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ANY conclusion about the desirability or the practicability of codifying international law ought to be based on a clear idea of what the process would involve, and unfortunately "codification" is an ambiguous word. In the sense in which British and American lawyers use the word it relates to the *form* in which the law is presented. When we codify, we do not regard the task as one of improving the substance of the law, but as one of collecting the existing rules and stating them concisely and clearly. It is true that, even so, the work must involve some element of law-creating, for when we examine the materials on which we have to work, the customary rules, the judicial precedents, the particular statutes or conventions, we inevitably come across points on which no authority exists, or on which the existing authorities are conflicting, and it would be pedantic to insist that, because codification is concerned only with the form of the law, these defects should be reproduced in the finished code. Where the authorities are in conflict therefore, the codifier must choose the rule which seems the most desirable; where there are gaps in the existing law, he must suggest a new rule to fill them. To that extent codifiers must legislate. But it is only a limited extent. In the main, the work is not one of legislation, but of careful drafting. The few examples that we in England have of codification have been of this type. We have codified our law of sale of goods, and of bills of exchange in this way, and the result has been to tidy up the law on these topics. But that is its only important effect. It has not provided the layman with a sort of legal ready-reckoner, which many people seem to think a code ought to be able to do; and for the practising lawyer the chief difference is that instead of deducing the applicable rule from the decisions, he now uses the decisions to explain and illustrate the statutory rule.

But the great continental codes of the nineteenth and twentieth centuries have been proceedings of a different kind from this, and continental lawyers naturally take the sense which they give to the word codification from their own experience of the process in their own systems. When we examine the motives which led to these continental codifications, we find that behind most of them was one which Eng-

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lishmen and Americans have never had. For continental nations codification has generally been a means of unifying their law. France started the fashion in 1804 with the Code Napoléon, not because Frenchmen had discovered that codified is superior to uncodified law, but because up to that time there had been different kinds of law in different parts of the country, and this was an inconvenient state of things and out of touch with the growing strength of national feelings. Other nations have followed the French example, partly no doubt because of the great prestige that France has always held in intellectual matters, but many of them, too, had the same need to create unified national systems of law. An obvious recent example of that is the Polish codification after the first world war; when Poland recovered her independence, she naturally wanted to weld together the previously Russian, Prussian, and Austrian parts of the country. And an important part of that process was the unification of their different systems of law. England on the other hand never had to undertake a codification of this kind because our law was unified more than seven hundred years ago when the King's judges substituted for the differing local laws a system uniform throughout the whole country. Today it requires an effort to remind ourselves what the original significance of the term "The Common Law" was.

Not only the meaning that the word "codification" conveys to our minds, but the technique that is appropriate for carrying it out will necessarily be determined by the nature of the process that it involves. When the law is tolerably well settled and defective only in its formulation, codification is a skilled, but otherwise a relatively simple task. Being a means for improving the form of the law and only to a small extent its substance, it is a task that can appropriately be handed over to the lawyers, for it requires just those qualities which a lawyer's training produces, namely, knowledge of the existing law and practice in drafting. But when, as in the case of the continental codes, the existing law is in a condition which calls for important preliminary decisions as to the substance of the rules that the lawyers are to put into the code, the task is quite a different one. Lawyers are still needed, but the leading part is not for them, because it is not for lawyers to decide what the code is to contain; they can formulate the law when the materials are given to them, but they cannot create the materials on which they are to work. The creation of law is always a political and not a juridical function, and only an authority that has power to legislate can exercise it.

In applying these preliminary remarks about the meaning of codification to the idea of codifying international law, the first question for consideration is to which kind of codification would the codification of

international law belong? Would it be codification in the Anglo-American sense, that is to say, mainly a process of improving the form of the law? Or would it be a codification of the Continental kind, that is to say, requiring first and foremost an agreement between the nations as to the substance of the rules that the code is to contain? Clearly it would be a process of this second kind. The codifiers would constantly have to choose between competing rules, to fill up gaps on points on which the existing law is uncertain or altogether silent, to give precision to abstract general principles; in short, at every stage in the process someone would have to tell them what to put into the code. If there were any doubt on this point, the experience of the Hague Conference of 1930, to which I shall presently refer, would prove it up to the hilt. These decisions about the contents of the code could not possibly be handed over to international lawyers, because the governments of the world will not be willing to accept whatever rules the lawyers think would be good for them; they will certainly reserve the deciding voice on that question for themselves.

This point is the heart of the difficulty that stands in the way of any easy or rapid reduction of the rules of international law to codified form, and unfortunately it is often overlooked. We are tempted to think of codification as a cheap method of establishing international order, as something that lawyers could easily do for the world if only they could be brought to see how badly it needs doing. But that is a complete delusion. The responsibility cannot be shifted in this light-hearted way on to the shoulders of the lawyers. Lawyers can help; they can do the donkey work, but the responsibility belongs to all of us, and of course particularly to the leaders of our nations. For international law can only be codified if and so far as sovereign nations will agree among themselves on what the lawyers are to put into the code, and we have only too much evidence of the difficulty of getting agreements of that kind. The ambiguity of the word codification, its use to describe two processes which differ so widely both in their objects and in the techniques that they require, has had most unfortunate effects; it has disguised the real difficulties and induced men to think of codification as a means of international progress that can be adopted without any important concessions being made by our nations. It is something very different from that.

There is no excuse for this easy optimism since the great Conference on codification which was held at The Hague in 1930. The preparatory work of that Conference was exceedingly thorough. The League of Nations first appointed a Committee of Experts to advise what subjects were ripe for codification, and this Committee, after examining a great number of subjects and consulting the governments

on them, finally recommended certain subjects out of which the Assembly chose three for treatment at the Conference. Then a second committee was set up to prepare for the Conference, and this Committee circulated carefully drafted questionnaires on the three subjects to the governments. When the replies had been received the second Committee compared them and framed "bases for discussion" on which it was hoped that the Conference might be able to frame conventions. I mention these details to show that it was not from any lack of careful preparation that the Conference failed. Its most valuable legacy was its documentation, which, as the Committee justly claims, defined the present state of the law on the three subjects chosen with greater clearness than before.

Some useful lessons can be learned by examining what happened to each of these three subjects. The subjects were Nationality, Territorial Waters, and Responsibility of States for damage done in their territories to the person or property of foreigners. The only subject on which anything at all was achieved was Nationality. Now on that subject there are in the existing state of the law two great abuses: certain people have no nationality—they are "stateless" persons—and others have more than one nationality. Every reasonable person would like to see those two conditions done away with, so that on this subject, though there might be and were differences as to method, the Conference had at least definite and agreed aims in view. There was a policy which everyone would like to see carried out in a reform of the existing law, and the Conference did succeed in producing protocols on these two points in the law, some, but not all, of which have been ratified and are now in force, though unfortunately the ratifications have not been many. The first essential of any process of codification by international convention is a substantial measure of agreement on what the code is to contain. It is perfectly useless to assemble a conference and merely say to it, "Codify such and such a subject." That only makes sense when the law is already well settled, and not when, as in international law, the law has to be settled before the codifiers can get to work.

This result was disappointing enough, but at least something was achieved. But on the two other subjects the failure was complete. On territorial waters no convention could even be drafted because no agreement could be reached on the fundamental question of the width of these waters. The reason was simply that nations have different interests in this matter, and they were not willing to make the concessions which a convention would have called for. There was therefore no agreed policy for the Conference to translate into law. The present differing views are sometimes inconvenient and they do sometimes give rise to friction, but evidently the states did not feel that the incon-

venience of this unsettled state of the law was so serious as to make an agreement really urgent. On the responsibility of states, the Committee which dealt with the subject did not even succeed in producing a report for consideration by the Conference as a whole. Again the reason was clear and might surely have been foreseen. There is a deep division of opinion on that subject among states, especially on the point whether the existing law prescribes an objective standard for the treatment of aliens, or whether it is satisfied if a state merely does not discriminate in its treatment between aliens and its own nationals. Everyone agrees that this state of the law is most unsatisfactory, but that was not enough to secure a successful codification. Once again we come back to the essential point that codification by international convention can only succeed if states have an agreed policy, if there is some definite reform of the law which they can instruct the lawyers to carry out in the code. Codification in the abstract is not such a policy.

In the light of the results of the Hague Conference, we have no excuse if we fail to recognize the obstacles that stand in the way of codification by the methods hitherto used. The aim has been to secure conventions signed and ratified by governments and converting existing customary international law with all its uncertainties and incompleteness into binding conventional law formulated in clear and comprehensive terms. But is there then no other method that might be tried? Sir Cecil Hurst, formerly president of the Permanent Court of International Justice, has suggested, in a paper entitled "A Plea for the Codification of International Law on New Lines," which he read before the English Grotius Society in 1946, that there is an alternative method, and his suggestions have met with very general support among the international lawyers of many countries.

He suggests a more gradual approach to the goal. He regards the attempt to secure binding international conventions as having for the time being definitely failed. He does not deny that that is the ultimate objective, but before we try again to reach it he thinks there is a preliminary task that we must undertake, that this will not be a simple or a short piece of work. For, another failure would be disastrous. It would not simply leave things as they are, because a failure to reach agreement throws doubt even on rules that have hitherto been generally assumed to be part of customary international law.

In Sir Cecil Hurst's view there are three conditions that must be fulfilled if a new effort is to succeed. The first is that the work cannot be done by governments or by delegates working under government instructions. At first sight, that may seem a surprising suggestion, because, after all, only states can give the force of law to a code; no one can make international law *for* them. The objection to asking governments to undertake the task in the first instance is, however, that, if

they do, they will inevitably be impelled to aim at a codification of the Continental type, to lay down the law not as it is but as they think it ought to be, and, that if they do succeed in producing the draft of a codifying convention on these lines, they will naturally ask themselves, before they accept it, whether its terms accord with their own particular interests. If one asks why these should be the results of an attempted codification by governments, the explanation lies in the nature of the materials which international law provides for them. Certainly it is theoretically conceivable that states should make "declarations" rather than "conventions," frame, that is to say, agreed statements of the law in its existing state, but the result would not be worth the effort. The Conference which produced the Declaration of London on the rules of naval warfare in 1909 started with this intention. Its purpose, said the Official Report, was "to note, to define, and where needful, to complete what might be considered as customary law."[1] But the London Conference found it impossible to limit its work in this way; there were so many points on which it was necessary to "complete" the law, so many controversial questions on which it had to adopt compromise solutions, that in the end what was called a declaration was really a convention, and as the compromise solutions were unacceptable to many states the draft was never ratified. On the other hand, the Codification Conference of 1930 did not try to limit its work to stating the existing law; it had been expressly directed by the League Assembly to aim at adapting the law to contemporary conditions of international life. But whether a proposed law-making convention is adapted to contemporary conditions of international life is a question which every state insists on answering for itself in the light of its own special interests, and it will do that even if the convention is styled a declaration. It will look closely at all the terms, it will try to foresee all the possible implications of any general principle which it is invited to accept, it will consider whether an acceptance may not perhaps prove embarrassing in some future contingency, and even if it inclines to the view that the principle in question is only declaratory of the existing rule, it will ask whether there is really anything to be gained by subscribing to it in unequivocal terms, or whether it may not be wiser to leave the matter open to argument if at some future date that should turn out to be expedient. The fact is that states do not bind themselves by the obligations of a treaty, codifying or other, unless they are satisfied that its terms will promote their own interests, and unfortunately the mere urge to improve the law by codifying it is not an interest which presents

[1] BRITISH PARLIAMENTARY PAPER, Misc. No. 5, p. 345 (1909); translation, THE DECLARATION OF LONDON, FEBRUARY 26, 1909, Carnegie Endowment for Int. Peace, p. 135 (1919).

a strong appeal. No doubt this cautious attitude is exasperating to the international lawyer, but in itself it is not wholly unreasonable.

For reasons such as these the work then, in Sir Cecil Hurst's opinion, should be, in the first instance, not governmental but unofficial. His second condition is that it cannot be done on an individual basis. In the last century there were produced by private individuals a number of unofficial codes of international law which were of some interest and value. But this is no longer an appropriate method for several reasons. One is that the field has become too big for any one man to survey in this way. Another is that with the increase of the number of points at which states are in contact with one another, it becomes more and more difficult for an individual, however fair he tries to be, to rise above the national tradition as to what are the rules of the law in which he personally has been trained. And still another reason is that with the growth of international adjudication and the development of case law the opinions of international jurists, even of the first rank, carry less weight than they used to, and no single man today could produce a work which the world would accept as really authoritative.

Before stating his third condition, which contains his alternative to the method hitherto followed, Sir Cecil Hurst dealt with an argument against any kind of codification. This is one that makes a certain appeal to English, and probably also to American lawyers. Most English lawyers are not much attracted by codification; they think it tends to petrify the law, to strangle its development and prevent that steady adaptation to changing social conditions to which the common law has accustomed us. This argument has some force when it is applied to international codification. If, for instance, the Conference of 1930 had been able to agree on the width of territorial waters, we might today be finding the question of the Continental Shelf which has suddenly acquired such great practical importance a somewhat embarrassing one. As it is, we may reasonably hope that the new questions that have arisen will be settled by a development of the customary law, which will provide for the new interests which have emerged. On the other hand, Anglo-American lawyers, Sir Cecil Hurst thinks, ought not to press the analogy of the common law too far. The alternative to codification is to rely on the growth of custom and of judicial precedents for the development of the law, and both of these are slow-working processes. We cannot let the improvement of the system wait until the courts have refashioned the customary law and supplied us with a wealth of precedents comparable to those of the common law. Moreover, international law is not a case law system, and precedents are not one of its primary sources. In any case international courts are quite rightly cautious; they know that they cannot legislate for states, even in the limited sense in which judges legislate for us in a

common law country. We cannot afford to accept the juristic pessimism of the extreme historical school, which would have us believe that law grows, but that it cannot be made. That is only a half-truth, or less than that. Instead we must do something positive to stimulate the development of international law.

Sir Cecil Hurst's third condition is that the next step ought to be a combination of national and international effort on the part of international lawyers. In every country there should be a group of lawyers, working to an agreed international plan, and formulating the law, with all its present imperfections, as they think it is. These national contributions would be the material on which an international body of lawyers would work, and out of which they would try to make an agreed formulation or "restatement" of the existing law. This restatement would have no official status; its authority would depend entirely on its scientific merits. Nor would it be final; it would constantly be subject to discussion and revision. But it would provide governments with a firm foundation, a starting point, for the modification by convention of any of its provisions which might for one reason or another require amendment.

The idea that lies behind this suggested method of proceeding by restatements is clearly much the same as that which the American Law Institute had in drafting its restatements of American law, and those who favor it hope that it would have a similar effect; they hope, that is to say, that the restatements would be examined by, and exercise an influence on the judgments of courts both international and national, applying international law; that they would help to mold opinion, to harmonize some of the present conflicting views as to what the rules are; that they would show governments where the law is defective or out of date, and perhaps induce them from time to time to amend it by conventions.

Something of the sort was adumbrated by Mr. Elihu Root as long ago as 1911, and in the United States a splendid beginning has been made by the Harvard Research in International Law carried out in the years between the wars by a group of American international lawyers under the inspiration of Judge Manley Hudson of the Harvard Law School, and these Harvard Reports might well be taken as a basis for the work of the other proposed national groups of international lawyers.

What, then, of the future prospects? Last year the United Nations decided to set up an International Law Commission for the progressive development and eventual codification of international law. The wording shows that the Commission is not to be limited to actual codifying work, and it may be able to assist in other ways in developing international law. There are to be fifteen members, who are to be

elected by the General Assembly meeting in Paris this year. It is intended that the members should be independent experts, not in any way representing their governments, and much will depend on the loyal acceptance of this idea both by the governments and by the members themselves. In the preparatory committee which prepared the plan for the Commission the British would have liked to reduce the risk of political appointments by entrusting the selection of the members to the International Court of Justice, but that proposal was not accepted. Both the Americans and the British wanted to stress the scientific nature of the work; so far as it was codifying work, we wanted to proceed in the first instance by way of restatements of the existing law, as suggested by Sir Cecil Hurst; where it was a work of developing the law by extending its area to new fields we agreed that this could only be done by multilateral governmental conventions. The restatement idea, however, met with opposition of two kinds—some more conservative members of the Committee did not think that the failure of the 1930 Conference was decisive; they wanted to give the same method another trial. But the most violent opposition came from the U.S.S.R. and its satellite states. They are intensely jealous of anything that might even remotely impair their sovereignty. They wanted to keep the whole work under governmental control; they would even have liked to prevent the Commission from taking up a subject unless expressly directed to do so by the General Assembly. They wanted either governmental conventions or nothing at all. Of course the restatements which we were advocating could not in fact have affected the sovereignty of states because they would have no binding force, but these states apparently did not want to be exposed even to the persuasive force that the restatements might have had. In the end a compromise was reached which on the whole is fairly satisfactory. The word "restatement" does not appear in the constitution of the Commission. It is to prepare drafts and these are to have the form of draft articles for conventions; the General Assembly will decide what, if anything, is to be done with these drafts. It may decide to do nothing; in that case the draft, having been published, will in effect be a restatement, and its influence will depend on the quality of the work put into it. It may adopt the draft by Resolution, which, though it would not give the draft any binding force, might add to its persuasive force. It may recommend that the members should turn the draft into a convention. Or, finally, it may convoke a conference of states to frame a convention on the subject of the draft. On the whole, a promising start has been made; the machinery that is being set up is capable of producing valuable results if its purpose is not defeated by the political tensions in the present international outlook. But the work will be arduous and quick results are not to be expected.