[Distributed to the Members of the League, the Assembly and the Council.]

Official No. : **A. 12 (b).** 1931. V.

Geneva, August 31st, 1931.

LEAGUE OF NATIONS

PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

OBSERVATIONS BY THE GOVERNMENTS

Series 3.

Finland.

LETTER OF AUGUST 24TH, 1931.

[*Translation.*]

The Finnish Government is thoroughly convinced of the importance of widening the sphere of international law by means of codification, and is therefore very favourably disposed towards all measures aiming at a progressive codification of international law.

With regard to the recommendations formulated by the first Codification Conference which met at The Hague, and the resolutions of the last Assembly bearing on the same question, my Government approves in substance of the ideas therein expressed, but desires to emphasise and develop certain points which were embodied in these resolutions.

When preparations for future codification work are made, the Finnish Government thinks it advisable to avoid all work likely to lead to duplication, so that the codification conferences and their preparatory organisations should not be called upon to deal with questions which have already been referred to other international organisations and institutions for consideration. The codification conferences should, in the first instance, be entrusted with the task of attempting to unify the existing rules or to formulate new uniform rules in the legal sphere affecting the mutual relations of Governments.

When the time comes to determine, within this range, the questions which ought to be considered, the Finnish Government believes that attention should be paid chiefly to the practical aspect of these questions, and that, accordingly, the problems to be approached in the first instance are those in relation to which it is established that the unification of existing rules or the formulation of new rules would fulfil an actual and wide-felt need. Further, a fact, which appears to have been borne out by experience, must not be lost sight of — namely, that it is easier to formulate more or less new rules bearing on treaty law than to agree upon what is to be regarded, at any given moment, as a general rule of unwritten international law. My Government considers, however, that, in the work of codification, unwritten international law should not necessarily be entirely neglected. As far as the definition and interpretation of the conception of " codification " is concerned, the Finnish Government adopts as a starting-point the formula suggested by the Swedish and Norwegian delegations at the last session of the Assembly.

The organisation responsible for the preparation of a codification conference must be in close contact with the organisations and authorities which, in practice, are responsible for the questions selected, particularly with the competent Sections of the Secretariat of the League and its various Committees. As soon as the subjects for discussion have thus been chosen, regard being had to the practical aspects, the most thorough preparatory work will have to be undertaken : in addition to the continual assistance of the aforementioned special authorities and technical bodies, recourse should be had to scientific preparation, which might be carried out by well-known international associations or smaller scientific societies, and even by the individual experts in different countries. In this connection, the Finnish Government considers that, in order to co-ordinate the preparatory work for the codification of international law, it would be worth while to arrange for closer

Series of League of Nations Publications

V. LEGAL

1931. V. 10.

S. d. N. 1625 (F.) 1395 (A.) 9/31. — Imp. de la T. de G.

co-operation than hitherto between the Committee of Experts for the progressive codification of international law and the Institute of International Law. This Committee's work would thus be facilitated.

In the course of this preparation, the opinion of the Governments concerned may, as for as necessary, be requested from time to time on the questions selected, so that, when the conference is summoned, there will be broad agreement upon the draft resolution used as the basis of discussion.

The question whether it will be necessary, in order to apply the procedure outlined above, to appoint fresh committees of experts or to consider the possibility of another division of the existing committee into sections to which might perhaps be attached technical experts of the League according to the question to be examined, is one which at the present stage of the codification drafts it would probably be premature to go into.

Portugal.

LETTER OF AUGUST 28TH, 1931.

[*Translation.*]

The Portuguese Government is in agreement with the recommendations of the Hague Conference. It is of opinion that the work of codification should be continued without interruption, and that the preparatory work should be begun immediately, seeing that the success of future conferences largely depends on this preparatory work. The Portuguese Government desires to add that, to enable this preparatory work to be brought to a successful conclusion, steps should be taken to ensure the active co-operation of institutes, academies and associations of international law. The work of such institutions, which is always of great value, would, in the present case, be of real practical worth by reason of its being purposely directed to a definite end. It would lead, moreover, to a more general discussion in the legal Press, and the effects of such a discussion might yield certain advantages.

From among the various draft resolutions submitted to the First Committee of the Assembly in 1930, the one put forward by the German, British, French, Greek and Italian delegations should be singled out as of particular importance. In accordance with this resolution, the term " codification ", as applied to the work of development of international law undertaken by the League of Nations, should be taken as implying the fixing, in international conventions freely accepted by States, of precise rules based on international law, whether customary or of an entirely new character, and not the establishment and progressive development of customary international law as the gradual outcome of the practice of States and of the progress of international jurisprudence. Two other draft resolutions were submitted on these lines — that of the Swedish and Norwegian delegations and that of the Belgian delegate, M. Rolin.

The Portuguese Government sees no advantage in this form of prior limitation of the work of codification of international law. In its opinion, everything should be subordinated to questions and circumstances as they arise. Consequently, it thinks that no restrictions of whatever nature should be introduced at present. On the contrary, a very wide view of the problem of the codification of international law should be taken. In order to achieve and to expedite this codification, it is desirable that the greatest efforts, duly concerted, and conceived in the broadest spirit, should be put forth without interruption ; that all possible means should be utilised as circumstances demand ; and that an endeavour should be made to produce a result corresponding in practice to the needs of intellectual life and the requirements of justice, yet resting on a strictly scientific basis.

Switzerland.

LETTER OF AUGUST 21ST, 1931.

[*Translation.*]

We have the honour to inform you that Switzerland has always shown the keenest interest in the progressive codification of international law, which she considers to be closely related to the cause of international arbitration, and therefore of peace. Her attitude to this problem is still the same, and she desires to take every opportunity of indicating the importance which she attaches to the consolidation, through codification, of the bases of international law. It is, therefore, with the closest attention that the Federal Council has followed the attempts to bring the work of codification to a successful conclusion.

The problem has at present two different aspects. In the first place, an appropriate procedure must be sought for the organisation of future codification conferences and, in the second place, there must be an absolutely clear understanding as to the object which it is desired to attain. These two aspects of the problem were considered at the Hague Conference ; as far as time allowed, they were also examined by the First Committee of the Assembly.

In regard to the first point, relating to the procedure which should be followed in the preparation of conferences, the Federal Council, like the First Committee of the Assembly, fully recognises the great value of the suggestions put forward at The Hague. In its opinion, the most important point is to ensure that the procedure finally adopted is likely to guarantee to future conferences the fullest measure of success. Advantage should be taken of the experience gained at the first Hague Conference. No new conferences should be summoned unless tangible results are almost certain. From this point of view, the method suggested by the Hague Conference is satisfactory ; for, after the threefold consultation of the Governments recommended in the resolution adopted at The Hague, there will be little doubt as to the expediency or inexpediency of drawing up, at a given time, uniform rules on a specified question.

It might be desirable, however, having regard to the last Assembly's investigations on the " preparatory procedure " to be followed in the negotiation of conventions in general, to consider whether the method recommended at The Hague could not be improved by allowing the Assembly, in the same way as the Council, to express an opinion on the choice of subjects for codification. The recommendation of the Hague Conference rules out any action on the part of the Assembly. Section IV of the resolution on the ratification of international conventions concluded under the auspices of the League of Nations provides, however, that, when a draft convention has been prepared at the request of the Council, and the comments of the Governments have been obtained, the Assembly " shall decide whether to *propose* to the Council to convoke the contemplated conference ". The Assembly's powers would obviously not be excessive. It would have nothing more than the right of proposal.

A revision along these lines of the general plan outlined by the first Codification Conference would offer no serious difficulties. Instead of merely providing, as in Section 5 of the Hague recommendation, that " the Council might then place on the programme of the conference such subjects as were formally approved by a very large majority of the Powers which would take part therein ", it should be specified that the Council should only take action following a proposal by the Assembly. This method of procedure would appear to be more in keeping with the general practice in regard to international conventions. As far as we are aware, indeed, the Council has never summoned a world conference except at the formal request of the Assembly. In view of the numerous difficulties invariably encountered when any attempt is made to achieve progress in the sphere of normative law, it would appear desirable — in this matter even more than in others — that each step forward should be taken with the authority of an organ, such as the Assembly, representing all the competing interests and all the conceptions which will be met with at every codification conference.

The second aspect of the problem, that relating to the actual object of codification, had been considered by the Federal Council even before the first Codification Conference at The Hague. The question to be decided is as follows : Will the codification conventions drawn up at The Hague be declaratory or enactory? Will they merely state the law as it exists or will they create new law? Will their object be to convert customary law into written law? Or, while leaving customary law intact, will they attempt, in respect of a given subject, to enact a number of rules intended, on the one hand, to define the scope of a customary law which is not always as clear or reliable as it might be and, on the other hand, to introduce certain new principles in an existing law the deficiencies of which no one would deny? In other words, does the conventional law elaborated at The Hague supplant customary law or supplement it?

The Federal Council is of opinion that such new law cannot have the effect of merely supplanting the old. The old law, which is derived from international practice or the decisions of international tribunals, or from both combined, remains in force in its entirety. Otherwise, we should be forced to the conclusion that States not bound by the new conventions are free from all obligations. International law would be shaken to its very foundations, and codification accepted in this sense would cause irreparable harm.

It is not the task of codification conferences to register existing international law, but to lay down rules which it would appear desirable to introduce into international relations in regard to the subjects dealt with. Their work should, therefore, mark an advance on the present state of international law. In certain cases, indeed, it would be extremely difficult to say what the existing law really is, as it is not clearly known or is a matter of controversy. It would be most unfortunate if the attempt to discover an adequate solution of an important problem were abandoned on the ground that no such solution is to be found in the existing positive law. One of the fundamental tasks of codification conferences should be to choose between disputed rules and, within the limits of their agenda, to fill up the gaps in a law whose deficiencies and obscurities are obvious.

The experience gained at The Hague has, moreover, shown clearly that, if a conference were empowered — supposing this to be possible — to state the existing rules of international law, the results might be disastrous. It has been proved that the conception of existing international law current in the various States or groups of States is very different. In some of them it may be extremely liberal, in others much less so. It is therefore beyond question that, on a number of subjects, unanimous agreement would be unattainable without mutual concessions. But, if existing law is to be enunciated in conventions at the cost of concessions which, in fact, would mark a retrograde movement, the law which would emerge from such bargaining would no longer represent what the friends of legal progress could rightly regard as the existing law ; it would be a compromise law, a law impaired

and weakened. To accept this law as the expression of the only law in force would amount for many to a disavowal of progress. The only reasonable course is to accept such compromise law as a second best, as a kind of supplementary law in no way affecting those rules of customary law which are not incompatible with the new rules. That conventional law and customary law should thus exist side by side would undoubtedly complicate international jurisprudence, but such a state of affairs is inevitable. Customary law is stable ; that is one of its virtues. But, if its stability degenerated into immutability, the virtue would become a defect. The law would become petrified, and we should be apt to forget the principle of evolution which is the guiding rule of life. This disadvantage, however, can be remedied by means of conventional law, which, by definition and by nature, is open to revision. The possibility of excessive rigidity in the one will be corrected by the suppleness of the other, and the latter's tendency to variability will be held in check by the comparative stability of the former. A kind of balance will thus be struck between the two kinds of law. The Federal Council is therefore of opinion that the Assembly should abide by the sound principle which forms the basis of one of the draft resolutions submitted at its last session — namely, that the law laid down in codification conferences must not impair the force of customary law, " which should result progressively from the practice of States and the development of international jurisprudence ".