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A CODE OF INTERNATIONAL LAW--IS IT POSSIBLE?

The lack of an authoritative textual statement of what the rules of International Law actually are, that is, the lack of a code, has always been cast in the face of that law as one of its weaknesses. So far as these rules are the result of extensive international agreement they are definite enough. But there is a large marginal body of usage; there are ethical principles translated into action; there is that treatment which the comity of nations prescribes, which all taken together, make up a set of rules far wider than the sum of treaty agreement, yet are binding equally with the latter. Nevertheless until expressed in codified form, we cannot be quite sure of what they are. Hence the reproach is justified. "Your rules are binding but indefinite," say the critical minded. "What are we to think of a system so impracticable." "How could any conceivable court enforce it?" "A code is the key to all further progress of the science." Then comes the additional reflection that no code is within the range of possibilities. No publicist exists, or can be imagined, of sufficient authority to frame one which will be accepted. No congress of nations could agree upon one, because the diverse theories and the clashing interests of its members would always prevent. And so they reach a deadlock. A code is essential, but it is also impossible.

While conscious of the force of criticism such as this, we maintain that there is another side to the question. There are reasons

for thinking not only that a code is possible, but even that it is in process of formation. Moreover, we may hope for still faster and further growth from agencies recently created. To show if it may be, that this aspect of the matter is not unreasonable is the object of the present article.

A few words as to the right and the wrong methods, or rather the possible and the impossible methods of International Code construction. An individual draws one up. We may admit at once that it has no more value than an unpretentious treatise. The title, and the form in which the work is cast, are pure assumption. That which must spring from and be founded on the common consent of nations, can see in the *dicta* of individuals, however learned, only suggestions.

Again, unauthorized societies, without the sanction of their members' governments, may spread the knowledge of the law by study of its past; they may pave the way for changes in it by mutual discussion and agreement; but they cannot hope to draft an acceptable code. The reason is fundamental. Code construction must be animated throughout by the feeling of national responsibility and the sense of international authority. Every line must bear the official stamp. Every provision must be considered from its special point of view, in the light of its own interests, by every nation. Perhaps the origin of the Geneva rules neutralizing the agencies for the care of wounded soldiers, comes near being an exception to this rule. But even in that case, the first or unauthorized gathering of persons devised one system, that of the extra-military aid to wounded under the Red Cross. The second, official, conference enacted into law quite another, the principle of neutralization, and the two though engineered by much the same persons and supplementing one another, have never had any official connection.

There is a third consideration bearing upon the possibility or impossibility of code construction, which may fairly be called axiomatic; it is easier to agree upon few rules, than many: to settle the law covering a minute portion of the relations of states, than to frame a code in its entirety.

A priori then we argue, that a code of International Law if it ever comes into being, must be built up piece by piece, so that the whole will be the sum of the results of international agreements, arrived at by all governments, through official conferences and conventions. It will *not* be spun whole out of a scholar's brain.

There is one further thought: what rules of International Law would be apt to be attacked and settled first? Those relating to

peace or to war? Clearly the latter. For in war lie greater evils which need curing; in war uncertainties of law have a more serious result; during the heat of action there is no chance of amicable agreement.

With these probabilities in mind, that a code would be built up in parts, by official action, and beginning with the questions relating to war, if at all, we ask what has been done in this direction. Is the sum of results thus far obtained sufficient to substantiate the claim that a code of International Law is actually in process of formation?

Here are the facts set together for consideration.

I. The Declaration of Paris of 1856.

The parties to this important instrument do not include Spain, Mexico, the United States, any South American or any Oriental powers except Turkey. Strictly speaking therefore, the rules formulated by this conference are not in code shape, nor do they form part of the body of International Law. And yet no nation since has in practice disregarded them. The United States professes to be governed by them all, except that abolishing privateering, but in the recent war with Spain neither combatant issued letters of marque. So that probably not very much objection would be made from any source, to a restatement and adoption of these rules by all maritime powers, if the step were properly urged. The rules of the Declaration abolish privateering, declare only effective blockades to be legitimate, open innocent belligerent trade to the neutral, but do not penalize the latter if he ships his goods on an enemy's merchantman.

II. Rules respecting the care of the wounded on land, the result of a conference at Geneva in 1864.

Here the subject matter of legislation is rather more restricted, but the agreement reached more extensive. It encouraged both military and extra-military aid to the wounded on the field of battle, by a system of neutralization of the agencies concerned. Hand in hand with the Red Cross societies, this has been an important and beneficent step in the world's progress. No influential state has refused assent to it. It is positive law, covering an important field, a valuable precedent in code making.

III. The St. Petersburg Convention as to explosives, of 1868.

This was a step, though not a very important one, in the same direction, both towards a code of war rules and towards the humaner conduct of war. It forbade the use of explosive bullets less than six-sevenths of a pound in weight.

IV. In 1875 came a more ambitious attempt at Brussels, to formulate rules which would cover the whole field of land warfare. In this the large and the small military powers of Europe took issue. The principal matters in dispute were two, the legality of the *levèe en masse,* or popular rising for defense, and the definition of occupied territory. So far as official action, towards adoption of the rules evolved, was concerned, that conference was a failure. But those who study later rules and see how closely they have followed the lines of the Brussels attempt, must realize the latter's value.

The United States, interpreting strictly its policy of avoiding entanglement in European politics, has not largely shared in the events hitherto described. It refused to accede to the Declaration of Paris, because that involved the surrender of privateering. It did not sign the Geneva Convention until 1882. It has never adopted the principle of the St. Petersburg Convention. It sent no delegates to the Brussels conference. Yet it was in sympathy with nearly all these movements. Its Sanitary Commission was a precedent for the Red Cross movement. Its rules for land warfare adopted during the Civil War, known as Lieber's Code, were in advance of their time, both in the humanity of their methods and in their codified form. So that the sympathy and influence of our own country in this whole matter must not be overlooked. And in the next step, its delegates did valuable service.

V. The Hague Conventions.

Officially authorized, adopted by all the greater powers, covering the whole field of warfare on land, extending the principles of the Geneva Convention to the sea, the importance of the conventions entered into at The Hague in 1899, cannot be overstated. It was the longest step towards the extension of the code principle yet taken. It succeeded where Brussels had failed. It accomplished besides much which at Brussels had not been attempted. It would be out of place here to describe its provisions in detail. But in order to show the extent of ground which it covers, the subjects regulated are here enumerated by title. The qualification of belligerents. The treatment of prisoners of war and of the sick and wounded. The means of injurying an enemy. Sieges and bombardments. Definition and punishment of spies. Flags of truce, capitulations, armistices. Military authority over hostile territory. The detention of belligerents and the care of the wounded in neutral countries.

In addition, the launching of explosives from balloons was forbidden for five years, and projectiles filled with asphyxiating gases

were legislated against. But the movement for a partial disarmament was futile. This Convention has been ratified by most of the twenty-six powers taking part in the conference.

Here we have obligatory rules, which cover pretty nearly the entire subject of land warfare.

In war on the sea, nations are more susceptible, and Great Britain at least is unwilling to run any risk of having her hands tied by harassing changes in the rules. Yet here, too, at The Hague a beginning was made at a code to govern naval warfare, with a convention which extended in detail to naval war the provisions agreed upon at Geneva for the care of the wounded.

In this connection should be mentioned the very creditable manual of "Laws and usages of war at sea," a naval war code for the use of the United States navy, drawn up by Captain Stockton in 1900. This of course is not international in its character. But it is in codified form, and may very properly serve as a model to other powers, thus paving the way for a naval war code which shall be generally binding.

We find then in common use, rules to govern land warefare, the beginnings of a naval war code, and certain provisions respecting neutral trade, which taken together go a long way towards covering the relations of states in time of war. Accepted in treaty form by nearly all governments, clearly and briefly stated, the result of years of study and experience, is it saying too much to assert that a code of International Law is in process of growth, and that it already has gone far?

What now of the future? Here we are on less certain ground. But it is reasonable to believe that the same growth, by the same process of conference discussion, will continue. The whole field of naval warfare should be taken up. It is not difficult to imagine a general agreement upon a list of contraband articles and how they shall be treated. The specific laws of blockade present no insuperable questions. Then we would be in position to add to our code rules governing the treatment of neutral property, and so complete the war code. In a similar way, various branches of the law in times of peace can be worked over suitably. The laws of embassy; the conditions of extradition and list of extraditable crimes; the rules governing recognition and intervention even, though that is more doubtful, for here state policy enters in; postal, cable, trade mark and copyright relations, these and more could be arranged.

But besides the method of growth of an International Code which has been outlined, there is another possible agency at work:

judicial construction of existing law at the hands of The Hague arbitration tribunals.

It will be recalled that the system there adopted provided machinery which any states might employ if they agreed to submit their questions. From a big panel of arbitrators, four to be named by each of the twenty-six signatories, men of the highest character and attainments, a court of five is selected to try the case. In every question at issue this court must determine what existing law is, as well as the equities of the litigants' cases. If this system comes into general use, towards which there seems a tendency, it would appear probable that the net result in the course of time may be such statement and construction, even such amplification of the International Law as will add greatly to our clear understanding of it. This has to some extent resulted from the judicial decisions of prize courts which are purely national. The decisions of international courts should have greater weight. In one judgment will be found precedents for others.

With a considerable body of the decisions of arbitration boards under The Hague Convention before them, the delegates of the powers in conference would be aided and guided in drafting rules to govern the relations of states in time of peace. And so, bit by bit, through international enactment and judicial construction, the code of the future might be built up, if it is realizable at all. That a beginning at this has been made, that such a code is in process of construction, and that it is proceeding on lines and in ways which are sound and natural, are therefore not unreasonable statements.

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