THE FLAG LAW REVISITED : THE HELEANNA CASE

par

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1. In an intriguing note which was published in the *American Journal of International Law* (1), Assistant Professor, Detlev Chr. Dicke, commenting upon the *Heleanna* case (2), suggested that, under customary international law of treaties, if two States have separately accepted the same rule of international law in two different multilateral law-making treaties that rule would *ipso facto* regulate their relationship, although the States concerned are not parties to one and the same treaty (3). Considering *in casu* the applicability of the rule granting competence to the flag State in cases of collision or of any other incident of navigation concerning a ship on the high seas in the bilateral relations between Italy and Greece, the writer correctly observed that : *a)* the rule had been embodied in two different multilateral treaties, namely, the 1958 Geneva Convention on the High Seas (4) and the 1952 International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or

(1) « The *Heleanna* Case and International Lawmaking Treaties : A New Form of Concluding a Treaty ? », *69 Am. J. Int'l L.*, 624-628 (1975).

(2) As summarized by Detlev Chr. Dicke, the case consists in a dispute between Italy and Greece concerning the applicability of the flag law to an incident of navigation (the ferryboat *Heleanna* caught fire) on the high seas involving a ship flying the Greek flag and a number of victims of Italian nationality, *id.*, at 624.

(3) *Id.*, at 627, 628.

(4) Article 11, paragraph 1, of the Convention reads as follows : « In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or of the State of which such person is a national », *450 U.N.T.S. 82.*

Other Incidents of Navigation (5); *b)* only Italy is a party to the former convention (6), and only Greece is a party to the latter one (7); and *c)* the two conventions are, by no means, related to each other (8). The fact that neither convention is in force between Italy and Greece, as well as the ascertainment that the two conventions are not related to each other, would probably suffice for an international lawyer who has been trained in the traditional way of thinking to advise that the two countries are not, juridically speaking, under any treaty obligation to apply between them the rule here in question. Assistant Professor, Dicke, suggested, however, that there exists a rule of customary international law of treaties providing that, if there is conformity of treaty rules, then a new treaty must exist between the States participating in the two different treaties. Applying *in casu* that rule, he concluded :

> The two governments have accepted one and the same solution of a problem of international law, and have *in effect declared* that this will be *the law binding on both nations,* subject to reciprocity by the other State involved (9).

This writer is entirely unaware of the existence of such a rule (10), and it should have been demonstrated rather than asserted in the note here under consideration. Greater elaboration on this point would have, all the more,

(5) Article 1 of the Convention provides : « In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation », *439 U.N.T.S. 233.*

(6) *521 U.N.T.S. 400.*

(7) *560 U.N.T.S. 286.*

(8) *Loc. cit.,* at 628. This ascertainment was made in connection with the provision contained in Article 2, paragraph 1 (a) of the Vienna Convention on the Law of Treaties, which makes it plain that the instruments embodying an international agreement must relate to each other *(Doc. A/CONF. 39/27), United Nations Conference on the Law of Treaties* (First and second sessions : Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969). Official records. Documents of the Conference, at 289. In the Draft Articles on the Law of Treaties with Commentaries, that the International Law Commission adopted at its eighteenth session, the « exchange of notes » between international persons is given as an example of related instruments which embody an international agreement.

(9) *Loc. cit.,* at 628 (italics supplied).

(10) Contrary to the opinion of Assistant Professor, Dicke, there does not appear to exist any rule of customary international law conflicting with the requirements for « related instruments », which is set forth in Article 2, paragraph 1 (a) of the Vienna Convention on the Law of Treaties. It is entirely true that, as Professor Kelsen, among others, pointed out : « General international law does not prescribe a definite form for the conclusion of treaties. Hence, the contracting parties may express their consent by written or spoken words, by symbols, such as a white flag for instance, or even by gestures » [*Principles of International Law,* 2nd ed. revised and edited by Tucker, 465 (1967)]. However, States practice indicates that certain forms have traditionally been established for the conclusion of treaties. (The most extensive — though probably not

been necessary, as it is universally accepted that treaty relations are based on the common intention of the parties to enter legal obligations (11). Assistant Professor, Dicke, found that intention in the ratification of the Brussels Convention by Greece and of the Geneva Convention by Italy. In his opinion,

> what the Greek ratification of the Brussels Convention amounts to is a declaration that Greece will concede penal jurisdiction under certain circumstances to the State of the flag if that State has *accepted the same obligation.* Italy, one of the signatories of the Brussels Convention, has accepted the same obligation *in the Geneva Convention.* The same analysis holds true if we start with the Italian ratification of the Geneva Convention as a *declaration* and the Greek ratification of the Brussels Convention as *an acceptance* (12).

0060 In this apparently innovative solution, the act of ratification would have not only the function of establishing the consent of a State to be bound by the ratified treaty (13), but also the function of soliciting the acceptance of its rule by any other State, third party to the treaty, with a view to establishing bilateral relations outside the latter's framework and without any other formality. This writer is unable to find such a function for ratification either in judicial decisions and the practice of States, or in the teachings of the most highly qualified publicists of various nations (14). Therefore, it is respectfully submitted that, if the solution here in question presents some practical interest, it could be contemplated only as a proposal *de lege ferenda.*

Assistant Professor, Dicke, placed strong emphasis on the distinction between contractual and law-making treaties; he considered that the traditional solution is altogether acceptable for the category of contractual treaties, but this would not be the case with the category of law-making treaties, on the ground that

exhaustive — list of these forms was drawn up by Professor Lauterpacht in his first report on the law of treaties *(2 Y.B. Int'l L. Comm'n,* 101 (1953), and the International Law Commission made substantial use of that list in its Draft Articles on the Law of Treaties with Commentaries, which the Commission adopted at its eighteen session, *supra* footnote 8, at 8). It is conspicuous, however, that neither the list prepared by Professor Lauterpacht, nor any other legal writing that could be taken as evidence of international law, mentioned the form of concluding treaties which is suggested by Assistant Professor Dicke, namely, that, if there is conformity of treaty rules, then a new treaty must exist between the States participating in two different treaties.

(11) The law of treaties is based on the same general principle of law which regulates the contracts in various legal systems. For a commentary concerning the impact of that principle upon the law of treaties, with special reference to the common law system, see : McNair, *The Law of Treaties,* at 6 (1961).

(12) *Loc. cit.,* at 627 (italics supplied).

(13) Seé Article 2, paragraph 1 (b) of the Vienna Convention on the Law of Treaties, *supra* footnote 8, at 289.

(14) Needless to say that most of the law-making treaties contain participation clauses which confer on them the character of closed treaties. If the suggestion of Assistant Professor, Dicke, were accepted, they would practically be opened by any State accepting *aliunde* the rules contained in the treaty.

> the advantage under a *traité-contrat* seems fixed from the outset, whereas advantage may lie with one or another party to a multilateral law-making treaty, depending on circumstances (15).

This writer readily agrees that the distinction, if feasible (16), between contractual and law-making treaties involves essentially the determination of the advantages secured by the parties concerned (17), but that distinction does not appear to have any relevance for the solution of the problem. There is no direct connection between the advantages which may, or may not, be secured by the parties to a treaty and the suggestion that, by ratifying it, they have *ipso facto* consented to accept the same treaty obligations towards States which might have ratified, or could eventually ratify, another law-making treaty containing one or more similar rules of conduct. Sir Gerald Fitzmaurice clearly stated this point in its fifth report on the law of treaties :

> Where the treaty does make new law, it does so, strictly only for the parties to it (18).

It follows that, although Italy and Greece have accepted one and the same solution of a problem of international law, they did not, strictly speaking, thereby declare that the flag law would regulate their bilateral relations in cases of collision or of any other incident of navigation concerning a ship on the high seas. This amounts to saying that, contrary to the opinion of Assistant Professor, Dicke, the *Heleanna* case did not actually raise the legal question brought into discussion, and, therefore, it cannot mark, as suggested, a new stage in the development of the law of treaties.

It seems that the basic assumption of Assistant Professor, Dicke, was that the rule granting competence to the flag State in cases of collision or of any other incident of navigation concerning a ship on the high seas is treaty law which, as such, is binding only upon the parties to the treaties which contain it. Thence, the need felt by the writer to discover a treaty nexus between States participating in different treaties, with a view to establishing the obligation of Italy and Greece to settle their dispute on the basis of flag State competence. The question is, however, whether the rule providing for such competence is actually treaty law, or, on the contrary, it belongs to customary international law, and is, therefore, of general application. This writer respectfully submits that the *Heleanna* case gave rise precisely to this point of law.

(15) *Loc. cit.*, at 625.

(16) See, for instance, the discussion which occurred in the International Law Commission during its 642nd meeting, on May 14, 1962 [*1 Y.B. Int'l L. Comm'n* 77-82 (1962)], as well as, Rosenne, « Bilateralism and Community Interest in the Codified Law of Treaties », in *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup.* Edited by Friedman, Henkin and Lissitzyn, 206-207 (1972).

(17) See comments by Amado at the 643rd meeting, on 15 May 1962, of the International Law Commission, [*1 Y.B. Int'l L. Comm'n* 85-86 (1962)].

(18) *2 Y.B. Int'l L. Comm'n* 95 (1960). See also the papers written by the same author : « Some Problems Regarding the Formal Sources of International Law » in *Symbolae Virzijl,* at 157-158 (1958); « The Older Generation of International Lawyer and the Question of Human Rights », in *Essays of International Law in Honour of D. Antonio de Luna,* 322 (1968).

There may be a great amount of truth in the opinion that the rule of flag State competence, which flatly contradicts the pronouncement of the Permanent Court of International Justice in the *Lotus* case (19), does not really represent a codification of customary international law (20), as the Preamble of the 1958 Geneva Convention of the High Seas seems to suggest (21). However, that opinion does not seem to negate the possibility that, in the meantime, the rule has been absorbed in customary international law, which is the submission of this writer. In this regard, it is, first, observed that Article 11 of the Geneva Convention prescribing the flag State competence was adopted by 63 votes to 1 with 7 abstentions (22), and that vote, as well as the discussion which preceded it (23), may be interpreted as evidence of a general opinion as to the most appropriate legal solution to the conflict of jurisdiction in cases of collision or of any other incident of navigation concerning a ship on the high seas. Secondly, until the *Heleanna* incident, the subsequent practice of States does not appear to have contradicted the rule of

(19) The Court stated on that occasion : « The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown », *P.C.I.J., Ser. A, N° 10,* at 30. In its report to the General Assembly of the United Nations, the International Law Commission acknowledged that the text of Article 35 of its draft articles on the law of the sea (finally Article 11 of the Geneva Convention on the High Seas) was actually the opposite of the decision of the Court [11 GAOR, Supp. N° 9 (A/3159), at 50 (1956)], and the same fact was stressed by several delegations during the Geneva Conference. See : Liu (China), *4 U.N. Conference on the Law of the Sea,* Lütem (Turkey), *id.,* at 58; Bierzanek (Poland), *id.,* at 104; and Jhirad (India), at 106.

(20) Baxter, « Treaties and Custom », *120 Recueil des cours,* 31, 54 (1970). His opinion is strongly reinforced by the declaration made by Jhirad, the delegate from India, at the eleventh plenary meeting, on 23 April 1958. He stated that, during the recess that had been taken to that effect, the delegations « had arrived at a compromise proposal that there should be a convention with a suitable preambular clause to be drawn up by the Drafting Committee, stating that the *majority* of the articles were generally declaratory of existing international law », *2 United Nations Conference on the Law of the Sea,* at 27 (italics supplied). As the discussion at the Conference made it clear, Article 11 belonged to the minority of articles about which one could not properly say that they were declaratory of existing rules (see *supra* footnote 19).

(21) The Preamble of the 1958 Geneva Convention on the High Seas characterizes the latter's « provisions is generally declaratory of established principles of international law », and in the *Fisheries Jurisdiction Case* the International Court of Justice gave its imprimatur to such characterization *(I.C.J. Reports 1974,* at 22). Given the evidences cited above, the Court should have been more careful in endorsing *tale quale* what appears to be an overstatement deliberately made by the participants in the Conference of Geneva, with a view to strengthening the force of the rules enshrined in the Convention. See in this regard the discussion which occurred in the Second Committee (High Seas : General Régime) of the Geneva Conference on the kind of instrument required to embody the results of the Committee's work *(4 United Nations Conference on the Law of the Sea,* at 102-106), as well as in the plenary meeting, *2 United Nations Conference on the Law of the Sea,* at 24-28.

(22) *2 United Nations Conference on the Law of the Sea,* at 21.

(23) Only four delegations questioned the advisability of the provision, and, finally, it was only Turkey which remained a staunch opponent to its adoption. See the explanation of vote given by Lütem, the delegate from Turkey in the Second Committee, after the adoption of Article 35 (finally Article 11 of the Geneva Convention on the High Seas), *4 United Nations Conference on the Law of the Sea,* at 77.

flag State competence, and — a detail of some significance — no proposal aiming at a change of the rule seems to have been made during the Third United Nations Conference on the Law of the Sea. It would be, therefore, a strong case to suggest that States have regarded the rule here in question as satisfactory for cases falling under its purview, and apparently they have complied with it as a matter of legal obligation rather than comity. In other words, the rule would belong to that category of new rules about which Sir Gerald Fitzmaurice expressed the opinion that,

> if they prove their worth in practice, as applied by and between the parties to the treaty, and are also of a character suitable for wider application, they may come to be accepted and to pass into the general *corpus* of international law — they then acquire the status of general rules of law, instead of mere treaty rules binding only on the parties to the treaty, and as such, are, or become, binding on all other States, even though not parties to the treaty (24).

One could, therefore, conclude that Italy and Greece are bound to apply between them the rule granting to the flag State competence in cases of collision or of any other incident of navigation concerning a ship on the high seas, that had originally been prescribed in Article 1 of the Brussels Convention and Article 11 of the Geneva Convention, although Italy is a third party to the former and Greece is a third party to the latter convention.

(24) *2 Y.B. Int'l L. Comm'n* 95 (1960). The viewpoint of Sir Gerald Fitzmaurice appears to be very close to the stand taken by the International Court of Justice, which, according to Edvard Hambro — its former Registrar — « has given its sanction to the theory that multilateral treaties under certain circumstances can create universal international law, or rather — in a more limited way — has shown itself not willing to accept the proposition that general treaties exclusively regard the signatory States » [« The Interpretation of Multilateral Treaties by the International Court of Justice », *Grotius Transactions,* 235, 237 (1953)]. One could add that, during the eleventh plenary meeting of the Geneva Conference, Professor Tunkin, the delegate from the Soviet Union, had observed that « a convention would produce effects even outside the group States parties, for it would come to be regarded as a source of international law *(2 United Nations Conference on the Law of the Sea,* at 26), and that remark referred primarily to the Convention on the High Seas.