principal British antarctic claims is that to the Falkland Islands Dependency, based on the sector theory and resting upon the projection of longitudinal lines outward from those islands.[9]

Should it become apparent that the resources of Antarctica or its air-strategical potentialities are of great importance, it will no doubt become necessary to settle the conflicting claims to sovereignty. Any decision in regard to that area would obviously be a powerful precedent for the settlement of comparable claims in the Arctic despite the physical differences between the two areas. It is possible that the matter could be adjusted by a conference such as that which produced the Berlin Act of 1885 concerning Africa. On the other hand it would facilitate the work of such a conference if there were first a decision by the International Court of Justice regarding the applicable law. The decision of the Permanent Court of International Justice in the Eastern Greenland case is evidence that such a question can be handled judicially. The matter might well be referred to the Court for an Advisory Opinion by the General Assembly of the United Nations in the interest of peace and of the progressive development of international law. It might equally be referred to the Court by any two states whose claims in Antarctica conflict. In the latter case one might anticipate that other interested states would ask leave to intervene under Article 62 of the Statute.

PHILIP C. JESSUP

REVOLUTIONARY CREATION OF NORMS OF INTERNATIONAL LAW

Law is a dynamic system of norms which, in continuous concretization and individualization, develops from the basic norm above to the last act of mere execution below. Law is a normative system which itself regulates the creation of its own norms. The legal order must, therefore, establish norms which give determined organs the power to create, change, abolish, apply, and execute the norms of a particular legal order. Such power we call competence or jurisdiction. The order of competences of a particular legal community we call its Constitution. The Constitution must define what persons shall act as organs, what their competence is, and by what procedure it is to be exercised. It may, in addition, prescribe, positively or negatively, certain contents. A legal norm is, therefore, valid if it has been created by the Constitutionally prescribed procedure and (or) is in conformity, as to contents, with the Constitution or the immediately higher norm. It remains valid as long as it has not been changed or abolished by a procedure also provided for by the Constitution. The Constitution may also contain norms for its own change, perhaps prescribing particular procedures for such action.

But law can also be changed or created otherwise than by the Constitutionally prescribed procedures, this also "illegally": *ex injuria jus oritur.*

[9] G. H. Hackworth, *Digest of International Law*, Washington, 1940–, p. 462.

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"The principle of legitimacy is qualified by the principle of effectiveness."[1] In a broader sense, any "illegal" creation of a norm, whether general (a Statute) or individual (a judicial decision), which, in spite of its "illegality," asserts itself as law, may be called a "revolutionary" creation of law. But we must distinguish between a truly revolutionary and a merely "unconstitutional" creation of law.

Let us look, first, at municipal law. The "unconstitutional Statute," the "illegal" decision of a Court of last instance[2] is, nevertheless, valid law, if the Constitution provides no particular procedure for abolishing it, or, if such procedure is provided, as long as the decision has not been abolished by this procedure. "Illegality of a norm means possibility of abrogating the norm (otherwise than in the normal way) or punishing the norm-creating organ."[3] Such "illegal" creation of law must, therefore, be regarded as authorized by the Constitution, although the Constitution may provide a special procedure for abolishing it. The "unconstitutional Statute" is a legal feature which, paradoxically, may, but must not, appear in a legal order. But the revolutionary creation of law is a universal phenomenon under any municipal legal order.

Revolution in the legal sense occurs if a Constitution, particularly its basic norm, is changed contrary to the Constitutionally prescribed procedure. It is legally irrelevant whether such change is peaceful or violent, whether the revolution starts from below or above—the *coup d'etat*—, whether the triumphant new regime entirely changes the legal order or accepts most of the legal order of the previous regime, whether the new legal order which the revolution brings about is better or worse than the old, whether the revolution is of far-reaching historical importance or only a game of politicians. Even the most drastic change in the contents of a Constitution is legally not revolutionary if it is brought about by Constitutionally prescribed procedure.[4] Even a slight and peaceful change is legally revolutionary if brought about by a procedure not provided by, or in violation of, the Constitution in force.[5] Revolution means the discontinuity of the

[1] H. Kelsen, *General Theory of Law and State*, Cambridge (Mass.), 1945, p. 119.

[2] *Erie Railroad v. Tompkins* (304 U. S. 64, 58 S. Ct. 817) (1938) not only overruled *Swift v. Tyson*, but held, repeating the words of Justice Holmes, that "*Swift v. Tyson* was an unconstitutional assumption of power, by courts of the United States." Nevertheless, under the principle of *res judicata Swift v. Tyson* (16 Pet. 1, 10. L. Ed. 865) (1842), was valid law for ninety-six years.

[3] Kelsen, work cited, p. 371.

[4] Whether Italy's change from monarchy to Republic was legally a revolutionary creation of law, depends on whether such change was or was not brought about in conformity with a procedure provided by the Constitution of the Kingdom of Italy in force at that time.

[5] The American Republics held the change from the Vargas regime in Brazil to be Constitutional for diplomatic reasons, so as to avoid the problem of the recognition of a *de facto* government. But the overthrow of President Vargas by a palace revolution was, from a legal point of view, certainly revolutionary, as contrary to the Vargas Constitution of 1937, then in force.

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legal order. It cannot be understood from the point of view of the legal order which has been violated. According to that legal order it constitutes an illegality. A "right to revolution" cannot exist as a right in the sense of positive law. In such a case everything depends on effectiveness. If the revolution succeeds it abolishes the old and creates a new legal order; if it fails the revolutionaries are, under the old legal order, traitors.[6]

But, while revolutionary creation of law cannot be legally understood from the point of view of the old municipal law, it is the positive norm of effectiveness of the supra-ordinated international law which guarantees the continuity of the municipal legal order and the identity of the international personality of the State. Revolution, therefore, must be understood as a procedure of creating municipal law provided for by international law. There is also a procedure of international law itself, *debellatio*, which constitutes a revolutionary form of creation of municipal law. The revolutionary creation of municipal law, which leads us to international law, has been the subject of many studies. But little attention has been given to the possibility of a revolutionary creation of law on the level of international law itself.

International law also has its constitutional norms; there is the constitution of general international law, there are the constitutions of particular international communities, like the United Nations, based on particular, treaty-created, international law. International law also regulates the creation of its own norms, by custom or by the treaty procedure.[7] Here, too, norms of international law may be created in contradiction to the constitutionally prescribed procedure, or in violation of certain contents of hierarchically superior norms of international law. Here again there is no revolutionary creation of law, however drastic the change in contents may be, if the new law has been created in conformity with the procedure prescribed by the international law in force.[8]

We need first to consider a possible revolutionary creation of general

[6] Hence the paradoxical situation of the crime of treason. In positive Common Law it is the highest crime, standing in a category apart. But a successful revolution leads to an original creation of law. "Those who lose are the traitors," says the King in Calderón's *La Vida es Sueño*. An old English verse reads:

"Treason cannot prosper, What's the reason?
For if it does, who would dare to call it treason?"

[7] See Josef L. Kunz: "The meaning and the range of the norm *pacta sunt servanda*," in this JOURNAL, Vol. 39 (1945), pp. 180–197.

[8] At the World Health Conference, held in the Summer of 1946 in New York, it was proposed that the World Health Assembly of the new World Health Organization should have jurisdiction of enacting regulations, immediately binding upon member-States without ratification, except if specifically rejected by a member-State. The Belgian representative, rejecting this proposal, spoke of a "revolutionary change of international law." But legally such a norm, created by the treaty procedure, with the consent and ratification of the contracting parties, and binding only upon member-States, would not be revolutionary at all.

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international law, by overthrowing the whole present international legal order and its basic norm, so that apparently the new international law could not be legally understood from the point of view of the international law actually (or previously) in force. It is true that general international law, although a primitive legal order, has shown since the Renaissance a high degree of stability, far superior to that of the more advanced municipal legal orders. But such revolutionary change is thinkable. Such an idea was held widely in early Bolshevik Russia. The idea, as expressed by the leading Soviet international lawyer, Eugene Korovin,[9] was to look at the present international law as something intrinsically bad from a Marxist point of view and theoretically superfluous. The aim was to overthrow by a world-revolution the present system of a plurality of sovereign, capitalistic states, and to replace it by a world-wide Soviet state, of which the Union of Soviet Socialist Republics, an open state under the Constitution of 1923, was to be the nucleus. In such case the present international law would be overthrown and replaced by a Marxist world-law, a wholly intra-Soviet municipal law. Only for the period prior to the victory of the world revolution was Korovin willing to recognize an "international law of the transition period": general international law, he held, had lost its validity between a Soviet state and the capitalistic world; the Soviets would be bound only by treaties. This construction is already theoretically untenable; for the norm *pacta sunt servanda* of general international law is the reason for the validity of all treaty-made law. And as the Soviet world revolution has, up to now, not succeeded, the present international law has remained in force and is binding on the Soviet Union.

Undoubtedly such "revolutionary" change of the present international legal order would again depend on effectiveness for validity. But the question arises whether such creation of new law, even if effective, would legally have the character of revolutionary creation of law. Revolutionary creation of municipal law is revolutionary because it is illegal under municipal law; it is only the positive norm of effectiveness of international law which validates the revolutionary creation of municipal law. The latter is, therefore, a legal form of creation of municipal law provided for by international law. But general international law has no superior positive law above it and contains the positive norm of effectiveness. There is no rule of general international law which makes such "revolutionary" change illegal. In consequence the so-called revolutionary change of general international law must be understood as a legal procedure for the change of its Constitution provided for by the Constitution itself, on condition of effectiveness. It follows that the legal figure of "revolution" has no place in general international law, which is the only legal order in which there can be no revolution in the legal sense.

[9] E. A. Korovin, *Das Völkerrecht der Übergangszeit* (German translation), 1929. See also T. A. Taracouzio, *The Soviet Union and International Law*, New York, 1935.

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But there is the possibility of the creation of particular treaty-made international law, made not in conformity with the supra-ordinated general international law. Examples are not rare to-day.

We may refer to the creation of the norms—both as to procedure and contents—which form the basis of the War Crime Trials in Germany and Japan. A jurist can hardly admit that he is dealing here with normal, or long-established, international law, with a mere routine application of international law, already previously valid. But this problem would demand a whole volume for its investigation.

There are other recent examples, such as Article 2, par. 6, of the Charter of the United Nations, according to which the Organization shall ensure that non-members act in accordance with the principles of Article 2, so far as may be necessary for the maintenance of international peace and security. This paragraph has a predecessor in Article XVII of the Covenant of the League of Nations.[10] Article XVII left it entirely to the discretion of non-member states whether they should accept or not accept the invitation of the Council. In the Eastern Carelian case Tchitcherin sharply rejected the invitation and Soviet Russia declared that any attempt to apply Article XVII against her would be considered as a hostile act. Article XVII does not attempt legally to bind non-member states. True, it provides that, if the third state rejects the invitation and resorts to war against a member State, the provisions of Article XVI shall be applicable against it. But such measures would not have the legal character of sanctions for sanctions in the legal sense presuppose the violation of a legal duty and non-members are not bound by the Covenant. Article XVII was, therefore, not in viola-

[10] Art. XVII.

1. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

2. Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such actions as may seem best and most effectual in the circumstances.

3. If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article XVI shall be applicable as against the State taking such action.

4. If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

See the well-known Commentaries on the Covenant by Schücking and Wehberg, Ray, and Göppert, as well as the following monographs: E. Morpurgo, "L'articolo 17 del Patto della Società delle Nazioni ed il diritto internazionale consuetudinario," in *Revue de Droit International* (Sottile), 1925, pp. 177–185); A Bavaj, *L'interpretazione dell' articolo 17 del Patto della Società della Nazioni*, 1931; R. Weinberg, *Völkerbund und Nichtmitgliedstaaten*, 1932.

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tion of the general international law then in force. Article 2, paragraph 6, of the Charter takes a different approach. Two completely different interpretations of it have already been given. Goodrich and Hambro [11] state emphatically that "the Charter does not of course create any legal obligations for non-member States. They are, therefore, not obligated in a legal sense to act according to the principles of the Charter for any purpose whatever." True, there is, under Article 35, the possibility of the acceptance of the Charter *pro hac vice* by non-members, as under Article XVII of the Covenant. But it is also true that the UN is bound to ensure that non-members act in accordance with the principles of the Charter whether they have accepted or not. In this case the Organization, according to Goodrich and Hambro, "assumes authority not based on the consent of the States affected" and the Charter "provides for the imposition by force, if necessary, of the prescribed conduct without any legal basis in contractual agreement." But that is no solution and no juridical explanation. For the authors can only mean that such action constitutes either old-fashioned intervention and war, not sanctions, or that the Charter imposes upon the Organization the duty to act with no basis in law at all, or a duty to act illegally.

Kelsen,[12] on the other hand, interprets Article 2, paragraph 6, as claiming that the Charter is legally binding upon non-member States. Under Article 2, paragraph 6, only Article 2 would be binding, but Article 2, paragraph 2, covers all the obligations under the Charter. Kelsen considers [13] that non-members are even legally bound to register their treaties (Article 102). He even goes so far [14] as to say that the Charter claims to constitute general international law and that, if this interpretation is accepted, all the States of the world would be "members" of the UN.

This interpretation seems to go too far in any case. Article 2, paragraph 2, covers all the obligations under the Charter, it is true, but imposes this duty "in order to ensure to all of them the rights and benefits resulting from membership," a purpose which naturally makes no sense in the case of non-members. Such wide interpretation would, under Article 17, bind non-members even to bear the expenses of the Organization. The fact that the Charter distinguishes between members and non-members, the exclusion of Franco-Spain from membership, and the unsuccessful application for membership by a number of States, show that the Charter only constitutes particular international law, although it may have, like the League, a tend-

[11] Leland M. Goodrich and Edward Hambro, *Charter of the United Nations: Commentary and Documents*, Boston, 1946, pp. 70–71.

[12] H. Kelsen, "Sanctions in International Law under the Charter of the UN," *Iowa Law Review*, Vol. 31 (1946), pp. 499–543, at p. 502.

[13] Work quoted, note 12, p. 512.

[14] H. Kelsen, "Membership in the United Nations," *Columbia Law Review*, Vol. XLVI (1946), pp. 391–411, at pp. 394, 411.

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ency toward universality. It seems to follow that Article 2, paragraph 6, cannot intend to bind non-members by all the norms of the Charter. But by what norms? Would a non-member State be legally bound to make available armed forces to the Security Council under Article 43? Is Switzerland legally bound to grant rights of passage to UN troops? Finally the restricting phrase "so far as may be necessary for the maintenance of peace and security" must not be forgotten.

We need, first, the "jurisprudence" of the UN to determine the meaning and range of Article 2, paragraph 6. The wording of this clause does not compel the adoption of the construction that non-members are thereby legally bound. But if this interpretation is adopted then Article 2, paragraph 6, as Kelsen fully recognizes, "is not in conformity with general international law as prevailing at the moment the Charter came into force." For under general international law a treaty creates only legal rights and duties among the contracting parties.[15]

While Article 2, paragraph 6, of the Charter is not so worded as clearly to claim that non-members are legally bound, this issue is unequivocally raised in the draft treaty for the outlawing of atomic bombs, proposed by the Soviet Union, and read by Mr. Gromyko [16] in the session of the Atomic Energy Commission of the UN. The proposed treaty, it is true, is open to accession by all States, whether members of the UN or not. But under Article 6 the treaty is to come into effect after the approval of the Security Council and after ratification by half of the signatory States, including all States members of the UN, and Article 7 reads: "After the entry into force of the present agreement, it shall be an obligation upon all States, members or not of the UN." This clause is clearly not in conformity with general international law. For treaties do not legally bind non-contracting parties and "save in exceptional cases are binding only in virtue of their ratification." [17]

The draft treaties of peace with the minor European Axis states purport to be legally binding after ratification by one party only. A peace treaty is valid even if imposed by force but it is, nevertheless, a treaty and needs, therefore, in order to be a treaty at all, signature and ratification by the vanquished as well as by the victor. But in Article LXXVIII of the Draft Peace Treaty with Italy [18] we read that the treaty "shall be ratified by the

[15] Permanent Court of International Justice, Publications A/22, p. 17, A/B/46, pp. 141, 143.

[16] *The New York Times*, June 20, 1946, p. 4.

[17] Permanent Court of International Justice, Publications A/23, p. 20.

[18] *The New York Times*, July 27, 1946, p. 9. Analogously Article XXXVII of the Hungarian, XXXVIII of the Rumanian, XXXVI of the Bulgarian, and XXXIV of the Finnish Draft Peace Treaties (the same, July 31, 1946, pp. 15, 18, 19 and 21), only with the difference that the first three treaties come into force immediately upon deposit of ratification by the U. K., the U. S. and the U. S. S. R., the last upon deposit of ratification by the U. K. and the U. S. S. R.

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Allied Powers. It shall be ratified also by Italy. It will come into force upon the deposit of ratification by France, the United Kingdom, the United States and the Union of Soviet Socialist Republics." What is in this case, by the way, the legal significance of ratification by Italy?

As we have seen, "revolution" has no place in general international law, for the reason that such so-called revolutionary change is not illegal under the international law, at any moment in force, in view of the norm of effectiveness. But the examples of the creation of treaty norms already discussed, not in conformity with general international law, are in a very different category. For here this creation is illegal under general international law. And it cannot be said that here everything depends on effectiveness. As Verdross [19] correctly states, "the principle of effectiveness can create new law only within the framework of international law; for a *boundless* recognition of the principle of effectiveness would legalize *any* illegality and thus abolish international law itself."

Such illegal creation of treaty law will need a healing of the illegality, in order to become valid international law, as by general recognition. Or it may be rejected as illegal in a procedure and by an organ of international law. Indeed Article 2, paragraph 6, is, as Kelsen [20] asserts, "problematical." Kelsen says that an arbitration tribunal *ad hoc,* established between a member and a non-member State, may possibly not consider the non-member State as bound by the Charter. But there is more to the problem than this. Even the International Court of Justice at The Hague, although, under Article 3 of the Charter, it is a "principal organ" of the UN, may not only possibly, but will be bound to, decide that a non-member is not legally bound by the Charter, or that Italy is not legally bound by an Italian Peace Treaty not ratified by her. For this Court, under Article 38 of its Statute, is bound to apply general customary international law, under which these treaty norms are not legally binding, and can apply international conventions only if they "establish rules expressly recognized by the contesting parties."

The problems of "revolutionary" and illegal creation of norms of international law have hardly been considered as yet by the writers on that subject. These problems call for further investigation. They are highly interesting theoretically and, therefore, highly important practically. For there is no practice without theory and in the relation between them it is theory which holds the commanding position; as the great Leonardo Da Vinci has put it: *La teoria è il capitano, e la prattica sono i soldadi.*

JOSEF L. KUNZ

[19] A. Verdross, *Völkerrecht,* Berlin, 1937, p. 126.

[20] Kelsen, work quoted, note 12, pp. 512–513.

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