Free Territory might, at the moment of the coming into force of the Treaty, have no original citizens at all.

(d) Again the option is limited and constitutes here a right of the ethnical majority. Italian nationals, domiciled there on June 10, 1940, whose customary language is for example, Slovene, are excluded from any right to option, not only for Italy, but also for Yugoslavia.

JOSEF L. KUNZ

CRUCIAL PROBLEMS IN THE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW

Now that work has been resumed on the elaboration and statement of international law under official international auspices, it is presumably permissible to suggest some of the more crucial issues involved in that activity, as far as they can be detected by study of the problem from the outside. In view of the ignominious collapse of this effort over seventeen years ago it is obviously desirable that any possible aid should be given in the renewed attempt at what is by almost universal consent an extremely urgent task, namely the revival, revision, and restatement of international law for the future.

A slight change has been made in the formulation of the problem today. More emphasis has been placed upon the development of international law, in contrast to its codification. And more recently reference has been made, in connection with the second point, to this or that portion of international law being "ready" rather than "ripe" for codification, as the point was stated in the language employed under the League of Nations. The first shift of emphasis is undoubtedly intentional and significant; the second may be merely a chance choice of words but serves to expose an issue of very serious import.

Thus by the "development" of international law reference is almost certainly made to international legislation, either by multipartite unanimous conventions or by statutory action by some degree (simple, two-thirds, three-fourths) of majority vote. And this international legislation must almost certainly fall in the fields of international economic and social problems (health, communications, trade and finance, morals) rather than in the subjects covered by the customary common international law (recognition, jurisdiction, diplomatic privileges, conduct of hostilities, neutrality). The law on the latter topics could conceivably be developed by international legislation also, but they are probably not the subjects in the minds of those speaking of "development" of the law, and it is a matter of historical record that development in this field has normally been achieved by practice rather than by legislation.

If this is true, however, certain inferences follow. One is that the task of international legislation is radically different from that of codification. It deals with different subjects, it proceeds by different methods, it aims

at different results. Consequently it has to be carried on by very different types of persons—health experts, transportation experts, economists, penologists, and so on, rather than by lawyers and diplomats (except for its formal aspects). No alert student of international organization could be opposed to this kind of activity, and must, indeed, be strongly in favor of it, but it is indispensable to make note of and emphasize the vital difference between the job of codification of customary law on basic phases of state organization and action, on one hand, and the development of new state organization and action on more far-reaching social problems on the other.

The League formula, "ripe for codification," to return to that aspect of the matter, was never explained with precision. Obviously codification of presumably existing international law might be undertaken either because of the existence of such an amount of agreement on this, that, or the other topic that codification would be more practicable there than in other cases. Or it might be undertaken because of the existence of such an amount of disagreement on a given important subject that it would seem imperative to secure a reconciliation of divergent views. And the degree of consensus might be such on one side, or the degree of discord such, on the other, that various topics might seem to be distinctly overripe for codification. The adoption of the term "ready" in place of "ripe," in current usage, does not necessarily commit us to one or the other of the two interpretations mentioned. It does seem, however, to point rather in the direction of topics on which a considerable degree of agreement already exists. Where does that leave us with today's problems?

Actually there are few questions or topics in common international law in respect to which sharp and strong differences of national policy do not exist. The three questions—territorial waters, nationality, responsibility of states—submitted to the League codification conference at The Hague in 1930 were chosen largely on the presupposition that agreement could be reached on those topics. The result was catastrophe. The fact is that it had been almost completely overlooked that radical disagreement, the holding of definite divergent views, on the subjects mentioned would be the actual state of affairs, rather than agreement, and that the necessity for some technique for securing agreement in such conditions had been still more completely disregarded. It was not an effort to reform the law which wrecked the Hague conference but simply the effort to get agreement on what the law was in the face of radical disagreement, or rather failure to develop any technique for that purpose. And no change in these matters is perceptible today. Unless something is done to remedy this situation we shall run squarely into exactly the same kind and degree of conflict and frustration as before. Whether an adequate technique can be found for producing agreement out of disagreement in such cases is very doubtful but the problem must be explored.

One attempt to meet this situation has been suggested. A "new" approach to the problem of codification of international law has been recommended, namely unofficial codification. Of course this is not new at all, but the oldest of all methods, practiced for generations before the states got around to official codification. It is retreat and evasion. It may be unescapable, and it does retain some value—such unofficial codes do exercise some influence. But it is far from the level of codification in the national sphere. It is not clear that it is necessary to give up the effort at official codification quite yet although we should know where we stand fairly soon.

Similar to the device of unofficial codification, or taking refuge in that device, is the concept of gradual or ultimate codification. There is no doubt that complete or overall codification of international law presents a tremendous task, and that codification by portions is perfectly feasible and even sound theoretically, provided it is carried into all important sections of the law, coördinated properly, and carried out within a reasonable time —not unimportant stipulations, however. On the other hand it remains true that much of the value of codification,—in so far as such action has any practical value at all, and even in its moral, psychological, and political implications,—depends precisely upon comprehensive rather than fractional application of the method. It might also be suggested that, if comprehensive codification did not seem too great an effort to Justinian and Napoleon, not to mention numerous other similar figures throughout legal history, perhaps a little more courage and loyalty to the task might be expected of our international jurists and our governments today.

Incidentally it will be necessary in this connection, if the effort at codification under United Nations auspices goes very far, to straighten out the situation produced by codification action under Pan-American auspices while the League program was collapsing. The Pan-American action contrasted strongly on the surface with League failure. On the other hand the Pan-American effort may indeed have been more superficial than real. The whole situation calls sharply for clarification.

Finally it is impossible to disregard the need for revision and restatement of the law of war and neutrality. Confusion as to the content of the law is worse here than anywhere in the law of peace. The effects of World War I were almost completely ignored in the period 1919–1939; still further confusion was created during World War II. It is by no means certain that there will be no need for law concerning the conduct of hostilities and even concerning neutrality in the future. Rules may be needed for the operation of international police forces. The war crimes trials and recent efforts to restate the law relating to prisoners of war indicates that these branches of the law are by no means dead. United Nations efforts for development and codification of international law are intended to deal with these subjects only at very special points. We seem to be standing—nay

lying—with regard to the great bulk of the law of war and neutrality, just as still and lifeless today, as we did during the period 1919–1939.

It was well known that resumption of the codification effort under United Nations auspices was hazardous but the decision to resume was made—and justifiably made. Now, however, superhuman efforts must be made to avoid failure along any essential line.

PITMAN B. POTTER

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