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COMMENTS

PRELIMINARY WORK IN THE CODIFICATION OF AMERICAN INTERNATIONAL PUBLIC LAW: SOME RESULTS OF THE HAVANA CONFERENCE

The principal task which concerned the recent International Conference of American States at Havana was the statement, in the form of codes, of the international public and private law which shall, on acceptance by the several American republics, govern the states of the western hemisphere in their mutual relations. The results of the labors of the conference are to be found in two codes, one of American international public law and one of American international private law, which will be submitted to the proper authorities of the individual republics to be constitutionally incorporated into the law of each as the duly recognized law of American nations. Analysis of the codes as proposed by the Havana conference is not yet possible for the quite sufficient reason that their contents have not been officially divulged, but there are some aspects of the work done preliminary to this conference which merit comment.

Out of the plexus of political, social and economic forces which finds expression in the codification of American international law¹ at least four more or less ill defined movements or tendencies may be segregated for special observation as being of unusual significance. These are: (1) a growing world-wide movement toward the codification of international law; (2) the persistent theory that the republics of the western hemisphere form a separate family in the community of nations;² (3) the ripening belief that all disputes between independent states can be settled fairly, and therefore honorably, by peaceable means; and (4) a crystallizing conviction in the south that the increasing hegemony of the United States must be opposed by more robust measures.

The movement for the codification of international law has a fruitful and not undramatic past. Beginning as early as the middle of the nineteenth century various works on international law have appeared in code form.³ Many associations of persons

¹ As the title suggests, this comment will deal only with the preliminary work in the codification of American international *public* law—not with private law.

² European possessions in America have no share in American international law.

³ The more noteworthy of these works are: E. de Ferrater, *Codigo di derecho internacional*, 2 Ronvls. (Barcelona, 1846-47); A. Parodo, *Saggio di codificazione del diritto internazionale* (1851); A. de Domin Petrushevcz,

interested in international law have arranged into code their ideas of what international law is or should be.⁴ But of far greater importance are the actual steps made toward codification by the nations themselves in the form of treaty agreements to follow certain practices in the future.⁵ A list of multi-lateral conventions or treaties which are recognized as declaratory of international law would reveal that codification has been extended to a great variety of subjects, e. g.: the declaration of Paris (1856) concerning privateering, blockade, and captures on the sea; the Geneva conventions (1864 and 1906) for the amelioration of the condition of the wounded in war; the declaration of St. Petersburg (1868) renouncing the use of explosive bullets; the Hague conventions of 1899 and 1907 dealing mainly, but not exclusively, with the conduct of belligerents and neutrals; convention for the regulation of aerial navigation (1919); Barcelona conventions (1921) concerning freedom of transit and use of international rivers; and a convention establishing an international regime of maritime ports (1923).⁶ The League of

Précis d'un code de droit international (Leipzig, 1861); J. G. Bluntschli, *Das moderne Völkerrecht der civiliserten Staaten als Rechtsbuch dargestellt* (1868. This work, translated in several languages, appeared in the 5th French edition, translated as *Le droit international codifié* by M. C. Lardy, Paris, 1895); D. D. Field, *Draft Outlines of an International Code* (New York, 1872); P. Fiore, *Il diritto internazionale et la sua sanzione giuridica* (Turin, 1890), translated into English as *International Law Codified* by E. M. Borchard (New York, 1918); and J. Internoscia, *New Code of International Law* (New York, 1910).

⁴ The most notable examples of these projects are those prepared by the Institute of International Law, an organization founded at Ghent in 1873, and admitting persons of every nationality to its membership. The draft codes of the Institute can be found at various places in its publication, *Annuaire de l'Institut de Droit International* (Paris, 1877).

⁵ Some importance should be attached to the codification, by an individual nation, of the rules which shall guide it in its relations with other countries. The axemple of this type of codification which receives most frequent mention and highest praise is *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber in 1863 for use during the Civil War. Very high honors should go to several Italian states for the comprehensive codes which they issued, during the war of the American colonies and France against England, to make clear the position of those states as neutrals. These Italian codes seem to be unmentioned by modern writers but they can be found in G. F. de Martens, *Recueil de Traité des puissances et états de l'Europe*, 2e éd. (Göttingen, 1817-35), III, 24-35, 46-59, 64-87.

⁶ Mention should also be made of the work of the conferences at Brussels (1874) and London (1909) which prepared in the form of conventions rules governing the conduct of belligerents toward both the enemy and neutrals, but which failed of ratification.

Nations has accelerated the movement towards codification by appointing a committee of experts for the progressive codification of international law, which committee has made appreciable progress in the work preparatory to actual consideration of draft codes by diplomatic representatives of the various nations.⁷ It is noteworthy that the incentive for codification of international law comes almost altogether from those nations whose national legal systems are code systems as distinguished from the common law system. Great Britain has been for generations the chief opponent of codification of the law of nations, a fact abundantly illustrated in the fate of the declaration of London.

The idea that the republics of the western hemisphere form a distinct family in the community of nations is also not of recent origin. As early as 1826 a Pan American congress met at Panama, to be succeeded by many conferences made up of delegates officially representing the American republics. Since 1889 there has existed the permanent organization of the republics known first as the Bureau of the American Republics, and later as the Pan American Union, which convened this year in its sixth conference at Havana.⁸ To accompany this special international organization of the western hemisphere there has developed a theory that the American republics are governed in their mutual relations by a separate American international law. Due mainly, no doubt, to the vigor of the chief exponent of this doctrine, M. Alejandro Alvarez, this theory has won considerable adherence in both American continents.⁹

Of the accounts of the progress of the idea and practice of codification which the writer has seen, that by J. W. Garner in his *Recent Developments in International Law* (Calcutta, 1925), 708-74, is by all odds the best. Other accounts worth the reading are: E. Nys, "The codification of international law," 5 *American Journal of International Law* (1911), 871-900; L. Oppenheim, *International Law*, 4th ed. by R. F. Roxburgh, 2 vols. (London, 1920-21), I, §§ 30-32, pp. 37-42; A. Rivier, *Principes du droit des gens*, 2 vols. (Paris, 1896), I, 38-42; E. Root, "The function of private codification in international law," 5 *Am. Jour. of Int. Law* (1911), 577-89; G. Roszkowski, "De la codification du droit international," 21 *Revue de droit international et de legislation comparée* (1889), 521-31.

⁷ On the work of the League of Nations toward codification, see G. W. Wickersham, "The progress of codification under the auspices of the League of Nations," 20 *Proceedings of the American Society of International Law* (1926), 121-35; and F. J. Urrutia, "La codification du droit international," 1 (3d série) *Revue generale de droit international public* (1927), 619-26.

⁸ W. A. Reid, *Story of the Pan American Union* (Philadelphia, 1924).

⁹ The doctrine is set forth by M. Alvarez in his *Le Droit international Americain* (Paris, 1910), a volume of nearly 400 pages.

Little need be said of the various evidences that the American republics are aware of the advantages of peaceable settlement of international disputes. An international court for the handling of the differences of the five Central American states was created in 1907, disrupted ten years later to be resurrected, in form at least, in 1923.¹⁰ The states of the new world have not been slow to enter into bi-lateral agreements looking toward peaceable settlement of their disputes, and by June, 1927, fourteen of the twenty-one were signatories of the statute of the world court, eight having accepted the optional clause making obligatory the submission of certain disputes to that tribunal.¹¹

Observers disagree as to how much love, hate, fear, admiration, etc., enter into the attitudes of the southern republics toward the United States. One can be certain, however, that there have been expressions of fear at the steady southward expansion of the United States, and evidences of resentment toward the policy of the United States in policing the Caribbean.¹²

Since the interesting story of the steps taken in preparing for the Havana conference has been garrulously related in another place, it is sufficient merely to trace the outline here.¹³ At the fifth Pan American conference at Santiago de Chili in the spring of 1923, a resolution was adopted calling for the creation of an international Commission of Jurists who should meet at Rio de Janeiro in 1925 to prepare draft codes of international law, said codes to be submitted for acceptance by the sixth Pan American Conference as the substance of conventions which should for the future make definite the rules to be observed as the international law of the American republics.¹⁴ In order to facilitate the work of the commission of jurists, the governing board of the Pan American Union in 1924 invited the American Institute of International Law to prepare code pro-

¹⁰ The constitutions of the two courts can be found in 2 *Am. Jour. of Int. Law* (1908), *Supplement*, 231, and 17 *Ib.* (1923), *Supplement*, 83.

¹¹ *Publications of the Permanent Court of International Justice. Series E, No. 3. Third Annual Report, June 15, 1926-June 15, 1927* (Leyden), 335-40.

¹² On this point see: I. Goldberg, "As Latin America sees us," 3 *American Mercury* (1924), 465-71; S. G. Inman, "Imperialistic America," 134 *Atlantic Monthly* (1924), 107-16; V. R. Haya de la Torre, "Is the United States feared in South America?," 118 *Nation* (1924), 408-10. A recent book which the writer has not seen is C. H. Haring, *South America Looks at the United States* (New York, 1927).

¹³ J. E. Scott, "The gradual and progressive codification of international law," 21 *Am. Jour. of Int. Law* (1927), 417-50.

¹⁴ This resolution is printed in 20 *Ib.* (1926), *Supplement*, 295.

jects to be submitted to the commission of jurists as a basis for their work. The Institute, at its 1924 meeting in Lima and through the work of a special committee meeting in Havana in 1925, agreed upon thirty projects which were duly laid before the commission of jurists when it met at Rio de Janeiro in 1927, two years after the date anticipated in the Santiago resolution which called for its creation.¹⁵ The commission of jurists completely reworked the thirty projects, rejecting some and revising others, with the result that the delegates at Havana in 1928 were confronted with a pamphlet of forty pages printed in four languages and containing twelve projects for the codification of American public international law.¹⁶

One may well be puzzled as to what aid the commission of jurists received from the thirty projects presented to them by the American Institute of International Law. To the writer it seems that the most noticeable quality of the work of the Institute is slovenliness.¹⁷ A group of college undergraduates could have been depended upon to avoid some of the flaws which the projects reveal. Authorities may well disagree, as they long have, as to whether the code shall merely state the law as it is believed to exist at the time, or whether the code shall also include new rules which are needed and are ripe for adoption.¹⁸

¹⁵ These thirty projects are published by the Pan American Union as *Codification of American International law. Projects of Conventions prepared for the consideration of the international commission of jurists* (Washington, 1925). They appear also in *20 Am. Jour of Int. Law* (1926), *Supplement*, 300-387. The commission of jurists was also presented with a project of international private law, prepared by a committee of the American Institute of International Law. Scott, *op. cit.*, 430.

¹⁶ These four versions, English, French, Portuguese, and Spanish, are published by the Pan American Union, the title of the English edition being *International Commission of Jurists. Public International Law. Projects to be submitted for the consideration of the sixth International Conference of American States* (Washington, 1927). The projects for the codification of international private law bear the same title page except that the word *Private* is substituted for *Public*.

¹⁷ These projects received faint praise indeed from Professor J. L. Brierly in "The draft code of American international law," *The British Yearbook of International Law*, 1926, pp. 14-23, but most criticisms have not been severe if even unfavorable. See the comment by various authors in *21 Am. Jour. of Int. Law* (1927), 118-46, 306-16.

¹⁸ We are told that this difference of opinion is no longer serious enough to obstruct the advancement of a program of codification. "What public opinion demands, and what most American jurists who advocate codification want, is the rehabilitation, readaptation and extension of the law. They demand that the existing rules be altered, where alteration is desirable, to bring them into relation with the changed conditions of international society, and above all, they want new rules covering international

Specialists may also disagree as to what the existing law is, or, in case it is agreed to extend the law, what lines of extension are most timely. But upon some matters there is such unanimity of agreement that departure from the customary and expected can hardly be laid to difference of opinion. Thus, when the American Institute of International Law, in attempting an enumeration of the ways or situations by which a treaty may legally cease to be effective, failed to specify as one of these means mutual agreement of the parties (e. g. by substitution of a new treaty for the old one) they outlawed the method most universally accepted as lawful.¹⁹ A provision in a code declaring that in order for extradition to be granted "it shall be necessary" for the person demanded to "be guilty" of a crime of designated seriousness would bar the extradition of persons who were being sought in order to stand trial on indictment. In face of the near-perfect agreement of practice and theory that fugitives from trial as well as fugitives from punishment should be returned to the site of the alleged crime it may be charitable to charge this innovation in the project of the Institute to mental lapse rather than to deliberate eccentricity.²⁰ Perhaps even less excusable are repeated violations of some of the most elementary rules of drafting. It was noted above that a case of incomplete enumeration exists in the project on "Treaties." Imperfect classifications abound.²¹ Terminology is inconsistent;²² indeed, the choice of words is so often unfortunate that

relationships which are not now regulated or only inadequately regulated. In brief, what they want is not *codification*, as the term is generally used in the law books, but *legislation*, although they persist in calling it 'codification.'" J. W. Garner, "Some observations on the codification of international laws," 19 *Am. Jour. of Int. Law* (1925), 328-29.

¹⁹ Project No. 21, "Treaties," art. 6, of the codes submitted by the Institute. This was corrected in project No. 4, "Treaties," art. 14, by the commission of jurists.

²⁰ This flaw was corrected by the commission of jurists in art. 344 of the code project of private law.

²¹ A glaring example of this fault is in project No. 29, "Measures of Repression," where arts. 2 and 3 list "reprisals" as one of seven measures and art. 8 defines reprisals so as to include all the seven.

²² "It seems clear that in a code it is best to use the same word for the same idea throughout . . ." H. G. Crocker, "The codification of international law," 18 *Ib.* (1924), 38. Yet in project No. 4, "Fundamental Bases of International Law," the terms, "principles," "rules," "customs," "practices," and "usages" are interchanged where one is sure there is no intention to make distinctions in meanings. "Nation," "state," and "country" are used interchangeably. Project No. 21, "Treaties" uses both "negotiate" and "conclude" without explanation for the change.

a lack of preciseness mars many of the projects.²³ These types of fault, happily, are largely absent from the drafts prepared by the commission of jurists.²⁴ If the Havana conference has improved on the work of the commission of jurists to the degree that the latter improved on the work of the Institute, the projects should now be faultless.

The projects of the commission of jurists, as one might expect, go farther than to merely state the existing law, yet they do not venture far into legislation. This, a most important aspect of the code projects, must be left for discussion when the work of the Havana conference is known.

The codes, of course, purport merely to codify international law in so far as it governs the relations of the twenty-one American republics. Where these codes make rules different from the rules of universal international law there will consequently be one law for the American republics and another for the rest of the world. Perhaps, as provided in the work of the commission of jurists, such conflicts will not create any great difficulties, but among the projects of the American Institute

²³ "And" is often used when doubtless either "or" or "and-or" is intended e. g. project No. 4, "Fundamental Bases of International Law," art. 1, states that "The reciprocal relations of nations forming the international community are governed by the principles, rules, customs, practices or usages which are recognized as applicable . . ." In project No. 21, "Treaties," art. 2, it is stated that "The credentials of the representatives must be accepted by the other contracting parties." The intention, no doubt, was not to deny the other parties the privilege of questioning the credentials but to make their acceptance of the credentials a prerequisite to negotiation. Art. 1. of this same project states that "All the contracting nations have complete capacity to negotiate treaties and conventions of all kinds soever . . .", leaving the meaning of the word "kinds" in doubt, particularly in view of definite limitations placed upon the power of states to enter into certain agreements in projects No. 8, "Fundamental Rights of American Republics," and No. 17, "Extradition." The word "majority" may seem to have been used naïvely when seen in the statement that rules of international law may "be derived from custom recognized as obligatory by the majority of those republics" (project 4, art. 7), particularly if the United States, Argentine, Brazil, and Chili should happen to be in the minority.

²⁴ However, many articles in the draft of the commission of jurists are not stated in the best of language. Thus, "Treaties will be concluded by the competent authorities of the contracting states according to their internal law, or by their duly authorized representatives" (project No. 4, "Treaties," art. 1). In project No. 7, "Diplomatic Agents," art. 27, confusion is created by using the words "State," "territory," and "foreign State" to designate the state to which the diplomat is accredited. See also the quotation on p.— and note 29.

there was one (No. 20) concerning "Aerial Navigation" which, besides working positive injury to Canada, Newfoundland, and other European possessions in the western hemisphere, would have made it impossible for an American republic to become a party to the international aerial convention signed at Paris in 1919.²⁵ The projects of both the Institute and commission of jurists provide for interchange of professors, students, and governmental publications among the republics.

The outlawry of war is kept as a prominent objective in the preliminary work of codification, the last of the projects of the commission of jurists being called "Pacific Settlement of International Conflicts." A project of the Institute stated that the republics "agree to have recourse for the settlement of all disputes between them, when direct negotiations have failed,"²⁶ to more persuasive means, making provision for good offices, mediation, commissions of inquiry, conciliation, friendly composition, arbitration, and trial before an international court. Another project provided for a Pan American court of justice and gave it "obligatory jurisdiction" over four types of cases.²⁷ The commission of jurists appears, however, to have been unwilling to go so far. Its project on pacific settlement not only does not provide for the creation of an American international court, but does not bind the republics to take any steps beyond negotiation toward the settlement of their disputes. It does, however, provide for the easy operation of conciliation, friendly composition, and commissions of inquiry. In the case of the last mentioned, however, the project does not go as far as the Bryan treaties for there is not created a permanent commission with authority to take up the investigation of disputes of its own accord and without waiting for the request of the parties to

²⁵ This conclusion is based upon the fact that art. 5 of this project would defeat the very purpose of the convention of 1919. Art. 5 reads: "No American Republic shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of an American Republic." Yet the purpose of the convention of 1919 was, of course, to supplant all special and temporary authorizations by a general and permanent regulation. This purpose is stated in art. 2 of that convention in the following words: "Each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting states, provided that the conditions laid down in the present convention are observed." The convention for the regulation of aerial navigation is in 17 *Am. Jour. of Int. Law* (1923), *Supplement*, 195.

²⁶ Project No. 27, "Pacific Settlement," preamble.

²⁷ Project No. 28, "Pan American Court of Justice," art. 17.

the dispute. Indeed, it is hard to see that the project of the commission of jurists would materially further peaceable settlement. The laws of war are omitted altogether from the projects and the laws of neutrality were only reluctantly inserted on the ground that their statement in the code would better enable the republics to present a united front to their more bellicose neighbors beyond the seas.²⁸

Evidence of the growing desire to curb the United States prevails throughout the projects of both the Institute and the commission of jurists. Space will permit the mention of only some of the more pointed expressions. Article 2 of the commission's second project, entitled "States," reads:

"States are equal before the law, enjoy equal rights, and have equal capacity to exercise them. The rights of each are dependent not upon the power which it possesses to insure the exercise of them but solely upon the fact of their existence as a person of international law."²⁹

Such an assertion could conceivably determine the decision of an international court but it is much more likely to see service as a support to the representative of a bullied state arguing that his nation is under no greater obligation to submit to a supervision of its elections than is Pennsylvania, or to permit control of its finances than is South Carolina. Article 3 of the same project provides: "No state may intervene in the internal affairs of another." Just what would constitute "intervention" or what are "internal affairs" being unexplained, one can see in this statement less of a rule of law than of a protest aimed against the only American republic which indulges in the luxury of intervention. The draft of the American Institute went to much greater care to insist upon the rights of small nations,³⁰ stating that:

"No nation shall hereafter, for any reason whatsoever, directly or indirectly, occupy even temporarily any portion of the territory of an American Republic in order to exercise sovereignty therein, even with the consent of the said republic.

²⁸ J. B. Scott, "The gradual and progressive codification of international law," 21 *Am. Jour. of Int. Law* (1927), 443-44.

²⁹ The grammatical error—" . . . *their* existence as a person . . ."—is not extraordinary.

³⁰ See project No. 7, "Declaration of Rights and Duties of Nations" and project No. 8, "Fundamental Rights of American Republics." coercion."³¹

"No nation has a right to interfere in the internal or foreign affairs of an American Republic against the will of that republic. The sole lawful intervention is friendly and conciliatory action without the character of coercion."³¹

For those who cherish a tenderness for redundancy it may be stated at this point that the codification of American international law is a Latin American and not a North American movement.

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³¹ From art. 1 of project No. 8.