COMMUNICATIONS

21 April 1980

The Editor
Israel Law Review
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Sir,

I presume that on p. 133, line 13, of the January 1980 issue of the *Israel Law Review*, the word "justifiable" is a misprint for "justiciable". In the context this is a typographical error with potentially disastrous consequences.

I would like to take this opportunity to break my self-imposed rule of silence regarding contemporary international law issues of concern to Israel, and refer to the sentence on page 132 of the same Note, reading: "It has long been the position of the Israeli courts that, whereas a declaratory treaty is enforceable in the local courts, a constitutive treaty, unless it has been specifically enacted into law by the Knesset is enforceable only on the international level."

Such an idea has no basis in modern public international law nor, so far as I am aware, in that part of the theory of international law which deals with the relationship between international law, whether conventional or customary, and domestic law.

As far as international law is concerned, the International Law Commission, in its prolonged work on the law of treaties (from 1950 until 1966) ultimately reached the conclusion that it was neither possible as a practical matter, nor necessary, to develop any sophisticated concepts of the classification of treaties, beyond the purely formal distinction between bilateral and multilateral treaties. The Vienna Conference on the Law of Treaties (1968, 1969) made no change in this. I do not know what is meant by the adjectives "declaratory" and "constitutive" in the sentence previously quoted, and I fail to understand why the Fourth Hague Convention of 1907—incidentally, neither Israel nor any one of the Arab States is a party to that Convention—should be given one classification and the Geneva Convention of 1949 given another. Indeed, the third sentence of the preamble of the Fourth Hague Convention mentions specifically the object as being "to revise the general laws and customs of war", hardly the language of a convention conceived by its draftsmen as one "codifying"

or "declaring" existing customary law, while the preamble to the Fourth Geneva Convention of 1949 gives no ideological or teleological justification and simply states that the parties agreed on the following terms "for the purpose of establishing a Convention for the Protection of Civilians in time of War."

Two articles of the Vienna Convention on the Law of Treaties of 23 May 1969 deal with the problem, as one of international law, and indicate with some finesse what is really involved.

In article 38, which concludes Part III (Observance, application and interpretation of treaties), section 4 (Treaties and third States), it is stated:

> *Rules in a Treaty becoming binding on third States through internaitonal custom*
>
> Nothing in articles 34 to 37 [the substantive articles on treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

In article 43 in Part V (Invalidity, termination and suspension of the operation of Treaties), section 1 (General provisions), it is stated:

> *Obligations imposed by international law independently of a treaty*
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> The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, ... shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Those two provisions have in common, that a rule contained in a treaty cannot *as such* be binding on a State which is not a party to that treaty—and no classification of treaties is necessary here—but that if that rule *also* exists independently of the treaty, as a rule of customary international law, a State which is not a party to that treaty may nevertheless be bound by the customary rule. Subtle though this distinction may be, it is fundamental, and any attempts to blur it must be resisted.

In this connection, one further observation may be made. Although the Statute of the International Law Commission (Article 15) purports to make a formal distinction between the codification and the progressive development of international law in the language of Article 13 of the Charter of the United Nations, long experience has shown that as a practical matter this distinction cannot be sustained. Accordingly, it is the normal practice

of the Commission to include in its final drafts a statement to the effect that its work on a given topic constitutes both codification and progressive development in the sense in which those concepts are defined in the Commission's Statute, but that *it is not practicable to determine into which category each provision falls* (emphasis supplied). That double formula is today usually picked up in an appropriate form in the preamble of conventions drawn up on the basis of preparatory work submitted by the International Law Commission. The same technique has recently been followed in the draft preamble adopted unofficially by the Third United Nations Conference on the Law of the Sea for the new Convention on the Law of the Sea, which it is hoped will be ready for adoption early in 1981 (U.N. document A/CONF. 62/L.49). The consequence is, that it is left to the interpreter—including any international or national court required to interpret and apply such a provision—to determing the nature, as codification or progressive development, of any individual provision of such a treaty.

A fortiori this approach must be adopted when one is dealing with a treaty drawn up in the beginning of the present century, when the problems and the techniques of the codification of international law were imperfectly understood.

In the light of this varied and accumulated international experience, he would be a rash international lawyer who would assert without thorough examination of all the antecedents and applying established international techniques (including the techniques of the intertemporal law), that a rule embodied in any international treaty is binding on a State which is not a party to that treaty as a rule of customary international law; and even less can it be said with confidence that any treaty *as a whole* is binding upon a State which is not a party to it, as a rule of customary international law.

I am aware that the International Military Tribunal for the Trial of Major Nazi War Criminals (the Nuremberg Tribunal) in 1946 did state in its judgment that by 1939 the rules laid down in the Hague Convention were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war referred to in the London Charter by which that Tribunal was established and which defined its jurisdiction. I would add that the Italian courts—Italy not having ratified the Hague Convention—have also regularly since the Second World War followed that precept. However, close inspection of the Nuremberg *dictum* discloses several factors. The *dictum* was not an *ex cathedra* pronouncement by the Tribunal, but its response to very specific contentions by the defence, based on the *si omnes* clause appearing in all the Hague Conventions (to which Germany and the major Allies were all parties), as to the correct interpretation of the London Charter. In this connection, it is noteworthy

that in 1949 the International Court of Justice, in the *Corfu Channel* case (merits), did not accept an analogous British submission based on the eighth Hague Convention of 1907 relative to the laying of automatic submarine contact mines (to which apparently neither Albania nor Greece were parties), and based Albanian responsibility on an independent source of law (International Court of Justice, *Reports*, 1949, 4 at 22). Furthermore, the apparent generality of the Nuremberg *dictum* is considerably restricted when it is noted that both the indictment and the defence, again based exclusively on the London Charter, referred to four out of the 56 articles of the Regulations annexed to the Fourth Hague Convention. That *dictum*, in the bald form in which it was enunciated, is hardly authority for the proposition that every provision of that Convention is *ipso facto* binding on every State as a rule of customary international law in force today, regardless of whether that State is a party to the Convention.

My criticism of the quoted statement taken from the Note under discussion relates only to the excessively wide reasoning which, in my perception, goes far beyond anything necessary to decide the relevant points at issue, and which may lead to most unsatisfactory and surprising developments in other contexts unless it is severely circumscribed if not abandoned entirely. I would have nothing to say on this score had in the Israeli cases the relevant articles of the Hague Convention been properly examined in accordance with established international law techniques, to reach the conclusion that the rules embodied in given articles were binding on Israel, as a third State, as customary rules of international law, recognized as such, and in force today, some 73 years after they were drawn up.

Yours truly,
*Shabtai Rosenne**

S. Goldstein and D. Schottenfels:

The word "justifiable" is indeed a misprint for which we are sorry and which is corrected in the errata accompanying this issue. As to the substantive points made by Mr. Rosenne, it would appear that they are not directed at the accuracy of our reporting of the decision of the High Court of Justice in the *Eilon Moreh* matter, but rather at the decision itself, or at least, at a portion of the court's analysis. Without expressing an opinion as to the substance of the matter, we wish to express our gratitude to Mr. Rosenne for his thoughtful remarks and our hope that our summaries of Israeli legal developments will continue to stimulate such responses.

* Advocate, Member, Institute of International Law; Honorary Member, American Society of International Law; Member of the International Law Commission, 1962–1971.