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PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

(Article 13, paragraph 1(a) of the Charter)

(Item 3 of the Supplementary List to the Provisional Agenda for the second part of the first session)

Memorandum prepared by the Secretariat

I. CODIFICATION UNDER THE LEAGUE OF NATIONS

The history of formal international activity to codify international law may be said to have started as early as the second International Conference of American States held in Mexico City in 1901-1902.* It was not until The Hague Conference of 1930, however, that governments had actually sent their plenipotentiaries to a meeting avowedly convoked for the codification of international law. This conference was the result of a resolution adopted by the League Assembly 22 September 1924. By this resolution, the Assembly requested 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 civilization and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organizations 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:
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> (a) to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment; and
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> (b) 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

* A fuller discussion of inter-American efforts at codification is contained in Part II below.

(c) 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.

The first task of preparing for the conference was given to the Comm of Experts for the Progressive Codification of International Law which co of sixteen (16) members,* appointed by the League Council, and which funct from April, 1925, to September, 1927. The work of the Committee consisted the preparation of a provisional list of topics deemed ripe for codificati and the drawing up of preliminary reports and memoranda on each of these topics. Questionnaires on these topics were then sent out to individual governments, and the replies received were analyzed and arranged with a vi to selecting those topics which seemed sufficiently ripe to be submitted t a conference for codification. Three topics (nationality, territorial waters, and State responsibility) were selected to be placed on the agenda of the conference and a list of topics for future conferences was also dra up, comprising diplomatic privileges and immunities, consuls, piracy, and the position of States before foreign courts.**

A further step in preparing for the Conference was taken with the establishment of the Preparatory Committee for the Codification Conference

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* M. Hammarskjöld - Sweden (Chairman)
Professor Diena - Italy (Vice-Chairman)
M. Christobal Botella - Spain
Professor Brierly - Great Britain
M. Fromageot - France
Dr. J. Gustavo Guerrero - Salvador
Dr. B. C. J. Loder - The Netherlands
Dr. Barboza de Magalhaes - Portugal
Dr. Adalbert Mastny - Czechoslovakia
M. M. Matsuda - Japan
Dr. Szymon Rundstein - Poland
Professor Walther Schucking - Germany
Dr. Jose Leon Suarez - Argentina
Professor Charles de Visscher - Belgium
Dr. Wang Chung-Hui - China
Mr. George W. Wickersham - United States of America

** Report of the Committee of Experts on Progressive Codification of International Law, Doc. C.196. M.70. 1927 V.

which consisted of five members* and functioned from September, 1927, to September, 1929. The Committee was authorized by the League Assembly of 1927 and appointed by the Council. Its first task was to prepare a list of some 15 points regarding the three topics which had been selected for the agenda of the Codification Conference, and these were submitted to individual Governments to obtain their views and replies. Together with the list of points, a request to the Governments for information was included concerning the following:

(a) The state of their positive law, municipal and international, with, as far as possible, detailed information, bibliographical reference and relative case law;

(b) The expreience gained in their own practice at home and abroad; and

(c) Their wishes with regard to any additions to be made to existing rules, and the manner in which omissions in existing international law are to be made good.

Replies to this request for information as well as the observations which were submitted on the list of 15 points were analyzed, digested, and collated in the form of a series of "Bases for Discussion" which became the basic documentation for the Codification Conference.

At a second meeting of the Preparatory Committee in May, 1928, draft rules of procedure were prepared in accordance with paragraph VI of the

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* The Committee was appointed under the Council's resolution of 28 September 1927, with the terms of reference contained in the Assembly's resolution of 27 September 1927.

The Committee consisted of Professor Basdevant (France) (Chairman), M. Carlos Castro-Ruiz, (Chile), M. Francois (Netherlands), Sir Cecil Hurst (Great Britain), and M. Massimo Pilotti (Italy).

Assembly Resolutions of 27 September 1927 which requested the Council, in is invitations to the Conference, to indicate certain general rules governing t discussions. These rules raised four problems:

(a) The possibility of taking decisions by majority vote. M. Politis, Rapporteur of the First Assembly Committee on Codification, had recomme previously that while unanimity in the Conference was desirable wheneve possible, the majority could not be blocked by the dissent of the minor and that the majority could decide to adopt, as among themselves, such articles and conventions as were agreed upon.

(b) The possibility of having a comprehensive convention, and, within its framework, other more restricted conventions. In such matters as might lend themselves to this procedure, it was thought useful to provid for the possibility of concluding two kinds of conventions: (1) a very comprehensive convention on the general rules of the subject, likely to accepted by all States, and (2) a more restricted convention which, whil keeping within the framework of the other convention, would include spec rules binding only upon such States as might be prepared to accept them.

(c) The possibility of providing for subsequent revision. In general, although it was thought desirable for all agreements emanating from a codification conference to be as permanent as possible and not subject to the easy denunciation of signatory States, some measure of flexibilit; was considered important in order that the law as codified would keep pace with changing conditions of international existence. It was, there the suggestion of the Preparatory Committee that a revisionary conferenc be convened after ten years, if a sufficient number of signatory States should express such a desire. The inclusion of such a rule governing discussions at the Conference would serve to facilitate the adoption of controversial conventions in the conference.

(d) The spirit of codification and the meaning which the term was to assume at the Conference. In the report of the Preparatory Committee, it was agreed that codification was not to be confined to the task of merely registering existing rules, but to include attempts to adapt the rules to present conditions of international life. This recommendation should, however, not be interpreted to mean that academic attempts at filling in lacunae in existing law should be made at the expense of practical considerations.

In studying the problems raised by the Assembly resolution, the Preparatory Committee found itself unable to incorporate any of these recommendations into the proposed draft rules of procedure and decided to leave these matters for the conference itself to settle.

The Hague Conference of 1930.

The draft rules of procedure as prepared by the Preparatory Committee had sought to distinguish between "Declarations" establishing agreed principles of existing law, and "conventions" dealing with new matters. Sentiment at the Conference rapidly developed against making any such distinction, and even the idea of having any declarations at all was opposed.

With respect to voting, the rules of procedure ultimately adopted required a preliminary approval in the Committees by a two-thirds majority, and adoption in the Conference itself, by simple majority. However, even this was thought to be too rigid and it was finally decided that if a proposal failed of adoption in committee by the required two-thirds majority, but obtained a simple majority, it could go to the Conference as a special protocol and be voted on there if five delegates so requested.

So far as the agenda of three topics was concerned, it was found too difficult to give thorough consideration to so ambitious a scheme in the space of one month. The necessity for convening three committees at once also placed a great strain on those states who had sent only small delegations to the Conference.

The Conference succeeded in adopting a Convention on Nationality* with three related protocols.** No agreement was reached in the Committee on Territorial Waters, and the Committee on the Responsibility of States was unable to complete its work. However, in the Convention on Nationality provisions were incorporated which are of importance to the drafting of future conventions seeking to codify international law. These provisions appear as Articles 18, 19 and 20 of the Convention on Nationality. The inclusion of Article 18, which reads in part as follows:

> "The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.
>
> It is understood that, in so far as any point is not covered by any of the provisions of the preceding articles, the existing principles and rules of international law shall remain in force."

resulted from (a) the necessity to rebut any argument that the formulation of principles and rules in the Convention was an indication that these rules did not previously exist in international law, and (b) the necessity for indicating that such a formulation was not exhaustive, and that the rules embodied therein were supplemented by customary international law.

Articles 19 and 20 provide respectively for the continuing validity of existing agreements between signatories to the Convention inter se, and the wide right to make reservations to the Convention.

II. INTER-AMERICAN EFFORTS AT CODIFICATION OF INTERNATIONAL LAW

The importance of the work of codifying international law was recognized by the American Governments as early as the Second International

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* League of Nations Official Journal, Special Supplement No. 193 Signatures, Ratifications and Accessions, 21st list, 1944. This convention has been in force since 1 July 1937. Twelve States have ratified it or definitively acceded to it.

** For text of the Convention and the Protocols, see League Document No. C.224. M. 111. 1930.

Conference of American States, held at Mexico City, 1901-1902. It was not until the Third International Conference of American States, held at Rio de Janeiro in 1906, however, that the first actual machinery for codification was successfully established.

This time the work of codification was assigned to an International Commission of Jurists, to be composed of one representative from each of the signatory States. The Commission was instructed to draft codes of both private and public international law and to submit them to the Fourth International Conference of American States. However, due to the delay of the governments in ratifying the convention, the International Commission was not convened until 1912, when it appointed a number of committees to undertake the preparatory work and arranged for a second meeting of the Commission in 1914. Because of the European war this meeting failed to take place.

The Fifth International Conference of American States, held at Santiago in 1923, revived the International Commission of Jurists, and provided that its resolutions should be submitted to the Sixth International Conference. The Commission met at Rio de Janeiro in 1927. It had before it a series of projects of conventions on public and private international law prepared by the American Institute of International Law, as well as reports from some of its six committees. Twelve projects of conventions were adopted for presentation to the coming Conference of American States. Ten of these projects covered the following topics of international law: bases of international law; states, their existence, equality, and recognition; status of foreigners; treaties; diplomats; consuls; maritime neutrality; asylum; obligations of states in the event of civil strife; peaceful solution of international conflicts.

With the aid of the preliminary work of the International Commission the Habana Conference adopted seven conventions relating to the following topics: Status of Aliens, Treaties, Diplomatic Officers, Consular Agents,

Maritime Neutrality, Asylum, and Duties and Rights of States in the Event of Civil Strife. The Conference provided for additional agencies of codification in the form of three Permanent Committees, one in Rio de Janeiro on public international law, another in Montevideo on private international law, and a third in Habana on comparative legislation and uniformity of legislation.

At the Seventh International Conference of American States, held at Montevideo in 1933, a resolution on Methods of Codification of International Law was adopted, providing for the continuation of the Commission of American Jurists, which had remained inactive since its meeting in Rio de Janeiro in 1927. At the same time a Committee of Experts, seven in number, was created to serve as a sub-committee of the Commission of Jurists and to do the preparatory work for the Commission. Provision was also made for the creation of National Commissions to undertake doctrinal studies of internatic law. The need of a general secretariat for the administration of the work of codification was recognized, and the Juridical Section of the Pan American Union was set up for that purpose.

Three years later, at the Conference for the Maintenance of Peace at Buenos Aires, a further effort was made to promote the work of codification by co-ordinating the resolutions of the Habana and Montevideo Conferences In addition to the effort of the Conference at Buenos Aires in 1936 to co-ordinate the agencies of codification established at the Habana and Montevideo Conferences, the Eighth International Conference of American States, held at Lima in 1938, made a new attempt at co-ordination by classifying the successive stages of the work and by establishing the precise duties which each of the agencies engaged in the work was to perform.

The elaborate machinery set up at the Lima Conference was interrupted by the outbreak of war in 1939 which created special and more urgent problems in the field of neutrality. The latest agency of general codification is

the Inter-American Juridical Committee, created by the Meeting of Foreign Ministers at Rio de Janeiro in 1942 as successor to the Neutrality Committee established at Panama in 1939. In addition to numerous other functions assigned to it the Juridical Committee was called upon "to develop and co-ordinate the work of codifying international law without prejudice to the duties entrusted to existing organizations."

Such in brief is the historical development of the agencies created by the American Conferences for the Codification of International Law.

III. THE ROLE OF THE UNITED NATIONS

The United Nations takes cognizance of international law in its most vital aspects. In the first Article of the Charter it is stated that one of the purposes of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." It is also provided in Article 13 that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

The constant application of international law in the daily operations of the United Nations as well as in such emergencies as the Organization might be called upon to meet was clearly foreseen at the San Francisco Conference. In discussing the power granted to the General Assembly in Article 13 of the Charter, the Delegate for China said, at the Fourth Meeting of Commission II:*

> "We consider that the nature of the power of the Assembly to initiate studies and make recommendations for the encouragement of the development of international law and for its codification is of very great significance to our future.

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* Fourth Meeting of Commission II, 21 June 1945, Doc. 1151 (English) (E) II/17.

"While the maintenance of international peace and security is a very important task entrusted to the Security Council, it, after all, can only constitute an incident or accident in the course of international life, whereas the normal course of international life is bound to be everyday relations. And if we desire to promote the relations, there can be no better basis than the promotion of respe for international law and its development. It is only thus that we can hope to develop our relations and place them always under th rule of law."

Consideration of Charter Provisions on the Development and Codification of International Law at the UNCIO Conference at San Francisco.

The delegates for the nations at the UNCIO Conference at San Francis were fully aware of the importance of including the development and codification of International Law in the Charter. They did not, however, wish the new world organization merely to pick up the threads of internat action where the League of Nations had left off. Rather it was hoped tha with the new powers vested in the Organization, a fresh and bolder approa could be made which would stress the progressive development of the law a its codification.

To this end one delegation submitted a memorandum which would have included the codification of international law as one of the purposes of the United Nations.* This was not accepted, however, the Committee II/2 took up the matter as one of the functions and powers of the General Assem

At its Tenth Meeting, Committee II/2 considered and answered the following questions:*

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* Summary Report of Tenth Meeting Committee II/2, 21 May 1945, Doc. 507 (English). II/2/22.

1. Should the Assembly be empowered to initiate studies and make recommendations for the codification of international law?

DECISION: Question affirmed by a vote of 27 to 8.

2. Should the Assembly be empowered to initiate studies and make recommendations for promoting revision of the rules and principles of international law?

DECISION: Question affirmed by a vote of 16 to 8.

3. Should the Assembly be authorized to enact rules of international law which should become binding upon members after such rules shall have been approved by the Security Council?

DECISION: Question negatived by a vote of 1 to 26.

After these two affirmative decisions, the matter went to the drafting Sub-Committee B of Committee II/2. At the seventh meeting of that Sub-Committee there was considerable divergence of opinion as to whether the term "development" included the concept of "revision". As there was no agreement on this point, the Sub-Committee submitted two alternative texts to Committee II/2 as follows:

A. "and also for the codification of international law, the encouragemen of its development and the promotion of its revision."

B. "and also for the encouragement of the progressive development of international law and for its codification."

When the matter finally came before Committee II/2 at its twenty-first meeting, the delegates in favour of Text A argued that "revision" should be mentioned in order to avoid the rigidity implied by the mention of "codification" of international law without making provision for modification. In support of Text B, however, it was argued that the use of the words "progressive development", juxtaposed as they were with "codification", implied modifications as well as additions to the existing rules. It was thought that the term "progressive development" struck a "nice balance between stability and change", and when the Chairman put the matter to vote, there were 20 votes in favour of the text embodying the term "progressive development", which was then considered adopted.

The significance of the above discussions probably lies in the fact

that it was not the intention of the drafters of the text of Article 13, 1(a), of the Charter to limit the functions of the General Assembly to th encouragement of codification alone, but to specifically stress the neces for encouraging the progressive development of international law.