

Enfin Carlos Calvo soutint la doctrine latino-américaine de la concession de l'asile diplomatique pour les délinquants politiques.

VI. A l'Institut, Calvo a joué un rôle limité. Sa contribution principale concerne l'«Examen des trois règles du Traité de Washington» (de 1871, sur les devoirs des neutres dans la navigation maritime), (Gand, 1874). Quant à la session initiale, il a participé à une commission sur le sujet.

Calvo a également pris part au Congrès international des sciences géographiques de 1875, en présentant un travail sur l'émigration et la colonisation, Paris, 1875, Durand.

Il fut ministre de son pays en Allemagne, Autriche, Russie et auprès du Saint-Siège et reçut la grande consécration scientifique d'être membre de l'Institut de France, dans l'Académie des sciences morales et politiques. La Conférence internationale américaine de Mexico en 1902, en résolution plénière, lui envoya son témoignage de considération.

Carlos Calvo mourut à Paris le 3 mai 1906, âgé de 82 ans. Ses funérailles solennelles ont eu lieu en présence du gouvernement et des représentants du monde intellectuel.

En décembre de la même année ses restes mortels sont arrivés à Buenos Aires où le gouvernement et les élites argentines lui ont adressé de nouveaux et solennels hommages.

## David Dudley Field and the Codification of International Law

(1805-1894)

By Herbert Whittaker BRIGGS

David Dudley Field—like Johann Caspar Bluntschli, Carlos Calvo, Baron Emile de Laveleye, Pasquale Mancini, Augusto Pierantoni, and Gustave Rolin-Jaequemyns—was a founding member of both the *Institut de Droit International* at Ghent in September 1873 and of the Association for the Reform and Codification of the Law of Nations (which in 1895 changed its name to the International Law Association) in Brussels in October 1873. Although Rolin-Jaequemyns, in his confidential note inviting a carefully selected group of jurists to form an institute for the study of the principles of international law, had been unwilling to "write at the head of its program the *codification* of international law," since this "would be a question for settlement,"<sup>1</sup> the very title of the Association for the Reform and Codification of the Law of Nations revealed the obsession of David Dudley Field with codification and (in the words carried in the historical note of the Association's annual reports) the conviction "that a Code of International Law must precede any general resort to International Arbitration, and that the want of such a Code was the great obstacle which hindered the general substitution of Arbitration for War."<sup>2</sup> In fact, Field's interest in the codification of international law came after thirty years of attempts, often bitterly contested, to codify the procedural and substantive law applied in New York courts.

David Dudley Field was born February 13, 1805, at Haddam, Connecticut, son of David Dudley and Submit Field. His father was a clergyman who later moved to Stockbridge, Massachusetts, where the young Field was schooled with his many brothers and sisters. After

<sup>1</sup> Quoted in James Brown Scott, *Resolutions of the Institute of International Law* . . . Carnegie Endowment for International Peace, Oxford University Press, p. xviii (1916); French edition, p. xv (1920).

<sup>2</sup> Cf., e.g., International Law Association, Report of the 54th Conference, The Hague, 1970, p. xxvi.



attending Williams College, he read law in Albany, New York, and was admitted to the bar in 1828. Over the next half-century, Field became one of the towering figures of the American bar and argued a number of cases of great constitutional significance before the Supreme Court of the United States. He also incurred some obloquy by taking as clients such characters as Jay Gould, "Jim" Fisk and "Boss" Tweed but died a much-honored man, after a full life and a distinguished legal career, on April 13, 1894, and is buried at Stockbridge, Massachusetts.<sup>3</sup>

It was in 1839 that Field first urged reform of the system of remedial justice in the State of New York.<sup>4</sup> As his ideas developed, he opposed duplication of procedures in law and in equity, favored the abolition of the rigidly conventionalized forms of action, and persistently advocated the codification of New York law, substantive as well as procedural.<sup>5</sup> Largely the personal work of Field himself were the Civil Code, the Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, and a Political Code. Not all of them were adopted by the New York State Legislature, but his Code of Civil Procedure became the basis of judicial reform in many American states, as well as of English and colonial judicature acts. It has been said of David Dudley Field that he preferred to break, rather than respect, precedents and "to establish sound principle against apparent authority";<sup>6</sup> and while "a leader at the bar, . . . it is as the champion of law reform that his greatest triumphs

3 Biographical notices upon which the writer has relied include: Albéric Rolin, "David Dudley Field," *Notice nécrologique*, which Rolin writes is based in part on a note given him by John Bassett Moore, *Annuaire de l'Institut de droit international, Session de Cambridge, 1895-1896*, pp. 310-320.

Albéric Rolin, *Les origines de l'Institut de droit international, 1873-1923*, [n.d.], pp. 21, 30-32.

S. Newton Fiero, "David Dudley Field and His Work," in *Proceedings of the New York State Bar Association, 18th Annual Meeting*, XVIII, 177-193 (1895).

Helen K. Hoy, "David Dudley Field, 1805-1894," in William Draper Lewis, ed., *Great American Lawyers—The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation and Have Developed the Jurisprudence of the United States—A History of the Legal Profession in America*, V, 125-174 (1908).

F. C. Hicks, "David Dudley Field," in Allen Johnson and Dumas Malone, eds., *Dictionary of American Biography*, III, Part II, 360-362 (1930).

On the distinguished Field family, see *Appleton's Cyclopaedia of American Biography*, James E. Wilson and John Fiske, eds., II, 447-448 (1888).

See also A. P. Sprague, ed., *Speeches, Arguments and Miscellaneous Papers of David Dudley Field*, 3 vols., N.Y.: Appleton and Co., 1884-90 (hereafter cited as *Field, Speeches*).

4 Cf., *Field, Speeches*, I, 219 ff.

5 See, e.g., *ibid.*, 226-383.

6 Hoy, *loc. cit.*, 132.

were achieved, and as a law reformer, he was best known, most admired and, during his life, most severely criticized."<sup>7</sup>

As Field achieved some success with his private law codes,<sup>8</sup> he turned his attention to international law. On October 5, 1866, he addressed the British Social Science Association at Manchester on "First Project of an International Code."<sup>9</sup> His abiding interest in codification as a method of law reform, as well as in providing "a uniform system of rules for the guidance of nations and their citizens,"<sup>10</sup> had been reinforced by the then current search for agreed rules of international law on the basis of which the American *Alabama* claims against England could be arbitrated,<sup>11</sup> and by the successful attempt, after numerous failures, of his distinguished brother, Cyrus W. Field, to lay the Atlantic cable, a bond which David Dudley Field thought could be more closely forged by agreement on an international code. While his theoretical approach is strictly Positivist, even Austinian at times, he comprehensively reviews the state of international law in 1866, pointing to uncertain and unsatisfactory rules and calling for their reform and a codification which would eliminate uncertainty. He favored arbitration, but believed that the courts required an agreed international code of law to apply. Such an international code must necessarily be accepted by States in order to be binding upon them but he believed that "the times are favorable" for such assent. He, therefore, proposed that a committee of the Association be appointed to prepare such a code "to be submitted at the next annual meeting."<sup>12</sup>

When separation of participants and lack of coordination impeded the work of the committee of eminent jurists of different nations appointed by the British Social Science Association to prepare it, Field took upon himself the preparation of the entire Code of International Law. Even with research assistance from several members of the New York bar, seven years were to elapse before Field could present his *Draft Outlines of an International Code* to the British Social Science Association at Norwich in 1873.<sup>13</sup> It had been published in the United States in

7 Fiero, *loc. cit.*, 180.

8 Nine volumes of the codes of New York State and ten volumes of reports are largely the personal work of Field. Rolin, *Annuaire, loc. cit.*, 316.

9 The text appears in Field, *Speeches*, I, 384-396.

10 *Ibid.*, 396.

11 The British Government had denied responsibility under international law, and the agreement to submit the claims to arbitration was not signed until May 8, 1871. Field refers to the debate over the governing principles "for no other purpose than illustration" in his 1866 address, *ibid.*, 391.

12 *Ibid.*, 394.

13 See his address "Presenting the International Code," *ibid.*, 416.



1872, and a second edition entitled *Outlines of an International Code* (omitting the word *Draft*) appeared in 1876.<sup>14</sup> The Code was subsequently translated into French by Baron Albéric Rolin<sup>15</sup>, and Italian by Augusto Pierantoni.

In prefatory observations, Field states that "A code is a digest of law, moulded into distinct propositions, and arranged in scientific order. An international code is an extended Treaty."<sup>16</sup> His purpose, however, was "not only a codification of existing rules of international law, but the suggestion of such modifications and improvements as the more matured civilization of the present age should seem to require." Thus, he proposed "to bring together whatever was good in the present body of public law, to leave out what seemed obsolete, unprofitable or hurtful, and then to add such new provisions as seemed most desirable."<sup>17</sup>

It is always easier for one man to draft a blue-print of international law, with such modifications and reforms as he considers required by the age, than for broadly representative groups like the *Institut de Droit International* or the International Law Commission to prepare drafts which will command widespread acceptance by States as the living law. Although Field envisaged that his International Code would require the consent of nations before they became bound thereby (Art. 1), he provided for accession to any part of the Code (Art. 1006) and the right of any party to rescind its adoption of the Code, in whole or in part, upon notice (Art. 1007). When ratified or adopted by a nation, however, the Code "shall be binding upon all persons, officers and tribunals in such nations, anything in their local laws to the contrary notwithstanding" (Art. 995).<sup>18</sup> Uninhibited by any serious fears that consent might not be forthcoming or by problems of the relation between customary international law and codification treaties such as concern international lawyers today,<sup>19</sup> Field constructed his edifice to the satisfaction of his own high sense of rectitude, at times in complete disregard of the practice of States.<sup>20</sup>

14 *Draft Outlines of an International Code*, by David Dudley Field. New York: Diossy and Co., 1872.

*Outlines of an International Code*, by David Dudley Field, Second Edition, New York: Baker, Voorhis & Co.; London: Trübner & Co., 1876.

15 *Projet d'un code international . . . par David Dudley Field*, trad. par Albéric Rolin. Paris: Pedone-Lauriel and Gand: Hoste, 1881.

16 Preface to the Second Edition, 1876.

17 Preface to the First Edition, 1872.

18 References are to the Second Edition.

19 Cf., R. R. Baxter, *Treaties and Custom*, Recueil des cours de l'Académie de droit international de La Haye, vol. 129 (1970-I), 27 ff.

20 It should also be noted that Field's *Outlines of an International Code* covered, in

In the Preface to the second edition of his *Outlines of an International Code* in 1875, Field notes that since the appearance of the first edition, "two international societies for the study and improvement of the law of nations" had been established:

The Institute of International Law was founded at Ghent on the 10th of September, 1873. It is an exclusively scientific association whose object is to favor the progress of international law, formulate its general principles, and give assistance to any serious endeavor for its gradual and progressive codification. The number of active members is limited to fifty. . .

The Association for the Reform and Codification of the Law of Nations was founded at Brussels, on the 10th of October, 1873, and consists not only of jurists, but of men known as statesmen, economists, and philanthropists, with the view not only of adding its labors to those of the Institute, but of aiding by independent methods the reform and codification of the law of nations, so as to promote pacific relations between the nations and the progress of international civilization. The two associations are really complements of each other.

Although Field participated in the foundation of both associations, it was his driving energy and his obsessive interest in codification which provided the impetus for the very creation of the Association for the Reform and Codification of the Law of Nations. At his instigation, an International Code Committee, with himself as President, had been formed in the United States early in 1873. Its twenty-six members included, in addition to jurists, diplomats, poets, preachers, and advocates of peace.<sup>21</sup> After exploring the possibility of support abroad, Field went to Europe where, with Auguste Visschers (who was to become the first president of the Association), an invitation was issued (in the name of a *comité provisoire*) to an international conference to meet in Brussels, October 10, 1873. The circular of invitation revealed the dominating interests of Field by suggesting that participants in the proposed conference

auraient pour mission de chercher des moyens d'amender les traités, les conventions qui règlent actuellement les relations internationales, d'y faire introduire les réformes nécessaires, d'en obtenir la codification, de manière à

addition to public international law, the entire field of private international law, many topics of private law, proposed international regulations for the rights and obligations of quarantine, the establishment of an international unit of currency (with conversion tables) based on gold, a learned note of some fifty pages on weights and measures, leading to the adoption of an international metric system, and proposed international regulations, *inter alia*, on patents, trade-marks, copyrights, longitude, and the Gregorian style of reckoning time.

21 Cf., The International Law Association, Reports of the First Conference held at Brussels, 1873, and of the Second Conference held at Geneva, 1874, pp. 2-4 (London, 1903).



substituer un droit positif écrit et uniforme à ces traditions incomplètes et contradictoires qui laissent subsister tant de lacunes et donnent lieu à tant d'interprétations diverses.

Whether the cautionary note which followed is traceable to Field is less clear:

Toutefois le travail collectif ayant ses limites, le but de la Conférence est moins d'entreprendre une semblable œuvre dans le cours borné de ses séances, que d'en hâter l'accomplissement, d'en encourager les tentatives, les essais, et d'éclairer les voies à parcourir.<sup>22</sup>

When the Brussels conference met to establish the Association for the Reform and Codification of the Law of Nations, Field was elected Honorary President and, addressing the conference, observed that the "end which we are pursuing is to establish a broader and better system of treaties, defining the public law of the whole world, for the maintenance of justice and the preservation of peace among the nations."<sup>23</sup> As President of the Association at its sessions of Geneva (1874), The Hague (1875) and Frankfurt (1878), Field pursued the same theme,<sup>24</sup> often relating it to his advocacy of international arbitration.

In the *Institut de Droit International*, Field played a more minor role. He participated in its sessions of Ghent (1873), The Hague (1875), Paris (1878) and Heidelberg (1887)—at which session he was elected Honorary Member—but never served as President or Rapporteur. Baron Albéric Rolin has recorded that Field collaborated conscientiously in the *Institut* commissions of which he was a member.<sup>25</sup> A listing of them reveals his interests: international arbitral procedure; the laws and usages of war; the applicability of customary international law to oriental nations; proof of foreign law. One may suspect, however, that the promotional opportunities of the Association for the Reform and Codification of the Law of Nations were more congenial to Field than the careful juridical work of the *Institut*.

In some ways it may seem curious that a hard-driving reformer and successful practitioner of private law should be so lacking in discernment as to proclaim: "There is no more difficulty in framing a code of

<sup>22</sup> *Ibid.*, 4-5.

<sup>23</sup> Field, *Speeches*, I, 429.

<sup>24</sup> *Ibid.*, 430-447. See especially his address at The Hague, *ibid.*, 432-443, at 437, where he reiterates that one of the objects of the Association is "to lessen the chances of dispute between nations by settling, beforehand, in an International Code, the rights and duties of each . . ."

<sup>25</sup> *Annuaire de l'Institut de droit international*, 1895-1896, Session de Cambridge 1895, XIV, 311.

international law than of national or . . . municipal law."<sup>26</sup> One may admire, however, his steadfastness in pursuit of the ideals of the *Institut de Droit International* as set forth in its devise, *Justitia et pax*, and conclude with the tribute of Baron Albéric Rolin, who knew David Dudley Field personally, that:

Il était de ceux qui n'hésitent point, dès qu'ils entrevoient la possibilité de faire faire à l'humanité un pas en avant vers ces horizons lointains de paix et de justice, dont elle se rapproche toujours malgré de déplorables écarts, tout en semblant condamnée à ne jamais pouvoir réaliser complètement cet idéal.<sup>27</sup>

<sup>26</sup> From Address by Field on October 29, 1869, on "Advantages of an International Code," *Speeches*, I, 404 ff. at 407.

<sup>27</sup> *Loc cit.*, note 25, pp. 310-311.