desired to have the support of a unified country and obtained it by the declaration of war. All the congressmen who spoke before 4:10 P.M. on December 8 assumed that war was in existence and the request of the President had read "I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire." A mass of evidence was introduced to show that Congress and the Departments considered war to have begun on December 7, so that Judge Murrah felt obliged to decide the case in line with some previous cases.[3] When a foreign country invades the United States the President does not have to wait for a declaration by Congress in order to begin hostilities. The Acts of 1795 and 1802 prescribed that course.

It thus appears that a declaration of war by Congress was in this case unnecessary to create a state of war. War is a fact which may begin by the invasion of another power, a fact which the Court can determine either by accepting the determination of the political department of the government, in this case the President, or by taking account for itself of historical facts.

EDWIN BORCHARD

NATIONALITY AND OPTION CLAUSES IN THE ITALIAN PEACE TREATY OF 1947

Although general international law, in order to delimit the spheres of validity of individual national legal systems, delegates in principle to the sovereign states the power to determine the rules for the acquisition and loss of their nationality by their own municipal law, so that the matter of nationality is, likewise in principle, within the exclusive jurisdiction of the states,[1] these states can, of course, conclude treaties on the sub-

[3] *Prize Cases.* "If a war is made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but he is bound to accept the challenge without waiting for any special legislative authority, and whether the hostile party be a foreign invader or states organized in rebellion, it is none the less a war, although the declaration of it be unilateral. . . . However, long may have been its previous conception, it nevertheless springs forth from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact."

Dole v. Merchants Mutual Marine Insurance Co. "War is an existing fact and not a legislative decree. Congress alone may have power to declare it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it exists, whether there is any declaration of it or not. It may be prosecuted without any declaration; or congress may, as in the Mexican war, declare its previous existence. In either case it is the fact that makes 'enemies' and not any legislative Act."

[1] But not wholly; for the freedom of the states is limited by a superior norm of general international law, prescribing that individuals, on which the states confer their nationality, must have qualified points of contact with the state in question. Nationality Draft of the Harvard Research in International Law (in this JOURNAL, Vol. 23 (1929), Special Supplement); Convention on the Conflict of Nationality Laws, 1930,

ject and thus create norms of particular international law concerning nationality. This is being done especially in cases of transfer of territory by treaty and consequent change in the territorial jurisdiction of the states involved.

From feudal times onward the inhabitants of ceded territory shared its fate and owed allegiance to the new sovereign.[2] After the seventeenth century, however, we observe tendency to protect the persons coming under the new allegiance. The means employed was the institution of option, first appearing in the Capitulation Treaty of the City of Arras of 1640. The option was originally no more than a *beneficium emigrandi*, granted to all "inhabitants" of the ceded territory. After 1815 the newer form of option developed into a faculty granted to the nationals of the ceding State to retain their old nationality by an act of their own free will. From that time on option, although still based only on treaty law, became more and more frequent [3] and played an enormous role after the First World War, as millions of persons were involved in the new territorial settlements.[4]

As Italy suffers severe losses under the Peace Treaty of 1947, it is pertinent to inquire concerning the nationality and option clauses of this Treaty. The purpose of this paper is to analyze these clauses as they stand, to study them in the light of the long history of the option clause and of the experience of the Paris Peace Treaties of 1920, and to investigate the extent to which they follow traditional lines or reveal modifications and innovations.

The territorial losses of Italy under the Treaty are of different kinds.

I. Of no importance in the Treaty are Italy's ephemeral annexations of the Province of Ljubljana [5] and of Dalmatia,[6] nor the setting-up of the "Independent State of Croatia," where Italy had "protective rights" and the nominal King of which was the Duke of Aosta.[7]

II. As to Ethiopia, Italy recognizes by Article 33 the sovereignty and independence of that state. Under Article 36 Italian nationals in Ethiopia

Art. 1 (L. of N. C. 351. M. 145. 1930. V.); Verdross, *Völkerrecht*, 1937, p. 133; H. W. Briggs, *The Law of Nations*, 1938, pp. 157, 165. That is why the language of the P.C.I.J. in its Advisory Opinion No. 4 is not wholly unobjectionable.

[2] This was common juridical doctrine; see the *règle de Pothier: Lorsque une province est démembrée de la couronne, les habitants changent de domination.* Even in England, notwithstanding the dogma of perpetual allegiance, "When the King cedes by treaty, the inhabitants of the ceded territory become aliens."

[3] For a full historical and theoretical study of option see: Josef L. Kunz, *Die Völkerrechtliche Option*, 1925, Vol. I, pp. 1–170, 301–325.

[4] For a full study of nationality and option in the Versailles and St. Germain Peace Treaties see Kunz, work quoted, Vol. I, pp. 171–300, 326–328 and Vol. II (1928).

[5] Annexed by Royal Decree-Law of May 3, 1941 (Text in Raphael Lemkin: Axis rule in occupied Europe. Washington. 1944, pp. 584–85).

[6] Annexed by Royal Decree of May 18, 1941 (Lemkin, work quoted, pp. 587–88).

[7] He never went there and resigned on July 31, 1943.

will enjoy the same juridical status as other foreign nationals but Italy recognizes the legality of all measures of the Ethiopian Government annulling or modifying concessions or specific rights granted to Italian nationals, provided such measures are taken within a year from the coming into force of the present Treaty.

III. Identical norms are laid down with regard to Albania.[8] Italy recognizes also that the Island of Saseno is part of the territory of Albania and renounces all claims thereto.[9]

IV. Italy renounces all right and title to the Italian colonies in Africa, namely Libya, Eritrea, and Italian Somaliland.[10] According to the Treaty the final disposal of these colonies shall be made jointly by Russia, the United States, Great Britain, and France within one year from the coming into force of the Treaty. Pending final disposal the colonies shall continue under their present (British) administration. Nothing is said as to nationality or a right of option of the inhabitants, natives or Italian citizens.

Under the Versailles Treaty Germany ceded her colonies to the "Principal Allied and Associated Powers" and undertook the obligation to recognize the final measures taken by these Powers. The natives, it was laid down, should be entitled to the diplomatic protection of the Government which exercised authority over these territories. The colonies rested therefore, under the sovereignty of the Principal Powers, exercising this sovereignty in condominium until final disposition, which was made by granting these colonies as B and C Mandates to certain Mandatory Powers under the League of Nations.

The regulation in the Treaty of 1947 is not so clear; Italy only "renounces all right and title" to her colonies but does not cede them to any particular Power or Powers. It is thus clear that Italy loses her sovereignty over her former colonies with the moment of the coming into force of the Treaty. Who is the sovereign of these colonies from this moment on, "pending final decision"? The Treaty is concluded between Italy and 21 "Allied and Associated Powers." Nevertheless it seems to follow from Article 23 and Annex XI that the "Big Four" are sovereign over the ceded territories, Great Britain only "administering" them. As Italy loses her sovereignty with the coming into force of the Treaty she can no longer exercise any diplomatic protection over the natives. Is this protection to be granted by Great Britain, which administers these colonies as the agent of the four condominium sovereigns? Italian nationals in the former colonies will remain Italian nationals, subject perhaps to expulsion by the administering Power.

The final determination can only be brought about by the final disposal of the colonies. Should they be given to one or more UN Members in

[8] Articles 26, 30.

[9] Article 28.

[10] Article 23, Annex XI.

trusteeship [11] everything will depend on the trusteeship agreements; if the model of the League Mandates is followed the natives will not become nationals of the trustee but merely "persons under the protection of the trustee." Should Libya, for example, be made into an independent State [12] the natives would become nationals of the new state. In both cases Italian nationals resident there will probably remain Italian nationals.

V. Although the Austrian South Tyrol remains Italian Italy has pledged herself, under the Italo-Austrian Agreement, reproduced in Annex IV of the Treaty,[13] "to revise in a spirit of equity and broad-mindedness the question of the option for citizenship resulting from the 1939 Hitler-Mussolini agreements."

VI. As to territorial cessions properly speaking Italy cedes certain small but strategic areas to France,[14] the Dodecanese Islands to Greece,[15] and vast areas—the greater part of the Istrian Peninsula, the island of Pelagosa and the adjacent islands, as well as the community of Zara and all islands and adjacent islets—to Yugoslavia.[16] It is with regard to these ceded territories that the clauses concerning nationality and option are of particular significance. Whereas the Versailles Treaty gave these clauses separately in the case of each single cession, the Treaty of 1947 has adopted the technique of laying down these clauses in a special part of the Treaty [17] in a uniform way for all cases of cession.

Contrary to earlier treaties, but following the system of the Paris Peace Treaties of 1920, the Treaty of 1947 regulates first the legal consequence of the cession of territory, as far as the nationality of the persons involved is concerned. This is theoretically correct and apt to avoid difficulties. For the right to opt is a means to escape a change of nationality; the circle of persons entitled to opt can only be clearly determined on the basis of the knowledge of the circle of persons changing their nationality in consequence of the cession. In this respect Art. 19, par. 1, provides that Italian citizens who were domiciled in a ceded territory on June 10, 1940, and their children, born after that date, become citizens of the State to which the territory is transferred, with the exception of those who, under par. 2, are entitled to opt. This change of nationality is automatic *ipso*

[11] Although under Art. 77, par. 1 (b), of the UN Charter the trusteeship system is to apply to "territories which may be detached from enemy States as a result of the Second World War," par. 2 of this Article leaves it entirely "for subsequent agreements as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms."

[12] UN Charter, Art. 78.

[13] See this writer's Editorial Comment in this JOURNAL, Vol. 41 (1947), p. 439.

[14] Treaty of 1947, Articles 2 and 6.

[15] Article 14.

[16] Articles 3 and 11.

[17] Articles 19, 20, further Annex XIV, pars. 10–12.

jure and takes effect at the date of the coming into force of the Treaty. As a measure to prevent dual nationality the Treaty provides that these persons upon becoming citizens of the successor state lose their Italian nationality. The change of nationality hits, of course, only Italian nationals; beyond this the standard adopted is the pure principle of domicile, the classic principle which seems to be the most just. Birth in the ceded territory, without domicile there at the critical moment is, therefore, irrelevant.

Whereas normally the critical moment is that of the coming into force of the treaty, the Treaty of 1947 follows the example of the Versailles Treaty [18] by asking domicile in a critical moment long before the date of the coming into force of the treaty, here Jnue 10, 1940, the date of the Italian declaration of war on Great Britain and France. Thus Italian nationals domiciled in a ceded territory after that date remain Italian nationals; the reason for this innovation is, of course, political. The new institution of "reclamation of the nationality of the Successor" only by special authorization of the "Successor" has not been adopted by the Treaty of 1947.

It is interesting to note that the Treaty of 1947 rests on the traditional position according to which individuals are no subjects in international law and acquire no rights under a treaty, which is binding only upon States. Art. 19, par. 1, prescribes that the acquisition of the nationality of the Successor is brought about only "in accordance with legislation, to be introduced by that State within three months from the coming into force of the Treaty." In consequence it is municipal legislation which operates the change, but France, Greece, and Yugoslavia are internationally bound to enact corresponding laws.

The persons thus acquiring the new nationality have the guarantee that their property, rights, and interests in Italy must be respected by Italy in the same way as that of United Nations nationals and have a right to effect the transfer and liquidation of such property, in accordance with a special agreement to be concluded between Italy and the successor state.[19]

The determination of the conditions of the acquisition of the new nationality, namely "Italian nationality," and "domicile" at the critical moment is governed by Italian law.

Contrary to all precedents, not all the persons (Italian nationals, domiciled in the ceded territory at the critical moment) acquire the new nationality but only those who are not entitled to opt.

The Treaty of 1947 recognizes two very different kinds of option:

[18] Versailles Treaty, Art. 36, par. 2; Art. 91, par. 3; Art. 112, par. 2.
[19] Annex XIV, par. 11.

1. There is, first, what this writer has called the "genuine option," under Article 19, or option of the nationals of the ceding state in favor of the nationality of the ceding state, and only of such nationals, directly involved in the cession of territory. Here again, it is provided that the successor state enacts appropriate municipal law concerning the option.

Traditionally all the persons determined, as here, by Italian nationality and domicile on June 10, 1940, who acquire the new nationality, are entitled to opt, so that the circle of persons changing their nationality and the circle of persons entitled to opt were identical. Exclusions from the right to opt were rare.[20] In this respect the Treaty of 1947 involves a profound innovation: of Italian nationals domiciled in a ceded territory on June 10, 1940, only those are entitled to opt "whose customary language is Italian." Whereas option was traditionally a means to enable the persons involved in a territorial cession to show their fidelity to the losing state, regardless of blood and language,[21] the option is here what this writer has called an "ethnical option." Such "ethnical option,"[22] introduced by the Paris Peace Treaties of 1920 only in cases of "non-genuine option," has here been, for the first time, made the basis of the genuine option. This "ethnical option" is, of course, an expression of the principle of nationality, of an era in which nationalism precedes state allegiance. The Treaty of 1947 has dropped the criterium of "race" and has decided the problem of "language"—mother tongue or customary language—in the latter sense. On the other hand this criterium may in certain cases not express the "ethnic" character.[23] We see here, therefore, an emphasis on language alone and on the subjective side of the "ethnic" character, as the customary language depends on the will of the individual. The criterion of Italian as "customary language" must exist at the time of the coming into force of the Treaty.[24]

The Treaty recognizes, therefore, only a restricted or ethnical option which, in the case of the Dodecanese Islands, is a right of an ethnical

[20] No option in the case of Alsace-Lorraine (Vers. Tr., Annex to Art. 79) and Neutral Moresnet (Versailles Treaty, Art. 32).

[21] It is well known that many Alsatians, German in blood and language, opted under the Treaty of 1871 for France.

[22] The "ethnical option" was newly introduced in the Versailles Treaty only in cases of "non-genuine" option, either for new States (Czechoslovakia, Versailles Treaty, Art. 85, par. 1, par. 3; Poland, Art. 91, par. 4, par. 9) or, further developed as "option according to race and language" by the St. Germain Treaty, Art. 80, and the Trianon Treaty, Art. 64, finally only as an option for the "State of the race" in the Turkish Peace Treaty of Lausanne 1923, Art. 32, 34.

[23] An Italian national, domiciled on June 10, 1940, in a territory ceded to Yugoslavia, who is, perhaps, a Slovene in blood and has Slovene as his mother tongue, is entitled to opt for Italy if his "customary" language is Italian.

[24] Persons, "who were domiciled on June 10, 1940," but "whose customary language is Italian."

minority, but in the case of cessions to Yugoslavia may be a right of the ethnical majority.

Because of this innovation the Treaty of 1947 also takes a new stand concerning the much discussed question of whether persons entitled to opt retain or reacquire their old nationality. Under the Versailles Treaty the change of nationality was automatic, so that option meant a reacquisition of the old nationality, although the problem of a possible retroactive effect of the option came up. Under the Treaty of 1947 only the persons not entitled to opt acquire the new nationality, whereas the persons entitled to opt and who have opted "shall retain Italian citizenship and shall not be considered to have acquired the citizenship of the Successor State." [25] Such persons will become citizens of the successor only with the expiration of the time-limit for option, without having exercised the right to opt. In any case only one change of nationality is involved.

Many of the detailed norms concerning option follow traditional lines. The remarkable innovation of the Paris Peace Treaties of 1920, creating a special age for the capacity to opt, namely 18 years, is here adopted, with the further innovation of an individual right to opt for all married persons—men or women—whether under or over that age. Option on the part of the father or, if the father is not alive, on the part of the mother, is automatically to include all unmarried children under the age of 18 years.[26] As to the technique of option, the action must be exercised through a declaration.[27]

The norms concerning property rights of optants [28] follow traditional lines: freedom to take out movable property and transfer funds, provided —a new rule hitting Fascist measures—they were lawfully acquired, in the case of emigration to Italy; freedom also to sell movable and immovable property; such sale is, therefore, in the traditional way, merely a right, not a duty.

The Treaty of 1947 contains also certain innovations:

(a) Contrary to all previous treaties "the option of the husband shall not constitute an option on the part of the wife"; in consequence an individual right to opt on the part of married women arises, an expression of the movement for the emancipation of women; (b) contrary to the

[25] Art. 19, par. 2.

[26] This formula is clearer and better than the Versailles formula: option on the part of the "parents."

[27] The term "right to opt" can mean either the fulfillment of all the requirements for a valid option or merely the declaration. In the first case a declaration not followed by emigration would not be an "exercise" of the right to opt, or an *agere in fraudem legis*, so that the person in question would remain a national of the successor. Under the second hypothesis the successor could expell the person in question as an undesirable alien. The Treaty of 1947 calls the mere declaration the "exercise of option."

[28] Annex XIV, par. 10.

Paris Peace Treaties of 1920 which gave, generally, two years for the exercise of option, the time-limit is here one year from the coming into force of the Treaty, and may in fact be only nine months, as the successor has to enact corresponding legislation within three months; (c) contrary to all previous treaties which prescribed emigration of the optants, the Treaty of 1947 leaves it to the discretion [29] of the successor, whether it will require emigration. If so, the time-limit for emigration is one year from the date when the option was exercised and does, therefore, not coincide with the time-limit for option, an innovation introduced by the Paris Peace Treaties of 1920. But, if prescribed, the emigration must be to Italy, and must be actual emigration, a giving up of the domicile in the ceded territory with an *animus non revertendi.* This is certainly the sense of the phrase: "move to Italy."

As to juridical persons, Annex XIV, par. 12, gives certain companies the right to remove their *siège social* to Italy with the benefits of par. 11 of this Annex, provided they fulfill the following conditions: having been incorporated under Italian law; having their *siège social* in a ceded territory; having more than 50 percent of their capital owned by persons who opt for Italian nationality under the Treaty and move to Italy; finally having the greater part of their activity carried on outside the ceded territory.

As in the Paris Peace Treaties so in the Treaty of 1947 there are important *lacunae:* no norms concerning the right to opt of illegitimate children, of unmarried persons under 18 years of age who have no parents, of adopted children, of insane persons, and persons in jail. Contrary to most of the Paris Peace Treaties the Treaty of 1947 contains no norms guaranteeing the exercise of the right to opt. Many problems of option procedure are not dealt with, problems of examining and verifying the prerequisites for option, and so on. In these and other matters differences and difficulties may arise. Much is left to the municipal law of the successor states. No doubt special agreements between Italy and each successor state for carrying-out these treaty norms will be necessary.

2. Art. 20 of the Treaty grants a "non-genuine" option. This writer speaks of a "non-genuine" option because it is not connected with the territorial cession; it is an option of persons, not connected with the ceded territory and in favor of the successor state. This new type of option was introduced by the Versailles Treaty in favor of new states on an ethnical basis and developed in the case of the dismemberment of the Austro-Hungarian Monarchy.

Under Art. 20, par. 1, all Italian citizens domiciled on Italian territory, whose customary language is Serb, Croat, or Slovene, have a right to opt for Yugoslavia. All the other norms concerning this option are identical with those concerning the "genuine" option under Art. 19. But there are

[29] Whereas they "shall" provide for other rules, they "may" require emigration.

important differences: (a) the critical moment is here the date of the coming into force of the Treaty; (b) it is no real option, or a unilateral, constitutive act of the optant, but rather what the Versailles Treaty called a "reclamation of nationality," an innovation of that treaty. The persons in question have only a right to file a request with a Yugoslav diplomatic or consular representative in Italy. They acquire Yugoslav nationality only if the Yugoslav authorities accept their request, which is entirely discretionary with them. Yugoslavia will diplomatically communicate to Italy lists of persons who have thus acquired Yugoslav nationality; from the moment of this communication these persons automatically lose their Italian nationality.

Italy has no right to enact municipal law with regard to this option, but "may" require emigration from Italy.[30]

VII. A special case is that of the "Free Territory of Trieste."[31] It is, under the Treaty, not a case of a ceded territory, but of the creation of a new state. Under Art. 6 of the Permanent Statute, Italian citizens, domiciled in the area of the Free Territory on June 10, 1940, and their children born after that date, become *ipso jure* original citizens of the Free Territory and in the same moment lose their Italian nationality. Although the Permanent Statute will come into force only as determined by the UN Security Council, Italian sovereignty over that area comes to an end with the coming into force of the Treaty; at this date, therefore, the change of nationality of the persons involved will take place.

Art. 6, par. 2, of the Permanent Statute grants a restricted right of "ethnical option" to those persons whose customary language is Italian. All the other rules are identical with those under Articles 19 and 20, but there are the following differences:

(a) The conditions for the exercise of this right of option are to be laid down, in accordance with the norms of the Permanent Statute, by the Constitution of the Free Territory.

(b) The time-limit for this option is only six months, running from the date of the coming into force of the Constitution.

(c) Contrary to Art. 19 all persons, Italian nationals and domiciled there on June 10, 1940, acquire the new citizenship, whether they are entitled to opt or not. In consequence those entitled to opt for Italy who do so opt reacquire Italian nationality; hence a change of nationality twice. For this there are good reasons, as the overwhelming majority have Italian as a customary language. If the norm of Art. 19 had been adopted here the

[30] The question of interpretation comes up. The Treaty uses the phrase "transfer their residence to Yugoslavia." Does that mean emigration? Is "residence" equivalent to domicile? Does the phrase of Art. 20 ("transfer their residence to Yugoslavia") have the same legal meaning as the phrase of Art. 19 ("move to Italy")?

[31] Art. 4, 21, 22, Annex VI.

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