CO-EXISTENCE CODIFICATION RECONSIDERED

Draft codes of peaceful co-existence were presented to the 50th Conference of the International Law Association in Brussels during August, 1962.[1] For the first time it has become possible to determine with some clarity the varying meanings given to a controversial concept by international lawyers of different schools of thought. The Yugoslav rapporteur, a member of the Indian Branch, a committee of the American Branch, and the Soviet Branch each submitted drafts. A report of the Association's committee stated the circumstances under which the drafts had been prepared, and its Canadian member appended a commentary on the problem.[2]

A synthesis of the various drafts is now to be attempted under resolution of the Association's committee, although the title of the endeavor may be altered to bring it into accord with the work of the General Assembly of the United Nations on "legal aspects of friendly relations and co-operation among states."[3] Such a change of name would, in the view of most of those attending the committee's presentation at Brussels, help the Association to fulfill its consultative function to the United Nations by providing materials directly related to the entire study of the United Nations rather than to such part of it as may be included in what many believe to be a narrower concept, namely, that of peaceful co-existence.

The Brussels meetings were not without drama. In response to the activities of some participants seeking to eliminate the title "peaceful co-existence" from the committee's designation, participants from the U.S.S.R. and several of the people's democracies took the floor. Their opposition rested on the assumption that the change of name was not to bring the work of the Association into accord with that of the United Nations, but to register a defeat for Soviet policies, which Soviet statesmen have sought to associate with the concept of peaceful co-existence for some years.

In the light of the debate, the vote of those attending the committee's presentation recommending a change of name for the committee was reported to the plenary assembly of the Association, but action was postponed until the Executive Committee might consider the matter in greater detail and with more leisure than was possible during the short Brussels meeting. Yet, whatever the decision as to the future name of the committee, the Brussels Conference represented a milestone in consideration of the

[1] The record is in process of assembly and will appear as International Law Association, Report of the Fiftieth Conference, Brussels.

[2] All drafts and comments, except those of the Soviet Branch, were printed as a committee document distributed at the Conference. The Soviet Branch submitted separately a Report by the Committee on Peaceful Coexistence of the Soviet Association of International Law (Moscow, 1962; 20 pp.) and a Declaration of Principles of Peaceful Coexistence, Draft (Moscow, 1962; 5 pp.). The report and draft of the committee of the American Branch also appears in Proceedings and Committee Reports of the American Branch of the International Law Association 1961–1962, pp. 72–77 (New York, 1962).

[3] See Future Work in the Field of Codification and Progressive Development of International Law. Report of the Sixth Committee. U.N. Doc. A/5036, Dec. 15, 1961.

subject because of the presentation of draft codes. The issues that were excessively vague when the item of peaceful co-existence was placed on the agenda of the Association at the Dubrovnik Conference in 1956 on motion of the Yugoslav Delegation, have become clearer, although they are not yet sharply defined.

All of the drafts took the view that an extensive code in the form of an exhaustive international convention to be executed by states was undesirable, if not impossible of achievement. The concept of peaceful co-existence was conceived to be not a branch of law subject to codification, but a global aim to be sought by many means.[4] For the draftsmen of Western mentality it was interpreted as but the minimal aim of maintenance of peace, to be fostered with whatever difficulty until time has been gained to establish a firmer fabric of world order. Under this view a code of peaceful co-existence can be only a statement of those principles of international law that take priority in achieving this minimal aim. For the draftsmen from the U.S.S.R. and the lawyers who associate themselves with them, the concept is much more, being an aim suggesting the reformation of society upon the basis of existing international law, but incorporating social, economic and organizational elements favored by Soviet policy as essential to preservation of peace shaped as much as possible in the Soviet image. Thus the Soviet Branch found it necessary to include within its draft the principle of the "troika" as a feature of the structure of international organizations.

Readers of the JOURNAL have recently had the opportunity to examine Soviet concepts as they appear to an American [5] and a Canadian [6] student of Soviet literature relating to international law. From the quotations set forth by these scholars it is possible to note the vehemence with which Soviet authors have sometimes espoused peaceful co-existence. It emerges as an aim going far beyond the limited maintenance of peace to a reconstitution of the entire corpus of international law. Speakers from the Marxist-oriented states at Brussels and the report of the Soviet Branch did not go so far. The point was made, as it had been stated by delegates from the U.S.S.R. and the people's democracies at the United Nations

[4] This position might have been anticipated in the light of the debate within the Sixth Committee of the 16th General Assembly. Mr. Dorogin (Byelorussia) then said: "There was, of course, no question of making it [peaceful co-existence] the subject of a special convention, but it was a fundamental principle which should influence all the activities of the United Nations, including those of the International Law Commission." See General Assembly, 16th Sess., Official Records, 6th Committee, Legal Questions, Summary Records of Meetings, Sept. 20–Dec. 15, 1961 (New York, United Nations, 1962), p. 175 (S.R. 724, par. 5). Mr. Capotorti (Italy) said likewise: "Peaceful coexistence as it was usually understood was a political phenomenon which did not lend itself to codification." *Ibid.*, p. 160 (S.R. 722, par. 6).

[5] See Robert D. Crane, "Soviet Attitude Toward International Space Law," 56 A.J.I.L. 684 at 710–723 (1962).

[6] See Edward McWhinney, " 'Peaceful Co-existence' and Soviet-Western International Law," 56 A.J.I.L. 951–970 (1962).

during the 16th General Assembly in 1961, that there was no intention to create a wholly new body of international law without regard to the past.[7]

Examination of the records of the Sixth Committee at the 16th General Assembly indicates that several delegates from former colonial areas had very much in mind a sense of injustice done by international law as it existed prior to the second World War. It was urged that the institutions of international law favoring colonial Powers be changed quickly.[8] The slow evolution of customary law was declared inadequate to the situation. Just what the elements are that require modification remains to be clarified, but some were specified: the new concept of neutralism,[9] the new international pluralism,[10] nationalization of subsoil, and control by archipelagos that have become states of the waters between the various islands.[11] Some delegates referred constantly to the influence of technical advance upon international law, as well as to the wave of national liberation and economic emancipation, and the rise of socialist countries.[12]

If consideration of the legal aspects of peaceful co-existence is to mean a review of the general principles of international law to determine which require re-thinking in the light of technical and social change, there would be many international lawyers, even those of mature years and from long established states, who would participate. They would see in the review a

[7] Prof. G. I. Tunkin, who also spoke for the Soviet Branch at the International Law Association Conference, said in the Sixth Committee:

". . . the trends in the old international law sanctioned the policy of force and the institutions of colonialism . . . but the old international law also contained democratic principles and progressive rules which remained in force. . . . The old international law had changed to such a point that today it was necessary to speak of a new international law. That, however, did not mean that nothing had remained of the old international law. Some of its parts remained in force with the necessary alterations but the differences between the old and the new law ought to be pointed out. . . ." Sixth Committee, Summary Records of Meetings, cited note 4 above, at 211 (S.R. 729, par. 6). It may be significant that Prof. Tunkin corrected a misrepresentation of his remarks in the provisional summary record which had made one sentence read: "The old international law should not be rejected as a whole, since it was the foundation of modern law." See U.N. Doc. Provisional A/C.6/SR.729, p. 3.

[8] See report of Mr. Ulloa (Peru): "The difference between the international law of the past and that of the future was one of substance rather than form. Where in some spheres of international life international relations remained the same, the law of the past could be maintained and perfected, but new types of relations should be governed by new rules." Sixth Committee, Summary Records of Meetings, cited note 4 above, at 193 (S.R. 726, par. 29). Mr. Yasseen (Iraq) said: ". . . there was no doubt that since the establishment of the International Law Commission the situation in the international community had changed considerably from both the scientific and political point of view; . . . the slow evolution of customary law was no longer enough." *Ibid.*, p. 175 (S.R. 724, par. 7). Mr. Roseen (Israel) said: "His delegation had been impressed with the sincerity of those who held that traditional international law was no longer satisfactory, although he thought that too broad a generalization to that effect might be misleading." *Ibid.*, p. 75 (S.R. 704, par. 3).

[9] See report of Mr. Perera (Ceylon), *ibid.*, p. 210 (S.R. 728, par. 26).

[10] See report of Mr. Pechota (Czechoslovakia), *ibid.*, p. 170 (S.R. 723, par. 22).

[11] See report of Mr. Jusuf (Indonesia), *ibid.*, p. 71 (S.R. 702, par. 25).

[12] See report of Mr. Jusuf (Indonesia) quoting speech of President Sukarno to the General Assembly on Sept. 30, 1960, *ibid.*, p. 189 (S.R. 726, par. 6).

continuation, albeit at accelerated pace, of the ever-recurring process of "development" of international law to keep abreast of change. This very process was declared by the Charter to be a function of the United Nations, and the International Law Commission has frequently indicated that in its view codification must include "development" if it is to have validity.

Perhaps the reluctance of jurists from long established states to proceed in the direction of a concept of "peaceful co-existence" has been strengthened, beyond the natural reluctance to sail uncharted seas whose distant shores are vaguely defined, by what exuberant authors in the U.S.S.R. have written. If the corpus of international law is to be changed beyond recognition in the creation of a new international law, jurists, whose careers have been oriented on the measured development of law through carefully considered judgments, rendered in solution of specific problems presented by concrete conflicts, cannot be expected to embrace the proposal. Their reluctance to do so is strengthened when they hear the concept of peaceful co-existence pressed so vigorously by politicians as to arouse suspicion that it is one-sided; that it requires acceptance of a single nation's or group of nations' maximum aims before it can be achieved.

No student of psychology will deny that it is the rare mind that can dissociate its concept of the desirable from what is "right" for the world. In spite of the well-recognized danger of attempting to transfer to the group or nation the motives of the individual, history suggests that in this instance there is reason to do so. The youthful United States included founding fathers who were confident that an end would be brought to the international evils of those times if other states could be induced to adopt the American form of democracy. The youthful enthusiasm of new states that have emerged since the first World War indicates that there are again men who believe they have found truth and that the truth will set us free.

Painful as it may be for men with longer memories to listen to the current claims of those with panaceas, there can be no escaping the ordeal. Perhaps the most that can be expected in a world courted by demagogues is that the steps necessary to achievement of their panaceas be made crystal clear so that those who are being wooed can measure the cost of what they are asked to accept. Thus, if the achievement of peaceful co-existence requires acceptance of the principle of the "troika" in international organization, the statesmen of Asia and Africa can measure this against their present achievement. They can compare the proposal that their representative be one of three executives with the present situation in which an Asian is the sole executive. The votes in the General Assembly in the past suggest that in such a comparison of but a single issue listed in those necessary to achievement of peaceful co-existence they have made up their minds.

Some of those of Western orientation who have sat on the Committee on Peaceful Co-existence of the International Law Association have been of the view that the term had such worldwide appeal as to require its exploration. To reject it, at least at the present time, because it is closely associated in the United States and in some countries of Western Europe with Soviet and Communist Chinese diplomacy is to play into the hands of

those who wish to paint opponents as war-mongers. The declaration of the Bandoeng Conference incorporating peaceful co-existence as an aim of Asian and African policy was signed by too many Powers to be ignored. Because of this view, the decision of the 49th Conference of the International Law Association [13] to codify peaceful co-existence was accepted as a means of clarifying issues. The 50th Conference provided the stage for testing the wisdom of such an approach.

The drafts submitted in Brussels permit jurists of all lands to assess the situation. The drafts of the Soviet Branch and of a committee of the American Branch may now be compared textually.

The Soviet Branch draft proclaims the following principles of peaceful co-existence:

(1) The principle of peaceful co-existence is a fundamental principle of modern international law. No distinctions in the social and state structure shall hinder the exercise and development of relations and co-operation between states, since every nation has the right to establish such a social system, and to choose such a form of government as it considers expedient and necessary for the purposes of ensuring the economic and cultural prosperity of its country.

(2) All states shall practice tolerance and live together in peace with one another as good neighbors, without recourse to the threat or use of force against the territorial integrity or political independence of any nation, and shall settle all their international disputes by peaceful means. All states shall, in accordance with the United Nations Charter, take individual or collective measures to prevent or suppress acts of aggression, and to maintain international peace and security, and shall prevent and suppress propaganda of a new world war, and acts constituting a threat to international peace and security, as well as the fomenting of enmity among nations. All states shall do their utmost to promote the prompt implementation of general and complete disarmament, which is the most effective means to secure international peace.

(3) All states shall develop and strengthen international co-operation in the economic, social and political fields, as well as in the field of science and culture, on the basis of free will, equality, and mutual benefit, without any discrimination for economic, political, ideological, or other reasons.

(4) Relations between all states shall be developed on the basis of respect for the sovereignty and territorial integrity of states, for the right of peoples and nations to self-determination. The right of peoples and nations to self-determination, *i.e.*, the right to freely determine their political, economic, social, and cultural status, also includes inalienable sovereignty over their natural wealth and resources. Peoples may in no case be deprived of means of subsistence belonging to them by any title whatsoever claimed by any other state; colonialism in all its forms and manifestations must be done away with.

[13] Resolution on the Legal Aspects of Coexistence. International Law Association, Report of the Forty-Ninth Conference, Hamburg, pp. xxii–xxiii (London, 1961).

(5) No state has the right to interfere in the internal affairs of any other state. The recognition of the right of every people to settle all questions concerning its own country by itself is an immutable law of international relations.

(6) All states, regardless of size, and political and economic might, are, to one and the same degree, equal participants in international intercourse. No state may be prevented from participating in the settlement of international problems affecting its interests. States shall be represented in international organizations with consideration for the fact of the existence at present of three large political groupings.

(7) All states shall fulfill in good faith their international obligations arising from treaties and other sources of international law.

The draft of the American Branch's committee reads:

(1) States shall respect obligations arising from the Charter of the United Nations, from treaties and from other sources of international law.

(2) Disputes between states shall, if not settled by negotiation, be referred to third parties for mediation, conciliation or arbitration, or to the International Court of Justice or other international tribunal for decision in accordance with international law.

(3) International interchange of cultural accomplishment, of peoples and of ideas shall be encouraged and permitted without censorship, unless the interchange be designed by one or more of the parties to foment civil strife in the receiving state. In case of dispute a state believing itself threatened may submit the matter to the United Nations, the International Court of Justice or impartial arbitrators for determination.

(4) States administering non-self-governing territories shall, in furtherance of the United Nations' Charter's objective of self-government and of the commonly accepted right of self-determination of peoples, establish a program of preparation of the inhabitants of these territories for, and attainment of, self-government or political independence, provided the inhabitants desire such preparation and are capable of benefiting by it to the extent of maintaining an independent existence and social fabric. Should there be a dispute as to such a desire and ability, individuals residing in such territory may submit it to the United Nations' Trusteeship Council for determination. The administering state shall facilitate such action, and in the event that the Trusteeship Council responds affirmatively to the submission, shall develop with the inhabitants a proper program. In the event of disagreement in the preparation of such a program, the Trusteeship Council shall reconsider the matter and prepare a program to be binding upon the parties and implemented under its supervision.

(5) International commerce shall be promoted with the aim of maximizing the peaceful production and sharing of abundance.

(6) States having the economic capacity to do so shall tender to states with economies in less advanced stages of development economic and

technical assistance and capital investment, by public or private means as circumstances suggest, and the receiving state shall ensure that aid so tendered and investment so made shall be used for the designated purposes, and afforded the most constant security and protection in accordance with international law and with such terms of treatment and repayment as may have been agreed upon between the receiving state and the foreign public or private source.

(7) Aid to peoples seeking to improve their economic condition or to achieve or render secure their political independence shall in no case take the form of military advice or military equipment, much less of direct military action or support to armed bands, by the aiding state, regardless of the apparent justice of the cause, except on recommendation of the Security Council or the General Assembly of the United Nations and on request of the lawfully constituted authorities of the receiving territory.

(8) There shall be complete disarmament of every state, but only after agreement has been reached on effective control and a permanent international police force has been established by the United Nations. States may retain only those forces and weapons which are necessary for the maintenance of internal order, but annual reports shall be filed with the United Nations declaring forces, weapons, and production facilities, and the approximate location of forces. The state must submit to verification of such information by the United Nations.

Both drafts have elements in common, the most notable being form. Although the American committee entitled its draft a "code" so as to bring it into accord with the resolution in response to which it was prepared, the form is that of a declaration. The Soviet Branch entitled its draft a "declaration." Both drafts are relatively short and avoid the details that would be necessary to a draft of a convention. Both have to do with many of the same issues: performance of treaty obligations, promotion of trade, exchange of cultural accomplishments, non-intervention in domestic affairs, self-determination and disarmament. Yet, with these elements of similarity, many of which were found in the draft of the member of the Indian Branch and in the report of the Yugoslav rapporteur, the accord ends.

The committee of the American Branch evidenced preoccupation with detail in a few places where a simple statement of a principle such as self-determination could be expected to be more disruptive than if the fact were squarely faced that immediate liberation in some instances can make for war. The African and Asian states recognize this fact in their votes in the United Nations. They have favored an approach to what was New Guinea that causes it to pass through a series of hands before it may choose its own future. The American committee's specific proposals indicate a possible procedure to be followed during a period of tutelage on the road to independence and out of the hands of the original colonial Power. The Soviet Branch, in contrast, seems to recognize no possibility but immediate liberation, regardless of consequences for the peace of the world.

For the American committee emphasis would be placed on third-party determination, and notably the International Court of Justice, in the settlement of disputes. The Soviet Branch finds it enough to require that disputes be settled by peaceful means and to demand that a state have the right to settle all questions concerning its own country by itself. Soviet practice has favored diplomatic negotiation above all else in the settlement of disputes, and this may be what is favored by the draft, even though it has been pointed out in the past that diplomatic negotiation favors the stronger Power and impairs the sovereignty of the weaker.

Cultural exchange is favored by both sets of draftsmen but with a significant difference. The Soviet Branch speaks for the fostering of international exchange on the basis of free will, equality and mutual benefit without discrimination. Nothing is said of censorship, even though it has been Soviet practice to close borders to foreign periodicals not emanating from, or endorsed by, fraternal Communist parties in the countries of origin. The American committee has been specific in attempting to regulate the practice of censorship rather than to pretend that its does not exist.

Economic aid, for the American committee, must include conditions for the protection of investment, whether public or private, so that conditions for further infusion of capital may be preserved. The Soviet Branch limits its declaration to "strengthening international cooperation in the economic field."

Military assistance seems to the American committee to be a troublesome matter requiring control in the interest of world peace. Events have proved that, without control, military assistance can foster civil war which quickly flames into conflict between the great Powers. For the Soviet Branch, the matter requires no clarification unless it be contained in the prohibition of aggression or the threat or use of force against the territorial integrity or political independence of any nation.

Examination of the Soviet draft whets the appetite for more. There may be a basis for friendly relations and co-operation among states, as the United Nations agenda defines the concept, but much study remains to be directed to clarification of the manner in which broadly stated goals are to be achieved. The problem before the International Law Association is now to determine the lines of such study.

The majority of the participants in the Brussels discussions concluded that the work of the Association should be devoted to exploration of specific issues arising from the demand that the corpus of international law be reviewed so as to determine what aspects require modification to meet postwar needs. Thus, it was proposed that there be consideration of the machinery to be utilized in bringing about peaceful change of existing rules of international law, and that there be study designed to discover those rules of conduct that are common to the variously oriented schools of thought. The recently successful Vienna Conference on Diplomatic Immunities might be a model for such study in other fields.

Specific matters proposed for study were the legal consequences of the accession of new states to independence; a state's responsibility for the use

of its territory to the injury of other states, and damages in the case of injury done to another country; aggression; the content of the rule of non-intervention; and peaceful settlement of disputes.

Seen in the light of these proposals that came from many places on the floor, the participants in the Brussels Conference indicated their concern lest the development of international law be too slow to aid in reducing tensions arising under the special conditions of wars of colonial liberation and in the first years of independence of new states. The demand is being made for the application of careful thought by the scholars who comprise the membership of the International Law Association with branches in states of widely varying political orientation and experience.

Some delegates to the Sixth Committee of the 16th General Assembly doubted that anyone but diplomats could be practical in the development of international law, and the rôle of professors was specifically derided.[14] The history of the development of international law belies such a conclusion. The academics of the *Institut de Droit International* and the practitioners, academics and diplomats of the International Law Association in the past have taken the time, which busy foreign office officials often lack, to prepare proposals that are not without influence, if one may judge by references in the Sixth Committee itself to the work of these reflective bodies.[15] There is no reason why these unofficial bodies need conceal their expert knowledge and avoid preparation of studies that will guide the diplomats in their thinking when the ultimate international conference of states is held to debate the issues.

With regard to the specific matter of codification of the legal aspects of peaceful co-existence, the new direction proposed by those who attended the debates of the International Law Association in Brussels seems sound. Codification has been tried. It has produced some clarification, but the subject remains excessively vague. Concentration on the items that have been indicated both within and without the United Nations as requiring re-thinking in the light of the admittedly considerable changes that have appeared in the social and technical structure of the fabric of international relations commends itself as the most fruitful goal of scholarship. Whether these are to be studied as aspects of peaceful co-existence or of friendly relations and co-operation among states has yet to be decided.[16] The argu-

[14] See report of Mr. Amado (Brazil), Sixth Committee, Summary Records of Meetings, cited note 4 above, at p. 156 (S.R. 721, pars. 6 and 14), and report of Mr. Yasseen (Iraq), referring to remarks of Mr. Amado excised from the final report: "As the Brazilian representative had said . . . international law was the work not of professors but of States." *Ibid.*, p. 176 (S.R. 724, par. 10).

[15] See report of Mr. Ustor (Hungary), *ibid.*, p. 142 (S.R. 718, par. 16); of Mr. Amado (Brazil), *ibid.*, pp. 155–156 (S.R. 721, pars. 6 and 21); and of Mr. Perera (Ceylon): "He referred, in particular, to the three conferences held by the International Law Association, which boasted a large membership from Western States . . ." *ibid.*, p. 210 (S.R. 728, par. 25).

[16] The Executive Council of the International Law Association decided on Oct. 27, 1962, after completion of this editorial comment, to continue the Committee on the Juridical Aspects of Peaceful Co-existence under its present name until 1964 to complete a list of the principles or rules of peaceful co-existence, and also to establish

ments in favor of adopting the United Nations' terminology will seem impelling to many because it permits a fresh start unencumbered by such political overtones as have come to be associated with the words "peaceful co-existence" in recent years, and because it permits precise correlation between the work of the Association and the diplomats of the United Nations who seem, in spite of their criticism, to have drawn upon the Association in the past for ideas.

JOHN N. HAZARD

THE SABBATINO CASE—THREE STEPS FORWARD AND TWO STEPS BACK

The July 6, 1962, decision of the United States Court of Appeals for the Second Circuit in *Banco Nacional de Cuba* v. *Sabbatino*[1] reached the correct result in holding the Cuban Government's title to sugar, which it had expropriated while in Cuba, was invalid because the expropriation decree violated international law. However, from the standpoint of expanding the rôle of our courts in ascertaining and administering international law "as often as questions of right depending upon it are duly presented for their determination" (*Paquete Habana,* 175 U. S. 677, 700), the court's opinion was disappointing. The court took three steps forward by (1) its willingness to review the international law validity of the Cuban expropriation decree; (2) its holding that the decree was in violation of international law, and (3) its further holding that this violation of international law invalidated the expropriating government's title.

Unfortunately, these steps forward were accompanied by two, in the writer's opinion, unnecessary steps backward: (1) The court expressly limited its willingness to review the international validity of a foreign government's acts to a case "where the State Department has expressed a lack of concern as to the outcome of the litigation" and "where an agency of the expropriating country instead of some third party is the litigant relying upon the expropriation for its title." (2) It cast doubt on the established principle of international law that a taking of an alien's property without provision for adequate compensation is, in and of itself, a violation of international law, without regard to whether or not the taking is also discriminatory or retaliatory in nature.

Act of State Doctrine

The doctrine, asserted by the Cuban Government in defense of its title, that acts of a foreign sovereign with respect to persons or property within such sovereign's territory may not be reviewed in the courts of the United States, should not apply where such acts are alleged to violate international law. The act of state doctrine is not a rule of public international law, but rather a doctrine that, if applied to acts violating international law,

a new committee to examine and report on two topics: (1) the legal aspects of the emergence of new states into independence, and (2) the content of the legal rule of non-intervention in the internal affairs of other states.

[1] Reported in 56 A.J.I.L. 1085 (1962).