

The Codification of Public International Law

R. P. Dhokalia

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MANCHESTER UNIVERSITY PRESS

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Published by the University of Manchester at
THE UNIVERSITY PRESS
316-324 Oxford Road, Manchester M13 9NR
UK standard book number 7190 0404 7

U.S.A.

OCEANA PUBLICATIONS INC.
75 Main Street, Dobbs Ferry, N.Y. 1 522
US standard book number 379 00264 7
Library of Congress catalog card number 66 11927

Distributed in India by
N. M. TRIPATHI PRIVATE LTD
Princess Street, Bombay 2

Printed in Great Britain by Butler & Tanner Ltd, Frome and London

FOREWORD

Dr. Dhokalia's work is based on a thesis prepared in the years 1962 to 1964, and since then steps have been made in the codification of international law, notably the Vienna Convention on the Law of Treaties.

The great value of Dr. Dhokalia's work, however, is in fact that he deals with the story of codification from the beginning, and has been led in his researches to discover little-known authors and codifiers, of whom he gives an account not otherwise available. In addition, Dr. Dhokalia deals with the work and achievements of the International Law Commission and with the perennial problems that face all attempts to enunciate and develop international law by international agreements.

I am glad to recommend this work to students of international law and politics, as well as to the general reader interested in the progress of international law, which now not only deals with the problems arising on land, sea and in air space, but is beginning to deal with the problems of outer space, where many of the old formulae are inappropriate.

November 1969

B. A. WORTLEY
Faculty of Law
University of Manchester

Dedicated to my mother
and to the memory of my father

PREFACE

The most notable fact in the history of public international law has been the movement towards the substitution of codified rules for unwritten customs. Indeed, nothing is more damaging to the prestige of a system of law than its uncertainty or doubtful existence. The more a system of law is precise, definite, detailed and up to date, the more is it likely to be perfect and effective. In view of the fact that international law has suffered from lack of precision and certainty because of its decentralized creation and consequent complexities and scattered character, the codification process represents the most substantial progress towards realizing fully the idea of a legally ordered society of states governed by a global law.

The idea and the movement of the codification of public international law, like other ideas and movements which have come to fruition in objective institutions, had their roots in earlier periods and were the result of the culmination of an historical and evolutionary process. The movement can be satisfactorily studied and understood only by examining its history.

This study attempts to trace the history of the codification of public international law. The subject matter has been presented in three principal divisions.

Part One deals with the background of the movement towards codification. It deals with the concept of the unity of mankind and its progress towards world organization. It shows that man's quest for peace and order led to two interlinked movements for a régime of law and world organization. These two movements—for a world organization and for the development and codification of international law—are shown to have culminated in our times in the establishment of the United Nations and the International Law Commission. The ultimate object of both movements has been to substitute for force and violence a régime of law and justice as the basis of international conduct.

Part Two of the study gives in some detail an account of attempts at the codification of international law made by individual publicists in their private capacity, by scientific bodies of non-official character, and by governments acting individually or in concert. It shows how the idea of codification pioneered by Bentham was transformed into a world-wide movement leading to the concerted efforts on the part of governments, and how it eventually matured into the organized work undertaken by the League of Nations.

A detailed study of the codification sponsored by the United Nations is made in Part Three. The organization, functions, method of work and achievements of the International Law Commission up to the end of 1966 are examined, and the future prospects for the codification of public international law are assessed, taking into account the difficulties and problems involved in the task.

Ever since Grotius enunciated a system in which the totality of international relations were to be subjected to the rule of law, the history of international law has been the story of a struggle between the idea of a legally ordered society of states on the one hand, and the idea of a mere juxtaposition of sovereign states on the other. Whilst the progress of international law has been more pronounced during certain periods than during others, its recent history shows a marked extension of its domain to new relationships, the adaptation of old rules to new conditions, and the reaching of agreement upon matters about which there has been a divergence of opinion among states. Furthermore, whilst in the period before the second World War, developments in international law were related much more largely to the law of war than to the law of peace; in the post-war period, on the contrary, the discussions provoked, the solutions sought, the efforts put forth to codify and improve the law, and the conventions formulated have concentrated mainly on the perfection of the law of pacific relations.

Whilst rapid changes in the international community—the appearance of many new states of widely differing cultural backgrounds and levels of development; the rise of new ideologies and systems of public order; rapid technological progress and a growing demand for social reform; and the increase in the number of international organizations—have, on the one hand, tended to decrease the relevance of some traditional legal norms, they have created, on the other hand, new areas for legal regulation. The acceleration of the process of change in the international community and the necessities of international life continue to demand a large measure of uniformity of basic rules of international law. This strengthens the trend towards law-making by multilateral treaties and the quasi-legislative process of codification in which new states with their numerical preponderance seem to insist on having their voices heard. These tendencies are indicative of a process of universalization and democratization of international law on which codification is likely to exercise an abiding influence.

ACKNOWLEDGMENTS

This study originated as a doctorate thesis submitted in 1964 to Manchester University. I am deeply grateful to the University not only for the generous award of a research grant for the period of my stay at Manchester but also for honouring this work by publishing it.

My two years' work in the Faculty of Law under Professor B. A. Wortley's guidance was indeed a rewarding experience. His constant guidance at every stage of the preparation of the manuscript and of its improvement with a view to its publication has been more than I can adequately acknowledge here. I am furthermore deeply indebted to him for kindly writing the foreword.

I gained much from discussions with Dr. D. W. Bowett of Queens' College and Dr. Clive Parry of Downing College, both of Cambridge University, for which I am very grateful. To Dr. W. H. Balekjian of the Vienna Law School, then Simon scholar at Manchester, and Mrs. J. Hoyle my sincere thanks are due for much help with French and German sources. Mr. Edward Reid-Smith kindly helped me by undertaking a patient reading of practically the whole manuscript and making many suggestions for improvement in its literary style.

In the preparation of the thesis, especially in the search for elusive League of Nations and United Nations documents and verification of source material, I received valuable and ungrudging aid from the staff of Manchester University and the Manchester reference libraries. My thanks are also due to the Director of the Codification Division of the United Nations, Miss Margret Mcfee of the U.N. Information Centre, London, and Mr. Gonzalo J. Facio of the Organization de los Estados Americanos for much valuable information sought by me.

No author can properly thank everyone for the assistance extended to him, directly or indirectly, in the preparation of his work. However, special thanks go to Messrs. R. K. Mukherji, Masud Khan, N. R. Kazmi, and Surendra Nath for much help in the correction of the typescript. To my parents-in-law, Mr. and Mrs. J. L. Beohar, who completely relieved me of worries about my family back at home, I am immeasurably indebted. Mr. and Mrs. W. W. Woollett and Miss Valerie Woollett of Sale, Cheshire, deserve my special gratitude for making my stay in the U.K. homely and full of happy memories.

Finally, I wish to express my grateful appreciation to Manchester University Press for all the scholarly care which they have bestowed upon their arduous task of bringing out the book while my continuous co-operation with them could not be possible owing to the distance between us. For any shortcomings and errors in the book, of course, I remain solely responsible.

Varanasi, India

R. P. DHOKALIA

ABBREVIATIONS

<i>A.J.I.L.</i>	American Journal of International Law
<i>B.Y.B.I.L.</i>	British Year Book of International Law
<i>Col. L. Rev.</i>	Columbia Law Review
<i>C.L.P.</i>	Current Legal Problems
ECOSOC	Economic and Social Council of the United Nations
GA	General Assembly of the United Nations
<i>H.L.R.</i>	Harvard Law Review
<i>I. & C.L.Q.</i>	International and Comparative Law Quarterly
<i>Int. Con.</i>	International Conciliation
ICJ	International Court of Justice
I.L.A. Rep.	International Law Association Report
ILC	International Law Commission
<i>I.L.Q.</i>	International Law Quarterly
<i>Int. Peace Year Book</i>	International Peace Year Book
<i>L.Q. Rev.</i>	Law Quarterly Review
L.N. Doc.	League of Nations Document
L. of N. Offl. Jnl.	League of Nations Official Journal
<i>N.Y. Univ. Law Rev.</i>	New York University Law Review
PCIJ	Permanent Court of International Justice
<i>Proc. Am. Soc. Int. Law</i>	Proceedings of the American Society of International Law
<i>Trans. Grotius Soc.</i>	Transactions of the Grotius Society
<i>T.L.R.</i>	Tulane Law Review
UN	United Nations
UNCDIOR	United Nations Conference on Diplomatic Intercourse and Immunities Official Records
UNCIO Doc.	United Nations Conference on International Organization Documents
I UNCLSOR	First United Nations Conference on the Law of the Sea Official Records
II UNCLSOR	Second United Nations Conference on the Law of the Sea Official Records

U.N. Doc.
UNGAOR

United Nations Document
United Nations General Assembly Official
Records

Y.B.I.L.C.

Year Book of the International Law Com-
mission

YB of the UN

Year Book of the United Nations

Y.B.W.A.

Year Book of World Affairs

Yale L.J.

Yale Law Journal

CONTENTS

FOREWORD by Professor B. A. Wortley, O.B.E., Q.C., LL.D.	ix
PREFACE	xi
ACKNOWLEDGMENTS	xiii
ABBREVIATIONS	xv

PART ONE

THE HISTORICAL BACKGROUND OF THE MOVEMENT TOWARDS CODIFICATION

I THE PROGRESS OF MANKIND TOWARDS WORLD ORGANIZATION	3
INDIVIDUAL VISIONS OF WORLD ORGANIZATION Pierre Dubois; Dante; Emeric Crucé; Hugo Grotius; Sully's 'Grand Design'; William Penn; John Bellers; Saint-Pierre; Jean Jacques Rousseau; Jeremy Bent- ham; James Mill; Immanuel Kant; William Ladd; William Jay; Leon Levi; Johann Caspar Bluntschli; James Lorimer	5
THE ORGANIZED PEACE WORK The First Phase 1815-1867; The Second Phase 1867-1900; The Movement in the Twentieth Century	19
FROM THE LEAGUE TO THE UNITED NATIONS	31

PART TWO

THE MOVEMENT TO CODIFY PUBLIC INTERNATIONAL LAW

II PRIVATE EFFORTS AT CODIFICATION	37
CODIFICATION PROJECTS BY INDIVIDUALS Jeremy Bentham; Abbé Grégoire; Early nineteenth- century Advocates of Codification; Project of Domin- Petrushevecz; Project of Johann Caspar Bluntschli; David Dudley Field; Pasquale Fiore; E. Duplessix; Jerome Internoscia	37
CODIFICATION BY SCIENTIFIC ORGANIZATIONS The Institute of International Law; International	62

Law Association; The Harvard Law School; The American Institute of International Law; The American Society of International Law	
III OFFICIAL EFFORTS AT CODIFICATION	76
EFFORTS OF GOVERNMENTS ACTING INDIVIDUALLY OR IN CONCERT	76
Initiative of Individual Governments; International Conferences; International Regulation of Social and Economic Problems	
THE WORK OF THE HAGUE PEACE CONFERENCES OF 1899 AND 1907	87
The Hague Peace Conference of 1899; The Hague Conference of 1907; Appraisal of the Hague Conferences	
OTHER EFFORTS BEFORE THE FIRST WORLD WAR	109
APPRAISAL OF THE CODIFICATION BEFORE THE FIRST WORLD WAR	111
CODIFICATION EFFORTS UNDER THE AEGIS OF THE LEAGUE OF NATIONS	112
Appointment of the Committee of Experts 1924; Preparatory Committee for the Codification Conference; The Hague Conference of 1930; Appraisal of the Work of the Conference	
CODIFICATION OF INTERNATIONAL LAW IN THE INTER-AMERICAN SYSTEM	133
CODIFICATION OF THE LAWS OF WAR AS A RESULT OF TWO WORLD WARS	140
PART THREE	
CODIFICATION SPONSORED BY THE UNITED NATIONS ORGANIZATION	
IV THE INTERNATIONAL LAW COMMISSION AND ITS ORGANIZATION	147
PRELUDES TO THE ESTABLISHMENT OF THE ILC	147
The Dumbarton Oaks Conference 1944; The San Francisco Conference and Article 13 of the UN Charter; The implementation of Article 13(1)(a) of the UN Charter; The Committee on Progressive Development of International Law and its Codification; The Report of the Committee of Seventeen	

THE ADOPTION OF THE STATUTE OF THE INTERNATIONAL LAW COMMISSION	160
THE WORKING MACHINERY OF THE INTERNATIONAL LAW COMMISSION	165
The composition of the Commission; Organization of the Commission's work	
V THE FUNCTIONS OF THE COMMISSION AND ITS METHODOLOGY	201
Functions; Distinction between codification and progressive development of international law	
METHODS, PROCEDURES AND TECHNIQUE OF THE COMMISSION'S WORK	217
Methods; Procedures; Selection of topics; Technique and working methods of the Commission	
GO-OPERATION WITH INTERGOVERNMENTAL ORGANIZATIONS	266
The Inter-American Council of Jurists; Asian-African Legal Consultative Committee; European Committee on Legal Co-operation	
VI THE ACHIEVEMENTS OF THE COMMISSION	271
WORK COMPLETED	271
Special assignments by the General Assembly; Matters forming part of the Commission's own programme of codification; UN Codification Conferences	
TOPICS UNDER STUDY BY THE COMMISSION	321
VII FUTURE PROSPECTS	333
METHODS	334
EXTERNAL FACTORS BEARING ON CODIFICATION	339
SOURCES OF INTERNATIONAL LAW	341
'THE GENERAL PRINCIPLES OF LAW'	344
INDEX	351

PART ONE

THE HISTORICAL BACKGROUND OF THE
MOVEMENT TOWARDS CODIFICATION

CHAPTER ONE

THE PROGRESS OF MANKIND TOWARDS WORLD ORGANIZATION

In order to appreciate fully the feasibility of a universal legal system and the significance of the connection between the movement for the codification of international law and mankind's aim to replace the rule of force by the rule of law in a world community, it will be profitable to analyse briefly the main ideas, theoretical concepts and historical links underlying various attempts to organize the community of mankind through an association of independent states and to evolve a system of law common to all.

Concepts of a world society, of a common law of mankind and of equality of man are fundamental to the existence of both the state and the international community. Such concepts may be seen as a synthesis of the ideals of philosophers, jurists, theologians and far-sighted statesmen of different countries at different periods of history. Nearly every civilization—the Chinese, the ancient Indian, the Mesopotamian, the Islamic and the Christian—has developed the myth and the symbol of a unified world. However, as Europe predominated during the last five centuries in the world of ideas and of thought as well as in the social, political and economic fields, it is relevant here to confine our account to the concept of a world society as it grew in Europe to be powerful enough to have attained world-wide significance. If we speak today of 'one world', it is certainly a world made one by European methods and European techniques.¹

The concept of a free union of humanity—a real commonwealth of mankind—has developed in the course of history through various efforts to organize international life and has been embodied in recent times in the Covenant of the League of Nations and in the Charter of the United Nations as intrinsic to general peace and security. It is the product of a historical pattern of thought which expected that an international organization, which was not a world state, would inaugurate an era of universal peace, security and order, even though such thought has at times emphasized freedom, at times unity.² Typically, however, there is always the thought of

¹ G. Pearson: *Towards One World*, 1962, p. vii; Sir Ernest Barker, Sir George Clark and P. Vaucher (eds.): *The European Inheritance*, 3 vols, 1954.

² See Franciscus Suarez: *De lege et dei legislatore*, ii, c. xix, para. 9, cited by T. E. Holland, *The Elements of Jurisprudence*, 13th edn. 1924, p. 393.