

CODIFICATION OF PEACEFUL COEXISTENCE

Jurists have been devoting their attention to the legal aspects of "peaceful coexistence" since 1954. At that date the concept was inserted in the Sino-Indian treaty concerning the status of Tibet, as one of the principles to govern the relations of the two signatories. The following year the Afro-Asian powers assembled at Bandoeng adopted the concept as one of the fundamentals of their respective foreign policies. Within three years the legal adviser to the Yugoslav Foreign Office proposed a definition in legal terms of the concept, and an eight years study was inaugurated in the International Law Association. Finally, in 1964, after years of fruitless effort in U.N.E.S.C.O., the United Nations and the International Law Association, the Yugoslavs succeeded in obtaining endorsement of a "code of peaceful coexistence" at the conference of non-aligned nations held in Cairo.

Few subjects have occasioned such conflict among jurists as the concept of codifying peaceful coexistence. The scholars from Latin America have been in the forefront of the opposition within the United Nations. They have been vigorously supported by the lawyers rooted in the traditions of the common law, and by the western Europeans. Proponents of the project have come primarily from Eastern Europe, Asia, and Africa.

What is in issue? Comparative lawyers can understand readily some of the causes of dispute. Among the common law traditionalists codification is of doubtful service to a legal principle at least during its period of crystallization. Professor James L. Brierly of Oxford typified common law attitudes of distrust when he opposed codification of international public law by the International Law Commission of the United Nations. He disclosed in the debates before the committee creating the Commission that in his view international public law was still in an early stage of development. Codification at such a moment would stultify growth. In an effort to reach agreement among the experts from various countries, the Commission could be expected, in his view, to search for a lowest common denominator, and that would be very low indeed. He preferred to see international public law develop through a series of diplomatic exchanges, bi-lateral treaties and activities of states in extension of custom. Each event would added to the lore of the law, just as it had done in the

five centuries during which the common law of England had been in a period of formulation. He relied on the files of foreign offices with their voluminous, if conflicting, records of exchanges between states for his law. In the give and take of daily intercourse, the better rule of two approaches would emerge as states tried one or the other, and when the test had proved beyond question to most of the states of the world that one would be preferable, it would be time enough to write it down in a multilateral treaty, which might be called a code.

Jurists in the United States of America shared Professor Brierly's view, although they were familiar with codified principles far more than their English forebears. Jefferson had seen to that for he chose to draft the Declaration of Independence in principled terms inspired by Continental concepts. Natural law traditions had been accepted in the nineteenth century in legal circles of the United States of America far more than they had ever been in England. Nevertheless, lawyers were reluctant to codify, and when the legislators felt impelled to do so, the judges tended to interpret the statutes as no more than declaratory of the common law. Unless the statutory language specifically reversed a rule of the common law, the judges applied the language in what they believed to be the meaning of the judicial decisions which it was intended to codify. This made for flexibility, and even left the door open for considerable growth in extension of law.

While opposition to the concept of codification of law in any field may be traced in the common law tradition to the factors indicated, the opposition to codification of peaceful coexistence among the Latin Americans and the Western Europeans of Romanist traditions cannot be traced to the same causes. Romanists have no reason to dislike codification, as it is the foundation of their tradition. Opposition to any particular proposal to codify has to be based for them not on the form but on the substance. Opposition rests upon a feeling that in codification of "peaceful coexistence" there lurks not a legal problem but a political one.

Mr. Quintero of Panama stated the feeling in many Western Romanist minds when he said in the Sixth Committee of the United Nations in 1962, "The ideal of 'peaceful coexistence, which seemed to be the central point of the resolution [Presented by Czechoslovakia] aroused the distrust of many countries, not because those words were improper or expressed an idea which was reprehensible in itself, but because the circumstances surrounding the birth of that slogan had rendered it suspect to many."¹

The reference was to the use of the term by communists to express the essence of their foreign policy. Not only had the term been used by the Chinese in the treaty with India of 1954. It had been made the key-stone of the Program of the Communist Party of the Soviet Union, adop-

¹ U. N. Doc. Prov. A/C.6/SR 760, p. 8.

ted in October, 1961. But that program had suggested that the concept was something less than cooperation. It was represented as a form of struggle. Its appeal to the peoples of the world in spite of that fact was in its presentation as a no-war policy. The words of the 1961 program on this subject were. "Peaceful coexistence serves as a basis for the peaceful competition between socialism and capitalism on an international scale and constitutes a specific form of class struggle between them."

Nikita Khrushchev, while First Secretary of the Communist Party of the Soviet Union and Prime Minister of the Soviet State, had made the issue even clearer a few months before when he declared in his speech of January, 1961, "Thus, in terms of its social content the policy of peaceful coexistence is a form of intensive economic, political and ideological struggle of the proletariat against the aggressive forces of imperialism in the international arena."²

It was this political history to which Mr. Quintero had reference. The communist support for the term carried with it the well-known connotations of communist doctrine that the world cannot live forever in peace; that there is an inescapable struggle between classes and states representing those classes, and that the communist-led states have a duty to help people not so favored toward a goal typified by the Russian Revolution. War was being declared out of the question by the Communist Party Program of 1961, not because of a change of heart, but because it was too destructive to be utilized as a tool of struggle. This was made clear by the program's words, "Peaceful coexistence of the socialist and capitalist countries is an objective necessity for the development of human society. War cannot and must not serve as a means of settling international disputes. Peaceful coexistence or disastrous war —such is the alternative offered by history."

Not all communists shared this Soviet view, as evidenced by the subsequent disclosure of the dispute between the Chinese and Soviet communist parties. In the exchange of letters of July, 1963, the Chinese charged that the Soviet communist's policy of peaceful coexistence would be a betrayal of Marxism. The Chinese said, "In the application of the policy of peaceful coexistence struggles between the socialist and imperialist countries are unavoidable in the political, economic and ideological spheres; it is absolutely impossible to have 'all-round cooperation'."³ The Chinese were willing to risk war to further a communist-led revolution, and they buttressed their argument by declaring, "the wars of national liberation and revolutionary people's war that have occurred since World War II have not led to world war".

The Soviet communists retorted to say, "The Chinese comrades say outright: 'On the ruins of dead imperialism' —in other words, as the

² *Kommunist*, No. 1 (Jan., 1961) p. 3. English translation in *Current Digest of the Soviet Press*, vol. XIII, núm. 4, p. 10 (1961).

³ English translation in *Ibid.*, xv, núm. 28 (1963).

result of the outbreak of war— 'a beautiful future will be built.' If we accept this, then indeed the principle of peaceful coexistence and the struggle to strengthen peace will have no pertinence. We cannot enter upon such an adventurist path: it contradicts the essence of Marxism-Leninism." Later the Soviet critics presented a purported stenographic transcript of a conversation in which Mao Tse-tung is quoted as saying that China could afford to lose half its population, for the other half would survive to build the future.

Having concluded that "peaceful coexistence" was a concept too closely related to the idea of class struggle and risk of war to be accepted, the delegates to the United Nations rejected it in 1961 as a subject of further study in the Sixth (Legal) Committee and substituted in its stead, "friendly relations and cooperation among states conforming to the Charter of the United Nations".⁴ Eastern European states reluctantly signified their acceptance of the formula. They continued to press their position by saying that the formula included their concept of "peaceful coexistence". Other states refused to accept this view because they considered the concept of cooperation to be studied under the resolution far wider than coexistence. To most of those present, whatever their native tongue, coexistence meant but an armistice to be maintained as long as necessary to avoid mutual destruction in an atomic war. In contrast, cooperation represented a concerted effort to overcome the causes of conflict. It was not just the capping of a gushing stream of hate so that it could not flood the world.

Perhaps it is possible to define the desires of many in the words of the report of the American Branch Committee of the International Law Association, which said in 1958 that if "peaceful coexistence" was incapable as a term, it must be interpreted as "a concept requiring vigorous efforts to bring all peoples of the world closer together so that there may be an evolution of an informed, educated world public prepared to formulate policies designed to further the economic and political development of all peoples . . . a concept opposed to forceful measures designed to impose the will of a strong power or group of powers upon a power or group of powers believed to be less strong".⁵

Although the United Nations had moved away from use of the term "coexistence" in 1961 and had substituted "cooperation", the International Law Association continued to work on its original 1958 resolution for eight years before abandoning the term and changing the name of its committee. Defining the concept in a brief paragraph early proved to be impossible. The Yugoslav rapporteur did his best to find some measure of agreement in a committee balanced equally between Eastern Europeans

⁴ General Assembly Resolution 1686 (xvi) Dec. 18, 1961.

⁵ Proceedings and Committee Reports of the American Branch of the International Law Association, 1957-1958, p. 85 at p. 93 (1958).

and the rest of the world. The effort at definition was abandoned in 1960 and the concept of codification introduced. In spite of reluctance of the common law component of the committee to codify, consent was finally given in the interest of specification of the problem. While a brief definition had proved to be such a vague generalization as to be meaningless, a code was expected to have the merit of being sufficiently specific to draw out the issues on which the Eastern Europeans thought that new legislative action was required.

One of the problems plaguing many of the Western Europeans was whether there was need for something going beyond the Charter of the United Nations. A French spokesman in the Sixth Committee of the United Nations had said at one time that he thought the proposal for codification was comparable to a proposal to restate the Code Napoleon. Unless something new was to be added, there was no reason to restate obligations already assumed in the Charter. Many agreed with him. Still, the members of the International Law Association's committee from the West thought that an attempt at codification in a non-governmental organization such as the International Law Association had some justification as it would help to identify any changes in international public law which Eastern Europeans desired so that others could decide whether they wanted the changes. In short, codification would require the communists to come out from behind vague generalities which they might use later to lead the world in quite new directions to which sufficient thought had not been given by Western jurists at the time of formulation.

Both the Soviet and American Branches of the International Law Association reached the same conclusion as to form in the next two years. Both concluded that a detailed code was undesirable, if not impossible. In consequence, the Soviet Branch introduced in 1962 what it called a declaration, while the American Branch introduced a similar document, although it was called a code to comply with the resolution's language. For both Branches, the Universal Declaration of Human Rights was adopted as a model.⁶

The contrast between the two declarations provided a measure of the differences between East and West. The committee from the United States of America showed concern for more detail than the Soviet Committee proposed. Both drafts had 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. The contrast is exemplified by the treatment of peaceful settlement of disputes. The Soviet Branch thought it enough only to require that disputes be settled by peaceful means and that a state have

⁶ The two drafts are reproduced in *American Journal of International Law*, vol. LVII (Jan., 1963) pp. 92-94.

the right to settle all questions concerning its own country by itself. The American Branch placed emphasis upon third-party determination, and especially that of the International Court of Justice. While the Soviet statement in generalized terms might be taken to include third-party determination, Soviet practice has avoided commitment to such means. The U.S.S.R. has accepted third-party determination only when its desire to become a party to a convention has been so strong, as it had been with the International Labor Organization and the World Health Organization, that it has accepted third-party determination of disputes over the meaning of the statute creating the organization rather than remain outside. Since Soviet practice has always pressed for diplomatic negotiation and resisted arbitration or judicial determination, the suspicion existed in some minds that the draft code's provisions had been designed to reflect this practice. The United State's scholars were unwilling to accept vague language inadequate to the needs of the small states whose negotiating strength was little.

On the issue of cultural exchange there was also a difference. The Soviet Branch proposed fostering international exchange on the basis of free will, quality and mutual benefit without discrimination. Nothing was said of censorship, although it has been Soviet practice to apply it to exclude foreign periodicals coming from other than fraternal communist parties abroad. The American Branch was specific in proposals to regulate censorship rather than to pretend that it did not exist.

In the economic field the Soviet Branch contented itself with a declaration in favor of "strengthening international cooperation in the economic field", while the American Branch thought that economic aid must include conditions for the protection of investment, whether public or private, so that conditions for further infusion of capital might be preserved.

On the much debated issue of self-determination, the Soviet Branch seemed to recognize no possibility but immediate liberation, regardless of consequences for the peace of the world. The American Branch took the unpopular but reasonable position that when self-determination might result in the birth of a new nation with no possibility of maintaining internal order, it should be placed under United Nations trusteeship or tutelage for a period to permit the education of its people, development of the viability of its economy and creation of security forces. The New Guinea experience with United Nations supervision was taken as an example, although the shortness of the period before the territory was turned over to Indonesia made the model less than perfect.

The 1962 conference of the International Law Association led to such a clash of views among the participants, many of whom were unwilling to accept even the measure of codification proposed by the American Branch committee, that no decision could be taken. The matter was given to the Executive Committee for resolution, and it chose to make one more effort.

The Committee on Juridical Aspects of Peaceful Coexistence was asked to bring in a final list of the principles of peaceful coexistence. The American Branch committee set to work and produced a list of topics for study on the ground that it was premature to codify until the practice of all states had been examined, and notably that of Latin America, Asia, and Africa. None of the practice of these areas had been sufficiently widely examined to permit crystallization of principles.⁷ The Yugoslav rapporteur, however, was ready with eighteen principles, and he succeeded in persuading all but the Canadian and United States representatives on the committee that these could be presented as a final report.⁸

The 1964 conference of the Association accepted the report, but because of strong opposition to its possible implications, it was stated in the resolution of acceptance that there was no prejudging the issue of the definitive character of the list of principles or the question whether the principles were those of peaceful coexistence or of general international law. Further, there was to be no further study of the list as a whole, but rather concentration on but a few of the principles to collect the information necessary to make a report on the state of the law. This decision signified a departure from the policy of early codification and a return to the established practice of the International Law Association of exhaustive collection of data on practice throughout the world as the foundation for what might eventually but not necessarily be a convention on one or another specific theme. In short, the International Law Association ranged itself with the United Nations which had chosen to abandon any concept of general declaration or codification in favor of study of specific subjects so as to determine the state of the law and to draw such conclusions as might be possible. To indicate the extent of change of approach the name of the committee was changed to International Committee on Principles of Security and Cooperation.⁹

The dimensions of the dispute might be narrow if they were only on an East-West Axis, but it has become evident that they range on a North-South Axis as well. African and Asian spokesmen have been active since the time of the Bandoeng declaration incorporating peaceful coexistence as one of the principles governing relations between the signatories. In the minds of many of them the concept seems to be related primarily to anti-colonialism, and to be a key word identifying a revision of international public law in the interest of the developing states. In their lexicon

⁷ "Report of the Committee on Peaceful Coexistence", Proceedings and Committee Reports of the American Branch of the International Law Association, 1963-1964 (1964).

⁸ The rapporteur's personal explanation is available in Milan Radojkovic, *Les principes ou règles juridiques de la coexistence pacifique devant l'International Law Association*, 11 *Yugoslav Review of International Law* 1 (1964).

⁹ The resolutions will be published in a volume to be entitled *International Law Association, Report of the Fifty-first Conference — Tokyo*.

the law of peaceful coexistence is a "new law", philosophically different from that of the past, which they associate with their former imperial masters.¹⁰

Recognition of the elements of the old law that are to be rejected by the new state is not difficult, for their representatives have been outspoken in the United Nations against colonialism and the manifestations which remain since liberation of the Asian and African states from European powers. Far more difficult has been identification of the new elements that the Africans and Asians would substitute. Some of the difficulty lies in the absence of more than a few individuals in some of the new states who have been students of international public law. This results in unfamiliarity with the subject and its development, leaving only a residue of distrust of the great powers and of a legal system which so long served their purposes.

Upon this distrust has been thrust the necessity of organizing cooperation between African States to maintain peace. The Organization for African Unity has emerged, and its agreements have taken the form of treaties. When disputes have arisen, members have sought to mediate between the disputants. Principles of traditional international law have been applied, for want of any other principles. The African states have been stepping into the shoes of international public lawyers almost without thinking about it, while at the same time demanding a new international law.

At this point arises the great opportunity presented to the jurists of Latin America. For generations Latin America has given birth to distinguished jurists, many of whom have written standard texts and codes, or directed Academies or sat on the International Court of Justice and the International Law Commission. International public law is well known to Latin American diplomats. Further, Latin Americans come in many cases from developing economies which have some of the same economic and social problems as those of Africa and Asia. They have no tradition of domination over colonies. They are beyond suspicion, for no one can suppose them imperialists. Some, like the United States of Mexico have evolved new forms benefiting the common people in a revolutionary way. There is full appreciation of the need for buttressing independence by widespread public education, and economic readjustment, and public participation in government on a responsible basis. Latin American jurists may well study the needs of the Asians and Africans who are demanding the introduction of a new international public law and propose a solution that will not result in the discard of a whole system of public order in the international sphere because of failure to appreciate that it is not devised in more than limited and easily separated aspects to perpetuate a colonial

¹⁰ The African position is presented and assessed in Hans W. Baade, ed., *African Law, New Law for New Nations* (1963) pp. 2-5.

order. In short, Latin American can, perhaps, make it clear that it is not necessary to throw out the baby with the bath in rejecting undesirable elements from colonial practices.

The communist-led states have been utilizing the restlessness of the statesmen of Africa and Asia for their purposes. The Cairo resolution of 1964 on peaceful coexistence represents their major triumph in this field of law. Having been thwarted in the United Nations and the International Law Association in their efforts to promote a code of the legal aspects of peaceful coexistence, they have turned to the nonaligned countries. President Tito of Yugoslavia, who has won the confidence of many Africans and Asians as the leader of a small power independent of the U.S.S.R. although emotionally aligned with it, and as a demonstrated friend of many developing countries to which he has been willing to send experts, presented a draft resolution to the Cairo conference.¹¹ It plays upon many of the chords from which favorable responses have been received in the past, namely, complete independence to be recognized immediately and unconditionally, exercise of the right of all peoples to the free exploitation of their natural resources, abstention from the use or threat of force and refusal to recognize situations obtained thereby, respect for human and state rights, peaceful settlement of disputes and general and complete disarmament, cooperation with a view to accelerating economic development in the world, and finally meeting obligations in good faith in conformity with the principles and purposes of the United Nations. The General Assembly is asked to adopt the nine-point list as a Declaration on the principles of peaceful coexistence.

Should the General Assembly adopt such a resolution, and the existence of enough votes to do so may be presumed since the proposal comes from the numerous states present at the Cairo conference, it will be necessary to clarify details. First, it must be made clear that the resolution is in no way implementation of the foreign policy of the communist-led states, for the reasons already stated. To link the two would be to make the foreign policy of the USSR and of China acceptable to the world, even though the great majority of states want cooperation and not mere armistice in a class struggle maintained by a balance of terror.

Secondly, there must be dissociation of the declaration from the policy of one of the signatory Asian states which, though not led by communists, has seen no violation of international law in the landing of sea and air borne troops in the territory of a neighbor on the ground that a policy of aid to colonial powers and a perpetuation of colonialism is being fostered. If the prohibition of threat of force or force itself is to be prohibited, it must be without qualification. "Just wars" must be re-

¹¹ The press release is reproduced in Yugoslav Facts and Views No. 168 (October 22, 1964) Yugoslav Information Center, New York, The declaration also appears in International Affairs, No. 11 (Moscow, 1961) pp. 106-107.

cognized for what they are: instruments of foreign policy masked in humanitarian terms.

Thirdly, peaceful settlement of disputes must be interpreted to mean more than diplomatic negotiation. It is not enough to declare that the settlement must be on the basis of equality and sovereignty, for history has shown that institutional protections are necessary. Good will alone cannot protect the weak. Peaceful settlement must be interpreted to include third party arbitration and adjudication when diplomatic negotiation proves inadequate. Perhaps it is too much to hope at this stage of international development at the stage of protracted negotiation may be waived by a small power who fears that pressures upon it for settlement will prevent presentation of its case, but such a goal might well be placed before the members of the United Nations for consideration in the future.

Finally, and this will be the most unpopular and perhaps least possible of adoption as an interpretation: the exercise of the right to self-determination, while recognized immediately as a right, must be subordinated in practice to the peace of the world by making available a system of transfer under which the colonial power loses its control immediately but a tutelage of capable friends is established under the United Nations, or a regional organization such as the Organization for African Unity so that there is no repetition of the chaos and threat to peace created by the liberation of the Congo.

There will be those who will regret the decision of the General Assembly to adopt a resolution on peaceful coexistence for the same reason as that expressed some years ago by the French delegate, to which reference has been made. The Charter of the United Nations is itself an obligation to maintain peace, and it has provided the basis for creation of the conditions necessary to peace in terms of cultural interchange, economic and technical assistance, relief of disaster conditions and alleviation of human suffering, expansion of commercial relations and codification and development of international law. To restate these principles is but to recodify the Charter. It is as unnecessary as redeclaring the principles of the Code Napoleon. By such reassertion of what is already law, the declaration gives credence to the theory that law loses force unless reaffirmed at frequent intervals. Such an innovation cannot be tolerated.

Some will continue to oppose this type of codification because they see it from their common law background as but "poetry". Professor Edward McWhinney of Canada notes with reluctance that between the wars Continental European Civil Lawyers "seem frankly to have enjoyed the poetry involved in drafting high-sounding declarations of abstract general principle, perhaps because it immunized them from the tiresome responsibility of dealing with the dynamics of power involved in translating any

such agreements into working reality".¹² Declarations delude and disappoint people, in his view, and the codification of peaceful coexistence in general declaratory terms will only repeat the errors of the inter-war years.

A more attractive program than one establishing declarations is one of fact gathering on the practice of nations in all parts of the world, followed by international congresses on specific themes, such as those on the law of the sea or diplomatic and consular law, in which experts take the time to think out what are the implications of practice and the direction of future development that needs to be fostered. The International Law Commission also can serve a useful purpose in some types of codification such as the law of treaties, although it cannot gather experts on some more technical subjects when its elections are held in advance of knowledge of what is to be on the agenda for years to come. Also, up to the present it has been denied time by inadequate financing to meet for sufficiently long periods to conduct its deliberations in the depth desired by its members.

Impatient representatives of new states are naturally reluctant to adopt slow methods of expressing their views. Perhaps the Latin American jurists will find it possible to help the newcomers to grasp the problems of the complex world in which we live and accept deliberation rather than speed. In that may lie the hope for orderly development of the law of international intercourse.

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¹² See Edward McWhinney, ed., *Law, Foreign Policy and the East-West détente* (1964), p. 42. Professor McWhinney has provided an extensive review of the problem in his "Peaceful Coexistence" and *Soviet-Western International Law*. (1964).