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Dr. Lewis in his interesting and suggestive address has touched upon the principal function of the American university law school in demonstrating the value of an educated bar. The multiplication of problems of modern civilization has presented new and increasing demands upon legal scholarship and opened a fuller and richer life to those who possess it. When one reflects upon the invaluable assistance given by law school professors, in the work of the Conferences on Uniform State Laws, in the cause of improved educational requirements of candidates for admission to the bar, and in the recent scientific study of and report upon the causes of uncertainty in the law and its unsatisfactory administration directed by this Association, which resulted in the formation of the American Law Institute for the purpose of undertaking the herculean labor of restating the common law of America, it will be realized that the law schools, at least those represented in this Association, have ceased to be mere places for fitting young people to pass the required examinations for admission to the bar.

On another occasion, referring to this subject, I said: "The law school no longer can be content to be a mere training school for attorneys. It has a far greater mission as the laboratory of sound thinking and the center for the dissemination of correct legal principles. Nay, more! As the traditional development of law through the decisions of courts increasingly falls behind the problems created by the rapid processes of industry, trade and commerce as affected by modern discovery and invention, the law schools must assume the function of the continental European universities as the conservators and expositors of the law."* * * *[1]

If we consider the work of the professors of law in the fields mentioned and also in the direction of improving the organization of and the procedure in our courts of law, and the scholarly labor of preparing the restatements of the substantive common law

* Address delivered at the meeting of the Association of American Law Schools, Dec. 30, 1924.

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[1] Address at Centenary of Yale University, June 16, 1924.

under the auspices of the American Law Institute performed by reporters and critics drawn from the faculties of a number of the leading law schools, the practical value of modern legal scholarship will become apparent. Aside from the writing of commentaries on the law and text books and giving instruction to young law students, until recently the garnered knowledge and wisdom of professors of law has had no very definite outlet, nor has their office been held in especially high regard by the public, professional or lay. Today the world offers them increasingly new fields of useful effort.

The development of the analytical faculties of teachers and students, following upon the introduction and spread of the Langdell system of instruction in the law, broke up the placid convention of the law instructor's life by compelling original research and constructive thought. The field of activity of the legal scholar broadened as the problems of modern economic life outran the capacity of judicial process to solve. Today the student of law finds manifold problems appealing to him for aid in solution, and a fuller, richer, more active intellectual life opening before him.

The governing bodies of our universities too are beginning to realize how much greater is their function than formerly was conceived and how much credit is reflected upon them by the labors of their faculties in fields outside of mere curricula, and yet in directions which have a material influence upon the betterment of the law, the improvement of legal institutions and the solution of economic and social problems, all of which tend to the accomplishment of the supreme concern of mankind—the establishment and the maintenance of justice.

The most recent enterprise of high importance, in aid if which large drafts have been made upon the law-teaching profession of America, is that conducted by the American Law Institute. During the last two years no fewer than 26 professors of law, drawn from 11 university law schools, located in different parts of the United States, have been employed in the work of the Institute for a greater or less time. All of this work, however, has had to do with the domestic law of America.

I should like now to invite your attention to a subject which affects a wider domain than mere domestic issues, and yet is not, I think, foreign to the purposes of your organization, and in which, as it seems to me, many of your faculties are qualified to render public service of great value to all humanity. I refer to the field

of international law. What is known as international law, in the modern sense, largely dates from the time of Hugo Grotius. Yet many rules of that law are the product of ancient usage among nations, such as, for example, the rule recognized by the Supreme Court of the United States in cases which arose during our war with Spain,[2] that coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, are exempt with their cargoes and crews from capture as prize of war, a rule which the Court traced back to orders issued by King Henry the Fourth of England, in 1403 and 1406, and which, through increasing recognition, with occasional setbacks, has become finally established as law in the United States and generally throughout the civilized world.

I am aware that by your Articles of Association the object of your organization is defined to be "The improvement of legal education in America."

But the law of nations, defined by Blackstone as "A system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world," * * * * founded upon the principle "that different nations ought in time of peace to do one another all the good they can, and, in time of war, as little harm as possible, with out prejudice to their own real interests," was adopted in England by the common law[3] and after the American Revolution was recognized as a part of our municipal law.[4]

The Supreme Court of the United States in a notable case gave full recognition to this great body of law, saying:

"International law, in its widest and most comprehensive sense —including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and domain of one nation, by reason of acts, private or public, done within the domain of another nation—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination."[5]

The ascertainment and classification of this great body of our law is then clearly within the scope of your purpose to improve

[2] The Paquete Habana, 175 U. S. 677 (1900).

[3] IV., BL. COM. 66, 67.

[4] Respublica v. Keatng, 1 Dall. 110, L. Ed. (1784); Thirty Hgds. of Sugar v. Boyle, 9 Cranch 191, 3 L. Ed. 701 (1815).

[5] Gray, J., Hilton v. Guyot, 159 U. S. 113, 163-234 (1895).

legal education in America. Not merely in the Law Schools is such effort necessary, but throughout our nation, as well as in others, men must be retaught the existence and the value of that international law which was defied, outraged and trampled under foot by the Teuton powers when they launched their attack upon Belgium, France and Russia in 1914 and during the entire period of the World War which ensued.

The two Hague Conferences of 1899 and 1907 accomplished much for international law. Dr. James Brown Scott thus summarizes their work in this field:

"The first Conference raised good offices and mediation to the dignity of an institution; provided for the ascertainment of disputed facts likely to produce serious consequences by an international commission of inquiry; set the seal of its approval upon arbitration; devised machinery by which a temporary tribunal might be chosen from a permanent panel of judges, and adopted a code of procedure for the trial and determination of cases submitted to the tribunal. The first Conference also codified the laws and customs of warfare on land, exteneded to maritime warfare the beneficient provisions of the Geneva Convention, and, if it did not provide for the limitation of armaments, it at least discussed seriously and profoundly the question.

"The Second Conference revised each of these conventions thus rendering them more worthy of approval; it accepted with unanimity the principle of compulsory arbitration and, in a concrete case, namely the collection of contract debts, it restricted the use of force and bound the nations to arbitration. It laid the foundations of a court of Arbitral Justice, to be composed of judges, acting under a sense of judicial responsibility, in which the various systems of jurisprudence and the various languages shall be adequately represented; it actually created an International Court of Prize in which the validity of an alleged capture shall be determined by an international tribunal composed of competent, trained judges, in which the belligerents shall be represented, but in which the neutrals shall decide the question at issue. The Conference further codified the laws and customs of war and by prescribing belligerent duties and recognizing neutral rights as well as duties extended the empire of law."[6]

Before its adjournment, the Second Peace Conference recommended to the Powers the assembly of a Third Peace Conference, which might be held at a period corresponding to that which had

[6] THE HAGUE PEACE CONFERENCE OF 1899 AND 1907, James Brown Scott, Vol. II, pp. 737-8.

elapsed since the preceding conference, at a date to be fixed by common agreement between the powers, called their attention to the necessity of preparing the program of this conference a sufficient time in advance, and for this purpose recommended that some two years before the date of such meeting a preparation committee be charged by the governments with the task of collecting the various proposals to be submitted to the conference, "of ascertaining what subjects are ripe for embodiment in an international regulation," and of preparing a program to be decided upon by the governments a sufficient time in advance of the meeting to enable it to be carefully examined by those interested.[7]

The prize court thus referred to was not erected. But an International Conference of ten maritime powers, called by the British Government, met at London, December 8, 1908, to February 26, 1909, and adopted a Declaration which was intended to supply the law to be administered by the Prize Court, but the Declaration was not ratified by the British Parliament. This is the famous Declaration of London, of which so much was heard during the Great War. On June 10, 1912, President Taft appointed an advisory Committee to consider proposals for a program for the Third Hague Conference. This Committee made an elaborate report. The other powers not having moved in the matter, on January 31, 1914, the Secretary of State, Mr. Bryan, addressed a communication to the various powers, proposing that the duties of the preparatory committee should be committed to the Administrative Council of the Permanent Court of Arbitration at the Hague.[8]

The outbreak of the War in Europe prevented any further action in this direction.

It is familiar history that all principles and agreements of international law were violated by Germany during the World War.

"More important still," Mr. Root has pointed out, "is a fact which threatens the foundation of all international law. The doctrine of Kriegsraison has not been destroyed. It was asserted by Bethmann-Hollweg at the beginning of the War, when he sought to justify the plain and acknowledged violation of international law in the invasion of Belgium upon the ground of military necessity." Of course, as Mr. Root truly says, "if that doctrine is to be maintained, there is no more international law,

[7] Scott, Vol. II, p. 735.

[8] AM. JOURN. INT. L., pp. 335-6.

for the doctrine cannot be confined to the laws specifically relating to war on land and sea."[9]

After the Armistice, the victorious nations incorporated in the Peace Treaty a Constitution or Covenant of a League of Nations, "in order to promote international cooperation and to achieve international peace and security," by methods recited, including "the firm establishment of the understanding of international law as the actual rule of conduct among governments," and "by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another."

The Covenant provided among other things that the Council of the League should formulate and submit to its members for adoption, plans for the establishment of a Permanent Court of International Justice, as distinguished from a Board of Arbitration, for the purpose of determining through the operation of judicial process, such controversies between nations as should be susceptible of such determination. In March, 1920, the Council appointed an Advisory Committee of eminent Jurists, ten in number, among whom was the Hon. Elihu Root, to prepare plans for the establishment of such a court. This Advisory Committee, after several weeks' deliberation, reported a proposed Protocol and Statute for the erection of such a court. In connection with the plans for the Court, the Committee further presented an unanimous recommendation, which, after reciting that they were convinced, "that the security of states and the well being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice," recommended that a new conference of the nations, in continuation of the first two conferences at The Hague, be held as soon as practicable, for the following purposes:

1. "To restate the established rules of international law, especially and in the first instance in the fields affected by the events of the recent war.

2. "To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

3. "To endeavor to reconcile divergent views and to secure general agreement upon the rules which have been in dispute heretofore.

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[9] INTERNATIONAL LAW AFTER THE WAR IN MEN AND POLICIES, E. Root, p. 425.

4. "To consider the subjects not now adequately regulated by international law or as to which the interests of international law require that rules of law shall be declared and accepted."

The Advisory Committee further recommended that the Institute of International Law, the American Institute of International Law, the Union Juridque Internationale, the International Law Association and the Iberian Institute of Comparative Law, be invited to prepare, with such conference or collaboration intersese, as they might deem useful, projects for the work of the conference, to be submitted beforehand to the several governments and laid before the conference for its consideration and such action as it might find suitable.

These recommendations were considered by the Third Assembly of the League of Nations. They did not immediately meet with a favorable reception. Lord Robert Cecil himself considered that the time was not ripe for the work of such a conference. The subject was perhaps badly misinterpreted as a recommendation for the codification of international law. Subsequent discussion also has run along the lines of debating the feasibility or the expediency of codifying international law. Professor Manley O. Hudson addressed the American Branch of the International Law Association at its Annual Meeting in January, 1923, on the subject, "The Codification of International Law Through the League of Nations." Referring to the fact that the International Law Association was first organized as an association for the reform and codification of the law of nations, and to the work of David Dudley Field, one of those most active in the organization of that Association, who, having prepared a code of procedure and one of substantive law for the State of New York, naturally came to think that international law, like municipal law, was easily susceptible of ready codification, and who in 1872 published an outline of an international code, Professor Hudson pointed out that many of the subjects dealt with by Mr. Field in his proposed code, formulated a proposed law upon topics which have so developed since his day as to have been made the subject of separate international agreements or treaties, while a vast number of topics now commonplace to us found no place whatever in Mr. Field's code.

At the Annual Meeting of the American Branch of the International Law Association in January, 1922, Mr. Arthur K. Kuhn referred to the fact that those who are engaged in a serious study of international law in this country today are limited by one

condition, namely, that they are discussing these problems principally with each other, are analyzing doctrines of international law mainly as they are handed to us from our own courts or executive departments, and the subjects are being discussed in national conferences solely from the American point of view, whereas international law exists only in so far as it is nationally and internationally recognized—particularly the latter. He added: "Unless we can meet fully workers and colleagues in other countries who are likewise imbued with the same desire to promote international peace and good will and to lay the foundations for profitable and peaceful international trade and commerce; in other words, to meet one another in conferences in which all nations are at least unofficially represented, our work is incomplete."

At the same meeting, Mr. Kuhn referred to the great amount of attention which is given to the broad field of private international law in South American countries, and to the fact that the United States had sent a delegation to the International Commission of Jurists which met at Rio de Janeiro in 1912, to consider, among other questions, arrangements for solving the conflicts of private law and the execution of private money judgments and agreements, establishing international bases for trademarks and copyrights and industrial property generally. And yet, he added:

"There is not a single organization in this country, of which I am aware, that has given them particular attention, or has laid the groundwork for progress in their solution by international agreement."

The work proposed by the Conference referred to, like the projected third Hague Conference, was interrupted by the World War. At the Fifth International Conference of American States, however, held at Santiago, Chili, March 25—May 3, 1923, the Conference reaffirmed its faith in the codification of public and private international law, and it was agreed to recommend to the Governments concerned the reconstruction of a Commission of Jurists, requesting each Government to appoint two delegates and that the Commission convene at Rio de Janeiro in 1925. In reporting these proceedings to the Secretary of State, the American delegates to the Santiago Conference referred to the difficulties in the codification of private international law presented by the fact that in some American states the principle of domicile is applied in the determination of the civil status of persons, while in others the principle of nationality obtains.

Dr. James Brown Scott, in a learned and interesting address

delivered in Spanish at the University of Havana in February, 1924, reproduced in English in the American Journal of International Law for April, 1924, expresses his confidence in the feasibility of the cooperation of the American republics in the codification of the rules and usages which are not only a law to them, but to every civilized state of the world," and adds that nothing could be more appropriate in a code of international law for the American states, "than the declaration of the rights and duties of nations adopted at the first session of the American Institute of International Law in 1916, by the jurists representing the American Republics, quoted in an address delivered by Secretary Hughes on November 30, 1923, in Philadelphia, and set forth in Dr. Scott's Havana oration. Undoubtedly this declaration contains material interesting for consideration in any conference in the codification of international law. But Mr. Henry G. Crocker, of the Carnegie Endowment for International Peace, writing in the January, 1924, number of the American Journal of International Law, has illustrated in very challenging fashion some of the difficulties in the way of codifying international law. The task, he says, "is so vast, the subject thus named so uncertain in nature and in limits, language so imperfect and misleading, and human reason so puny, that a person who addresses himself to the business, with the intention of elaborating concrete expressions of the law, finds himself with no solid footing to start from, no certain direction to take and no clear conviction how best to work." He then proceeds by the discussion of one topic only—"The Treaty"—to demonstrate some of these difficulties. Anyone who has followed the labors of the men engaged in the work of the American Law Institute in preparing restatements of a few of the topics embraced in such fundamental subjects of the common laws as Contracts, Conflict of Laws, Torts and Agency, will realize some of the difficulties involved in the comprehensive codification of any kind of law, municipal or international, including that which the States in the Pan-American Conference are about to embark upon.

Mr. Root, in his Presidential Address at the Annual Meeting of the American Society of International Law, held in April, 1911, clearly defined the difference between the task of codifying municipal and international law. "The substantial work of international codification," he said, "is not merely to state rules, but to secure agreement as to what the rules are, by the nations whose usage must confirm them. Except as a means to this end, any

codification of international law can be of little value, except as a topical index and guide to the student. As a means to this end, to be properly used and carried out, it is of great importance to press forward the work of codifying international law." It is interesting to note that the recommendations of the Commission of Jurists who drafted the Protocol and Statute of the Permanent Court, which are understood to have been written by Mr. Root, say nothing about "codification." They recommend "restatement" of established rules; formulation and agreement upon amendments to existing rules; reconciliation of divergent views in order to secure general agreement upon rules heretofore in dispute and consideration of subjects not now adequately regulated by international law, or as to which the interests of such law require that rules of law be declared and accepted.

No one nation and no group of nations can make international law. Great jurists like Field, Buntschli, Duplessix or Fiore may write ideal codes, but international law can only be created by the agreement of all the civilized nations, expressed by common immemorial usage or by compacts or treaties.

As already stated, the Third Assembly of the League of Nations, to which was submitted the report of the Committee of Jurists who prepared the Protocol and Statute of the Permanent Court of International Justice, took no action upon the further recommendations of the Commission of Jurists respecting the general subject of international law.

Since the formation of the League in 1920, many international agreements, conventions and treaties have been negotiated between members of the League, and between members of the League and non-member States, frequently including the United States, notably the treaties resulting from the Naval Limitation Conference held in Washington in 1922. All of these treaties have been registered with the Secretariat of the League of Nations at Geneva. They now are upwards of 700 in number. Together they constitute a great body of international law, which must be considered in connection with any plan of dealing comprehensively with the law of nations.

At the meeting of the assembly of the League held in Geneva in September, 1924, not only was the Protocol adopted providing for compulsory arbitration, security and disarmament, but the recommendations made by the Committee of Jurists in reporting the plan for the Permanent Court were again considered, and the following resolutions were unanimously adopted by the assembly:

"The Assembly:

"Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to communications and transit, the simplification of Customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolutions concerning legal assistance for the poor;

"Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

"Requests 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:

"(1) 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 reliable at the present moment; and,

"(2) 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

"(3) 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."

In presenting these resolutions, Mr. Rolin of Belgium referred to the progress made at the successive Pan-American Conferences, especially at the one held in Santiago, where a Committee of Jurists was asked to draw up a code of international public law and a code of international private law for the next Congress of the Pan-American Union, and stated that although this achievement might be possible at the stage which law and scholarship had reached in America "where traditions, after all, are comparatively recent and are not widely dissimilar," the majority of European Jurists would consider it still extremely distant and problematical, and they could not seriously undertake for the whole world the codification of international public and private law which had been decided upon by American jurists. They therefore recommended that the work be carried out step by step, and that inter-

national conferences should only be called to deal with particular questions of public or private international law, if these questions seem sufficiently urgent in themselves to demand immediate consideration, and at the same time appear to have reached such a stage of development, either in legal knowledge or in special interested agreements, as to render international solution practical.

This program is essentially that recommended by the Second Hague Peace Conference to be undertaken by the Committee to be charged with the work of preparing for the Third Conference, namely, the duty "of ascertaining what subjects are ripe for embodiment in an international regulation." The task imposed upon the Committee by the resolutions of the League Assembly would seem to be appropriate and necessary as a preparation for the restatement, formulation of amendments and consideration of subject matter not yet adequately regulated by international law recommended by the Commission of Jurists who prepared the Statute of the Permanent Court.

In preparing the provisional list of subjects of international law, the regulation of which by international agreement would seem to be most desirable and realizable at the present moment, the Commission, it seems to me, must first consider what subjects of international importance were regulated by recognized rules of international law before the war and which were affected by the war; the effect of the war upon those rules; whether they may be restored to vigor by restatements accepted by the nations, or to what extent they should be amended or supplemented. The Committee must also consider what other subjects of international law should be regulated by international agreement and to what extent.

Again, following the precedent regarding the Third Hague Conference, the Committee is required to recommend to the Council the procedure to be followed, with a view to preparing eventually for conferences regarding problems recommended for solution.

It will be observed that this Committee constituted by the Assembly resolution is instructed to consult "the most authoritative organizations which have devoted themselves to the study of international law," before completing its work. There are not a great many such organizations. In the recommendation of the Advisory Committee of Jurists above referred to, five are mentioned, only one of which is American—the American Institute of International Law. Aside from the Institute of International Law, I doubt whether any of these organizations are equipped with a body of

competent experts who could render greater service in the field under consideration than a group drawn from the professorial forces of the American universities. Such a body might be constituted through the machinery of the Association of American Law Schools. Your Governing Committee, with the information at its disposal, probably could pick out the students of international law in the faculties of the various law schools, possessing the necessary scholarship, who are best qualified to give effective suggestions in aid of the problem stated in the Assembly Resolution. If, pursuant to a report of the League Committee, a further step be taken and that Committee, or some successor, be commissioned to restate the established rules of international law, and to formulate amendments and additions to the rules of international law, shown to be necessary or useful by the events of the War and the changes in the conditions of international life and intercourse which have followed the war, then the precedent which has been established by the American Law Institute may well be followed and such a Commission draw to its aid in their task, from the Associated American Law School faculties, men qualified by years of study and teaching of the law of nations, in the same way in which professors of law are now engaged in collaborating in the production of restatements of the Law of Contracts, Torts, Agency, Conflict of Laws and other common law topics. Assuredly, in a work of this magnitude, America should contribute her best scholarship in connection with that of Europe and of the other lands, in the formulation of rules of law applicable to affairs outside of the exclusive domain of domestic law.

As Mr. Root said in his Presidential address before the American Society of International Law in April, 1921:

"There can be no real court without law to control its judges, and there can be no effective law without institutions for its application to concrete cases. This is the traditional policy of the United States—to establish and extend the law declaring the rules of right conduct accepted by the common judgment of civilization, and to stustitute in international controversies upon conflicting claims of right, impartial judgment under the law in the place of war."

Pursuant to agreement of the nations, a Permanent Court of International Justice has been set up for the purpose of determining through the peaceful processes of judicial action controversies between nations. The Secretary of State and two Presidents of the United States have recommended adhesion by our country to

that Court. Their recommendations are at present pending before the United States Senate. But in order that a court may be effective in the determination of controversies, the law which it is to apply must be known or ascertainable. Since the war, a very large body of international agreement has been entered into, which has the force of law over all of the nations, parties to the agreements. But there is still a vast body of what is known as international law, public and private, to be ascertained only in the decisions of courts, the proof of immemorial international usage, recognized as law by all civilized nations, and the writings of the most highly qualified publicists of various nations. That this body of law may be clarified and made more easily recognizable and authoritative, the scholarship of the whole civilized world should be invoked, to the end that the civilized conception of international justice should prevail and find expression in authoritative law. It is into this field of activity that I venture to invite the thought of the representatives and faculties of the law schools of America.