

1977

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Recommended Citation

James T. Kenny, *Manley O. Hudson and the Harvard Research in International Law 1927-1940*, 11 INT'L L. 319 (1977)

<https://scholar.smu.edu/til/vol11/iss2/8>

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Manley O. Hudson and the Harvard Research in International Law 1927-1940

The late nineteen twenties and thirties witnessed a marshaling of American scholarly talent into an embryonic movement to codify international agreements which gave direction and inspiration to modern attempts to develop a law of nations. The research and drafting team organized at the Harvard Law School and known simply as the Harvard Research in International Law first assembled to undertake the preparatory work for the first League of Nations' codification conference held in 1930. The intention of the Harvard group was to prepare draft conventions on legal subjects selected by the Eighth League of Nations Assembly as ready for consideration. However, the "Research" went beyond this assignment, continuing as a body until 1940 and offering even the modern reader an abundant collection of publications, draft instruments and a survey of enlightened opinion on a variety of international law topics.

The effort was organized in November 1927 by the Harvard Law School faculty under the guiding hand of project director Manley Ottmer Hudson, Bemis Professor of International Law.

Hudson, already something of an international figure because of his advocacy of the League in America, had been close to the codification movement since 1920. In that year American statesman Elihu Root, as a member of the Committee of Jurists who met at The Hague to write the Statute of the Permanent Court of International Justice, obtained the adoption of a resolution calling for periodic conferences for the advancement of international law. The League reviewed this proposal and four years later created a "Committee of Experts" to determine the legislative needs of the international community as a prelude to a law conference.

However, the formation of this group of "Experts" was by no means an inevitability. During the early twenties the League had not evinced the same

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level of interest in law-making as had the Hague jurists, and for the convening of this committee, too, much credit is due Hudson.

The young legalist's formidable talents had earlier convinced President Woodrow Wilson and his adviser, Colonel E. M. House, that his services were needed in the organization of America's postwar diplomatic effort. At House's invitation the scholar had come to Washington in 1918 to work with the Commission of Inquiry into the Terms of Peace. This group of technical experts in law, economics, politics and history, along with their British counterparts, had played an important part in developing plans that later took shape in the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice.

Hudson had also served as legal adviser to the American Delegation to the Paris Peace Conference. Here his work brought him into contact with a number of prominent international figures including Sir Eric Drummond, first Secretary General of the League. In later years, the Harvard law professor served as an important link between Sir Eric and successive Washington administrations.

In the wake of Root's call for law-generating conferences, Hudson, who in his own words was "led by utterances of the President of the United States"¹ worked with the Secretary General in securing the Swedish Delegation's sponsorship of a resolution giving effect to the program,² which was accepted by the Assembly on September 22, 1924. Thereafter he worked closely with his good friend, George W. Wickersham, newly appointed American member of the Committee of Experts.³

Meeting for three years, the experts chose the topics which they considered ripe for examination, and in 1927 reported upon seven they found to be in that category. These were: nationality, territorial waters, diplomatic privileges and immunities, the responsibility of states for damages done in their territories to the person or property of foreigners, piracy, exploitation of products of the seas, and procedures for the calling of international conferences and the drafting of treaties.

In the same year, the Assembly decided that the first Conference for the Progressive Codification of International Law should be convened at The Hague, on April 13, 1930, with an agenda to include three of the topics proposed by the Committee, namely, nationality, territorial waters and responsibility of states. While it was felt that the success of international conferences

¹Letter from Hudson to George A. Finch, Director, Carnegie Endowment (March 5, 1946). The Papers of Manley Ottermer Hudson, Box 16, Folder 30, (Manuscripts Division, Harvard Law School Library), cited hereafter M.O.H.

²*Id.*

³*Id.* Wickersham was also President of the American Law Institute, which organization was to work closely with the Harvard research group.

depended in some measure upon the quality of preparatory work on agenda items, this first League-sponsored codification conference had no agency with which to undertake that task. Several governments, including the United States, had shown an interest in the coming meetings but lacked an organization of scholarly talent; also, the foreign offices of the participating states lacked sufficient objectivity to divorce their formulations and points of law from their own national interests,⁴ a not uncommon situation.

Working with publicist James Brown Scott, members of the Harvard Law School faculty, and prominent international lawyers from all over the United States, Hudson accepted the challenge of beginning the preparatory work. Funds to carry the research through its initial phase were provided by the Legal Research Committee of the Commonwealth Fund with a supplemental grant from John D. Rockefeller, Jr.⁵

Forty-four scholars and jurists were invited to sit as members of the Advisory Committee which met on four occasions in 1928 and 1929 to oversee the undertaking. The Executive Committee consisted of: law professors Joseph H. Beale; Eldon R. James (member of the Permanent Court of Arbitration); Francis B. Sayre (also a member of the Permanent Court of Arbitration), of the Harvard Law School; Charles Cheney Hyde of Columbia Law School; James Brown Scott, President of the Institut de Droit International; George W. Wickersham, President of the American Law Institute; and Manley O. Hudson, Bemis Professor of International Law, Harvard Law School.⁶ While the project did have a base of support among the Harvard Law School faculty, there was some who did not cherish the ambitious effort. Professor Felix Frankfurter, for instance, objected to Hudson's mingling of "politics" and scholarship:

He (Hudson) doesn't seem to realize that the first, second and third conditions of scholarship are hard labor instead of what he calls "contacts."⁷

Along with this reference to Hudson's organization of the project and securing of funds, the dissatisfied colleague also reported to Dean Pound:

He doesn't work, he "dines" since the microbes of "publicity" and "world affairs" have made him their home.⁸

⁴Manley O. Hudson, *The Research in International Law*, May 8, 1931, an address before the American Law Institute in Washington, unpublished speech (International Legal Studies Library, the Harvard Law School).

⁵Manley O. Hudson, an untitled and undated page proof, M.O.H., 50:11. By 1925, the American Society of International Law was showing signs of greater interest in the proposed codification project. In that year, two articles appeared in the *Journal*, one of them by Elihu Root, citing the time as appropriate for this important work. Root, *The Codification of International Law*, *AM. J. INT'L L.*, XIX (1925), 675-684; and Kuhn, *Codification of International Law and the Fifth Assembly*, *AM. J. INT'L L.*, XIX (1925), 155-157. Also see, letter from Hudson to Finch (March 5, 1946), M.O.H., 16:31.

⁶*Id.*

⁷Frankfurter to Pound (Aug. 27, 1927), a letter, *The Papers of Roscoe Pound* (Manuscripts Division, the Harvard Law School Library), Box 64, Folder 12.

⁸*Id.*

Roscoe Pound's diary records earlier, less strenuous, objections to the organization of the Research aired at faculty meetings on April 20, 1927, and still later, on December 30.⁹ Pound himself had something to say about the fusion of scholarship with other purposes, and in a letter stated his displeasure with Hudson's use of the name of the law school with an undertaking which did not reflect the collective views or energies of all of its faculty:

The Harvard Law School is an intellectual trademark and work put out under its collective imprimatur carries to the world the implication that the output is an intellectual output emanating from the faculty of the Harvard Law School.¹⁰

At the core of the Dean's objection was Hudson's application to the Commonwealth Fund for a grant that members of the faculty apart from the Research group would have very little share in. The objection was not, however, a damaging one, and the project went forward.

The Research, in its first stage, was organized into work groups. A tripartite division of labor headed up by "reporters" provided a chain of authority, making manageable the enormous amount of work at hand. Edwin M. Borchard of Yale was assigned the responsibility of states; nationality went to Richard W. Flournoy, Jr., Assistant Solicitor of the Department of State; and territorial waters was assigned to Harvard's George Grafton Wilson. Each reporter was assisted by his team of nine "special advisers" to assist in the preparation of a draft convention covering his assigned field. It was understood that the drafts would later be presented to the Advisory Committee meeting in plenary session. Overall direction of the project was left in the hands of the Executive Committee, its chairman, Mr. Wickersham, and project director Hudson. It was the hope of the Committee that drafts of all three conventions might be available to guide the delegates to the 1930 League of Nations Conference.¹¹

With strong direction the work of the Research was pushed to completion, with draft conventions and commentaries readied by April, 1929. The volumes were sent to the Secretary General of the League of Nations who, in turn, provided copies for each of the participating states. The Secretary General was abundant in his praise of the Harvard group for its valuable contribution:

. . . (the Committee) has greatly benefited by the research work, specially conducted in view of the conference, at Harvard. . . . In these documents the conference will find very valuable information regarding difficulties which have arisen between states in

⁹The Diary of Roscoe Pound, entries, April 20, 1927, and Dec. 30, 1927 (Manuscripts Division, the Harvard Law School Library).

¹⁰Pound to Hudson (Oct. 26, 1927), a letter, The Papers of Roscoe Pound, 64:12.

¹¹Manley O. Hudson, *Research in International Law* (Feb. 3, 1930), a bound, unpublished report to members of the Advisory Committee (International Legal Studies Library, the Harvard Law School).

connection with nationality, territorial waters and responsibility for damage suffered by foreigners.¹²

The draft prepared by Flournoy and his colleagues contained twenty-two articles defining "nationality" and those recognized rules of law pertaining to the relationships between states and people. The determination of a citizen's national status was recognized to involve two known principles, *jus soli*, nationality by birth in a place, and *jus sanguinis*, nationality determined by parenthood.¹³ The draft convention called attention to troublesome problems of national status and the complex question of "dual citizenship." In that connection, the convention asserted that while such double nationality was possible at birth, at maturity one endowed with this status must declare for one state or another under the principle of "habitual residence." An important contribution found in the draft was the solution of the problem of "statelessness" sometimes faced by women married to foreign nationals. The convention postulated that these would acquire the citizenship of their husband's state in moving thereto, with native citizenship to be relinquished after one year's continuous absence from the state of origin.¹⁴

The territorial waters draft prepared by George Grafton Wilson and his group of scholars was also presented in February. It contained twenty-three articles covering the law of the high seas, marginal waters, jurisdiction over bays and the status of islands and straits.¹⁵ The convention called for the adoption of a three-mile territorial limit of national jurisdiction over the adjacent seas and gave definition to the limits of jurisdiction a state might exercise in its marginal seas. Article X called for the right of "innocent passage" of warships and merchant vessels through straits connecting high seas,¹⁶ a thorny issue which continued to vex subsequent efforts at codification.

Borchard's group, reporting on the responsibility of states for damages done in their territory to the person or property of foreigners, provided a well-researched nineteen-article draft and comment.¹⁷ The most important premise in this document was that states were liable, under specified conditions, for injuries suffered by foreigners and, therefore, ought to provide aliens a

¹²*Id.*

¹³Draft Convention on the Law of Nationality (Feb. 1929), Articles I-VII, an unpublished draft prepared under the direction of Richard W. Flournoy, Jr., for members of the Advisory Committee, M.O.H., 50:11.

¹⁴*Id.*, Article IX.

¹⁵Draft Convention of the Law of Territorial Waters, February, 1929, an unpublished, confidential report, prepared under the direction of George Grafton Wilson for submission to the members of the Advisory Committee of the Research in International Law, M.O.H., 51:11.

¹⁶*Id.*, Articles XVI-XXI.

¹⁷Draft Convention on the Law of Responsibility of States, February, 1929, an unpublished, confidential draft, prepared under the direction of Edwin M. Borchard for submission to members of the Advisory Committee of the Research in International Law, M.O.H., 52:5.

means of legal redress not less adequate than that provided nationals. Aliens could expect, under the terms of this draft convention, to have a means of recourse in cases of tort and contract as well as in the event of damages suffered during times of war or insurrection.¹⁸

An important feature of each of the three draft conventions was the inclusion, at Hudson's request, of a final article prescribing for settlement of disputes arising from any the instruments or questions relating to them. This provision enjoined the signatories to resolve such controversies either by arbitration or by previously agreed upon formulae. Where disputes arose without such provision, the Permanent Court of International Justice was to interpret and render judgment on the point of contention. Hudson explained the move in this way:

... One of the objects of the codification is to clarify the law which may be applied by international tribunals. This is the more important because of the extent to which the optional clause of the Statute of the Permanent Court of International Justice has been accepted by states. If the object is to be achieved, it would seem that any convention constituting a part of a code of international law should provide for the application of the provisions of the convention by international tribunals.¹⁹

He hoped that the inclusion of the identic articles might strengthen the Permanent Court of International Justice, making it an acceptable agency of judicial review in an emerging system of international law and justice.

The conventions prepared were given a wide distribution when they were reprinted as a special supplement to the *American Journal of International Law*.²⁰ The Research, in cooperation with the Carnegie Endowment for International Peace, also published a collection of nationality laws of all the countries of the world. The major contributors to this volume were Richard W. Flournoy, Jr. and Manley O. Hudson.²¹

So well received was the work of the Research by the Conference on Codification that it was moved to request that the Harvard group continue its valuable activity in preparation for future conferences.²² Accordingly, the Research pursued its investigation along lines prescribed by the League Committee of Experts, in the fields of diplomatic privileges and immunities, the

¹⁸See *Id.*, Articles I-V and X-XIV.

¹⁹Manley O. Hudson, "Comment on the Identic Articles Included in the Conventions on Nationality, Territorial Waters and Responsibility of States," comment appended to the draft convention of the law of nationality. The "Optional Clause" of the Protocol alluded to by Hudson was that clause giving the Court compulsory jurisdiction in certain classes of disputes among states signatory to said clause.

²⁰AM. J. INT'L L., XXIII, Special Supplement (April, 1929).

²¹Manley O. Hudson and Richard W. Flournoy, Jr. (eds.), *A COLLECTION OF NATIONALITY LAWS OF VARIOUS COUNTRIES AS CONTAINED IN CONSTITUTIONS, STATUTES AND TREATIES* (Washington: Carnegie Endowment for International Peace, 1929).

²²Manley O. Hudson, The Research in International Law, May 8, 1931, an unpublished address before the American Law Institute at Washington (International Legal Studies Library, The Harvard Law School).

legal status of consuls, the position of states before foreign courts and piracy.²³ Meetings were scheduled for October, November and December, 1931 for the drafting of conventions in each of these areas.²⁴

The accomplishments of the League Conference for the Progressive Codification of International Law were below expectations. In the area of nationality, the problems of dual nationality and statelessness were left unresolved, while the responsibility of states and territorial waters proved unready for codification. In retrospect that Conference marked the beginning of the end of the three-mile limit as a principle of international law. Participants were not totally dismayed, however, and there was a general feeling that this first conference, if accomplishing nothing else, furnished clues to the successful organization of future meetings. Hudson, who had served as a member of the drafting committee of the conference, expressed his hope that the work of the Research might continue whether or not the Assembly decided to stage another conference in the foreseeable future. He believed that, apart from its relevance to the work of the League, the project could have a functional autonomy, as many of the legal issues being attacked by the Research had been thorny problems for domestic courts in the United States. He especially believed that a valuable service would be done for the federal judicial system should scholarly research continue in the areas of dual citizenship and diplomatic immunity.²⁵

The second-stage work of the Harvard group did not proceed as quickly or as fruitfully as some had expected. Although the reporters and their committees on diplomatic privileges, the competence of foreign courts and piracy had each held four or five meetings by 1932, their progress was not nearly so inspired as it had been earlier.

The first set of projects undertaken had been completed in preparation for a coming international conference. The work done in 1932 was not. At the conclusion of the 1930 Conference, the assembled delegates agreed that another conference should be held. The Twelfth League Assembly had adopted this recommendation in principle but provided no meeting date. At the same time, the League's Committee of Experts ceased to function, placing the onus on the individual national governments to continue with the codification program after September, 1931.

The Harvard group believed that the Research ought to continue, even with diminishing League support, in the hope of generating and compiling useful

²³Manley O. Hudson, *Research in International Law*, February 3, 1930, an unpublished report to members of the Advisory Committee of the Research (International Legal Studies Library, The Harvard Law School).

²⁴Hudson to members of the Advisory Committee (Aug. 25, 1931), a letter, *Id.*

²⁵Manley O. Hudson, *The Research in International Law*, May 8, 1931, an address before the American Law Institute (International Legal Studies Library, the Harvard Law School).

publications for the World Body when it once again moved toward international legislation. They saw a need for a collection of diplomatic and consular laws of the nations of the world and a comprehensive "restatement" of existing national and international practice in those nine areas that the Committee of Experts had earlier deemed appropriate for drafting. The category included, in addition to those areas already mentioned, procedures for the organizing of international conferences and the conclusion and drafting of treaties.

Continuance of the project was assured, too, by encouragement from numerous prominent members of the international community. Francisco L. De La Barra, a distinguished juriconsult; Walther Schucking, Judge of the Permanent Court of International Justice; and Leo S. Rowe, Director of the Pan American Union, among others, praised the contributions of the Research.²⁶ Numerous letters of support were also forthcoming from Europe's academic community.²⁷

Members of the Research also manifested internal support reflecting their own dedication. Daniel C. Stanwood of Bowdoin College expressed the feeling of many in saying, "I don't like to praise our work but I believe it is immensely important and should continue."²⁸ Additional accolades came from James Brown Scott, George W. Wickersham and seventeen others of the original Advisory Committee.²⁹

It was therefore agreed by the committee in 1932 to continue its work into a third phase to last until 1935. During this time, the Executive Committee decided that the Research would deal with three additional subjects, selecting as reporters Dean Charles K. Burdick of Cornell Law School, on the law of extradition; Professor Edwin D. Dickinson of the School of Jurisprudence, University of California, on jurisdiction with respect to crime; and Professor James W. Garner of the University of Illinois, on the law of treaties.³⁰

In breaking ground in many of these areas, the scholars knew that the task would not be easy. It was not believed, for instance, that a clarification of the

²⁶Acknowledgements of Draft Conventions Published by the Research in International Law, (1932), an unpublished document (International Legal Studies Library, The Harvard Law School).

²⁷*Id.*

²⁸Daniel C. Stanwood to Manley O. Hudson (Feb. 12, 1932), a letter, in Research in International Law, an unpublished collection of letters from members of the Advisory Committee to Project Director, Manley O. Hudson (International Legal Studies Library, The Harvard Law School).

²⁹*Id.* Not all international lawyers shared in the view that codification was a necessary step in the development of international law. Edward Lindsey, in his volume on the Permanent Court of International Justice, argued that codification could well be postponed pending the development of a systematic case law through that institution. LINDSEY, *THE INTERNATIONAL COURT*, New York: Thomas Y. Crowell Company, 1931.

³⁰Preliminary Draft Conventions to be Considered at the Eighth Meeting of the Advisory Committee of the Research in International Law (Feb., 1935), p. 5, an unpublished report (International Legal Studies Library, The Harvard Law School).

law of extradition would necessarily lead to the drafting of an acceptable convention on this complex subject. Considerable discord had attended earlier discussions of concepts during the deliberations of the Committee of Experts in 1926. However, since two multipartite instruments on extradition had already been opened to signature (Montevideo, December 26, 1933, and Guatemala City, April 12, 1934), it was decided that merely publicizing the subject would be of some service to the international community.³¹

The second problem examined by the group in its third phase, was no less difficult; that of determining the criminal competence of states in regard to offenses committed outside of their territories. This, it was known, would lead to a web of interrelated political and legal questions. However, it was decided at least to explore the area with a view toward drafting a convention that could serve as a point of departure at some later conference.³²

There had been some reason for optimism in the realm of treaty law, the third area examined in this phase, as both the Committee of Experts and the Research Advisory Committee felt that the area would be a fruitful one.³³

Again, the Research set about formulating draft conventions, knowing that the value of its work would be difficult to estimate in the absence of specified dates for a conference. A ray of hope filtered through when the Seventh International Conference of American States provided, in its final act in 1931, the appointment of jurists from the various American republics to carry forward the valuable work of codification, then being neglected by the League. Nevertheless, by 1935 only thirteen of the twenty-one governments had sent lists of candidates for the new Committee, and the Pan American Union, charged with the formation of a final list of jurists, did not discharge its responsibility.³⁴

Despite developments that might have discouraged less dedicated men, the Harvard group remained undaunted. Among members who had attended the First Codification Conference along with Hudson, were Edwin M. Borchard and David Hunter Miller. They submitted a report on the Conference to the American Society of International Law, at its twenty-fourth annual meeting in 1930, in a statement that demonstrated why these men were willing to continue with the project even after the poor beginning made by the League. Speaking for the others, Hudson described the First Conference as an important experience for a nascent League of Nations, predicting that, at the next conference, the participating states would be encouraged to undertake more preparatory work with pre-conference exchanges of views and draft documents.³⁵ He also reported

³¹See AM. J. INT'L L., XX, Special Supplement (1926), 243.

³²*Id.*, p. 6.

³³*Id.*

³⁴*Id.*

³⁵Miller, Borchard and Hudson, *The First Conference for the Codification of International Law*,

his hopeful but realistic belief that, when started, progress in the field of international law would take fifty years or more.³⁶

Hudson's interest in codification was as strong as his interest in the League itself. Throughout the 1920s he had viewed, with growing concern, the proliferation of multipartite and bilateral agreements and the community of nations' lack of interest in restating, codifying and improving upon these sources of law.³⁷ Accordingly, as late as 1935, he obtained funds from the Bureau of International Research at Harvard and Radcliffe to carry out a fourth phase of work in the areas of recognition, neutrality and judicial assistance. At this time, he informed the members of the Advisory Committee that an agreement had been reached between the faculty of The Harvard School of Law, the Executive Committee of the Research in International Law and the American Law Institute to provide flexible terms for an affiliation between the first two groups and the latter. The advantage here was in providing additional judicial talent for the project.³⁸

In spite of this stimulus, the Research began to lose some momentum by 1936. The deterioration of the international situation was undoubtedly a factor, as was the continued lack of receptivity of the world community to the idea of codification. A further blow was dealt by the death of Executive Committee Chairman George Wickersham. In addition, it became necessary to extend the fourth phase of the Research from 1938 until 1939 because of the illness of Philip C. Jessup, the reporter on neutrality.³⁹

Funds were dwindling by this time, but the work was pushed ahead with some progress reported on Jessup's neutrality draft.⁴⁰ In 1939, drafts were also ready in the areas of aggression, judicial assistance and recognition.⁴¹ The Research was continued into 1940 when reports were readied in the areas of denial of justice and the rights and duties of states in case of civil strife.⁴²

Before the completion of the fourth phase, Director Hudson accepted an appointment as Judge on the Permanent Court of International Justice, a

April 26, 1930, a report submitted to the American Society of International Law, *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW*, Washington, D.C.: American Society of International Law, 1930, pp. 213-229.

³⁶*Id.*, pp. 233-234.

³⁷Hudson, *The Progressive Codification of International Law*, 20 *AM. J. INT'L L.* (October 1926), 655-669.

³⁸Manley O. Hudson to members of the Advisory Committee of the Research in International Law (Dec. 26, 1935), a letter, *M.O.H.*, 52:9.

³⁹Hudson to members of the Advisory Committee of the Research in International Law (Oct. 15, 1936), a circular letter, *Id.*

⁴⁰Hudson to members of the Advisory Committee of the Research in International Law (Jan. 26, 1937), a circular letter, *Id.*

⁴¹Hudson to members of the Advisory Committee of the Research in International Law (Jan. 12, 1940), a letter, *Id.*

⁴²*Id.*

position which came to take up proportionately more of his effort than the drafting project. But, if the Research was denied his complete attention after his 1936 appointment, his interest in codification itself never waned. In fact, Hudson was the bridge between the work started in America before the war and subsequent attempts to put international legislation on a firmer footing.

In the years following 1945 he worked with both the General Assembly of the United Nations and the American Bar Association in the organization of the International Law Commission of the United Nations. Serving as chairman of the Bar's Committee on the Progressive Development of International Law, he made a direct appeal to North American lawyers for support. Regional conferences were held in the United States and Canada, and after a presentation of views, the "weight of each meeting" was taken providing a consensual barometer of the views and wishes of the profession.

In 1947 he carried these views to the United Nations' Committee on the Progressive Development of International Law and its Codification—known as "The Committee of Seventeen." In the aftermath of his presentation the Committee produced the draft Statute of the International Law Commission which was approved by the General Assembly on November 21, 1947. The following year he was elected to the International Law Commission for a five-year term, becoming that organization's first chairman. His leadership was quickly apparent, as that international body firmly established itself on a foundation of abundant and painstaking research and drafting; and to this extent, the modern commission, as an agency of legislation, owes much to the accumulated experience of Manley O. Hudson and the scholars he brought together at Harvard in 1927.

