جامعة عين شمس
كلية الحقوق

المعاهدات غير المتكافئة
فى القانون الدولى

رسالة مقدمة لنيل درجة الدكتوراه فى الحقوق

باشراف

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بسم الله الرحمن الرحيم

الحمد لله الذى هدانا لهذا وما كنا
لنهتدى لولا أن هدانا الله

صدق الله العظيم

إهـــداء

الى . . . .

والـدای

شـــكر وتقـدير

يشرفني أن أسـجل جزيل الثنـــاء وأعظـم التقدير وخالص العـرفان **لاستاذنا الدكتور عبد العزيز محمد سرحان** على ما بذله من جهـــد وافر ورعاية كريمة بالتوجيـه والنصح والتشجيع أثنـــاء اعـدادى لهذه الرسالة ٠

وأود الاشـارة الى أن سيادته له الفضـــل الأول فى تعليمى وزملائى ، أثنـــاء دراستنا فى دبلومى القانون العـام والقانون الـــدولى ، أسس البحث العلمى من جـــدية فى العمل ، وعمق فى البحث ، ودقة فى التحليل ، وأمـانة فى العرض ٠

وعظيم الشـكر والتقـدير **لاستاذنا الدكتور محمد حافظ غانم** الـــذى تفضـــل برئاسة لجنة الحكم على الرسالة ٠ ويعتبر هـــذا تتويج لافضاله ، فقـــد علمنى مبـادىء القانون الدولى العام ، ونصحنى ورفقائى ، فى نهـــاية سلسلة دروس مادة العلاقات الدولية العربية لطلبة الليسانس آنذاك ، بضرورة الاستمرار فى تحصـــيل العلم ، وأن نجعل من تخرجنـا بـداية الدراســـة لا نهايتها ٠

وجزيـل الشـــكر والتقدير **للاســـتاذه الدكتورة عائشـــة راتب** التى شرفتنى بقبولها الاشتراك فى لجنـــة الحكم على الرسالة ٠

وأعبر عن شكرى للســـادة العاملين بالمكتبات القانونية فى جمهورية مصر العربية خاصـــة العاملين بمكتبة كليـة حقوق جامعة عين شمس ، ومكتبة الجمعية المصرية للقانون الدولى ٠ وأيضـــا العاملين فى مكتبة جامعـة نيروبى ومكتبة مدرسة القانون بجامعـــة استكهلم وذلك عما قدموه من معاونة أثنـــاء جمع المـــادة العلمية للرسالة ٠

وعرفانى بالجميل لوالدى اللذين لم يدخرا جهـــدا لتمهيد سبيل العلم أمـــامى ٠

وخالص شكرى وتقديرى للســـيدة زوجتى عما بذلته لتهيئة المنـــاخ الملائم أثناء تحضيرى للرسالة ٠

بسم الله الرحمن الرحيم

مقدمـــة

أولا : اهمية المعاهدات الدولية :

فى جميع عصور تطور القانون الدولى العام كانت المعاهـدات تلعب دورا فعالا فى خلق القاعدة القانونية الدولية ، ومنذ نشوء المجتمع الـــدولى ، حيث كان يتحتم ابرام معاهدات الصلح ، أو عندما كان الأمر يستلزم تحديد الحدود الفاصلة بين جماعتين أو أكثر من الجماعات التى يتكون منها المجتمع ،أو عندما كان الأمر يستلزم انضمام جهود جماعتين أو أكثر من أجل الدفاع عن كيانهـا المشترك ، أو من أجل قهر عدو مشترك (١) ٠

واكتسبت المعاهدات الدولية ، فى الحقبة الحالية من تاريخ العلاقات الدولية ، أهمية متزايدة فى النظام القانونى الدولى ، وهذ حقيقة لايوجد شك حيالها فى الفقه والقضاء الدوليين وأكدتها الممارسة العملية للدول ٠

وتتضح هذه الاهمية عند مقارنة التطور الذى مرت به المجتمعات الانسانية فى مجال القانون الداخلى ، وماتم فى مجال القانون الدولى ٠ فقد بلغت المجتمعات الداخلية درجة م ن النمو بحيث يوجد بنظامها القانونى سلطات ثلاث تهيمن على تنظيم العلاقات بين الأفراد الخاضعين له ٠

والسلطة الأولى هى التشريعية التى تقوم باصدار القوانين ، ويعهـــد للسلطة التنفيذية بتطبيقها ، أما السلطة القضائية فتختص بالفصل فيما ينشأ عن تطبيق هذه القوانين من منازعات ، وقراراتها فى هذا الشأن ملزمة ٠ولذلك يمكن القول بأن القانون الداخلى قانون فوق الأفراد تضعه السلطة صاحبـــة السيادة فى الدولة ويخضع له المخاطبون بأحكامه (٢)

أما فى الجماعة الدولية فلا يوجد بين أعضائها حاكم ومحكوم ، اذ يتساوى اعضاء هذه الجماعة بعضهم مع بعض ، ولا تهيمن عليهم سلطة مشتركة ، لذلك

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(١) أنظر أستاذنا د ٠عبد العزيز سرحان ،القانون الدولى العام (القاهرة ـ دار النهضة العربية ـ ١٩٧٣) ، ص ٨٥

(٢) أنظر د ٠ محمود سامى جنينه، القانون الدولى العام الطبعة الثانيـــة (القاهرة مطبعة لجنة التأليف والترجمة والنشر ـ ١٩٣٨) ، ص ٢٧ ٠

الفهـرس

نبذة عن الرسالة

باللغة الانجليزية

ains manifest and de facto unequality, at the time of it's inception. between the obligations of parties concerning their sovereign rights. But it is necessary that the application of this article will be within the outline of our study.

We suggest for these States to grasp the opportunity of the second coming session of U.N. Conference on succession of States in respect of treaties to try to codify the idea of unequal treaties.

We hope that we participated in offering an acceptable solution to one of the most important problems of the law of treaties.

CHAPTER FOUR

THE LEGAL SYSTEM OF THE UNEQUAL TREATIES

In this chapter we represented the legal system of the unequal treaties. We devoted section one to the Juridical nature of treaties. We examined the different views about the application of private law principles in international law. We analysed and compared the relation between treaties and contracts to know the legal nature of the system which must control the international treaties.

We studied in section two the legal qualification of the unequal treaties. We considered the traditional theory and the new theory. We explained our theory for unequal treaties. We pointed out the concept of the theory it's requirement and it's effects.

We can summarize it by saying that a treaty which contains manifest and de facto unequality, at the time of the inception of the treaty, between the obligation of the parties concerning their sovereign rights should be regard in law as void ab initio. There are procedural requirement which had to be fulfilled by State claiming that a treaty was unequal treaty. We mean that the State suffering unequal treaty should invoke the rule of unequality before I.C.J. or to refer the issue to obligatory arbitration.

Unequal treaties should be regarded in law as void ab initio. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with other State.

We came to a conclusion that the developing States must coordinate their efforts to add a new article to the Vienna Convention on the Law of Treaties which stipulate : A treaty is void if it cont-

We concluded that the equality of States means the equality of legal capacity. This principle is a recognised rule of the positive international law and it is an inherent right of every State. We decided that the the privileges granted to the Great Power in the Charter of the United Nations do not impair the principle of legal equality due to the functional or delegated authority trusted to the Great Powers because they have a greater share than the others in running the organizations.

CHAPTER THREE

The Relations between the principle of Equality of States and Unequal Treaties

Due to our opinion that the rules of international law are not enough to produce an acceptable solution to the problem of unequal treaties, we suggest a legal theory by which we can achieve the nullty of unequal treaties. We expounded the principle of equality of States as a legal basis of the theory. In this subject we studied the sovereignty theory to clarify the sovereignty rights which are an important elements of our definition of unequal treaties. We concluded that it is normally that States possess independence and sovereignty over its subjects and its affairs, and within its territorial limits. We saw the developments of this principle which led to the idea that sovereignty has a much more restricted meaning today than in the eighteenth and nineteenth centuries. Therefore we said that sovereignty of State means, today, the practice of power which it possesses within the confines laid down by international law.

In section two we analysed the equality of States in the international doctrine. We showed the ideas of the opposing jurists. to the idea of equality of States. We expounded the efforts of the doctrine to clarify the concept of equality. In this connection we referred to the political unequality and the legal results of the principle of equality.

We devoted section three to study the equality of States in international practice wheather prior to and during the League of Nations and in the scope of the United Nations.

that these Article entitles the party to invoke doctrine for the revision of the treaty.

We pointed out the necessity that the change must occur in the conditions constituting an essential basis for the consent of the parties, and it is inevitable to note that the change must transform in an essential respect the character of the obligations of the parties undertaken in the treaty.

We emphasized that this doctrine does not solve the problem of unequal treaties. We came to conclusion that the rules of international law, in general, and Vienna Conventio on the Law of Treaties in particular, do not offer the legal solution to problem of unequal treaties.

We distinguished between two phases. The first one before the conclusion of the Vienna Convention on the Law of Treaties, We noticed that the court, in this phase, refused to accept any invoked claims before it about the theory. In this point we referred to corfu channel case, right of passage over Indian territory case and Anglo-Iranian Oil Co. Case.

But after the conclusion of the above mentioned Convention, we saw that the Court gave explicit recognition to the doctrine. In the fisheries jurisdiction case. The Court decided that International Law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.

In section three we showed clearly the stand of International law Commission and U.N. Conference on the law of Treaties towards the doctrine.

In our opinion this doctrine is an objective rule of law by which, on ground of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for revision of the treaty.

In section four we explained the relation between the unequal treaties and theory of changing conditions from theoretical point view or from practical point of view.

After all of these analyses, we have said that the doctrine of **Rebus Sic Stantibus**, aiming to give legal protection and to terminate a treaty when a set of conditions existing at the time of the conclusion of the treaty has changed according to Article 62 of Vienna Convention on the Law of Treaties, although our opinion

CHAPTER TWO

The Theory of Changing of Conditions in Vienna Convention

In this chapter we dealt with the views which consider that the theory of changing of conditions in international law is enough to solve the problem of unequal treaties. We tried to illustrate the concept of the theory in section one. A distinction has been made between the voluntary schools and the objective trends. We referred to the theory of tacit clause contractual which was of the view that the entry of the parties into treaty, considering that a certain state of conditions was an element in determining their will to bear the obligations, made the continued existence of that State of conditions, an implicit condition. If those conditions change the obligation would lapse. We showed the theory of the imposed implicit condition which supposes the existence of a general condition in every treaty that things must remain in the condition when the treaty was concluded regardless of whether this condition existed or not. We analysed the objective trends which recognised the existence of the clause Rebus Sic Stantibus as an external rule imposed on every treaty. We pointed out the natural law school which based the theory on natural law, justice, good faith and fundamental rights. We showed the social school which saw that the theory is derived from social exigencies.

In section two we referred to the stand of International jurisprudence towadrs the theory. We saw that the Permanent Court of International Justice turned down France's claim — in the free zones case — on the ground of the absence of the conditions motivating contract.

We dealt with the International Court of Justice.

violation of the principles of the Charter and it is not including any economic or political pressure.

We examined the relation between the unequal treaties and theory of coercion. We decided that unequality is an independent ground for invalidity of treaties which must be distinguished from the coercion. We mean that unequality is a defect in the treaty itself but coercion is a defect in consent to a treaty.

Principles of International law concerning Friendly Relations and cooperation among States.

We consider that these developments justify the conclusion that invalidity of threat or use of force is lex lata in international law of today. But we must take in consideration the three cases which we can not consider the use of force an illegal act according to the charter of U.N. These three cases are self-defence, collective security measures (enforcement action) and the enemy State Case.

In section two we showed the effect of coercion on the validity of treaties. A distinction has been made between the traditional theory and the new theory. The traditional theory was that the acts of coercion or threats applied to individuals with respect to their own persons or in their personal capacity in order to procure the signature, ratification, acceptance or approval of a treaty invalidate the consent so procured, but the validity of a treaty was not affected by the fact it had been brought about by the threat or use of force against a State. In the new theory both types of coercio invalidate the treaty conclude by such coercion.

We dealt with peace treaties. We concluded that we must distinguish between peace treaty imposed on an aggressor and that imposed on a victim. A peace treaty which is imposed by a victorious aggressor on a State which has been the victim of a war in violation of international law is invalid. A peace treaty which imposed on a vanquished aggressor is valid. But it is necessary that the conditions which are to be imposed upon such aggressor have been taken within certain measures against this aggressor by U.N.

In section three we illustrated the concept of coercion effective on the validity of treaties. We showed the different views in the question and concluded that it must be cleard that the expression "threat or use of force" referred only to physical or armed force in

PART TWO

The stand of International law towards The Unequal treaties

It was logical that we study the stand of International law towards the unequal treaties, to clarify if the existening rules of International law are sufficient to produce an acceptable solution to the problem of unequal treaties. **We examined two theories** which there are some jurists are convinced that these theories have the possibility to solve the problem of unequal treaties. We refer to the coercion theory and the theory of changing conditions.

CHAPTER ONE

Coercion theory in the Vienna Convention on The Law of Treaties

In section one of this chapter we examined the evolution of the validity of use of force in international relations. We tried to follow the international efforts to codify the principle that States shall refrain in their international relations from the threat, or use of force against the territorial integrity or political independence of any States. In this sphere we pointed out from these efforts the Covenant of the League of Nations which obliged the Member States to employ pacific means of settling disputes and not to resort to war without first exhausting those means, the Protocol of .Geneva for pacific settlement of disputes and the Pact of Paris.

We dealt with the Charter of the United Nations which gives a clear cut prohibition of the threat or use of force.

We expounded the attempts which had been done in the scope of U.N. to codify this principle, weather in the special committee for the defination of aggression or the special Committee of the

ed in the special Committee on Principles of International Law Concerning Friendly Relations and co-operation among States. We saw that the States who supported the idea of unequal treaties tried to codify it as exception from the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. We noticed that they did not succeed to achieve that object. We also analysed the discussion of I.L.C. on the subject and U.N. Conference on the Law of Treaties. We found that some views tried to solve the problem of the unequal treaties by adopting a new concept to coercion. That means in addition to the use of physical or armed force it includes economic or political pressure

Some tried to solve the problem by using the Article of "jus cogens" and they said that the examples given in this Article should include unequal treaties.

We examined some questions of U.N. Conference on Succession of States in respect of Treaties relating to our subject.

After we evaluated all of the above mentioned views and showed clearly our own idea in the subject, we reached the conclusion that International Conferences & International Organizations did not offer any uncriticizable defination for unequal treaties or any acceptable solution to the problem of unequal treaties.

CHAPTER FOUR

Unequal Treaties in the discussion and recommendations of international conferences and international Organizations

We examined the above mentioned discussion and recommendations to have a complete idea about the concept of unequal treaties. We showed clearly in section one the following international conferences :

1 — The conferences of **international parliamentary** Union in 1938 and **1949. The latter** adopted a resolution it's first part reads as follows "Considering that certain States have been led, either of their own accord or by force, to signe unequal treaties depriving their governments, to the advantage of other governments, of exercise of certain powers normally belonging to sovereign States, or showing an enormous disproportion between the obligations laid upon the contracting parties.

2 — Afro-Asian lawyers conference in 1957, which adopted a resolution leads to a clear definition to the unequal treaties. They were defined as treaties establishing gross inequality between the obligations of the parties.

3 — The sessions of Asian-African legal consultative committee, which approved the desire of the developing countries to adopt new rules in international law.

We devoted section two to international organizations. In it's introduction we expounded unequal treaties in the scope of the Pact of the League of Nations. We noticed that at that time there were some States which invoked the Article 19 of the Pact to modify or to revise treaties which they were convinced that they are of unequal character. After that we analysed all the views express-

5 — The Paris Conference on International Economic co-operation which was convened in an attempt to establish a forum for discussion involving a more limited number of countries to clarify the positions of the industrialized and the developing States.

6 — Manila declarition and programme of Action which was issued at the Third Ministerial Meeting of the Group of 77.

7 — The United Nations Conference on Trade and development (UNCTAD IV). It showed the determination of both developing and developed countries to maintain the dialogue started at the seventh special Session of the General Assembly. We studied two examples of unequal treaties in economic sphere : the treaty between China and Belgium in 1856 and the trade agreement between Cuba and U.S.S.R. in 1972.

In section three we discussed the unequality in territorial regimes treaties such as Panama Canal treaty which was signed in 1977.

CHAPTER THREE

Unequal treaties in international precedents

In section one we selected some treaties in political relations : Libya — British 1953, Egyptian — British 1954, Cyprus — British — Greek — Turkish 1960, France — Madagascar 1960 and Egyptian — Russian 1971.

We dealt with these treaties from the point of view of it's background, the analysis of its' provisions which we are convinced that they have unequal characteristics and how these treaties are abrogated.

In section two of this chapter we studied the unequality in economic relations, we analysed the international efforts to achieve the equality in international economic relations. In this connection we expounded the following :

1 — The sixth special session of the General Assembly of U.N. held in 1974. The majority of the member of the U.N. proclaimed, in their recommendations for this session, their united determination to work urgently for the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and co-operation among all States.

2 — Charter of Economic Rights and duties of States.

3 — Lima declaration and plan of action on industrial development and co-operation.

4 — The seventh special session of the General Assembly of U.N. which was rightly acclaimed on all sides as a victory for conciliation and a co-operatice view of the future.

Others said unequal treaties are those treaties that became un-equal due to the change of conditions, or those treaties which do not respect the pirnciple of sovereign equality of States.

We evaluated all these views and concluded that they are not beyond criticism. Therefore we suggested that unequal treaties are those which contain manifest and de facto unequality, at the time of the inception of the treaty, between the obligations of the contracting parties concerning their sovereign rights.

In section two, we tried to trace the critera which we can conclude from international jurisprudence. We analysed the cases which were submited to international tribunals, and which had some connections with our study, we dealt with the Sino-Belgian dispute (1926), Leticia dispute (1932-1935) and customs Regime between Germany and Austria (1931). We reached to the conclusion that the international jurisprudence has not yet the opportunity to represent it's opinion about the question, due to lack of precedents.

In section three we examined, in brief, the practice of States, in the question. We saw that the question did not invite much attention prior to the foundation of the League of Nations, and even since then it has been treated only occasionally and too causally.

We noticed that States started to arouse the subject, in a large scale, after the second world war, particularly in international organizations.

CHAPTER TWO

The Critera For Unequal Treaties

To show clearly the critera for unequal treaties we analysed, in section one, the doctrinal norms. We noticed that there are some lawyers who refused the idea of unequal treaties. They stated that as long as there was no general agreement of the content of the unequal treaties, a proportion of its dominion my be exercised through the rules concerning capacity of parties, duress, fundamental change of circumstances, and the effect of peremptory norms of general international law.

The other side of the doctrine believes that unequal treaties must be invalid although the lawyers of this side do not agree upon what an unequal treaty is. We have expouded our classification for the different trends. Some assumed that it's the treaty imposed by coercion by one of the contracting parties upon the other, we noticed that some of the lawyers who supported this trend said that it must be necessary that the expression "coercion" referred not only to physical or armed force but also to any economic or political pressure. Second group said that it is the treaty which the undertaken obligations are disproportionate. Therefore they stated that equal treaties those in which the parties are under the same obligation, which under an unequal treaties one contracting party is bound to concede more than the other, or even to recognise the superiority of the other. A third group gathered the above mentioned elements together saying that an unequal treaties are those in which States find themselves compelled to entre with more dominating States, treaties which only favour the stronger of the parties. Some decided that unequal treaties are a form of new colonialism, they expressed that unequal treaties as a weapon for keeping the New Afro-Asian States in colonial dependence.

good faith. We consider this principle one of rules of the positive international law and as an absolute rule of the law.

We dealt also, in section three, with the vast literature that the principle aroused in the discussions between States weather in the special Committee on principles of International law concerning Friendly Relations and co-operation among States or International Law Commission, or U.N. Conference on the law of Treaties.

PART ONE

THE CONCEPT OF UNEQUAL TREATIES

In part one we tried to clarify the concept of unequal treaties. To do so we had to illaborate on the principle of "Pacta Sunt Servanda", critera for unequal treaties, unequal treaties in internatio-nal precedents and unequal treaties in the discussions and recom-endations of international conferences and international organiza-tions.

CHAPTER ONE

THE PRINCIPLE OF "PACTA SUNT SERVANDA" IN INTERNATIONAL LAW

As introduction to this chapter we dealt with the doctrinal theories about the binding force of treaties, we showed the auto-limitation theory and the common will theory. In Section One we tried to clarify the concept of this principle which is the fundam-ental basis of the law of treaties. We expounded it's historical eva-lution, it's concept in international doctrine and international practice.

In section two we studied the various qualifications given for the juridical nature of the principle by different schools of law.

In our opinion this principle means that every valid treaty is binding upon the parties to it and must be performed by them in

to their own views and interests, we noticed that they are keen to extend international law with the rule according to which each State should be entitled to free itself from the obligations derived from unequal treaties concluded between them and Great powers and to avoid such obligations in the future.

Having regard that the lawyers and practice of developing States do not agree upon the Meening, dominion and the legal effect of unequal treaties, this was the task which we tried to fulfil in our study. We expounded the historical background since capitulations treaties weather concluded between western powers and Ottman Empire or China.

It was necessary to study the articles of Vienna Convention on the Law of Treaties, which in one way or other bear some connection with the subject in question, we analysed those articles about the grounds for invalidity of treaties (specific restrictions on authority to express the consent of the State, error, fraud, corruption of a representative, coercion of a representative of the State, coercion of a State by the threat or use of force, and treaties conflicting with a peremptory norm of general international law "jus cogens") and fundamental change of circumstances. We concluded that this convention was not sufficient to produce an acceptable solution to the problem of unequal treaties.

Research plan

We devoted part one of our study to the concept of unequal treaties, and in part two we have tried to analyse the stand of international law towards the unequal treaties.

Introduction

The importance of international treaties

Treaties are the main instruments which the international community possesses for the purpose of initiating or developing international co-operation. We illustrated the importance of international treaties and their role and evaluation in our contemporary international legal life. For this importance the I.L.C. at it's first session in 1949, placed the law of treaties amongest the topics listed as being suitable for codification. In 1966, the Commission adopted a report on the law of treaties. In submitting it's report to the General Assembly, the Commission recommended that the Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject. The Conference held in 1968 and 1969, and it adopted the Vienna Convention on the Law of Treaties on 23 May 1969. This Convention recognized the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations. We said that the rules of the law of treaties were to a large extent codified and reformulated in the above mentioned convention.

Having regard to the significance of treaties as a primary source of international Law, and having Regard equally to the range and complexity of the law of treaties it was our desire to choose one of the main problems of the law of treaties, that is the problem of unequal treaties as a subject to our study.

The outline of the Problem of Unequal Treaties

In our perusal to the role of the new States in the development of international law and their efforts to mouled the law according

UNEQUAL TREATIES IN INTERNATIONAL LAW

Summary of the Thesis

UNDER THE DIRECTION OF

PROFESSOR DR. ABDEL AZIZ MOHAMED SARHAN

presented from

ESSAM SADEK RAMADAN

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