Celestial Empire and the principle that between them and the foreigner there is no intercourse, being one ever religiously adhered to by the servants of our government of China, it would not be proper for me to reply in person to the letter of the English Minister." What a contrast to the dignified ceremonial which accompanies the presentation of credentials in Tokyo today or the studied

courtesy and perfect European form of the diplomatic notes now being delivered by the Chinese authorities to the representatives of the foreign government! It would seem that European diplomatic forms and conventions have indeed conquered the world.

But even more startling than the spread of a uniform convention for the conduct of foreign relations is the development of the "Christian Republic" of the days of Westphalia and Utrecht into the modern world-embracing "Community of States." For the past century has witnessed the emergence of an organized world. This does not mean that every portion of the globe is adequately or equally organized or that it is organized for peace, or that the various organizations maintain perfect order. It does mean, however, that through the medium of independent states or protectorates or colonies or mandates, the entire body of mankind is now organized to carry on diplomatic intercourse, to exchange commodities and to form spiritual and intellectual contacts. There are no dark continents, no hermit nations. Sixty-five independent States and dominions are today developing their respective resources and working out their respective national destinies. Subordinate to these States and variously influenced by them are nine protectorates, more than thirty colonies and fourteen mandated territories. It would seem almost inevitable that as soon as such an organization was completed (even though in some instances it were formal rather than substantial) a need should arise first for more effective means of intercourse and second for a clearer statement of the fundamental assumptions and of the specific rules by which that intercourse should be governed. The League of Nations with its permanent Secretariat, its regular meetings of Council and Assembly and its Standing Committees represents a sincere effort to meet the first need. What Professor Garner has recently termed a "popular demand" for codification of international law represents the most natural suggestion to meet the second. Is this "popular demand" reasonable and is codification feasible?

We might expect a hesitant reply to this query from British scholars. Their thought reflects British experience with the

varied races of man. They share the intellectual tolerance and the realism of the great British administrators. They recognize that world agreement on fundamental assumptions is not a simple but a singularly complex aim involving as it does the blending of conflicting conceptions arising from deep set differences of race, religion, philosophy and tradition. They have welcomed far more enthusiastically than our American scholars the League of Nations as a practicable instrument of international conciliation. But they are loath to advocate a rigid code of international rules at such an early stage of world organization. Lord Robert Cecil expressed the British Statesman's view in one short sentence in an address before the First Assembly of the League of Nations when he said "We have not yet got to the stage where it is desirable to consider the codification of international Law."

This thesis is supported by Professor P. J. Baker, of the University of London, in an article of rare clarity published in the British Year Book of International Law for 1924. Professor Baker first inquires whether codification means preparing "a code of the existing obligations of States or a code of new law." He answers that "the popular demand for the codification of international law in the United States is a demand for a new system of Utopian rules"—in other words not really for codification but for legislation. He further concludes that the Committee of Jurists who in 1920 prepared for the council of the League of Nations the first draft Statute for the Permanent Court of International Justice evidently had in mind "as the object of the Conference they recommended a new body of rules founded on the existing law, but introducing amendments and additions which they believed to be required." In spite of the high authority from which this suggestion emanates Professor Baker cannot conceive of legislation for the world enacted in this manner. The practical difficulties appear insuperable. He therefore confines himself to the narrower inquiry whether even a codification of existing law, with a view to improve not the substance but the form of the law, is a wise or a practicable aim. In answering this query he states the following conclusions of his argument:

“First, the making of a single comprehensive code of international law governing all the legal relations between the members of the society of States is not practicable, and, even if it were, the codifying method by lawyers’ commissions and conferences would not be a satisfactory means of achieving the end in view. Second, even for the drawing up of written bodies of rules concerning certain restricted parts of international law, the method of codification is not one that is well adapted to the needs of the situation, nor one which statesmen should now endeavor to employ. The main reason for these views, upon which the above argument has been founded, is that there is now in process of evolution in the institutions of the League of Nations a working and hopeful alternative to the method of codification, an alternative which, being genuinely legislative in character, is more elastic and adaptable than the codifying system, which will permit development as fast as international society is ready for it, and which will in no way restrict—as codification might do—the spontaneous growth in other ways of the rules of international law. It is therefore to the improvement of this alternative method that those who are interested in the matter should direct their attention, for in this improvement lies the hope of progress.”

With these conclusions in mind, which may be taken as representative of the English school of thought, it will be interesting to consider what might be justly called the American viewpoint. No one could better express this than that veteran scholar and tireless worker in the field of international law, Dr. James Brown Scott. One can find his views and plans fully set forth in the Reports which he has published, as Director of the Division of International law, in the recent Year Books of the Carnegie Endowment for International Peace. In his Report for 1923 Dr. Scott discussed the nature and history of codification of the law of nations and expressed his conviction “that codification was a prerequisite to the successful operation of judicial institutions of an international character, notably the Permanent Court of International Justice.” A year later he returned to the subject and stated his fundamental belief in these words:

"The codification of the law of nations is indeed a prerequisite to the peace of the world inasmuch as the nations must have a standard by which their conduct is to be tested and the more clearly that standard is expressed the more difficult it will be for nations to follow lines of conduct which are inconsistent with a codification of their rights and duties, to which they have been parties."

Dr. Scott has been consistently active in applying these convictions. He has given enthusiastic support to the efforts of the American Republics to frame a code of what has been rather inaptly called "American International Law."

These efforts have continued with serious interruptions for just a quarter of a century. In addressing the Governing Board of the Pan-American Union on March 2d, 1925, Mr. Hughes, then Secretary of State, thus tells the story:

"The Second International Conference of the American Republics held in 1901-1902 in Mexico City provided for the appointment of a committee to draft codes of public international law and private international law to govern the relations of the American Republics. While the convention then proposed was not ratified, the interest in the subject continued and the question of the codification of international law was again taken up at the Third Pan-American Conference held at Rio de Janeiro in 1906. The resulting convention was ratified but the work was unavoidably delayed and the international commission did not meet until 1912. This happened to be on the eve of the World War which interrupted the consideration of the subject. . . .

"The Fifth Pan-American Conference, which was delayed because of the war, was held in Santiago, Chile, in 1923, and the plan to take appropriate measures for the codification of American international law was again brought forward. Provision was made for the appointment of an American international commission of jurists, which accordingly has been constituted, and will soon meet at Rio de Janeiro. It is, as I have said, preliminary to the undertaking of this congress of jurists that the Governing Board of the Pan-American Union has asked the aid of the American Institute of International Law which has so promptly and efficiently been rendered."

In the Year Book of the Carnegie Endowment for 1925 Dr. Scott returns to this, his favorite subject, and comments on the projects, some thirty in number, prepared by the American Institute of International Law, to be submitted to the Commission of Jurists, which is scheduled to meet at Rio de Janeiro during this year. Dr. Scott explains the dual scope of these projects. He says: "The projects expressly recognize the universal nature of international law and that it binds all civilized nations. However, they state with equal frankness that there are certain problems due to the geographical, political and economic conditions of the American Continent which either find no place in the universal law of nations because they are of restricted application or which have been inadequately stated. To this extent the projects recognize what may be called American International Law; but this phrase is to be understood as including the general rules of international law common to the world at large, to which are added the special rules of American practice." It seems ungracious to criticize a sincere effort of this character, but the aim as stated by Dr. Scott appears to ignore the vital distinction between "the accepted rules of international law" and "questions of international policy." If this be true, it is to be feared that even success in this venture will mean little, if any, advance in the clearer statement of international rules. Rather will it tend to add to the confusion by blending with an attempted statement of generally accepted rules matters of purely regional policy. In so far as the contemplated meeting of the Commission of American jurists expresses the aims of those who look to the codification of international law as a prerequisite to the peace of the world, one can hope for little from these efforts. One must return then to the instrumentality pointed out in the conclusions submitted by Professor Baker.

It will be recalled that a committee of the Assembly of the League of Nations as early as December 18, 1920, reported a resolution inviting the Council "to address to the most authoritative of the institutions which are devoted to the study of international law, a request to consider what would be the best methods of co-operative work to adopt for a more definite and more com-

plete definition of the rules of international law which are to be applied to the mutual relations between states." A short debate followed the introduction of this resolution during which Lord Robert Cecil is reported to have said, "that either the recommendation was submitted with serious intention of proceeding to the codification of international law or it was a pious hope of no real value of importance. He was opposed to the recommendation because if it meant something it was bad and if it meant nothing it was worse." The resolution was lost.

This action of the First Assembly expressed the practical judgment of the nations there represented that in the face of pressing problems of reconstructoin it was too soon to assume the task of reconciling conflicting views of international law. Four years later, however, the Fifth Assembly of the League of Nations adopted on September 21, 1924, the following very carefully drawn resolution which had been proposed by the Swedish delegation:

"The Assembly.....

.....

"Requests the Council:

"To convene a Committee of Experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilisation and the principal legal system of the world. This Committee, after eventually consulting the most authoritative organisations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

"(1) To prepare a provisional list of the subjects of international law, the regulation of which by international agreement should seem to be most desirable and realisable at the present moment:

"(2) After communication of the list by the Secretariat to the Governments of States, whether members of the League or not, for their opinion, to examine the replies received; and

“(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.”

On September 30, 1924, the Assembly included this Committee of Experts “among the organizations to be consulted by the Council, with a view to the conclusion of all agreements necessary to ensure the establishment, continuity and proper working of the International Institute for the Unification of Private law which the Italian Government has offered to found.”

During the meeting of the Council of the League of Nations at Rome on December 12, 1924, the Committee of Experts for the Progressive Codification of International Law was decided on. It is interesting to study the composition of this Committee. In the persons of its members we see revealed the juristic thought of the outstanding civilizations of the world. The Northern races of Europe present their interpretation of international right through the Chairman of the Committee, M. Hammarskjöld, Governor of Upsala. The dominating traditions of Roman Law are personified in the Vice-Chairman, Professor Diena, Professor of International Law at the University of Pavia. The supreme logical powers of the Gallican mind find expression in the distinguished French representative, M. Fromageot, Legal Adviser to the Ministry of Foreign Affairs of the French Republic. The colorful imagination of the Slavic peoples has its representative in Dr. Adalbert Mastny, President of the Czechoslovak Branch of the International Law Association. Asia is present in the persons of Dr. M. M. Matsuda, of Japan, and the brilliant jurist, Dr. Wang-Chung-Hui, of China. South America is represented by Dr. Jose Leon Suarez, Dean of the Faculty of Political Science of Buenos Ayres, and the spirit of the Anglo-Saxon law, that rich heritage of the English speaking peoples, finds expression through Professor Brierly, Professor of International Law at Oxford, and George W. Wickersham, former Attorney-General of the United States. Of great value to the Committee was the appointment in May, 1925, of Sir Muhamed

Rafique to speak for the many millions of our world's population who yield obedience to the Moslem law.

The aim which the Committee proposes to pursue and its method of procedure can best be given in the words of the Report of June 6, 1925, to the Sixth Assembly of the League of Nations on the Work of the Council, on the work of the Secretariat and on the Measures taken to execute the Decisions of the Assembly. Commenting on the progressive codification of international law the Report says:

"The Committee met for the first time at Geneva from April 1st to 8th 1925. In conformity with the terms of reference laid down under the Assembly's resolution the jurists composing the Committee endeavored to ascertain the subjects of international law the regulation of which by international agreements would seem to be most desirable and realisable. The subjects thus selected were then distributed for preliminary examination among a number of small Sub-Committees consisting of certain members of the Committee. These members will submit their reports to the Committee at its next session, which will be held at the end of the year or early next year. In indicating these subjects, the Committee had no intention of finally determining the subjects which might be communicated to the Governments for the purpose of obtaining their views on them. Its sole object for the moment was to make a first preliminary examination of the ground which would have to be explored with a view to the framing of detailed proposals to be elaborated at a later date. Only after this work has been done will the Committee be able to submit to the Council a report on the questions which are sufficiently ripe and on the procedure which might be followed with a view, when the time comes, to preparing for conferences for their solution."

Even more enlightening are the careful limitations placed on the specific topics to be investigated by the various sub-committees. No attempt is made toward wide generalizations. Those all-embracing declarations such as that of the American Institute of International Law on the Fundamental Rights and Duties of Nations are conspicuously absent. Only subjects involving

existing and embarrassing conflicts are to be considered and such changes as may be suggested must be of a character to command the acquiescence of the independent States of the world. Questions of policy are rigorously excluded. A few illustrations will suffice. For instance, one sub-committee is directed to inquire whether there are problems arising out of the conflicts of laws regarding nationality, the solution of which by way of convention could be envisaged without encountering political obstacles. Another sub-committee is appointed to inquire into the legal status of government ships employed in commerce. Another whether there are problems connected with extradition which it would be desirable to regulate by way of general convention; and another whether there are problems connected with the law of the territorial sea considered in its various aspects which might find their solution by way of conventions. And finally a sub-committee to inquire whether and in what places a state may be liable for injury caused on its territory to the persons or property of foreigners.

These sub-committees have been actively at work during the past year and the whole committee began its second session on January 12, of this year. It is now considering the reports of its various sub-committees and in particular what is termed a remarkable report on the international law in territorial waters presented by Walter Schucking.

There is no thought here of a "single comprehensive code." Nothing is to be done which "will restrict—as codification might do—the spontaneous growth in other ways of the rules of international law." Surely Professor Baker is standing on the firm ground of British realism when he concludes that "there is now in the institutions of the League of Nations a working and hopeful alternative to the method of codification," and that "it is therefore to the improvement of this alternative method that those who are interested in the matter should direct their attention for in this improvement lies the hope of progress."

Roland S. Morris.

Philadelphia, Pa.