FORBIDDEN TREATIES IN INTERNATIONAL LAW

COMMENTS ON PROFESSOR GARNER'S REPORT ON "THE LAW OF TREATIES"

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I. THE PRINCIPLE

James Wilford Garner has given us a profound, detailed and highly valuable Report on The Law of Treaties.[1] This report contains, it is true, a rule concerning the validity of a treaty which is in conflict with an earlier treaty.[2] On the other hand, there is no consideration, as far as this writer can see, of treaties which are in conflict with general international law, a problem which has been discussed many times.[3]

But as there is no settled opinion on this problem, it is necessary, in this writer's view, to unroll this problem once more. Our starting-point is the uncontested rule that, as a matter of principle, states are free to conclude treaties on any subject whatsoever. All we have to investigate, therefore, is whether this rule does or does not admit certain exceptions. The answer to this question depends on the preliminary question, whether general international law contains rules which have the character of *jus cogens*.[4] For it is obvious that if general international law consists *exclusively* of non-compulsory norms, states are always free to agree on treaty norms which deviate from general international law, without by doing so, violating general international law. If, on the other hand, general international law does contain also norms which have the character of *jus cogens*, things are very different. For it is the quintessence of norms of this character that they prescribe a certain, positive or negative behavior unconditionally; norms

[1] Harvard Research in International Law, this Journal, Vol. 29 (1935), Supp., pp. 655–1226. [The credit which the author attributes to Professor Garner for this report must be shared by the assistant reporter, Dr. Valentine Jobst, and, of course, by the Advisory Committee who collaborated in its preparation.—J. W. G.]

[2] *Op. cit.*, Art. 22, pp. 661 and 1009 *et seq.*

[3] *Cf., e.g.*, Bluntschli, *op. cit.*, p. 1209, par. 410; Fiore, *op. cit.*, p. 1214, par. 760; *cf.* further: Heffter, *Das europäische Völkerrecht*, 4th ed. (1861), p. 156; Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), p. 114; Kunz, *Die Revision der Pariser Friedensverträge* (1932), p. 241 *et seq.*; Pasching, *"Die allgemeinen Rechtsgrundsätze über die Elemente des völkerrechtlichen Vertrages"* in *Zeitschrift für öffentliches Recht*, XIV (1934), p. 59 *et seq.*; Verdross, *"Heilige und unsittliche Staatsverträge," Völkerbund und Völkerrecht*, II (1935–36), p. 164; Verdross, *"Anfechtbare und nichtige Staatsverträge"* in *Zeitschrift für öffentliches Recht*, XV (1935), p. 289 *et seq.*, and *"Der Grundsatz 'pacta sunt servanda' und die Grenze der guten Sitten im Völkerrecht"*, *loc. cit.*, XVI (1936), p. 79 *et seq.*

[4] *Cf.* Jurt, *Zwingendes Völkerrecht* (1933).

of this character, therefore, cannot be derogated from by the will of the contracting parties.

The existence of such norms in general international law is particularly contested by those authors who base the whole international law on the agreement of the *wills* of the states; consequently, they know no other international law but treaty law. But they overlook the fact that each treaty presupposes a number of norms necessary for the very coming into existence of an international treaty.[5] These are the norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled that an international treaty may come into existence, what juridical consequences are attached to the conclusion of an international treaty. These principles concerning the conditions of the validity of treaties cannot be regarded as having been agreed upon by treaty; they must be regarded as valid independently of the will of the contracting parties. That is the reason why the *possibility* of norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties, cannot be denied *a priori*.

But this reasoning does not decide the problem whether such compulsory norms concerning the contents of international treaties do exist in fact. A careful investigation, however, reveals the existence of such norms. Two groups of these norms can be distinguished. The first group consists of different, single, compulsory norms of customary international law. General international law requires states, for instance, not to disturb each other in the use of the high seas. An international treaty between two or among more states tending to exclude other states from the use of the high seas, would be in contradiction to a compulsory principle of general international law. International law authorizes states to occupy and to annex *terra nullius*. In consequence, an international treaty by which two states would bind themselves to prevent other states from making such acquisitions of territory would be violative of general international law. In the same way, a treaty binding the contracting parties to prevent third states from the exercise of other rights of sovereignty acknowledged by general international law, such as passage through the territorial waters of other states, would be in contradiction to international law.

But apart from these and other positive norms of general international law, there is a second group which constitutes *jus cogens*. This second group consists of the general principle prohibiting states from concluding treaties *contra bonos mores*. This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.

[5] In this sense Ottolenghi, *"Sulla personalità internazionale delle unioni di Stati"* in *Rivista i Diritto Internazionale*, XVII (1925), p. 335 *et seq.*