The Scope of the Territorial Application of Treaties

Comments on Art. 25 of the ILC's 1966 Draft Articles on the Law of Treaties

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The wording of the draft of Art. 25 reads as follows: "Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party" [1]).

1. The general importance of the provision

The treaties concluded after the Second World War are illustrative of the importance of the territorial application of treaties in State practice. Only a certain approach to objective figures can be presented here, due to overlapping treaty provisions and to the occasionally unclear formulations. However, this approach endeavours to present a precise picture [2]).

Nearly 650 treaties out of about 9100 bilateral agreements registered with the UN contain a clause delimiting, *expressis verbis*, the territorial application of treaty provisions (territorial clause). About 130 of the treaties deal with the extension of treaty provisions to dependent territories (colonial clause) and about 60 relate to so-called Berlin-clause.

This survey suggests that the express inclusion of provisions dealing with the territorial application of treaties is not at all the normal situation, on the contrary, it seems to be the exception. There are, of course, treaties for which the question of territorial application is irrelevant due to their object and

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1) UN Doc.: General Assembly, Official Records, Twenty-first session, supplement No. 9 (A/6309/Rev. 1), pp. 44/45; a special citation of the commentary of the authors, which is also published in this document, will not be given in this paper; hereafter it will be only cited as: Commentary *ibid.*

2) The following figures are the results of a research based on a collection of International Treaties (on punched cards), prepared in the Max-Planck-Institute for Comparative Public Law and International Law by O. Steiner and A. Maier.

purpose, *e. g.* treaties obviously creating only rights and obligations with regard to the principle of personality (as, for instance, generally recognized human rights) or treaties, where the territorial connection in view of their object and purpose is so evident that an express and special geographical delimitation is unnecessary[3]). Nevertheless, there are a great number of treaties which do not contain any provisions on the territorial application and which do not fall within the special categories above. With respect to these treaties, it is uncertain whether or not the execution of the treaty is limited in its territorial scope. Thus the attempt in art. 25 to provide more clarity in the codification of the law of treaties seems in principle to be justified. This endeavour continues the trends in former draft codifications[4]) with regard to questions connected with the problem of moving treaty borders[5]).

2. *The present law and the ILC draft*

The authors of the draft emphasized that their intention was only to codify an already existing general rule. According to their opinion, in the present law a presumption already exists to the effect that, in the case where there is no relevant indication in the stipulations, every treaty should be applicable to the entire territory of the States concerned. This position seems, in fact, to be the generally accepted rule[6]).

However, this codified general rule raises certain problems; in the first place this rule is not always clearly applicable. Therefore, in many cases both the territorial clause and the colonial clause would seem to be necessary. Thus it could well be assumed that the aim of the authors should have been to define the rule more precisely than is the case under the existing law. Such an intention did not succeed, however, because some members of the ILC as well as certain representatives of States refused to accept the scope of sovereignty, either generally (jurisdiction) or particularly (dependent

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[3]) The same view is expressed in the Commentary *ibid.*, No. 1; see also the respective debate in the Commission referring particularly to these considerations (Yearbook of the International Law Commission [YBILC] 1964, vol. I, p. 167 *et seq.*).

[4]) Fiore's Draft Code. From Fiore's International Law Codified. 5th ed. (1918), The American Journal of International Law (AJIL), vol. 29 (1935) Supplement, p. 1212 *et seq.*, section 775: "International Conventions must, in principle, be considered as having effect over all the territory of the state and be regarded as extending actively and passively to all its dependencies . . .".

[5]) Harvard Research in International Law. Law of Treaties, AJIL vol. 29 (1935) Supplement, p. 662, art. 26 (Effect of Territorial Changes); see also Convention on Treaties. Adopted by the International Conference of American States of Havana, February 20, 1928, AJIL vol. 29 (1935) Supplement, p. 1205 *et seq.*, Art. 11.

[6]) See *e. g.* Ch. Rousseau, Droit International Public (1953), p. 44 *et seq.*; G. Dahm, Völkerrecht, vol. 3 (1961), p. 109.

territories), as the real delimitation for the territorial application of treaties since they felt that all references to the colonial clause should be avoided [7]).

In the second place a problem arises with regard to the principle of moving treaty borders. This principle, despite difficulties of definition and despite many uncertainties, may be considered as a general rule of existing international law. However, it is neither expressed in the wording of the draft nor can it be conclusively discovered by means of interpretation. On the other hand, the wording of art. 25 does not exclude the application of the principle. In any case, it would be better, in this respect as well, if a clear answer could be found in this article.

3. Subsidiarity

The principle that the application of the treaty is extended to the entire territory of the States operates under the condition that the treaty itself, *i. e.* the will of the parties expressed by the treaty, has not provided for any other rule and that the intention of the parties to deviate from the principle cannot otherwise be made evident. ("Unless a different intention appears from the treaty or is otherwise established . . .").

The first condition corresponds to the general principle which gives the parties the right to decide freely on treaty contents. It is not necessary in this connection to mention the rule that this freedom is limited by the principle of *ius cogens*. The present formulation is well chosen, since it makes relevant in this context both the party will enunciated *expressis verbis* in the treaty and the intention of the parties as clarified by interpretation.

The second condition (". . . or is otherwise established . . .") is not so easily understood. The question arises what other grounds – beyond the party will as expressed in the treaty – could also create a deviation from the rule of territoriality [8]). In cases where such a deviation does not become immediately evident from the treaty itself but can only be concluded from the *travaux préparatoires*, the problem becomes one of interpretation of the treaty [9]). The rationale of this formulation can therefore only be discerned in the situation where a further agreement of the parties reached outside the treaty in question, *e. g.* by a conclusion of a new treaty, creates this deviation [9a]). In this connection it might be well to repeat that also in this respect

[7]) See Commentary *ibid.*, No. 3, where it is indicated that the wording "all the territory or territories for which the parties are internationally responsible" as it is sometimes used, could remind one of the suspect colonial clause.

[8]) For the above reason this clause has met with the opposition of the ILC, see YBILC 1964, vol. I (A/CN. 4/Ser. A/1964), p. 167 *et seq.*

[9]) For a similar opinion see Sir Humphrey Waldock, YBILC 1964, *ibid.*, p. 235.

[9a]) See, however, the contribution of V. Haak, *infra* p. 540.

ius cogens is always a limitation on the freedom to stipulate, even without an express indication to this effect[10]).

Nevertheless *ius cogens* cannot be the motive for this formulation since it deals only with the "intention" of the parties. If in a further treaty either a delimitation or an extension of the territorial application of the treaty concerned is foreseen, then the wording "otherwise established" seems to be meaningful in a certain sense. However, this formulation might still be misleading, since an opportunity would be given to a party to the treaty to try to find further reasons for a deviation, *e. g.* reasons which by themselves would not be justified but could nevertheless be raised in connection with the above formulation as an argument against the application. A party, for instance, could claim that it was bound by a treaty concluded with a third State. This legal situation was certainly not envisaged in the formulation "otherwise established" because according to the general principles of treaty law it cannot be assumed that the "intention" of only one of the parties concerned could be decisive. Although such a legal situation is clear enough, the possibility that similar arguments might in this situation be raised should be excluded. If, however, in another treaty concluded between the same parties, there is a stipulation referring to the territorial application of the first treaty, nothing can be said against such an arrangement; on the contrary, it has full legal binding force.

Therefore, one could propose the following wording for art. 25: "Unless a different intention appears from the treaty or from other agreements between the parties concerned . . .". There could be an objection to this wording, however, that the second treaty constituted in this respect a modification of the first one and, consequently, the first treaty received another content. In such a case, the general reference to the first treaty would seem to be sufficient. The weak point of this construction is, however, that the alteration by this new treaty is not apparent in the wording of the first treaty. In the face of this manifold lack of clarity and taking into consideration that in the last analysis the will of the parties has to come into play at all times, it would have been simpler to formulate the sentence as follows: "Unless a different intention of the parties concerned is established . . .".

4. The notion of "territory"

This notion has also been used in other draft codifications to qualify the spatial application of treaties[11]). Among the members of the ILC there

[10]) Therefore it was unnecessary to refer to "general principles of common law" in Fiore's Draft Code, *ibid.*, cif. 775.

[11]) See *e. g.* Fiore's Draft Code *ibid.*, para. 775.

was no doubt that this notion comprised not only the territory in its strict and limited sense, but also the whole area included in the sovereign power of States [12]). Consequently, the territorial sea as well as the air space are also included therein. The fact that the relevant formulation is not precise does not happen to be of great importance since its correct interpretation is not likely to become controversial.

What is more difficult is the interpretation and the application of the notion "territory" to areas in which limited sovereign rights are exercised by a party. In this connection reference should be made to the continental shelf, condominions, occupied zones and similar regions. From the point of view of legal policy, it could be justified either to include these areas or to accept their inclusion only if it was expressly stipulated. Naturally, the application of the treaty would be in any case effective only to the extent of the substantial sovereign rights. However, the present formulation gives no answer to the question whether this inclusion was intended or not. In that way the formulation remains obscure. Not even the wording "entire territory" solves this problem, since this was only meant to clarify that national territory is to be understood as a whole and not only partially nor even as comprising areas beyond the sovereign power of the parties [13]). This last point will be discussed later on in connection with the problem of moving treaty borders. The question dealing with the actual boundaries as determined by state jurisdiction is not sufficiently answered by the draft. In case the international extension of sovereign competences is recognized as being decisive – which seems to be the right course, it would have been better to accept a formulation similar to that of Ch. Rousseau which reads as follows: «Il y a coïncidence exacte entre la sphère d'application spatiale du traité et l'étendue territoriale soumise à la souveraineté» [14]). The real reason why the authors of the draft avoided such an extensive formulation was the fear that it could be confused with the suspect colonial clause [15]).

5. The "entire" territory

The meaning of this term is also not very clear [16]). As has already been mentioned above, the obvious meaning is that, when no other intention

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[12]) Commentary *ibid.*, No. 3.
[13]) Commentary *ibid.*, No. 3.
[14]) Ch. Rousseau, Principes généraux, vol. I (1944), p. 379.
[15]) Commentary *ibid.*, No. 3.
[16]) Rosenne (Israel) asked the ILC for an explanation of this formulation, which he considered incomprehensible (YBILC, 1964, vol. I, *ibid.*, p. 233).

of the parties can be discovered, the treaty does not extend only to parts of the territory of the parties concerned. The members of the ILC preferred the formulation "entire territory" to the wording: "all the territory or territories for which the parties are internationally responsible". For, the latter formulation could again remind one of the colonial clause [17]). They took the position that it was their task to rule the "normal situation" taking into account that colonies had almost disappeared [18]). Since the possibility cannot be excluded that even in the future "dependent territories" will exist and perhaps will have to exist under certain circumstances – for instance, territories which are temporarily under foreign sovereignty, a formulation also proposed during the ILC conferences and reading "territory under the jurisdiction of the State concerned" would seem to be preferable [19]).

The decision as to what formulation should be given preference finally depends only upon the consideration whether dependent territories should be included or not [20]).

In either case regardless of the formulation adopted, it should be clear enough to eliminate all doubts. However, if the treaty is extended to all territories under the jurisdiction of a party – that means the inclusion of dependent territories, then it should be noted that such extension does not imply the recognition of an annexation. For example, in the practice of the Senate of the USA the "territorial" effect of a treaty is seen as extending to all territories which are "controlled and administered" by the parties, but this position is not viewed as amounting to a recognition of the legality of this control [21]). What seems to be at least recommendable is to give the draft more precision with regard to the notion of "entire territory" with the view towards reinforcing legal security.

6. The principle of moving treaty borders

The draft gives no answer as to the legal situation created when, in the course of the application of a treaty, a change occurs in the national bound-

[17]) Commentary *ibid.*, No. 3.

[18]) El-Erian (UAR), YBILC 1964, vol. I, p. 46.

[19]) El-Erian, *loc. cit.*

[20]) According to the generally accepted view an automatic extension of the application of treaties to "dependent territories" does not exist and, especially for this reason, the colonial clause was introduced, see Ch. Rousseau, *op. cit.*, p. 379 *et seq.*; see also Schücking-Wehberg, Die Satzung des Völkerbundes, 2nd ed., p. 692; J. Huber, Le droit de conclure des traités internationaux (1951), p. 28; de Muralt, The problem of State succession with regard to territories (1954), p. 51 *et seq.*

[21]) D. P. Myers, Contemporary Practice of the United States relating to International Law, AJIL vol. 53 (1959), p. 899 *et seq.*

aries of a State. The formulation might lead to the conclusion that only the territorial boundaries at the time of the conclusion of the treaty are to be considered. On the other hand, the formulation does not prevent the consideration of any change of boundaries during the course of the treaty.

The generally accepted principle declares that during the course of the treaty the application refers at every moment to the given extension of the territory; *i. e.* territorial changes also alter the "treaty borders" [22]). This legal consequence might in certain cases result from the interpretation of the treaty itself [23]); under such circumstances the formulation of the ILC draft would suffice. Nevertheless, the formulation is also meant to clarify cases in which the interpretation of the treaty is without success.

It could be argued that reference to the principle of moving treaty borders would not be necessary in the draft since this principle is already generally recognized [24]). This argument nevertheless remains doubtful, because the whole question of State succession was deliberately excluded from the draft, which exclusion might indicate that on the contrary the principle of moving treaty borders was not meant to be included in the draft [25]).

In cases of a diminuation of the national territory, the problem would not become important, at least not if the State concerned remains a subject of international law; such diminuation could assume a certain importance only if the party concerned could argue that the execution of the treaty had become impossible. In contrast thereto, the increase of the national territory would lead to many uncertainties. An extension of the treaty to the new parts of the territory might result from the principle of moving treaty borders, but, on the other hand, such an extension might not be included within the scope of the draft because it excludes the question of State succession.

Former drafts have solved this problem [26]). In the "Law of Treaties"

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[22]) See K. Marek, Vertragsgrenzen, Grundsatz der beweglichen, Wörterbuch des Völkerrechts, vol. 3 (1962), p. 553 *et seq.;* G. Dahm, Völkerrecht, vol. 3 (1961), p. 109; Lord McNair, Law of Treaties (1961), p. 633 *et seq.;* F. Berber, Lehrbuch des Völkerrechts, vol. I (1960), p. 253.

[23]) D. P. O'Connell, International Law, vol. I, p. 435 *et seq.*

[24]) The Government of the Federal Republic of Germany has also approved this principle, see H. Alexy, Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1958, ZaöRV vol. 20, p. 666; W. Morvay, Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1959, ZaöRV vol. 21, p. 281.

[25]) See art. 69 of the draft: "The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State".

[26]) Special regulations as to the application of treaties in cases of territorial changes are contained in: Convention on Treaties, adopted by the Sixth International Conference of American States of Havana, *loc. cit.,* art. 11; Fiore's Draft Code, *ibid.,* para. 777.

of the "Harvard Research in International Law" [27]) the following proposition is made: "A change in the territorial domain of State, whether by addition or loss of territory, does not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change". Whether this particular formulation or another with similar meaning should be adopted need not be decided here. In any case, however, the draft should be completed in this respect.

A more convenient wording of art. 25 – not withstanding the above mentioned problem of moving treaty borders – might perhaps read as follows: "Unless a different intention of the parties is established, the application of a treaty extends to the entire territory under the jurisdiction of the parties concerned". Of course, this obligation is always limited by the scope of the international competence of the parties. Furthermore, it must be considered whether the above indicated effect of the territorial changes, as proposed by the "Harvard Research on International Law", should be adopted.

The ILC had considered whether or not the agreed formulation could lead to the assumption that all extraterritorial effects of treaties were excluded [28]). The will of the parties being the final decisive factor and the regulation being, as a whole, a subsiduary factor, such an interpretation could not be seriously supported. This was also the view of the majority of the members of the ILC.

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[27]) *Ibid.*, art. 26.

[28]) Commentary *ibid.*, No. 5.