ciple and moreover there is no agreement as to which rule applies and when. The danger is not to be ruled out that, by the manipulation of these principles, the experts may successfully interpret international law away and find themselves face to face with *Le Néant.*

LEO GROSS

CO-EXISTENCE LAW BOWS OUT

An item entitled "Juridical Aspects of Peaceful Coexistence" stood on the agenda of the International Law Association for eight years. At Tokyo in August, 1964, it was removed, and the committee charged with its study during the preceding years was given a new name. It became the "Committee on Principles of International Security and Cooperation."[1]

With this change the International Law Association follows the lead of U.N.E.S.C.O. and of the United Nations. The former's General Conference of 1954 chose "peaceful co-operation" as the aim of its research rather than "peaceful co-existence" when the matter was broached by an Indian resolution.[2] The latter once undertook a search for juridical aspects of peaceful co-existence, but substituted a study of the law of "peaceful relations and co-operation among states" in 1961.[3] The Tokyo decision leaves "peaceful co-existence" as an agenda item only in two prominent organizations. One is the Conference of Non-Aligned Nations, which included the subject on its agenda for its Cairo meeting of October, 1964. The other is the non-governmental International Association of Democratic Lawyers which last met in Budapest in April, 1964.

Can the Tokyo decision be interpreted as more than a new move in a wide-ranging dispute over terminology? Members present from the branches of the International Law Association in North America, Western Europe and the rim of the Pacific thought that the change was of substantive significance. Eastern European branches came prepared to accept the change as part of a compromise, for they knew that the pressure was strong for a change. An American Branch report had placed before the meeting, as it had on each of three previous occasions, a plea for a change.[4] The Americans argued that "peaceful co-existence" as a subject of study had two disadvantages: it was obscure, and if it meant anything, it was an inadequate aim for research by international lawyers. Obscurity stemmed from a wide variety of usage, from a 1954 treaty between India and the Chinese People's Republic over the status of Tibet, a foreign policy aim of the Afro-Asian countries set forth in the Bandoeng Declaration of 1955 in apparent emulation of Buddhism's *Pancha Shila,* a declara-

[1] The record is in process of assembly and will appear as International Law Association, Report of the Fifty-First Conference, Tokyo.

[2] For an account of this episode, see John N. Hazard, "Legal Research on 'Peaceful Coexistence'," 51 A.J.I.L. 63 (1957).

[3] See U.N. Doc. A/5036, Dec. 15, 1961. Report of the Sixth Committee.

[4] See Proceedings and Committee Reports of the American Branch of the International Law Association 1963–1964 (New York, 1964) 83–88. Prior reports appear *ibid.* 1957–1958 (New York, 1958) 85–94, and 1961–1962 (New York, 1962) 72–77.

tion of foreign policy goals in the program of the Communist Party of the Soviet Union as adopted in 1961, and as the purpose of *apartheid* in the Union of South Africa. Even if its meaning were limited to usage by the Marxist-oriented states which had used it most frequently, there had been charges hurled at the Chinese People's Republic by the heads of the U.S.S.R. that the concept was being abused. In short, who could tell just what "peaceful co-existence" was intended to mean as a policy goal?

Further, if the words can be taken as meaning what the dictionaries say, they have a connotation in English, and in other languages as well, of "armistice" in state relations rather than co-operation to overcome tensions. The words seem to look to the ultimate resumption of hostilities, to a final victory of one system over another with the extermination of the loser. There is no suggestion that a goal of peaceful co-existence means acceptance of the perpetual right of all to live in peace with neighbors while maintaining quite different social, economic, religious or other strongly held predilections.

Finally, the term is used in some of the developing states as shorthand for complete rejection of all elements of traditional international law in favor of a "new" law. For some delegates speaking in the United Nations the "new" law must be wholly new, while for others it may contain some elements of the old, but only if those elements have been specifically accepted by an international conference summoned for their reconsideration.

Factors such as these had played a part in the decision of a majority of the Member states of the United Nations to reject the term "peaceful co-existence" as the subject of legal study in 1961. The arguments aired in the United Nations were in the minds of many of the individuals voting in Tokyo, but there was a difference. This lay primarily in the emphasis to be given different factors, and it sprang from the nature of membership in the International Law Association. Individuals appear at its congresses not as representatives of their states nor even of national branches of the Association, but as individual scholars. This tends to reduce political considerations, although it does not eliminate them, and to push to the forefront humanitarian considerations regardless of preferences of foreign offices for one or another position.

The humanitarian considerations at Tokyo were compelling for many delegates. These individuals could not conceive of supporting by indirection, through a choice of words describing the work of a committee, a concept of incompatibility between social, economic or religious positions so great as to permit of resolution only through the victory of one over the other. Nagasaki and Hiroshima were too close to forget. Although the Soviet member of the Association's committee had kept assuring his colleagues in print and orally that "peaceful co-existence" meant not a state of armistice in a continuing struggle but required for its realization active efforts at co-operation in the interest of lasting world peace, he was not convincing. His readers may have been choking at straws, yet they drew a distinction between long-lasting armistice maintained by active co-operation, and a goal of co-operation leading to an end of struggle through

mutual toleration. They found reason for their insistence in the record of recent years in various parts of the world committed to a policy of peaceful co-existence, for there has been no peace.

The Tokyo resolution was the result of compromise. There was a sticking point in addition to the name of the committee on which the proponents of peaceful co-existence were prepared to yield. It was the barrier created by fear lest the work of the Association's committee as set forth in its list of sixteen principles of peaceful co-existence in dogmatic form be understood as creating the basis for "new" law.

To meet this objection, the compromise formula declared that the change in name was made "without prejudging the issue of the definitive character of the list of principles contained [in the committee's report] or the question whether these principles shall be deemed to be juridical principles of peaceful coexistence or principles of international law." In this way any pronouncement as to whether "new" law was being brought into being was avoided, and proponents of "peaceful co-existence" could continue to call them what they willed, while the rest of the world could think of them as burning problems in the field of traditional international law. The important consideration to most of those present in Tokyo was that the International Law Association avoid giving its cachet to any theory that a wholly new system of legal restraints was in the making, having no regard to the past, and that it adopt no goals that could be interpreted as endorsement of the foreign policy of any state or group of states because of a similarity of terminology.

To avoid misleading readers of the Association's committee's report who might otherwise assume that its sixteen principles constituted an exhaustive catalogue of the essential elements of international law, whether interpreted as being old or new, the compromise formula "accepted" the committee's report, but then proceeded to list only three items for current study, and these items were re-phrased from the form in which they had appeared in the committee report. They were not called "principles" but obligations, which were to be made the object of profound and detailed study. This stilled the fears of the American Branch's committee, which had feared that the form of the Association's committee's sixteen principles might suggest that the International Law Association was establishing a set of fundamentals, resembling those appearing in the Universal Declaration of Human Rights. If this were to happen, it could be expected that the United Nations or other bodies would incorporate them in proclamations and disseminate them so widely that, like the Universal Declaration of Human Rights, they would be accepted as law by many who did not know their origin. To the American Branch the suggested principles had not been sufficiently considered to determine whether they represented the law or not.

The opponents of the American Branch's view on this matter saw no danger of such proclamation and misunderstanding. Perhaps they were right in thinking the fear exaggerated, but it persisted, nevertheless. The American Branch, to overcome its fear, had proposed in a draft resolution

included in its report a generalized statement of eight study subjects, phrased in such form as to avoid their interpretation as finally considered statements of principles of law. The compromise formula chose this approach and cut the list to three.

Looking back over the past eight years since the matter reached the agenda of the International Law Association, what has been established? When Professor Milan Bartoš of the Yugoslav Branch introduced the item at the Dubrovnik Conference of the Association in 1956, it was novel to many of his listeners, in spite of wide use of the term in Eastern Europe.[5] In the spirit of inquiry, the Westerners were persuaded to accept the idea, for Bartoš called for a "definition," and no one could oppose an effort to define what seemed unclear.

From the outset the members from the common law countries found the effort to define the concept in a few words difficult if not futile, although they tried to do so in Branch reports. Perhaps this was because of the common lawyer's tradition of skepticism of synthetic conclusions and preference for precise solution of concrete problems. The American Branch sought in the early days to determine what specific problems the proponents of the concept desired to consider and what they would propose in solution of those problems. In this spirit, the American Branch proposed in 1962, after failure of the effort to reach a simple definition, a list of priority items deemed important to the preservation of peace.[6] The U.S.S.R. Branch did likewise, except that its terminology was more generalized and seemed to the Americans to open up possibilities of conduct that were unacceptable. The exchange had the advantage of exhibiting to the international lawyers of the world what was in the minds of two groups of legal scholars. That these statements were of some value was suggested by the fact that the Secretary General of the United Nations included them in his documentation for deliberations of the Sixth Committee in 1963. In a sense they put concrete form to the concept of peaceful co-existence. For example, the Soviet view portrayed the concrete proposal of the "troika" as necessary to the structure of the Secretary Generalship of the United Nations.

Having clarified elements of the concept of peaceful co-existence beyond its committee's earlier efforts to prepare definitions, the International Law Association's Executive Council decided after the 1962 conference to follow the lead established by the United Nations. It selected some burning issues for further committee consideration, namely, the legal aspects of the emergence of new states into independence, and the content of the legal rule of non-intervention in the internal affairs of other states; and it also authorized the committee to bring to Tokyo a list of principles or rules

[5] A suggestion as to possible motivation for introduction of the item has been made by Edward McWhinney, "Peaceful Coexistence" and Soviet-Western International Law 32 (Leyden, 1964).

[6] The operative provisions of the American and U.S.S.R. Branches' drafts are set forth in John N. Hazard, "Coexistence Codification Reconsidered," 57 A.J.I.L. 88 at 92–93 (1963).

of peaceful co-existence. It was this latter authorization which gave the committee a final chance to debate the issues between 1962 and 1964, and to bring in a report on which the Tokyo compromise was based.

What is to be the future of the discussion within the International Law Association of a subject that has caused such division? The change in name of the committee reflects the sentiment and provides the key. Future study will relate to matters of security. This is represented by two of the items chosen for further study, namely, disarmament and use of force. Also there will be study of one subject relating to co-operation, namely, the peaceful settlement of disputes. Real problems can be expected in each of these fields.

Disarmament has been pressed as an item for study for several years by the president of the U.S.S.R. Branch. It has not previously been undertaken because many individuals have thought the International Law Association incapable of coping with it. If the 18-Power Geneva Conference on Disarmament has found that the advice of scientists is necessary to consideration of the theme, how can the International Law Association without scientists add anything to the subject? Further, if scientists can be induced to participate, can the International Law Association with its routine of biennial meetings and rather slow deliberations keep up with a subject that changes with each new scientific discovery? In short, can the International Law Association add anything to what is being attempted in Geneva?

In contrast, the other two subjects are well suited to a body of the character of the International Law Association. One has to do with "the obligation of States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations." The other calls for examination of "the obligation of States to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

The Chief Justice of the Supreme Court of Japan had opened the Tokyo conference with a plea to remove restraints on the jurisdiction of the International Court of Justice. A committee of the Association was considering at the Tokyo conference a proposal to achieve this end by stages rather than to require acceptance of the Optional Clause as a whole or nothing. Presumably, the subject to be considered by the new Committee on Security and Co-operation will be the development of means of settlement in addition to the International Court of Justice, for that matter continues to be the subject of study in the older committee. There is much to be examined, notably the insistence of some states upon diplomatic negotiation as the principal means of settlement and certainly the prerequisite to use of other means. While this may seem to be a truism if one considers international relations still to be in an early stage of development, there may be reason for change. The committee could consider whether the enormous discrepancy in power between great and small states,

especially the small states that are just emerging as developing economies, requires a new formula. It may be, as some small states have claimed in the United Nations, that diplomatic negotiations are inadequate to their needs. They argue that their sovereignty is endangered by pressures from large states, which tend to think that a request that a dispute be referred to arbitration or even mediation is a sign of hostility. It may be that the international community should be required to come to the defense of the small states and to tell the large states that it is an abuse of the concept of sovereignty to argue that no one can tell a large state how it ought to settle its disputes. The parallel of the municipal community may now be compelling, for no neighbor is required to negotiate prior to taking a dispute to a municipal court.

By far the most pressing matter given the new committee to study is the item pertaining to the threat or use of force against the territorial integrity or political independence of any state. The U.S.S.R. Branch brought to Tokyo a report by Professor S.V. Molodtsov requesting consideration of a treaty.[7] This treaty would implement the Soviet Government's plea of January 4, 1964, for negotiation of "a solemn undertaking by all the signatory States not to resort to force for changing the existing State borders" and "an undertaking to resolve all territorial disputes solely by peaceful means, such as negotiation, mediation, conciliatory procedure, and also other peaceful methods at the choice of the parties concerned in conformity with the Charter of the United Nations."

The International Law Association's Tokyo resolution is framed in terms that suggest that it was designed to meet the plea in a measure, for it requests study of just these issues. It leaves open the nature of the obligation and whether a treaty is to be suggested. Professor Molodtsov thought a treaty necessary, even though it would seem to be only reaffirmation of the obligation of the Charter of the United Nations. His arguments were two: that some authors have suggested that reprisals and even war are still possible under the Charter against a violator of a state's rights, and this he thinks needs putting to rest. He also mentions the fact that not all states are bound by the Charter, and he names specifically Germany. Perhaps in view of subsequent Soviet charges that the People's Republic of China was seeking to alter frontiers, he may also have been considering this state as well.

Unquestionably the matter of frontiers deserves consideration, if only to determine whether the Charter's obligation requires reaffirmation. The issue has become clear with the Malaysian case. Do the Members of the United Nations think their obligation such as to require them to unite against a Member who admits violation of frontiers but claims justification? If Professor Molodtsov's argument has qualifications which are unspoken, committee study could bring this out. The sooner this fact is on the table, the easier it will be to cope with it. Commissar Litvinov used to

[7] Soviet Association of International Law, Committee on Peaceful Coexistence, Tokyo Conference (1964). Memorandum on Peaceful Settlement of Territorial Disputes and Frontier Questions. Contributed by S. V. Molodtsov (Moscow, 1964).

tell the League of Nations in the mid-1930's that "Peace is indivisible." The International Law Association now has an opportunity to explore the concept of state sovereignty and territorial integrity and to determine whether this concept protects only those who do not disagree with a neighbor's demands, and against whom no charge of outside influence can be levied. If outside influence is to be the test, many states in the developing parts of the world could be subjected to legally acceptable pressures from those who wish them to change their policies. Few developing states have chosen to break all ties with larger states, some of which provide their economic and even military sustenance, and do so at the request of the smaller states exercising their sovereignty.

Finally, the resolution of the Tokyo Conference calls for presentation to the organs of the United Nations of "the results at which the International Law Association has arrived since its conference in Dubrovnik in 1956." As a consulting non-governmental agency, the International Law Association has the right to make such a presentation. The only question is as to what the "record" means. In response to a question the committee chairman assured the audience attending the discussion of the resolution that it meant the full record of eight years of work, not just the final resolution. If the Secretary General and his colleagues choose to examine the full record and to utilize it in their documentation for the Sixth Committee, it will be impossible to present a brief summary of a unanimous position. The fissures between the views of the various branches have been deep. A compromise has resulted, but it is only on the program of future work. Fundamental differences remain unresolved.

The Secretary General could do little more in examining the record than conclude that no majority has agreed to the existence or even the progressive development of a law of peaceful co-existence. No one, even those who have pressed from Eastern Europe for a law of peaceful co-existence, sees the need for replacement of traditional international law in its entirety with "new" law. The majority has accepted the need for further study of the type conducted by the International Law Association for decades. These are issues requiring attention because of changing circumstances, the most important being the emergence of a large number of new states.

Fortunately the Tokyo Conference gave impetus to the establishment in Asia of several new branches of the Association and inspired old ones to greater activity. This activity will permit the incorporation within the committees of the Association of views not previously heard. In this development the International Law Association has gained strength. It can now begin to claim with some justification that it approaches the universal. Only the African states have yet to be heard from through their legal scholars. These have reason for interest since the International Law Association offers them a very special opportunity not provided by the United Nations. Members of the Association may speak without committing the prestige of governments, and they may take positions dictated by humanitarian considerations rather than power politics which sometimes

creep into deliberations within the United Nations. This is an attraction to many scholars from the long-established states. It may also prove to be attractive to jurists from the developing nations as well.

JOHN N. HAZARD

INTERNATIONAL LEGAL ORDER: ALWYN V. FREEMAN vs. MYRES S. McDOUGAL

There is a tendency to discuss which approach to international legal studies is the correct one. This produces rather sterile arguments by advocates of one approach against those of another. Such polemics overlook the important fact that the main established approaches all serve a useful function, and that this usefulness normally accounts for their existence. In this respect, the polemics for and against Kelsen or McDougal or Tunkin are mainly unnecessary and misleading. They create the impression that one contemplating the use or study of international law is confronted by a mutually exclusive choice; that there exists an either/or situation in which one must make a clear commitment to one approach and reject its competitors; and that if one, for instance, admires Kelsen, one must look askance at McDougal and vice versa.

On way to avoid this necessity for choice is to recognize that each particular approach has its own set of intellectual objectives. If we do this, our next task becomes to classify the major approaches according to their objectives. This will put us in a better position to select for a particular purpose the approach with the intellectual objectives that most clearly coincide with our own. It seems clear that an international lawyer may be interested in any one of several things. It is one thing to seek guidance as to the content of relevant rules and standards when advising a client about the extent to which international law presently offers protection against the risk of expropriation of property held abroad. It is quite another to ascertain the effectiveness of the existing rules and procedures for their enforcement. It is still different to emphasize those rules and procedures that should be brought into existence to sustain the international economy at optimum levels. And it is quite something else again to discern what rules of international law should apply to the protection of foreign investment, given a certain set of national attitudes toward the status of private property; this last is one of the central challenges confronting international lawyers writing from a socialist perspective. It is further different if one adopts a systemic outlook and tries to consider expropriation norms in light of a need for international law to achieve a proper balance between national prerogative and world community welfare. And, finally, the problems are quite different if one investigates the problems of expropriation primarily to gain insight into how international law works, rather than to receive guidance as to its doctrinal content.

Each of these inquiries reflects a genuine intellectual need. Each reflects a predominance of certain interests over others. Each tends to ex-