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Law-Making Treaties

Werner Levi

LAW-MAKING TREATIES

By WERNER LEVI*

THE QUESTION whether treaties are sources of objective law, i.e., law which is universally applicable to all members of the family of nations, has long been a controversial one. No doubt, the majority of writers on international law would answer the question in the negative. Consensus of opinion exists only in regard to the fact that treaties make law between the parties. Some writers may object to calling the obligation arising out of treaties law, but this would amount to an argument concerning terminology rather than about the substance of the matter. It is not denied that treaties set up rules to which the parties have to adhere and which determine their conduct. This is the substance of law In so far as treaties prescribe a rule of behavior or action which is formally recognized as binding by the act of concluding the treaty, they represent international law for the parties concerned. (Lex contractus)[1]

The strongest denial that treaties can ever be sources of universal, objective law comes from Hall. He denies to treaties the faculty of influencing third parties in any manner whatsoever, treating them as strictly pacts between the parties. "The only ground on which it is possible that treaties can be invested with more authority than other national acts is that, when they embrace a principle, they are supposed to express national opinion in a peculiarly deliberate and solemn manner, and therefore to be of more value than other precedents."[2]

A less uncompromising and more widespread opinion ascribes to treaties the power to contribute indirectly to the formation of objective rules of international law. This opinion holds that, when a certain principle occurs repeatedly and identically in a number of treaties, the principle may develop into a custom and thus become an objective rule. Of course, the rule has then acquired its

*Dr. of Jurisprudence, Fribourg University, Switzerland. Member of the teaching staff in the program of the Far Eastern Area and Language Studies, University of Minnesota.

[1]Oppenheim, L.-Lauterpacht, H., *International Law*, 5th ed. London, 1937, vol. 1, p. 25, note 3, de Louter, J., *Le Droit International Public Positif*, Oxford, 1920, p. 52.

[2]Hall, William E., *A Treatise of International Law*, 8th ed. Oxford, 1924, p. 8.

character thanks to the law-making power of custom, the treaties being evidence of existing custom. But the sum total of the treaties embodying the principle was responsible for the creation of custom, and thus each individual treaty had a significance transcending the immediate interest of the parties.[3]

Another more recent view on the law-making power of treaties has been expressed by a number of writers. They maintain that, even if a rule occurs in a single treaty only and there is no evidence of custom, the treaty may still have the effect of establishing a universally valid rule of international law When a number of first class nations regulate matters of permanent and general interest and arrive at a settlement of a problem of international character, such a settlement has great significance even for nations not parties to it. If no large power promptly and effectively dissents from it, such a settlement becomes universally accepted international law "within a moderate time" or after some time anyway [4] No reason is given why the time element alone transforms a rule binding only the parties to a treaty into one having the character of objective law, binding upon all members of the family of nations. If a rule stated only once becomes, under certain circumstances, law after a certain time, it should become law as soon as it is stated and the treaty concluded. Time alone has never been known to cause a rule to become objective international law In the view of the writers supporting this theory of the law-making power of treaties, time should be important only in so far as it might give non-signatory nations the opportunity to dissent from the rule. For they, together with some others,[5] either state expressly or imply that non-participants in the treaty have either expressly or tacitly to subject themselves to the rule established by the treaty in order to be bound by it. In other words, these writers adhere to the old established principle that treaties can bind only those who are parties to them. But then there is no need to single out treaties regulating matters of permanent and general interest, etc., as these writers do, because there is no difference between these and other treaties. Any treaty creates international, objective law

[3]de Louter, *op. cit.*, p. 53, Wheaton, Henry, *Elements of International Law*, 2nd ed. Cambridge, 1910, part 1, p. 16; et al.

[4]Pollock, Sir Frederick, quoted in Hackworth, G. H., *Digest of International Law*, Washington, 1940, vol. 1, p. 19; de Visscher, Fernand, "La Question des Isles d'Aland," *Revue de Droit International et de Legislation Comparee*, series 3, vol. 2, 1921, p. 262.

[5]Wright, Quincy, "Conflicts between International Law and Treaties," *American Journal of International Law*, 1917, vol. 11, p. 573, Phillimore, Robert, *Commentaries upon International Law*, London, 1857, vol. 3, p. 664.

between those who adhere to it. These writers apparently realize the desirability of giving certain rules and certain conventions the force of objective law. They apparently also realize that in practice certain rules and conventions do obtain the force of objective law, and they attempt to reconcile theory with practice with that Jack-of-all-trades the legal fiction of tacit consent.

At an earlier time there was no such reluctance to affirm, in accordance with experience, that certain treaties have the power to create objective rules of law, which may thus bind nations not parties to the treaty.[6] It was not stated exactly what kind of treaties or rules were involved. In a general way they were said to be concerned with certain abstract principles or certain general international affairs. They are essentially the same type of treaties described by the group of more recent authors just mentioned.

This brief survey of opinions on the law-making power of treaties shows that really two questions are involved. One is what rules embodied in a treaty are susceptible of becoming objective rules of international law; the other is under what circumstances does a rule, susceptible of becoming an objective rule of law, which is embodied in a treaty, acquire the character of an objective rule of law?

In an attempt to answer the first question, treaties have been classified with respect to the rules they embody into three main groups. These are. 1. treaties regulating only specific interests of the parties, interests which are of a restricted, or particular, or local character; 2. those which deal with an existing principle or rule of general interest and determine such rule or principle in a form binding upon the parties, and 3. those which resolve an existing problem of law or which declare or establish new law.[7] The greatest drawback of this grouping is that it presupposes what is to be proved. It takes for granted the knowledge as to which treaty contains a potential objective rule of international law, instead of supplying a criterion by which such knowledge may be acquired. Besides, the grouping is rather indistinct and opens possibilities of unending discussion.

[6]Bluntschli, E. C., *Das moderne Voelkerrecht*, Noerdlingen, 1878, p. 5; Pradier-Fodéré (Fiori) *Traité de Droit International Public*, Paris, 1907, vol. 1, p. 82; cf. Calvo, Charles, *Le Droit International*, Paris, 1896, vol. 1, p. 160.

[7]de Louter, *op. cit.*, p. 53, Finch, George A., *Sources of Modern International Law*, Washington, 1937, p. 62; Moeller, Axel, *International Law*, part 1, London. 1931, p. 60; Despagnet, F., *Droit International Public*, Paris, 1894, p. 64.

Under the leadership of Bergbohm[8] the German and Italian school created a classification which appears to lead to commendable results. These schools distinguish between "rechtsgeschaeftlichen" and "rechtssetzenden" treaties. The "rechtsgeschaeftliche" treaty would correspond to the contract in municipal law, the "rechtssetzende" treaty would be equivalent to an act of the legislature. The criterion by which the two groups of treaties may be recognized is the direction of the will of the parties. In the first group the will of each party has a different direction, a mutual exchange of goods or services is desired, opposed or incongruent interests are to be satisfied (for instance the buyer wants the goods, the seller the money) In the second group the will of each party has an identical direction, a common interest is to be satisfied.[9] If the objection is raised[10] that this distinction is untenable because in any kind of contract the wills of the parties have the same direction—the parties want the contract as a whole. each does not want the obligation of the other—it may be answered that, if it seems more satisfactory, a slightly different distinction may be made. Each of the parties wants the treaty (or contract) In so far their desires are identical in the case of all treaties. But the identity of wills ceases in regard to the obligation each wants the other to take on. There are two possibilities either the obligation of each would be the same, in which case identity of wills would continue beyond the common desire to conclude the treaty, or the obligation of each party would be different, in which case the identity of wills ceases. If the obligation is not the same for each of them, the treaty cannot be said to contain a potential objective rule of international law It is a characteristic of such a rule that it should apply among those subjected to it and that it should create the same right or burden for all. Non-identical obligations do not possess the character of a legal norm, and the treaty from which they emanate cannot be a potential objective law-making treaty For instance a treaty for the purchase of land obliges one party to deliver the land and the other party to deliver the purchase price. The obligations are not identical, and the treaty does not contain a rule which could develop

[8]Bergbohm, C., *Staatsvertraege und Gesetze als Quellen des Voelkerrechts*, Dorpat. 1877, p. 79.

[9]Heilborn, Paul, *Grundbegriffe des Voelkerrechts*, *Stuttgart*, 1912, p. 40 and the review of the teachings of the German and Italian schools there.

[10]Kaufmann, Erich, *Das Wesen des Voelkerrechts und die clausula rebus sic stantibus*, Tuebingen, 1911, p. 160, Gihl, Torsten, *International Legislation*, Oxford, 1937, p. 49.

into objective law. The Geneva convention of 1864 for the amelioration of the condition of the wounded in war creates identical obligations for all and contains therefore a potential objective rule of international law [11]

A more obvious and more easily applied criterion for the differentiation of law-making and other treaties would be a consideration of the result desired by the parties, which is, of course, a corollary of the wills of the parties. In the "rechtsgeschaeftlichen" group of treaties, each party expects a different final result from the fulfillment of the treaty. In the second group, the parties expect an identical result. The final objective to be reached by the treaty is identical for all participants. Their obligation from the treaty affects them all alike. This again is the characteristic of an objective rule of law and therefor only this second group of treaties can be potentially law-making.

A further mark of distinction by which potential law-making treaties and other treaties may be differentiated is the permanence of the obligation. It is a characteristic of a law that it continues to exist until abolished. An obligation which ceases to exist after fulfillment cannot be a potential rule of objective law. A law cannot be exhausted by fulfilling it no matter how often. An obligation can be, but need not always be, exhausted after it has been fulfilled. This criterion is of only limited use, however. It can be said that treaties creating obligations which cease after fulfillment cannot be law-making treaties. Treaties creating obligations which continue to exist after one or more fulfillments may be potential law-making treaties.

By thus applying the characteristic differences between lex contractus and general law to treaties, it is possible to establish two categories of treaties. One category embodies rules which have the characteristics of the general law, the other embodies rules which have the characteristics of the lex contractus.

After it has been established that a given treaty is potentially a law-making treaty, the question whether it actually does make objective law has then to be answered. Those authors who hold that a treaty is never capable of making law binding upon non-

[11] In order to demonstrate the impracticability of this distinction, Gihl, *op. cit.*, p. 50, gives as an example a treaty guaranteeing the most favored nation clause. While this example is directed at Triepel's theory of the Gemeinwille and its consequences, it is pertinent here too. Gihl's question, is this a law-making treaty or not, has to be answered in the affirmative. The obligation to apply equally favored treatment to other nations could be stipulated for any nation and the principle of the most favored nation is therefore a potential objective rule of international law.

signatories—and the overwhelming majority of authors have that opinion—can go no further than to find out whether a treaty belongs into the law-making category They will then have to apply their legal fiction of the tacit consent of those nations to whom they wish to apply the law established by the treaty, and will have to prove such consent. But there is another school of thought according to which potential law-making treaties actually do make objective law under certain circumstances.[12] The idea that no nation can be bound against its will is given up. The rigid concept of the sovereignty of nations in international law is surrendered. While this development began long before the second World War, it will be stimulated considerably by the prevailing tendency to restrict national sovereignty in favor of some supranational organization. This school maintains that a potential law-making treaty does create objective law if three conditions are fulfilled. There must be several partners to the treaty, a great principle of general international interest must be involved, and the parties must want the principle to be generally binding.

In the *Aland Case* the convention in question was signed by only three powers (although the convention was later attached to a treaty signed by a greater number of nations) and it appears that the first condition, that there must be several partners to the treaty, means more than two partners. But whatever the opinion of the arbitrators in the case may have been, the condition seems arbitrary The number of partners to the treaty should be irrelevant. The requirement has apparently been made to give an index of the extent of interest in the principle embodied in the treaty If several powers are concerned with the same treaty the likelihood that a principle of general interest is involved is greater than if only two powers settle an affair between themselves. The purpose of this requirement was to prevent a treaty regulating the subjective interests of the parties only from being considered a law-making treaty The need for it disappears if one subscribes to the distinction between the two categories of treaties already discussed. For in that case the fact that treaties which regulate non-identical—subjective—interests cannot be law-making treaties,

[12]Bluntschli, *op. cit.*, Pradier-Fodére, *op. cit.*, McNair, Arnold, "The Functions and Differing Legal Character of Treaties," *British Year Book of International Law*, 1930, vol. 11, p. 112, The Aland Islands case in League of Nations, *Official Journal, Special Supplement*, No. 3, October, 1920, p. 17 Cf. against the Aland Island case de Visscher, *op. cit.*, Udina, Manlio, "La succession des etats quant aux obligations autres que les dettes publiques," Academie de Droit International, *Recueil des Cours*, vol. 44, 1933 II, p. 713.

by definition, eliminates the necessity of proving the potential general interest by the number of parties to the treaty.[13]

Whether the principle involved is of general international interest is a question of fact. It has to be decided according to circumstances. The history of the principle to be settled has to be taken into consideration. The political conditions which led to the conclusion of the treaty have to be examined. The effect of the principle upon nations other than the signatories has to be gauged.

The third condition, which must be fulfilled to give a treaty law-making power is the will of the parties to make the principle involved binding upon all members of the family of nations. This will is usually present if the preliminary question, whether the principle is of general international interest, can be answered in the affirmative. It is just to take the will of the parties into account. They create the treaty and therewith the basis for the legal validity of the rule. If it were claimed that their will can have no influence upon whether a rule is to be objective law or not, then there is no limit to what a treaty may result in and, indeed, it could be argued that the treaty itself might exist without the parties' will. The effect of a treaty cannot go beyond what the signatories wanted it to be, if that be within the limits of legal possibilities.

As has been mentioned, one result of this theory of the law-making power of treaties would be that a small number of nations could obligate all of the remaining states. This would be contrary to the principle that no nation can be bound against its will or without its consent. However, quite apart from the tendency to disregard this principle, or at least to minimize its effect, it has never been consistently applied in practice. Customary law may be applied to a state although that state may actually object to it. If only those rules were valid in international law to which there was unanimous consent there would be no international law.[14] Besides, the fact that a limited number of states can bind

[13]The arbitrators in the Aland case do not make the distinction. It is probably for that reason that they seem to insist on several parties to the treaty in order to give that treaty law-making power. For in the same report the arbitrators stated that although the principle of the self-determination of peoples is of general and great political importance it has not been embodied in the covenant of the League of Nations and its consecration in a number of mutual (!) treaties would not turn it into a universal objective rule of international law. League of Nations, *op. cit.*, p. 5.

[14]Cf. de Martens, G. F., *Précis du droit des gens moderne de l'Europe,* Goettingen, 1789, part 1, p. 3.

all the members of the family of nations is not objectionable in itself. The condition that the rule must be of general interest is a sufficient safeguard against arbitrary action by a few states. On the other hand, general interest means interest on the part of most states, not all states. The opposition of some nations to the rule to be established as objective law still makes the existence of general international interest possible. Without here going into the problem of majority rule in international law, it may be said, in addition to what has been said on the subject above, that it is a phenomenon in municipal law and human society generally that unanimity of interests cannot always be obtained. Some interests have to be subordinated to others. This very fact is the origin of law It has to be taken into account in international law as well as everywhere else. If there were no clashes of interest there would be no necessity for law The rule of unanimity in decisions of an international character, never rigidly adhered to in practice, has done as much harm as, if not more harm than, good in important international affairs.

Far from encouraging arbitrary action by some nations, the adoption of this theory of the law-making power of treaties would actually diminish the possibility of such action. The result of the establishment of an objective rule by treaty is to give this rule a life of its own. It becomes detached from its basis, the treaty [15] The individual action of the signatory states or other states could not abolish the rule. It could be changed only in accordance with the general principles of international law concerning the establishment of new rules, or the change of old rules, of international law Whatever may happen to the original treaty or the relation between the treaty partners or the partners themselves, the rule once established continues to exist as objective international law The beneficial effect of this would be an increase in the permanence and stability of rules of general interest in international relations. Altogether this theory seems to be in accord with the aims and general principles of international law It also supplies a solid foundation for existing practice. For these reasons, the adoption of the theory as a principle of international law should be welcomed.

[15]The Aland Island case, League of Nations, *op. cit.*