United Nations | Nations Unies

GENERAL ASSEMBLY | ASSEMBLEE GENERALE

UNRESTRICTED

A/AC.10/30
20 May 1947

ORIGINAL: ENGLISH

STATEMENT BY THE RAPPORTEUR IN AMPLIFICATION OF PARAGRAPHS 10 AND 11 OF HIS MEMORANDUM A/AC.10/26

As I listened to our debate yesterday I was led to ask myself whether some of the differences between the opinions expressed by members of the Committee might not be due to a misunderstanding. I wondered whether all those who spoke of the "development of international law" were using the term in the same sense. It seemed to me that some delegates used the term for what I personally should describe as international legislation, i.e. for the process of extending the law into fields of state activity not previously regulated by rules of law. Now in that sense it does seem to me to be arguable to what extent the development of international law - its development, that is to say, by legislation - can in practice be kept distinct. The reason is that legislation and codification overlap - one task merges into the other. But that is a question to which I shall come back in a few moments. At present I am asking the Committee to consider whether we mean the same thing when we speak of the development of the law, and whether we all mean the same thing. Because to me - and here I associate myself with what the Delegate of China said yesterday - the development of international law means much more than its extension into new fields. It is a much wider term than international legislation - it includes international legislation. Legislation is only one way, a very important way, of developing the law, but it is not the only way. Many others have been suggested in that most valuable memorandum of the Secretariat A/AC.10/7.

Now some of these methods have nothing whatever to do with the codification of international law - and if we regard them as methods of

/encouraging

... MAY 1947
UNITED NATIONS ARCHIVES

encouraging the progressive development of international law, as this document does, and as I submit we ought to do, then the development of international law cannot possibly be just the same thing as its codification. There must be a distinction between the two. Take some of the technical improvements that the Secretariat refers to - the preparation of model treaties, the study of multilateral conventions which for some reason or other have failed to come into force, the method of encouraging states to ratify the conventions they sign, the preparation of digests state practice - these are all possible means of encouraging the development of the law, but none of them has even the remotest connection with codification. Then again international law is developed through the judicial process - through jurisprudence and there are possible ways of encouraging states to take their differences to courts, but this again would have nothing to do with codification.

Now, if there are all these different ways of encouraging the progressive development of international law, and if only one of them, development through legislation, has any possible relation to codification, it is clear that we are bound to make a distinction between development and codification. Development is a much wider term, which includes, but cannot be confined to, codification.

I want now to consider whether we ought to distinguish legislation from codification, as is done in the memorandum of the Secretariat. The distinction ordinarily made is that codification is the process of declaring the existing law, legislation is its extension into new fields. Now some members of the Committee have very properly pointed out that codification cannot be absolutely limited to declaring the existing law. As soon as you set out to do this, you discover that the existing law is often uncertain, that for one reason or another there are gaps in it which are not covered. If you were to disregard these uncertainties and these gaps and simply include in your code, rules of existing law which are

/absolutely

absolutely certain and clear, the work would have little value. Hence, the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest which is the better view; where a gap exists he will suggest how it can best be filled. If he makes it clear what he is doing, tabulates the existing authorities, fairly examines the arguments pro and con, he will be doing his work properly. But it is true that in this aspect of his work he will be suggesting legislation - he will be working on the <u>lex ferenda</u>, not on the <u>lex lata</u> - he will be extending the law and not merely stating the law that already exists.

But it does not follow from this fact that codification necessarily involves a certain measure of developing the law by legislation, that, therefore, legislation and codification are merely two names for the same process. The difference may be one of degree only, but it is important all the same, and it may well be, and I submit that it is in this case, that in codification, which is primarily though not exclusively concerned with stating the <u>existing</u> law, one method is the most useful, and that in legislation, where the question what is the existing law is unimportant and the aim is to create law in the future as it ought to be, another method of working is to be preferred. For example, suppose the problem that states have before them is a treaty about tariff reductions. If such a treaty is made, it will necessarily develop the law, but none, I think, will suggest that it codified the law. Until the treaty is made, there is no law on that subject. On the other hand, suppose the matter for consideration is a convention on territorial waters. Here then is already a great deal of law, but there are uncertainties and gaps in it. I think we should rightly describe that convention as a codifying convention, even though it would have to contain a certain element of new law, of legislation.