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Fifth Report on the Law of Treaties (Treaties and Third States) by Sir Gerald Fitzmaurice Special Rapporteur

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Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur

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CONTENTS

	Paragraphs	*Page*
INTRODUCTION	1–9	72
I. Text of articles		
SECOND CHAPTER. THE EFFECTS OF TREATIES		
Part II. The effects of treaties in relation to third States		
Division A. Definitions and basic principles		
Article 1. Definition of a third State	1–5	75
Article 2. States as subjects and as objects of treaties	1–3	75
Article 3. *Pacta tertiis nec nocent nec prosunt*	1–2	75
Article 4. Apparent or quasi-exceptions or qualifications to the principle *pacta tertiis nec nocent nec prosunt*	1–3	76
Article 5. Principles underlying the cases in which treaties may have, or result in, effects *in detrimentum* or *in favorem tertiis*	1–2	76
Division B. Rights and obligations *inter se* of the parties to a treaty, in consequence of provisions relating to third States		
Article 6. The case of *pacta in detrimentum tertiis*	1–3	77
Article 7. The case of *pacta in favorem tertiis*		77
Division C. Position of third States in relation to the treaty		
Sub-division I. Presumptions and methods of classification		
Article 8. Presumptions	1–5	77
Article 9. Methods of classification	1–8	77
Sub-division II. Effects of treaties *in detrimentum* and *in favorem tertiis*		
Section 1. Effects *in detrimentum tertiis*		
Sub-section (i). Active or positive effects or consequences *in detrimentum tertiis* – Obligations which the third State may have under, or which may be similar or parallel to, those contained in, the treaty		
Rubric (*a*). *In detrimentum* effects brought about by the volition of the third State		
Sub-rubric (*a*) 1. Effects directly brought about by the third State		
Article 10. Position of a third State signatory of, but not yet a party to, a treaty, in regard to the formal clauses of the treaty, and, in particular, to participation by other States having a faculty of participation under the treaty	1–2	79
Article 11. Case of specific agreement by the third State with the parties to the treaty, or with one or some of them, or with another interested third State	1–2	79
Article 12. Case where the third State assumes obligations or liabilities, or accepts other effects *in detrimentum*, by means of a unilateral declaration	1–3	79
Sub-rubric (*a*) 2. *In detrimentum* effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty		
Article 13. Rule applicable in respect of all treaties	1–2	79
Article 14. Case of the use of maritime or land territory under a treaty or international régime	1–2	79
Rubric (*b*). *In detrimentum* effects brought about by operation of law		
Sub-rubric (*b*) 1. The third State in effect is, or becomes a party to, the treaty by operation of law		
Article 15. Cases of State succession, agency and protection		80
Sub-rubric (*b*) 2. The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law		

CONTENTS (*continued*)

	Paragraphs	Page
Article 16. Case of customary international law obligations mediated through the operation of law-making or norm-enunciating treaties	1–2	80
Sub-section (ii). Passive or negative effects or consequences *in detrimentum tertiis*—Obligations incumbent on the third State, not under, but in relation to the treaty		
Rubric (*a*). *In detrimentum* effects resulting from the application of the principle of respect for lawful and valid international acts		
Sub-rubric (*a*) 1. In the case of all lawful and valid treaties		
Article 17. General duty of all States to respect and not impede or interfere with the operation of lawful and valid treaties entered into between other States	1–2	80
Sub-rubric (*a*) 2. In the case of treaties embodying international régimes or settlements, or of a dispositive character		
Article 18. General duty of all States to recognize and respect situations of law or of fact established under lawful and valid treaties	1–3	80
Rubric (*b*). Effects incidentally unfavourable to a third State resulting automatically from the simple operation of a treaty		
Article 19. Duty of States to accept and tolerate the incidentally unfavourable effects of lawful and valid treaties		81
Section 2. Effects *in favorem tertiis*		
Sub-section (i). Active or positive effects or consequences *in favorem tertiis*—Rights which the third State may have under, or which may be similar or parallel to, those contained in the treaty		
Rubric (*a*). *In favorem* effects brought about by the act of the parties to the treaty alone, or of a single grantor		
Sub-rubric (*a*) 1. Act of the parties to the treaty		
Article 20. The *stipulation pour autrui*	1–4	81
Article 21. Treaty provisions removing or modifying a disability or prohibition previously existing for a third State		81
Sub-rubric (*a*) 2. Act of a single State		
Article 22. Unilateral declarations conferring rights on other States	1–2	81
Rubric (*b*). *In favorem* effects brought about with the participation of the third State itself		
Sub-rubric (*b*) 1. Effects directly brought about by the parties and the third State conjointly		
Article 23. Exercise by the third State of a faculty of participation in the treaty itself	1–3	82
Article 24. Case of separate agreement between all, or one or more of, the parties, and a third State, producing for the latter *in favorem* effects similar to those of the treaty	1–3	82
Sub-rubric (*b*) 2. *In favorem* effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with the provisions of, the treaty, by the third State with the consent, express or tacit, of the parties		
Article 25. Rule applicable in the case of all treaties	1–2	82
Article 26. Case of the use of maritime or land territory under a treaty or international régime	1–2	82
Rubric (*c*). *In favorem* effects brought about by operation of law		
Sub-rubric (*c*) 1. Because the third State in effect is or becomes a party to the treaty by operation of law		
Article 27. Cases of State succession, agency and protection		82
Sub-rubric (*c*) 2. *In favorem* effects consequential on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law		
Article 28. Case of customary international law rights mediated through the operation of law-making or norm-enunciating treaties		82
Sub-section (ii). Indirect or incidental effects or consequences *in favorem tertiis*—Effects not under but in relation to the treaty		
Article 29. *In favorem* effects resulting from the application of the principle of respect for lawful and valid international acts	1–3	83
Article 30. Effects incidentally favourable to a third State resulting automatically from the simple operation of a treaty		83
II. Commentary on the articles		
SECOND CHAPTER. THE EFFECTS OF TREATIES		
Part II. The effects of treaties in relation to third States		
Division A. Definitions and basic principles	1–23	83
Article 1. Definition of a third State	1–6	83

CONTENTS (*continued*)

	Paragraphs	Page
Article 2. States as subjects and as objects of treaties	7–9	84
Article 3. *Pacta tertiis nec nocent nec prosunt*	10–16	84
Article 4. Apparent or quasi-exceptions or qualifications to the principle *pacta tertiis nec nocent nec prosunt*	17–19	86
Article 5. Principles underlying the cases in which treaties may have, or result in, effects *in detrimentum* or *in favorem tertiis*	20–23	87
Division B. Rights and obligations *inter se* of the parties to a treaty in consequence of provisions relating to third States	24–30	87
Articles 6 and 7. Cases of *pacta in detrimentum* and *in favorem tertiis*, respectively	24–30	87
Division C. Position of third States in relation to the treaty	31–112	89
Sub-division I. Presumptions and methods of classification	31–38	89
Article 8. Presumptions	31–35	89
Article 9. Methods of classification	36–38	89
Sub-division II. Effects of treaties *in detrimentum* and *in favorem tertiis*	39–112	90
Section 1. Effects *in detrimentum tertiis*	39–81	90
Sub-section (i). Active or positive effects or consequences, *in detrimentum tertiis*—Obligations which the third State may acquire under, or which may be similar or parallel to, those contained in the treaty	39–62	90
Rubric (*a*). *In detrimentum* effects brought about by the volition of the third State	39–54	90
Sub-rubric (*a*) 1. Effects directly brought about by the third State	39–47	90
Article 10. Position of a third State signatory of, but not yet a party to, a treaty, in regard to the formal clauses of the treaty and, in particular, to participation by other States having a faculty of participation under the treaty	40–41	90
Article 11. Case of specific agreement by the third State with the parties to the treaty or with one or some of them, or with another interested third State	42–44	90
Article 12. Case where the third State assumes obligations or liabilities, or accepts other effects *in detrimentum*, by means of a unilateral declaration	45–47	91
Sub-rubric (*a*) 2: Effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty	48–54	91
Article 13. Rules applicable in respect of all treaties	48–49	91
Article 14. Case of the use of maritime or land territory under a treaty or international régime	50–54	92
Rubric (*b*). *In detrimentum* effects brought about by operation of law	54A–62	94
Sub-rubric (*b*) 1: The third State in effect is or becomes a party to the treaty by operation of law	54A–57	94
Article 15. Cases of State succession, agency and protection	54A–57	94
Sub-rubric (*b*) 2: The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law	58–62	94
Article 16. Case of customary international law obligations mediated through the operation of law-making or norm-enunciating treaties	58–62	94
Sub-section (ii). Passive or negative effects or consequences *in detrimentum tertiis*—Obligations incumbent on the third State, not under, but in relation to the treaty	63–81	96
Rubric (*a*). *In detrimentum* effects resulting from the application of the principle of respect for lawful and valid international acts	63–78	96
Sub-rubric (*a*) 1: In the case of all lawful and valid treaties	63–67	96
Article 17. General duty of all States to respect and not impede or interfere with lawful treaties entered into between other States	63–67	96
Sub-rubric (*a*) 2: In the case of treaties embodying international régimes or settlements or of a dispositive character	68–78	97
Article 18. General duty of all States to recognize and respect situations of law or of fact established under lawful and valid treaties	68–78	97
Rubric (*b*). Effects incidentally unfavourable to a third State resulting automatically from the simple operation of a treaty	79–81	100
Article 19. Duty of States to accept and tolerate the incidentally unfavourable effects of lawful and valid treaties	79–81	100
Section 2. Effects *in favorem tertiis*	82–112	102
Sub-section (i). Active or positive effects or consequences *in favorem tertiis*—Rights which the third State may have under, or which may be similar or parallel to, those contained in the treaty	82–107	102
Rubric (*a*). *In favorem* effects brought about by the act of the parties to the treaty alone, or of a single grantor	82–93	102
Sub-rubric (*a*) 1. Act of the parties to the treaty	82–91	102

CONTENTS (*continued*)

	Paragraphs	Page
Article 20. The *stipulation pour autrui*	82–90	102
Article 21. Treaty provisions removing or modifying a disability or prohibition previously existing for a third State	91	104
Sub-rubric (*a*) 2. Act of a single State	92–93	105
Article 22. Unilateral declarations conferring rights on other States	92–93	105
Rubric (*b*). *In favorem* effects brought about with the participation of the third State itself	94–105	105
Sub-rubric (*b*) 1. Effects directly brought about by the parties and the third State conjointly	94–101	105
Article 23. Exercise by the third State of a faculty of participation in the treaty itself by the third State	94–96	105
Article 24. Case of separate agreement between all, or one or more of, the parties, and a third State, producing for the latter *in favorem* effects similar to those of the treaty	97–101	105
Sub-rubric (*b*) 2. *In favorem* effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with, the provisions of, the treaty by the third State with the consent, express or tacit, of the parties	102–105	106
Article 25. Rule applicable in the case of all treaties	102–103	106
Article 26. Case of the use of maritime or land territory under a treaty or international régime	104–105	106
Rubric (*c*). *In favorem* effects brought about by operation of law	106–107	106
Sub-rubric (*c*) 1. Because the third State in effect is or becomes a party to the treaty by operation of law	106	106
Article 27. Cases of State succession, agency and protection	106	106
Sub-rubric (*c*) 2. *In favorem* effects consequent on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law	107	106
Article 28. Case of customary international law rights mediated through the operation of a law-making or norm-enunciating treaty	107	106
Sub-section (ii). Indirect or incidental effects or consequences *in favorem tertiis*—Effects not under but in relation to, the treaty	108–112	106
Article 29. *In favorem* effects resulting from the application of the principle of respect for lawful and valid international acts	108–111	106
Article 30. Effects incidentally favourable to a third State resulting automatically from the simple operation of a treaty	112	107

Introduction

1. In his fourth report (A/CN.4/120 of 17 March 1959),[1] the Special Rapporteur presented part I of a second chapter of a code on the law of treaties. The first chapter having dealt with the topic of the validity of treaties, formal, temporal and essential, under the heads respectively of the conclusion, the termination and the substantive validity of treaties,[2] the second chapter was to be devoted to the effects of treaties, with a third chapter to follow in due course, on the interpretation of treaties—the distinction between the topic of effects and that of interpretation being discussed in paragraphs 2 and 3 of the introduction to the fourth report referred to above. In the same introduction (para. 4), it was mentioned that the topic of the effects of treaties fell into two parts—effects as between the parties *inter se* (this is the ordinary subject of treaty operation, execution and enforcement), and effects for or in relation to third States. The first of these subjects was dealt with as part I of the second chapter in the Special Rapporteur's fourth report; and the second subject is covered as part II of this second chapter in the present (fifth) report.

2. The topic of the effects of treaties in relation to third States presents the codifier with the usual difficulties; but in this particular case it is not that the topic itself is intrinsically difficult, but that as a matter of theory and doctrine it is in an unsatisfactory state. The literature of the subject is extremely sparse, and, in what there is of it, little attempt is made to deal with the matter systematically.[3] Sir Ronald Roxburgh's *International Conventions and Third States*[4] remains after nearly forty-five years virtually the only full length monograph devoted exclusively to the subject; and, while assembling within the confines of one volume

[1] See *Yearbook of the International Law Commission*, 1959, vol. I (United Nations Publication, Sales No.: 59.V.1), p. 37.

[2] These topics are covered in the first, second and third reports by the Special Rapporteur. The first report is printed in *Yearbook of the International Law Commission*, 1956, vol. II (United Nations Publication, Sales No. 1956. V.3, Vol. II), pp. 104 ff.; the second in *ibid.*, 1957, vol. II (United Nations Publication, Sales No. 1957. V.5, Vol. II), pp. 16 ff.; and the third in *ibid.*, 1958, vol. II (United Nations Publication, Sales No. 1958.V.1.Vol.II), pp. 20 ff.

[3] Rousseau however is, as usual, an exception—see Charles Rousseau *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944), vol. 2, pp. 452–484.

[4] London, Longmans, Green & Co., 1917.

much useful material, is inevitably somewhat outdated now. No later edition has appeared.[5]

3. The central problem involved by this topic is that, in a certain sense, it contains only one absolutely firm and unequivocal principle, namely, that formulated in the maxim *pacta tertiis nec nocent nec prosunt*. Thus, for State A, a treaty concluded between States B and C is *res inter alios acta,* under or by virtue of which (if the treaty is considered in, and of, itself) State A can have neither rights nor obligations. But few authorities actually leave it at that. All or most[6] admit in varying degrees that in practice there are, if not strictly exceptions, at any rate qualifications; and that if the inroads they make on the integrity of the strict *pacta tertiis* principle are seen, on analysis, to be more apparent than real, still, in a number of cases, treaties do in fact have effects on, for, or in relation to third States which, even if often of a predominantly incidental or consequential character, give occasion for the play of legal elements. This is not surprising. It does not follow that because a third State has no obligations under the treaty concerned and is not obliged to carry out or comply with its provisions, it has no obligations at all in relation to the treaty, or that the treaty is wholly without legal effect for the third State. Any consideration of the subject makes it speedily apparent that neither of these is the case. It may be granted that save perhaps in one or two respects, there is no true exception to the *pacta tertiis* rule as such—that is to say, the apparent exceptions can mostly be accounted for on some independent legal basis that does not involve postulating that the third State is or becomes directly obliged or entitled by the treaty itself. All the same, these qualifications or quasi-exceptions, even if they can thus be accounted for, constitute in the aggregate a considerable gloss on the *pacta tertiis* rule; and, to stop simply at that rule, absolute though, in a sense, it really is, would be to give a very misleading picture of the position of third States in relation to treaties to which they are not parties. In short, there are a number of ways in which treaties do have legal effects on, for, or relative to, third States, even if directly obliging or entitling the third State under the treaty itself is not amongst them, and even if the latter remains in principle one of the effects that a treaty cannot have for a third State.

4. The next problem is to find some unifying legal principle, on the basis of which these quasi-exceptions and qualifications can be accounted for. Probably this cannot be done, because a number of different legal principles are involved. But that is no excuse for the wholly piecemeal and *ad hoc* treatment which the matter so often receives—particular cases or types of cases being cited (admittedly usually based on a fairly firm course of international practice) but without much, if any, attempt to discover or suggest the underlying principle of the apparent deviation. Thus, to give an example, it is often stated that treaties about international waterways form an exception to the rule that treaties cannot create rights or obligations for non-parties. But if so, there must or should be some underlying principle, on the basis of which this class of case constitutes an exception—if, strictly, it does. The present Special Rapporteur has discerned—or thinks he has discerned—three or four main principles, on the basis of which treaties can and do have effects for third States, or on the basis of which third States may have rights or obligations in relation to (though not under) the treaty, and without any violation of the *pacta tertiis* principle. Leading to rights or obligations, if not under, then by reason of (or similar or parallel to those contained in) the treaty, are the principles of active consent (as when a State, without becoming a party to the treaty itself, separately agrees to observe it); and consent presumed (as when rules embodied in a treaty gain general currency as customary rules of law to which all States can be deemed to consent). Another principle having a similar effect as regards the application of treaty provisions to or by third States, is that of the automatic entailment of rights and obligations. The exercise of rights under a treaty entails performance of the corresponding obligations. The discharge of obligations probably confers a claim to exercise the corresponding rights. Making use of the territory of another State, when the conditions of such use are governed by the provisions of a treaty, entails conformity with the conditions of user—and so on. Then, leading to rights and obligations in relation to the treaty, there is the principle of respect for lawful, valid or legitimate international acts. The due execution of lawful treaties ought not to be impeded by third States. If an area is demilitarized by treaty, States not parties to it ought, in general, to respect this. If a territory is transferred by treaty, third States not themselves possessing a valid claim to the territory ought to recognize and accept the transfer. Equally, a third State has no legal cause of complaint merely because a treaty operates unfavourably for it, if the treaty is lawful, and infringes no actual legal right of the third State.

5. All the specific cases cited in the books can, it is believed, be brought under one or other of these principles—or under some principle. It is, however, but seldom that any attempt is made to group them in orderly fashion on the basis of recognizable principles. The Special Rapporteur is far from wishing to suggest that he has himself solved all the problems involved. Indeed, he is very conscious that he has manifestly not done so; for it is not easy to give an adequately definite and satisfactory shape to this amorphous and rather protean topic. In a further report, the Special Rapporteur hopes, at a later stage, to improve considerably on his present treatment of the subject. He has, however, endeavoured to introduce some order into it, and to deal with the matter as fully and systematically as an initial consideration of it (which is all that this pretends to be) will permit. The heart of the

[5] If Sir Ronald Roxburgh, since 1946 a Judge of the High Court, London, were writing today, he might feel able to pronounce with greater certainty on a number of points than was possible in 1917.

[6] Georg Schwarzenberger seems to be one of the few modern writers who gets near to denying altogether that there can be any gloss on the strict *pacta tertiis* rule: see *International Law*, Vol. 1 *International Law as Applied by International Courts and Tribunals*: I, 3rd edition (London, Stevens, 1957), pp. 458 ff.

problem of treaties and third States seems to lie in three or four main questions, such as how far, if at all, can a treaty ever oblige a third State; the passive obligations of third States in relation to treaties; treaties as the source of international custom; how far, if at all, beneficiary third States can claim not merely to exercise their "rights" but to continue indefinitely to do so unless they consent to termination or modification—and so on. With these and other related matters, the Special Rapporteur has tried to come to grips.

6. There are, of course, also the usual difficulties of arrangement that seem to inhere in the subject of the law of treaties, and from which this branch of it is in no way immune. Other methods of arrangement than the one actually adopted here would be possible, and some would in certain respects be more elegant. In article 9 of the text several methods of classification are suggested and an alternative set of the articles contained in sub-division II of Division C of the text will be provided at a later stage. However, at the cost of some repetition and duplication, the Special Rapporteur has thought it preferable, for the time being, to adhere in the main to the traditional sub-divisions of the subject. After a first section covering definitions and basic principles, there follow two main sections dealing respectively with "Rights and obligations *inter se* of the parties to a treaty in consequence of provisions relating to third States" and "Position of third States in relation to the treaty". This distinction is not always clearly drawn, and sometimes not drawn at all—that is to say, only the second head is dealt with. Yet there are these two distinct aspects of the subject: what the parties owe each other under the treaty in relation to the third State, and what, if anything, they owe to or can claim from the third State itself, and, generally, what is the position of that State in relation to the treaty. Both these sections treat in separate articles or sets of articles the two cases of "obligations" and "rights",[7] and therefore subdivide into the familiar heads of what are, for the sake of convenience, called in the draft by the portmanteau appellations of "*pacta*" (or, as the case may be "effects"), "*in detrimentum tertiis*" and "*pacta*" (or, as the case may be "effects") "*in favorem tertiis*". One of the difficulties of treating the subject is that it is too bald to speak, for instance, merely of treaties imposing, or rather purporting to impose, obligations on third States. Without attempting to do anything so positive, a treaty may purport to create a liability for a third State, place it under a disability, deprive it of rights or impair or dispose of its rights, or simply operate to its detriment or disadvantage, or be incidentally unfavourable to it. There are clearly gradations. In the same way, a treaty may purport to confer actual rights on a third State; but short of that, it may simply create a faculty or facility for it, or (which is of some importance) remove a disability or impediment; or else confer an interest, benefit or advantage on it; or simply operate in a manner incidentally favourable to the third State. While all these possibilities can conveniently be summed up for section-heading purposes under the notions of effects *in detrimentum tertiis* and *in favorem tertiis,* they do not all fall to be treated in the same way for substantive purposes, and some of them require to be separately dealt with in the individual articles.

7. As in previous reports,[8] the Special Rapporteur has aimed at putting as much as possible into the articles themselves rather than into the commentary, with a view to making the articles self-explanatory. In any final draft drawn up by the Commission, a fair amount of what is at present in the text could go into the commentary.

8. In conclusion, the Special Rapporteur would like to refer to, and reaffirm what was said in paragraphs 10 and 11 of the introduction to his fourth report,[9] and (in view of what was there said, and of the fact that, being now published, these and other reports of Special Rapporteurs are no longer virtually confined to the Commission but reach a far wider public) to add the following *caveat.* Reports such as these cannot be, and are not intended to be treatises on the subjects they deal with; nor to be substitutes for the ordinary textbooks and other authorities. Still less can they normally—except perhaps incidentally—offer much in the way of original research. To do these things would increase the length of the reports to an extent that would severely diminish their value for the practical purposes of the Commission which, after all, is the entity primarily concerned with using them. Nor would it be necessary, for the Commission already possesses the basic background knowledge required for working purposes. For these reasons, a Special Rapporteur's report must usually confine itself, in practice, to discussing fairly extensively and with enough (but by no means exhaustive) citation of supporting authority, those points that may be of special difficulty or obscurity, or which are of a key character; and, for the rest, the report may have to be somewhat dogmatic or cursory. To provide argument and authority for every statement made would, in reports destined for the purposes that these are, be tedious, cumbrous and superfluous.

9. The real essence of a Special Rapporteur's task consists in the articles he presents; and what can reasonably be expected of him is that he should have analysed and tried to think through his subject with sufficient thoroughness to be able to present it in the form of an orderly, coherent and fairly complete set of articles; for it is in the marshalling of all the different aspects of a topic, their arrangement in an orderly and logical fashion, and in the actual formulation and reduction to writing of the various rules and principles involved, that the real work of codification lies.

[7] This rigid separation is traditional, and perhaps an aid to comprehension, but it is in no way essential. In the alternative set of articles covering the material contained in sub-division II of Division C, to be provided later, "*in favorem*" and "*in detrimentum*" effects will be treated together whenever possible.

[8] See references in note 1 above.

[9] Ditto.

I. TEXT OF ARTICLES

Note: 1. The present (fifth) report continues a second chapter of a draft code on the law of treaties, the first chapter of which (first to third reports inclusive, 1956-8) covered the subject of the validity of treaties, formal, temporal and essential, under the heads of the conclusion, the termination and the substantive validity of treaties.

2. The present (second) chapter relates to the Effects of Treaties, and is in two parts, part I of which (Effects of treaties as between the parties—operation, execution and enforcement) appeared as a fourth report in 1959.

3. The present (fifth) report contains part II of this second chapter and covers the subject of the effects of treaties in relation to third States.

4. *Arrangement*

The present part II has three main divisions:

Division A. Definitions and basic principles.

Division B. Rights and obligations *inter se* of the parties to a treaty in consequence of provisions relating to third States.

Division C. Position of third States in relation to the treaty.

The contents of divisions A and B are sufficiently apparent from the table of contents of the present report.

Division C has two main sub-divisions:

Sub-division I. Presumptions and methods of classification (for detailed contents see table of contents).

Sub-division II. Effects of treaties *in detrimentum* and *in favorem tertiis.*

Sub-division II is itself divided into two sections:

Section 1. Effects *in detrimentum tertiis.*

Section 2. Effects *in favorem tertiis.*

Each of these sections has two sub-sections, each dealing respectively with:

Sub-section (i): Active or positive effects or consequences *in detrimentum* (and *in favorem*) *tertiis.*

Sub-section (ii): Passive or negative effects and consequences *in detrimentum tertiis*—and indirect and incidental effects and consequences *in favorem tertiis.*

Each of the two sub-sections in the two sections is itself subdivided into a number of rubrics and sub-rubrics. The nature of these is readily apparent from the table of contents of the present report.

Second chapter. The effects of treaties

Part II. *The effects of treaties in relation to third States*

DIVISION A. DEFINITIONS AND BASIC PRINCIPLES

ARTICLE 1. DEFINITION OF A THIRD STATE

1. For the purposes of the present articles, the term "third State" in relation to any treaty, denotes any State not actually a party to that treaty, irrespective of whether or not such State is entitled to become a party, by signature, ratification, accession or other means; so long as such faculty, where existing, has not yet been exercised.

2. The term "third State" therefore comprises:

(*a*) States which, while not yet parties to the treaty, are entitled by its terms to become parties, such as signatories of a treaty (requiring ratification) which have not yet ratified it, or non-signatories having a faculty of accession;

(*b*) States which, not being entitled by the terms of the treaty to become parties to it, can only do so if especially invited by all the parties to the treaty and by any other State entitled to participate in such an invitation.

3. Alternatively, the term "third State" may be said to comprise:

(*a*) States which, whether original signatories or not, participate in the framing and conclusion of the treaty, but which have not yet become parties to it;

(*b*) States which did not so participate, whether or not entitled by the terms of the treaty to become parties to it.

4. The term "third State" may equally be said to comprise:

(*a*) States which, though not parties to the treaty, are not strangers to it, because they participated in its framing and conclusion, or else, though not having so participated, are entitled by its terms to become parties;

(*b*) States wholly strangers to the treaty, because they have neither participated in its framing and conclusion, nor are entitled by its terms to become parties to it.

5. Except by virtue of paragraphs 1 of articles 10 and 23 of the present text, no legal distinction is to be drawn between different categories of third States, nor, in any event, as regards their position in relation to the substantive rights and obligations resulting from the treaty.

ARTICLE 2. STATES AS SUBJECTS AND AS OBJECTS OF TREATIES

1. The application of a treaty is, in principle, confined to the parties to it, and to their relations *inter se.*

2. However, the fact that a State is not party to a treaty (i.e. subject to it) does not prevent it being an object of the treaty.

3. Where a State is an object of a treaty, the position of the parties in their relations *inter se* as regards that State is governed by the provisions of Division B of the present text; and their position in relation to the third State—and the position of the third State itself in relation to the treaty—is governed by the provisions of Division C.

ARTICLE 3. *Pacta tertiis nec nocent nec prosunt*

1. By virtue of the principles *pacta tertiis nec nocent nec prosunt* and *res inter alios acta,* and also

of the principle of the legal equality of all sovereign independent States—but subject to the provisions of article 4 of the present text—a State cannot in respect of a treaty to which it is not a party:

(*a*) Incur obligations or enjoy rights under the treaty;

(*b*) Incur any liability, or suffer any disability or detriment, or any diminution or deprivation of right, or be entitled to claim as of right any faculty, interest, benefit or advantage under the treaty.

2. The provisions of paragraph (1) of the present article do not in any way prejudice such rights and obligations as the parties to the treaty may, by virtue of it, possess *inter se* in relation to the third State, as indicated in Division B below.

ARTICLE 4. APPARENT OR QUASI-EXCEPTIONS OR QUALIFICATIONS TO THE PRINCIPLE *pacta tertiis nec nocent nec prosunt*

1. Notwithstanding the principles referred to in paragraph 1 of article 3 of the present text, which are, in themselves, absolute, and subject to no real exception, third States may, in a number of ways, be or become affected by treaties to which they are not parties. These apparent, or quasi-exceptions, or qualifications, are set out in Division C of the present text.

2. The quasi-exceptions or qualifications referred to in paragraph 1 of the present article may have effects either *in detrimentum*, or *in favorem, tertiis*. These expressions are to be understood as follows:

(i) By the expression "effects *in detrimentum tertiis*", as herein employed, there is to be understood any effect (or the totality of the effects) which may operate to the detriment or disadvantage of the third State. These may range from the duty to perform active obligations, to the mere passive endurance of incidentally unfavourable consequences: and between these extremes may comprise liabilities or disabilities: the loss, diminution or impairment of rights, or, as the case may be, of advantages, benefits or interests; the coming into existence of disadvantages, impediments or other incidentally unfavourable circumstances; the recognition and acceptance of valid international acts, including the lawfully acquired rights of other States and the objective validity of any status, régime, or international settlement juridically effective *erga omnes*; and the passive obligation not to impede or interfere with the due performance of a treaty lawfully concluded between other States.

(ii) Equally, by the expression "effects *in favorem, tertiis*", as herein employed, there is to be understood any effect (or the totality of the effects) which may operate to the benefit or advantage of the third State. These may range from the acquisition of positive and active rights under the treaty, to the enjoyment of purely incidental beneficial consequences resulting from it; and between these extremes may comprise the acquisition and enjoyment of faculties or facilities; the removal of disabilities, disadvantages or impediments; the enjoyment of new benefits or advantages, or the enhancements of rights; the recognition by the parties to the treaty of the lawfully acquired rights or status of the third State; and the performance by them, to the consequential benefit of the third State, of their obligations under any international régime or settlement, or under any other treaty incidentally benefiting or favourable to the third State.

3. The extent to which an *in detrimentum* or (as the case may be) an *in favorem* position for the third State may involve, on the one hand, the active performance of obligations, or sufferance of liabilities or disabilities by it, or, on the other, the acquisition of positive rights or faculties—as opposed, respectively, to the mere acceptance of incidental disadvantages, or the enjoyment of merely casual or incidental benefits resulting from the existence of the treaty, and from its execution by the parties, is the subject of the articles contained in Division C of the present text.

ARTICLE 5. PRINCIPLES UNDERLYING THE CASES IN WHICH TREATIES MAY HAVE, OR RESULT IN, EFFECTS *in detrimentum* OR *in favorem tertiis*

1. The quasi-exceptions or qualifications to the general principle *pacta tertiis nec nocent nec prosunt*, as described in article 4 of the present text, are based on, or arise from the application of the following principles of international law:

(A) *Principles giving rise to rights or obligations for the third State, similar or parallel to those contained in the treaty*

(i) The principle of consent given actively and *ad hoc*—such consent resulting either in the acceptance by the third State of an *in detrimentum* position for itself (whether by agreement between that State and one or more of the parties to the treaty, or by agreement with another third State, or by means of a unilateral but legally binding, declaration made by the third State); or resulting in the creation of an *in favorem* position for the third State (either by a specific agreement to that effect between the parties *inter se*, or by an agreement between them (or by one or some of them, if not inconsistent with the treaty) and the third State, or by a unilateral, but legally binding, declaration, by which a State assumes obligations *in favorem tertiis*);

(ii) The principle of consent presumed, in those cases where, by operation of law, the third State becomes, or is deemed to be either a party to the treaty, or bound by its provisions, or by rules or principles, similar to those it embodies; and, correspondingly, to enjoy the rights attendant on the performance of the obligations concerned;

(iii) The principle of automatic entailment, whereby:

(*a*) The lawful use of the territory of another State for a specific purpose entails conformity with the conditions of such use, and, reciprocally, conformity, or readiness to conform, entails a corresponding right of user in the manner provided by the treaty;

(*b*) The exercise of rights or faculties, or the enjoyment of benefits or advantages, gives rise to a duty to perform the corresponding obligations, or suffer the corresponding disadvantages or disabilities; and si-

milarly, the performance of obligations, or conformity with the conditions of the treaty, may give rise to a claim to exercise rights or enjoy benefits under it.

(B) *Principles giving rise to rights or obligations for the third State in relation to the treaty*

(iv) The principle of respect for lawful and valid international acts, such as treaties lawfully concluded and not infringing the rights of other States, for rights lawfully acquired, or for statuses, régimes, settlements, or situation of law or fact lawfully created by treaty—whereby third States are called upon to recognize and respect international statuses, régimes, settlements, or situations of law or fact, validly established by treaty; not to impede or interfere with the due performance of a lawful treaty by the parties to it; and (on the basis of *damnum sine injuria*) to accept any incidentally unfavourable consequences for them resulting from such a treaty; and whereby, correspondingly, third States may enjoy such incidental advantages as may result for them from treaties to which they are not parties;

2. The extent to which, if at all, in the case of *in favorem* effects, the third State can object to the termination or modification, without its consent, of the treaty provisions under which these effects are enjoyed, is specified in section 2 of Division C of the present text.

DIVISION B. RIGHTS AND OBLIGATIONS *inter se* OF THE PARTIES TO A TREATY, IN CONSEQUENCE OF PROVISIONS RELATING TO THIRD STATES

ARTICLE 6. THE CASE OF *pacta in detrimentum tertiis*

1. Where a treaty provides for the application of certain measures to, or provides that one or more of the parties shall ensure, or seek to procure, certain conduct on the part of, a third State, or the performance by it of certain acts, or the carrying out of obligations of a similar nature to those which the treaty imposes on the parties themselves, the party or parties concerned shall, so far as possible, and so far as they can do so without infringing any other applicable treaty or any general rule of international law, bring about, or seek to procure, the conduct in question on the part of the third State; and they may be required by the other party or parties to do so, any failure constituting a breach of the treaty giving rise to the appropriate remedies.

2. Similarly, the fact that a treaty may result in creating a liability or disability for a third State, or may operate to the disadvantage or detriment of that State, or in a manner contrary to its interest, is not *per se* a ground on which the parties can, *inter se,* refuse to carry out the treaty.

3. Equally, the non-acceptance by a third State of a treaty provision detrimentally affecting it, does not *per se* impair the obligatory force of the provision as between the parties, unless:

(*a*) Such acceptance or agreement is a condition of the treaty provision concerned;

(*b*) The object of the provision would be, or would become, unlawful in the absence of such acceptance or agreement.

ARTICLE 7. THE CASE OF *pacta in favorem tertiis*

Where a treaty provides that certain treatment shall be afforded to a third State, the parties are under a duty, *inter se*, to carry out this obligation, irrespective of whether the third State can itself claim or enforce performance of it. Any failure by one party to perform the obligation will accordingly constitute a breach of the treaty, entitling the other party or parties concerned to appropriate remedies.

DIVISION C. POSITION OF THIRD STATES IN RELATION TO THE TREATY

SUB-DIVISION I. PRESUMPTIONS AND METHODS OF CLASSIFICATION

ARTICLE 8. PRESUMPTIONS

1. In case of doubt, there is a presumption, arising from the principle *pacta tertiis nec nocent nec prosunt,* that any given treaty has neither *in detrimentum* nor *in favorem* effects on, for, or in relation to third States.

2. This presumption relates, however, only to the actual applicability of the treaty, or of analogous provisions, to third States, and not to the passive rights and obligations of such States in relation to the treaty, as referred to in articles 5 (1) (iv) and 9 (3) (*c*) and (*d*) and 4 (*d*), of the present text, and as elaborated in articles 17-19, and 29 and 30.

3. The presumption is weakened, and may be negatived, whenever, from the character of the treaty or the surrounding circumstances, the treaty must be deemed to have, or comes to be regarded as having, effects *erga omnes.*

4. The presumption is, *per contra,* enhanced, and may become absolute, in the case of these treaties which contain specific provision for the participation of third States, either by leaving the treaty open for signature and subsequent ratification by States other than the original signatories, or by the inclusion of an accession clause or its equivalent.

5. In case, however, the position is as indicated in paragraph 4 of the present article, but the treaty, expressly or by implication, limits the right of participation to certain specified States, or to members of a specified class or group of States, and the third State concerned is not one of those specified, or does not belong to the group or class, as the case may be, no special presumption (beyond that indicated in paragraph 1 of the present article) arises against the possibility of effects *in detrimentum* or *in favorem tertiis* as regards such State.

ARTICLE 9. METHODS OF CLASSIFICATION

1. The position of a third State in relation to a treaty is basically that indicated in article 3, paragraph

1, of the present text, by virtue of the principle *pacta tertiis nec nocent nec prosunt*. Where however, without violation of this principle as such, treaties do, in accordance with, or subject to, the provisions of articles 4, 5 and 8 of the present text, or of sub-division II of the present division, have effects relative to third States, these may be classified as indicated in the ensuing paragraphs of the present article.

2. The effects of a treaty relative to a third State may be classified in four different ways:

(i) According to the nature of the effects produced;

(ii) According to the nature of the operative principles producing them;

(iii) According to the nature of the concrete acts or processes necessary for their production;

(iv) According to the nature of the treaty in relation to which the effects are produced.

3. Where method (i) in paragraph 2 of the present article is employed (nature of the effects for or relative to the third State), the main sub-divisions of the topic are as follows:

(*a*) Cases in which the third State is, or becomes subject to, or enjoys, the benefit of the actual provisions of the treaty, as such;

(*b*) Cases in which the third State subscribes, or becomes liable to, or enjoys the benefit of, similar provisions to, or of rules analogous or parallel to, or having the same effect as, those contained in, or embodied by, the treaty;

(*c*) Cases in which the third State is under an obligation to accept, recognize and not interfere with the execution of, or the rights granted by, or any status created, or régime, settlement, or situation of fact established under, a lawful treaty;

(*d*) Cases in which the third State is called upon passively to accept the purely incidental consequences favourable or unfavourable to itself, as the case may be, of a lawful treaty.

4. Where method (ii) in paragraph 2 of the present article is employed (nature of the principles producing the effects for third States), the main subdivisions of the topic are as set out in article 5 above (to which reference is hereby made), and may be summed up under the following four heads:

(*a*) The principle of active consent—whether on the part of the third State acting in agreement with the parties (or, in some cases, with certain of them only); or, in the case of *in detrimentum* effects, with another third State; or on the part of the parties alone, acting *inter se,* in the case of effects *in favorem tertiis*; or, where legally possible, by the unilateral act or declaration of the third State, or of some other State;

(*b*) The principle of consent presumed—on the part of the third State, under rules or principles of international law that lead to this result;

(*c*) The principle of automatic entailment of obligations by exercising corresponding rights, and *vice-versa*; and of conditions of user by exercising the user, and *vice-versa*;

(*d*) The principle of respect for lawful and valid international acts, such as lawfully concluded treaties or régimes, statuses, settlements or situations of law or of fact, brought about by the operation of a lawful treaty; and, where some detriment for the third State is incidentally involved by the operation of such a treaty, the principle of *damnum sine injuria* affords no basis of claim in the absence of any ground of absolute liability.

In cases (*a*), (*b*) and (*c*) above, the principle concerned gives rise to actual rights or obligations for the third State, under, or similar to, or parallel to, those contained in the treaty. In case (*d*) the principle involves rights or obligations for the third State in relation to the treaty.

5. Where method (iii) in paragraph 2 of the present article is employed (the nature of the concrete acts or processes producing the effects), the main subdivisions of the topic will be that effects on, for, or relative, to, the third State are produced:

(*a*) By the act of the obligee, who may, according to circumstances, be the third State itself, acting unilaterally, or in conjunction with the parties or with another third State, in assuming obligations or liabilities; or the parties to the treaty, or some of them, acting in conjunction with the third State; or, where *in favorem* effects are concerned, acting purely *inter se* (provided in that case that all the parties so act); or by a single State acting unilaterally in the creation of rights;

(*b*) By operation of law;

(*c*) By tacit acceptance or recognition, in response to an international law duty to accept or recognize;

(*d*) By passive acquiescence.

6. Under each of the methods of classification outlined in paragraphs 3-5 of the present article, heads (*a*) and (*b*) involve effects of a predominantly active or positive character; heads (*c*) and (*d*) of a predominantly passive or negative character.

7. Where method (iv) in paragraph 2 of the present article is employed (nature of the treaty in relation to which the effects for third States are produced), the main sub-divisions are as follows:

(*a*) Ordinary bilateral or group treaties;

(*b*) So-called law-making or norm-enunciating treaties;

(*c*) Treaties establishing international user régimes;

(*d*) Treaties embodying international political or territorial settlements, or treaties of a dispositive character.

8. The present text, on ground of convenience, comprehensiveness and tradition, adopts a mixed, *ad hoc* classification, compounded of all of these methods, but based principally on method (iii).[10]

[10] This method of classification also preserves the traditional complete separation of *in detrimentum* and *in favorem* effects. An alternative set of articles embodying a more highly integrated concept, and based on method (i), will be furnished at a later stage.

SUB-DIVISION II. EFFECTS OF TREATIES IN DETRIMENTUM *AND* IN FAVOREM TERTIIS

SECTION 1. EFFECTS *in detrimentum tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES *in detrimentum tertiis*—OBLIGATIONS WHICH THE THIRD STATE MAY HAVE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN, THE TREATY

Rubric (a). In detrimentum *effects brought about by the volition of the third State*

Sub-rubric (*a*) 1. Effects directly brought about by the third State

ARTICLE 10. POSITION OF A THIRD STATE SIGNATORY OF BUT NOT YET A PARTY TO A TREATY, IN REGARD TO THE FORMAL CLAUSES OF THE TREATY, AND, IN PARTICULAR, TO PARTICIPATION BY OTHER STATES HAVING A FACULTY OF PARTICIPATION UNDER THE TREATY

1. States which have signed a treaty, even though they have not yet ratified it, are deemed to have given a final and definitive assent to the formal clauses of the treaty dealing with the mechanics of bringing it into force, the right of other States to participate in it, the method of participation and related matters.

2. In particular, a State in this position is, by reason of such assent, under an obligation not to object to or obstruct, and to accept the legal consequences of, signature, ratification, accession, or the equivalent, by any other State having by the terms of the treaty a faculty to become a party to it.

ARTICLE 11. CASE OF SPECIFIC AGREEMENT BY THE THIRD STATE WITH THE PARTIES TO THE TREATY, OR WITH ONE OR SOME OF THEM, OR WITH ANOTHER INTERESTED THIRD STATE

1. A third State becomes bound by the same obligations as those involved by the provisions of a treaty to which it is not a party, or suffers the same *in detrimentum* effects, if it agrees to accept or carry out such provisions by a separate treaty entered into with either:

(*a*) The parties to the treaty concerned;

(*b*) One or more of such parties;

(*c*) Another interested third State.

2. In any such case, the obligations or liabilities of, or other *in detrimentum* effects for, the third State arise and exist, not under or by reason of the original treaty, which is and remains *res inter alios acta*, but solely by reason of, and under, the separate treaty into which the third State has itself entered.

ARTICLE 12. CASE WHERE THE THIRD STATE ASSUMES OBLIGATIONS OR LIABILITIES, OR ACCEPTS OTHER EFFECTS *in detrimentum*, BY MEANS OF A UNILATERAL DECLARATION

1. A third State becomes bound in the same way as under article 11 if it assumes obligations, or accepts other *in detrimentum* effects, under or by reason of a treaty to which it is not a party, if it makes a unilateral declaration to that effect, of such a kind, or in such circumstances, as, according to the general rules of international law, will result for it in legally binding obligations.

2. In any such case, the provisions of paragraph 2 of article 11 are, *mutatis mutandis*, applicable—substituting unilateral declaration for separate agreement.

3. Whereas, in cases coming under article 11, the question of the termination or modification of the separate treaty is governed by the ordinary provisions of treaty law, in the case of a unilateral declaration, as contemplated by paragraph 1 of the present article, such declaration—unless stated to be irrevocable—may be terminated at the will of the declarant third State; subject however to an obligation to pay compensation, or make other appropriate reparation, to any other State which, acting on the faith of the declaration, has changed its position in such a way that it suffers detriment going beyond the natural consequences of the termination or modification of the declaration, and is placed in a worse position than if the declaration had never been made.

Sub-rubric (*a*) 2. *In detrimentum* effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty

ARTICLE 13. RULE APPLICABLE IN RESPECT OF ALL TREATIES

1. Where a third State is in a position to, and does, take benefits or exercise rights under, or by virtue of, a treaty (or otherwise avails itself of it) in circumstances necessarily implying and involving the recognition of a duty to perform corresponding obligations, or of conformity with its provisions, or acceptance of its terms—such performance, conformity or acceptance becomes incumbent on the third State.

2. There exists a natural presumption, *prima facie*, that the circumstances referred to in paragraph 1 of the present article do involve such an entailment.

ARTICLE 14. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

1. Where use is made of the maritime or land territory of another State, and the conditions of user of that territory for that purpose are the subject of a treaty to which the third State concerned is not a party, the vessels and nationals of the State, or the State itself should the case arise, must conform to the conditions in question.

2. The same principle is applicable in regard to the use of territory placed by treaty under an international régime of common user for purposes, and on conditions, specified in the treaty, and in circumstances causing the treaty to have, or to come to be regarded as having, effect *erga omnes*.

Rubric (b). In detrimentum *effects brought about by operation of law*

Sub-rubric (*b*) 1. The third State in effect is or becomes a party to the treaty by operation of law

ARTICLE 15. CASES OF STATE SUCCESSION, AGENCY, AND PROTECTION

A third State not originally a party to the treaty concerned becomes bound by it:

(*a*) If it succeeds to treaty obligations or liabilities, by the operation of the rules of international law governing the topic of State succession;

(*b*) If treaty obligations are extended to it through the agency of another State to which it has delegated the right to enter as an agent into treaties on its behalf;

(*c*) If the third State is a protected State, and a treaty to which the protecting State is a party is applied to it.

Sub-rubric (*b*) 2. The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law.

ARTICLE 16. CASE OF CUSTOMARY INTERNATIONAL LAW OBLIGATIONS MEDIATED THROUGH THE OPERATION OF LAW-MAKING OR NORM-ENUNCIATING TREATIES

1. Law-making or norm-enunciating treaties, in the nature of general multilateral conventions, codifying branches of existing customary international law, or establishing new rules by way of the progressive development of international law, and in so far as they evidence, declare or embody legal rules or legal régimes which are, or eventually become, recognized as being of universal validity and application, constitute vehicles whereby such rules or régimes are or become generally mediated so as also to bind States not actually parties to the treaty as such.

2. In any such case however, it is the rule of customary international law thus evidenced, declared or embodied that binds the third State, not the treaty as such.

SUB-SECTION (ii). PASSIVE OR NEGATIVE EFFECTS OR CONSEQUENCES *in detrimentum tertiis*—OBLIGATIONS INCUMBENT ON THE THIRD STATE, NOT UNDER, BUT IN RELATION TO, THE TREATY

Rubric (a). In detrimentum *effects resulting from the application of the principle of respect for lawful and valid international acts*

Sub-rubric (*a*) 1. In the case of all lawful and valid treaties.

ARTICLE 17. GENERAL DUTY OF ALL STATES TO RESPECT AND NOT IMPEDE OR INTERFERE WITH THE OPERATION OF LAWFUL AND VALID TREATIES ENTERED INTO BETWEEN OTHER STATES

1. All States are under a general legal duty in relation to treaties to which they are not parties:

(*a*) Not to interfere with, or impede, the due performance and execution of the treaty on the part of the parties to it; provided always that the objects of the treaty are lawful and that it does not purport to deprive, or have the effect of depriving, the third State concerned of its legal rights, or of impairing such rights, or of creating legal liabilities or disabilities for such State without its consent;

(*b*) Subject to the same conditions, to respect, and if necessary recognize, any legal rights or interests created or established by the treaty in favour of one or more of the parties, or of another third State;

(*c*) In relation to a treaty which the third State concerned has signed, but not yet ratified, not to take any action which might impair the value of the treaty or frustrate the objects which it is intended to achieve; subject however to a right to resume freedom of action if, and when, a decision not to ratify is taken.

2. Provided the conditions specified in paragraph 1 (*a*) above are satisfied, the mere fact that a treaty operates to the disadvantage or detriment of a third State is not a ground on which its validity can be impugned, or on which the third State can refuse to recognize it.

Sub-rubric (*a*) 2. In the case of treaties embodying international régimes or settlements, or of a dispositive character

ARTICLE 18. GENERAL DUTY OF ALL STATES TO RECOGNIZE AND RESPECT SITUATIONS OF LAW OR OF FACT ESTABLISHED UNDER LAWFUL AND VALID TREATIES

1. Subject to the conditions specified in article 17, paragraph 1 (*a*) of the present text, to the provisions of paragraph 3 of the present article, and to the terms of the treaties themselves, or of any other relevant treaties, all States are under a duty to recognize and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*. The following are amongst the more important types of treaties producing effects of this kind.[11]

(*a*) Peace treaties, and other treaties containing political or territorial settlements;

(*b*) Treaties creating a general régime or status of neutralization, or demilitarization, for particular territories or localities;

(*c*) Treaties of a dispositive character, such as treaties of cession, frontier demarcation, or treaties creating a servitude.

2. *Mutatis mutandis*, the provisions of 1 above are, in relation to treaties having a regional or group character, equally applicable for (but only for) the States of the particular geographical region or group concerned.

3. The provisions of paragraphs 1 and 2 above do not involve or imply that the treaties specified can impose any direct or positive obligations on States not parties to them, but only that, subject to the conditions

[11] For the case of treaties governing the common use of territory, or establishing a régime for some means of international communications such as a river or waterway, see art. 14 above.

indicated, such States cannot deny the validity of the treaty, must respect its provisions, and must also conform to them in so far as any such States avail themselves of facilities created by the treaty, or have dealings in or relative to the locality or region which is the subject matter of the treaty.

Rubric (b). *Effects incidentally unfavourable to a third State resulting automatically from the simple operation of a treaty*

ARTICLE 19. DUTY OF STATES TO ACCEPT AND TOLERATE THE INCIDENTALLY UNFAVOURABLE EFFECTS OF LAWFUL AND VALID TREATIES

Provided that no legal right of the third State is infringed, and that the treaty concerned is otherwise in conformity with the conditions specified in article 17, paragraph 1 (*a*), of the present text, the third State does not suffer any legal wrong, or possess any right of recourse against the parties, merely by reason of the fact that it is adversely affected by the operation of the treaty, or that the treaty is incidentally unfavourable to it.

SECTION 2. EFFECTS *in favorem tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES *in favorem tertiis*—RIGHTS WHICH THE THIRD STATE MAY HAVE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN THE TREATY

Rubric (a). In favorem *effects brought about by the act of the parties to the treaty alone, or of a single grantor*

Sub-rubric (*a*) 1. Act of the parties to the treaty.

ARTICLE 20. THE *stipulation pour autrui* (RIGHTS OR BENEFITS EXPRESSLY CONFERRED ON A THIRD STATE BY THE TREATY ITSELF)

1. Where a treaty expressly confers rights or benefits on, or makes provision for the exercise of rights or faculties, or for the enjoyment of facilities or benefits by a third State, in such a way as to indicate that the parties meant to create legal rights for the third State, or to bind themselves to grant them, or to create a legal relationship between themselves and the third State, the third State concerned thereby acquires a legal right to claim the benefit of the provisions in question.

2. It is not a condition of the operation of paragraph 1 that the third State should be specified *eo nomine*, provided it is clear from the context or surrounding circumstances what State is intended, or that a group or class of States is intended of which the claiming State is a member.

3. In any case coming under paragraphs 1 and 2 of the present article, the claiming third State has a direct right of recourse against the parties to the treaty, acting in its own name and of its own motion, if the provisions of the treaty concerning the third State are not carried out—provided always that the third State has complied, or is willing to comply, with any conditions attached by these provisions to the grant.

4. However, the third State is not entitled by virtue of the preceding paragraphs of the present article, to require the indefinite maintenance in force of the treaty, or to object to its termination or amendment by the parties without its consent, except in the following cases:

(*a*) Where the parties, either in the treaty or separately, have undertaken to maintain the treaty in force indefinitely or for a specified period, or not to terminate or amend it without the consent of the third State, or where the legal relationship the treaty creates between the parties and the third State is of such a nature as to entail this;

(*b*) Where the clauses of the treaty in favour of the third State are of a dispositive character, and have been actually executed;

(*c*) Where the third State, for the purpose, or in the course of, exercising its rights or faculties, or of taking the benefits or advantages resulting from the treaty, has altered its position in such a way that the termination or amendment of the treaty would affect it detrimentally over and above the natural detriment to be expected from the cessation or modification of the rights, faculties, benefits or advantages concerned, by placing the third State in a worse position than before these were enjoyed;

(*d*) In the cases coming under article 21 of the present text.

ARTICLE 21. TREATY PROVISIONS REMOVING OR MODIFYING A DISABILITY OR PROHIBITION PREVIOUSLY EXISTING FOR A THIRD STATE

A treaty provision removing, cancelling or modifying a disability or prohibition previously existing for a third State, provided it is within the competence of the parties to the treaty to do so, ranks as an executed provision, in the sense that the third State (subject to any conditions stated in the treaty) is *ipso facto* freed from the disability or prohibition, which cannot thereafter be reimposed or revived merely by reason of the lapse, termination, or modification of the treaty.

Sub-rubric (*a*) 2. Act of a single State.

ARTICLE 22. UNILATERAL DECLARATIONS CONFERRING RIGHTS ON OTHER STATES

1. Where a State makes a unilateral declaration in favour of, or assuming obligations towards, one or more, or all, other States, in such a manner, or in such circumstances that, according to the general rules of international law, a legally binding undertaking will result for the declarant State, the other State or States concerned can claim as of right the performance of the declaration.

2. Unless the declaration specifies its own irrevocability, the State or States in whose favour it was made cannot object to its withdrawal or modification at the will of the declarant State; provided that, if this has consequences analogous to those indicated in paragraph 4 (*c*) of article 20 of the present text, the declarant State shall be liable to pay compensation, or make other appropriate reparation, in respect of the loss or damage caused.

Rubric (b). In favorem *effects brought about with the participation of the third State itself*

Sub-rubric (*b*) 1. Effects directly brought about by the parties and the third State conjointly

ARTICLE 23. EXERCISE BY THE THIRD STATE OF A FACULTY OF PARTICIPATION IN THE TREATY ITSELF

1. A third State has the right to become a party to the treaty concerned by such means as the treaty or any other applicable instrument indicates, and where the third State is a member of the class specified in the treaty or other instrument as having the faculty of becoming a party, or where there is no restriction on that class.

2. In such a case the third State has a right of objection in case, pending action by it to become a party, any other State so conducts itself as to impair the value of the treaty or frustrate the objects which it was intended to achieve; provided however that this right shall cease after the lapse of a reasonable period during which the third State could have exercised the faculty of becoming a party.

3. Where no provision is made by the treaty for the participation of States other than the original parties, the fact that a treaty purports to confer rights on, or contains provisions to the advantage of, any third State, does not invest the third State with any right to become an actual party to the treaty without the express consent of the existing parties.

ARTICLE 24. CASE OF SEPARATE AGREEMENT BETWEEN ALL, OR ONE OR MORE OF, THE PARTIES, AND A THIRD STATE, PRODUCING FOR THE LATTER *in favorem* EFFECTS SIMILAR TO THOSE OF THE TREATY

1. A third State possesses a legal claim to the enjoyment of the rights or benefits specified in any treaty, if the third State has entered into a separate agreement to that effect with:

(*a*) All the parties to the treaty;

(*b*) One or more of the parties only—provided that in such case the agreement is not contrary to or inconsistent with the treaty.

2. In cases coming under paragraph 1 of the present article, any right of recourse will exist solely by virtue of the separate agreement, and against such party or parties.

3. In cases coming under paragraph 1, the right, if any, of the third State to object to the termination or modification of the separate agreement concerned, will depend on its terms, and on the ordinary rules of treaty law respecting the termination or modification of treaties.

Sub-rubric *(b)* 2. *In favorem* effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with the provisions of, the treaty, by the third State with the consent, express or tacit, of the parties

ARTICLE 25. RULE APPLICABLE IN THE CASE OF ALL TREATIES

1. Where a third State, with the consent or tacit acquiescence of the parties, is permitted to perform, and regularly performs, the obligations of a treaty, or conforms to its provisions, it is entitled to exercise such rights, or to enjoy such facilities or benefits, as, under the treaty or by any general rule of law, are normally entailed by such performance or conformity.

2. Without prejudice to the special rule provided by paragraph 2 of article 26 of the present text, the third State cannot object to any termination or modification of a treaty under, or by virtue of which, it has exercised rights or obtained benefits, in accordance with paragraph 1 of the present article; provided that, if this has consequences analogous to those specified in paragraph 4 (*c*) of article 20 of the present text, the third State shall be entitled to compensation or other appropriate reparation in respect of the loss or damage caused.

ARTICLE 26. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

1. Subject to the terms of the treaties concerned, and to their correct interpretation, States, their vessels and nationals, if conforming to the conditions of user specified in treaties or international régimes of the classes indicated in article 14 of the present text, and provided such user is with the consent or tacit acquiescence of the parties to the treaty or régime, are entitled to enjoy the user and other benefits of the treaty or régime, on the conditions attached to them.

2. Third States are entitled to object to any termination or modification of such treaties or régimes, unless with general international consent, whenever the rights, facilities or benefits involved have, by constant exercise and enjoyment on the part of third States, acquired an objective existence independently of the treaty or régime under which they were originally established. Even where this is not the case, third States are entitled to compensation or other appropriate reparation for the loss or damage caused by the termination or modification of the treaty or régime.

Rubric (c). In favorem *effects brought about by operation of law.*

Sub-rubric (*c*) 1. Because the third State in effect is or becomes a party to the treaty by operation of law.

ARTICLE 27. CASES OF STATE SUCCESSION, AGENCY, AND PROTECTION

Any State which becomes bound by a treaty in the circumstances specified by article 15 of the present text is entitled to the benefit of the corresponding or related *in favorem* effects of the treaty.

Sub-rubric (*c*) 2. *In favorem* effects consequential on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law.

ARTICLE 28. CASE OF CUSTOMARY INTERNATIONAL LAW RIGHTS MEDIATED THROUGH THE OPERATION OF LAW-MAKING OR NORM-ENUNCIATING TREATIES

Where, by means of the processes indicated in article 16 of the present text, third States become subject, through the agency of a treaty, to rules that are, or have come to be, accepted as rules of general customary

international law, such States automatically enjoy the related rights and benefits.

SUB-SECTION (ii). INDIRECT OR INCIDENTAL EFFECTS OR CONSEQUENCES *in favorem tertiis*—EFFECTS NOT UNDER BUT IN RELATION TO THE TREATY

ARTICLE 29. *In favorem* EFFECTS RESULTING FROM THE APPLICATION OF THE PRINCIPLE OF RESPECT FOR LAWFUL AND VALID INTERNATIONAL ACTS

1. Any third State conducting itself in conformity with the provisions of articles 17 and 18 of the present text is entitled, in so far as the case may arise, to expect similar conduct on the part of other third States.

2. In the case of treaties embodying international régimes or settlements, or of a dispositive character, to which the provisions of article 18 of the present text apply, and which are or have come to be accepted as having effects *erga omnes,* third States which are conforming to the provisions of the régime or settlement, and which have a direct interest in the situation of law or fact created by the treaty, are entitled in principle to expect the continued maintenance in being of this situation, or to be consulted before any termination or modification of it is effected.

3. The provisions of the preceding paragraphs of the present article cannot however operate in themselves to confer on third States any direct or active rights under the treaty concerned.

ARTICLE 30. EFFECTS INCIDENTALLY FAVOURABLE TO A THIRD STATE RESULTING AUTOMATICALLY FROM THE SIMPLE OPERATION OF A TREATY

In cases not covered by any of the preceding articles of the present section, a third State may nevertheless enjoy benefits or advantages of an incidental character resulting automatically from the operation of a treaty between other States; but such State does not thereby acquire any rights under the treaty itself, or any right to its continued maintenance in force or non-modification by the parties, or to compensation for its termination.

II. COMMENTARY ON THE ARTICLES

[*Note*: 1. The texts of the articles are not repeated in the commentary. Their page numbers are given in the table of contents at the beginning of the report.

2. The Special Rapporteur refers to note 2 in the corresponding place at the head of the commentary in his second report.[12]

3. For the general arrangement of the present chapter, see *Arrangement* immediately before the text of the articles.]

Second chapter. The effects of treaties

Part II. *The effects of treaties in relation to third States*

DIVISION A. DEFINITIONS AND BASIC PRINCIPLES

ARTICLE 1. DEFINITION OF A THIRD STATE

1. *Paragraph 1.* This article deals with the notion of a "third State". Admittedly, this term is not in itself a very satisfactory one. It is imprecise, and strictly appropriate only for the case of a bilateral treaty; whereas, of course, the question of the position of States which are not parties to the particular treaty concerned arises not merely with reference to bilateral treaties, but also in relation to treaties which have several parties, or to which a group of States are parties; and equally in relation to treaties of the general multilateral type. However, it has been considered best to adhere to the term third State, the use of which is traditional and well understood. Deriving from the Latin expression *"tertii"*, similar expressions *("les tiers", "i terzi")* figure in the contract law of many States as denoting in general persons, whether individual or corporate, who, without being parties to a given contract, may none the less be affected by it in some way. In English this expression cannot be exactly reproduced (there is no such term as "the thirds"), but the same idea is found in the corresponding expressions "third parties" or "third States".

2. A third State can be defined quite simply in relation to any given treaty, as any State which is not actually a party to that treaty. On this basis, there is, strictly speaking, evidently only one category of third State. At the same time, although all third States are in the same position in the sense that they are none of them parties to the given treaty, yet they can stand in different relationships to the treaty in other ways; and it is worth drawing attention to this, even though, with one exception to be noted in a moment, no real legal distinctions between third States result from it—not, at any rate, in the sense of placing any one category either more or any less in the position of a third State than another.

3. *Paragraphs 2-4.* These paragraphs contain a classification of third States according to how they stand in relation to the particular treaty. In a sense, each of these paragraphs covers the same ground, but it approaches that ground from a different direction. The most obvious distinction between third States (though it must again be emphasized that it is not really a legal distinction in respect of the consequences involved) is the one that can be drawn between third States that are wholly strangers to the treaty and those that are not. In the latter category would come third States that participated in the framing of the treaty, but which have not yet signed it; or States that have signed but have not yet ratified. Such States are third States in so far as they are not as yet parties to the treaty. At the same time they cannot be regarded as being wholly strangers to it, and they have certain rights in relation to the treaty—for instance, a right to sign, or a right to ratify, as the case may be. Nevertheless, so long as they do not, by performing the necessary acts, become parties to the treaty, they remain third States, and have no greater rights or obligations under the treaty, or by reason of it, than any other third State, including those which, not having participated in the negotiation of the treaty or not having signed it, are wholly and entirely strangers to it in its origins.

[12] *Yearbook of the International Law Commission* (United Nations Publication, Sales No.: 1957.V.5, vol. II), document A/CN. 4/107, p. 37.

4. States which, though not having taken part in the framing of a treaty, are nevertheless by its terms entitled to become parties to it, usually by accession, are also in a sense not wholly strangers to it. But in the case of States having a right of accession, another basis of distinction operates, arising out of the provisions of the treaty itself, according as to whether it does, or does not, enable countries other than its original framers to participate in it. Some treaties make express provision for accession in one form or another by countries which did not participate in the negotiation of the treaty, and did not become parties to it by signature and ratification. In the case of this type of treaty, any third State can always become a party to it if it wishes to do so, by taking the necessary steps, provided always that such State comes within the class to which accession is open under the treaty if that class is expressly or by implication a restricted one.[13] Other treaties contain no such provision, and in that case it is normally not possible for third States to become parties to them unless the parties to the treaty should subsequently invite them to do so or make some separate and special arrangement for the purpose. Where a treaty does make provision for the participation of third States, the latter, of course, *ipso facto*, possess the right, or rather the faculty, to become parties; but again, so long as they have not exercised it, and so long therefore as they remain third States, their legal position in relation to the treaty (i.e. as regards having any rights or obligations of a substantive character resulting from it) are exactly the same as they would be in relation to a treaty that did not provide for any faculty of participation by third States.

5. The words in paragraph 2(*b*), "... and by any other State entitled to participate in such invitation" are intended to cover the case where a signatory, not having yet ratified, might be held to be so entitled.

6. *Paragraph 5.* This has already been explained. The point dealt with in article 10 will be considered in the commentary on that article (see para. 40 below). That dealt with in article 23 is simply the right conferred by some treaties on third States, or on a class of them, to become actual parties to it (see para. 94 below).

ARTICLE 2. STATES AS SUBJECTS AND AS OBJECTS OF TREATIES

7. The contents of this article and of the immediately following article (art. 3) contain statements of the same principle seen from slightly different points of view. The direct consequence of the rule which is considered in article 3 (*res inter alios acta*) is that, as stated in paragraph 1 of the present article, the application of a treaty is in principle confined to the parties to the treaty and to their relations *inter se*. As Charles Rousseau says:

"In principle, treaties have but a relative effect. They can neither damage nor advantage third States. Their legal effects are strictly limited to the circle of the contracting parties...."[14]

To put the matter in another way, treaties do not create law except for the contracting parties, and even then it is more accurate to say that what they create for the contracting parties is particular rights and obligations rather than general law. The circumstances in which a treaty may create what could properly speaking be regarded as law, even for the contracting parties, and still more (though indirectly) for non-contracting parties, involves considerations of a wider order dealt with elsewhere.[15]

8. *Paragraph 2.* The fact that the direct application of the treaty is confined to the parties to it does not, of course, mean that other States may not be (to use a French term that has no exact English equivalent in the context) *visés* by the treaty. From the point of view of personalities, it is only the parties to the treaty who can be regarded as the subjects of it, and therefore subject to it; but other States may be the objects of the treaty in one form or another as, for instance, if two States were to make a treaty agreeing upon certain action to be taken in relation to a third State, or in consequence of some action taken by that third State.

9. *Paragraph 3.* It is necessary to distinguish between the position of the third State itself in relation to the treaty, and the position of the parties in their relations *inter se* with reference to the third State. The fact that the latter State may have no rights or obligations, under the treaty, in no way affects the possibility that the parties may have rights and obligations, not directly towards the third State as such, but *inter se* (and enforceable *inter se*) as respects the third State.

ARTICLE 3. *Pacta tertiis nec nocent nec prosunt*

10. *Paragraph 1.* The general principles referred to in this paragraph, which constitute the foundation of the rules of treaty law relating to third States, are so fundamental, self-evident and well-known, that they do not really require the citation of much authority in their support. They derive, at any rate as concerns the question of obligation, from the general principle of consent as being the foundation of the treaty obligation. Rousseau[16] cites Professor Scelle[17] as alone protesting against

[13] As to this, see the Special Rapporteur's first report on the law of treaties, article 34, paragraphs 2 and 3, and commentary thereon, in the *Yearbook of the International Law Commission*, 1956, vol. II (United Nations Publication, Sales No.: 1956.V.3, vol. II), pp. 114 and 125.

[14] *Op. cit.*, vol. I, pp. 453 and 454: Special Rapporteur's translation of the passage cited.

[15] See below in connexion with article 16.

[16] *Op. cit.*, vol. I, p. 454.

[17] *Précis de droit des gens*, vol. II, 1934, pp. 367 and 368: Special Rapporteur's translation of the passage cited. It is permissible to contend whether Professor Scelle would really deny that at any rate no bilateral treaty, for instance, can directly oblige a third State without its consent, given expressly or to be implied in some shape or form, or in the absence of some independent rule of international law creating conditions in which a treaty may oblige third States. On the other hand, it is of course possible to take either a more extended or a more restricted view, as the case may be, of the various exceptions, or rather qualifications, that may be said to exist to the strict rule. Thus, while the present Special Rapporteur does not state this as necessarily representing his own opinion, it might not be unreasonable to take the view that an instrument such as the United Nations Charter, which is subscribed to by practically all the States of the world, may be capable in certain ways of creating liabilities even for

"... the application to inter-statal relations of a rule instituted for the private sphere and for relations of a contractual character."

Rousseau continues:[18]

"Nevertheless the principle [*pacta tertiis nec nocent nec prosunt*] appears certain as a matter of positive international law. It results as well from treaty law as from decided cases—international and national—and from diplomatic practice."

11. In spite of the self-evident nature of these principles, it may be of interest to cite some of the principal judicial decisions in which they have been affirmed, or which have been based upon them. Thus, in the case of *German Interests in Polish Upper Silesia* the Permanent Court of International Justice said, in relation to various instruments terminating hostilities after the First World War:

"It is, however, just as impossible to presume the existence of such a right—at all events in the case of an instrument of the nature of the Armistice Convention—as to presume that the provisions of these instruments can *ipso facto* be extended to apply to third States. A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States."[19]

Similarly, in the *Free Zones of Upper Savoy and District of Gex* case the Permanent Court, speaking of article 435, paragraph 2, of the Treaty of Versailles, said:

"It follows from the foregoing that Article 435, paragraph 2, as such, does not involve the abolition of the free zones, but, even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it."[20]

In the same way, in the case of the *Territorial Jurisdiction of the International Commission of the River Oder*,[21] the Permanent Court had to consider the effect of article 338 of the Treaty of Versailles. This provided that the régime set out in articles 332 to 337 of the Treaty were to be superseded by such régime as might be "laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character", and that this Convention was to apply in particular, *inter alia,* to the Oder. The subsequently drawn up Barcelona Convention of April, 1921, was considered to be such a Convention, and the question was whether the effect of article 338 of the Treaty of Versailles was automatically to apply the Barcelona Convention to the case of the Oder, even in relation to a country (Poland) which had not ratified the Barcelona Convention. As the Court said: "The question therefore is whether the obligation taken by Poland in virtue of Article 338 of the Treaty of Versailles is sufficient to render the Barcelona Convention applicable to the extent contemplated by that article"; and, since the parties to the Treaty of Versailles had agreed that its river provisions should be superseded by those of the future General (Barcelona) Convention "the question is therefore whether this supersession depends on ratification of the said (Barcelona) Convention by the States concerned—in this particular case on ratification by Poland". *The Court concluded that the* ordinary rules of international law must be applied, "amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification". It then remained to be seen "whether Article 338 intended to derogate from that rule". As to this, the Court concluded that there was nothing in Article 338 of the Treaty of Versailles which could be regarded as imposing upon the parties to it, and in particular upon Poland, an automatic liability under the future General Convention referred to, irrespective of whether the State concerned had become a party to such future Convention. The Court stated that it therefore

"concludes that, even having regard to Article 338 of the Treaty of Versailles, it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that article independently of ratification."[22]

12. On the other hand, a State not bound by a provision of Treaty A might nevertheless become bound by it through (but only through) accepting such an obligation under Treaty B. Thus, in the case of the *Treatment of Polish Nationals in Danzig*,[23] the Permanent Court considered the position of the Free City of Danzig in relation to Article 104, paragraph 5, of the Treaty of Versailles, to which it was not a party, but which it was considered to have accepted by the independent complex of instruments establishing the Free City and regulating the legal position as between it and Poland. The Court concluded:

"It is certain... that the Free City..., having accepted the convention which the Principal Allied and Associated Powers had negotiated in pursuance of the terms of Article 104 of the Treaty of Versailles, thereby ... accepted that article."[24]

13. The same principle was affirmed by the Arbitrator, Judge Huber, in the wellknown *Island of Palmas* case,[25] in which he said:

non-member States. Professor Scelle's view would indeed seem to relate largely to the multilateral *traité-loi*. He says (Special Rapporteur's translation) that "The assertion according to which the effects of treaties cannot extend to third States fails to recognize that in relation to a treaty there may be neither parties nor third States, but only legislators" (*op. cit.*, vol. II, 1934, pp. 345 and 346).

[18] *Loc cit.*

[19] *Publications of the Permanent Court of International Justice, Judgments, Orders and Advisory Opinions*, series A, No. 7, pp. 28 and 29.

[20] *Ibid.*, Series A/B, No. 46, p. 141.

[21] *Ibid.*, Series A, No. 23, p. 19.

[22] *Ibid.*, p. 21.

[23] Series A/B, No. 44.

[24] *Ibid.*, p. 30.

[25] *Reports of International Arbitral Awards*, vol. II (United Nations Publication, Sales No. 1949.V.1), pp. 842, 850 and 870.

"It is evident that whatever may be the right construction of the treaty, it cannot be interpreted as disposing of the rights of independent third Powers... It appears further to be evident that treaties concluded by Spain with third Powers recognising her sovereignty over the 'Philippines' could not be binding upon the Netherlands... On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded by third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing [this] inchoate title...".

These citations from the *Island of Palmas* case illustrate another aspect of the basic principle that a treaty cannot impose obligations on third States—namely, that it equally cannot impose liabilities or disqualifications upon them or impair, affect, or dispose of their rights; and this aspect is also illustrated by an opinion given by Lord Stowell in 1796 when he was King's Advocate, cited in Lord McNair's *Law of Treaties*:

"...And with respect to the operation of any subsisting treaties between the Crown of Denmark and the Dey (of Algiers) for the mutual protection to be afforded to each other's Property by their respective Flags, it cannot be extended beyond the Powers who are parties to that Engagement, and cannot in any manner abridge the Rights of other States founded upon the general law of Nations...".[26]

14. A further variation, and a striking illustration of the same basic principle, is afforded by the decision of Professor Verzijl as umpire of the Franco-Mexican Claims Commission, in the *Pablo Najera* case. The question was whether Mexico, not being a member of the League of Nations, could nevertheless avail herself of Article 18 of the Covenant of the League, which provided for the registration of treaties and international agreements with the Secretariat of the League, and added that "No such Treaty or international engagement shall be binding until so registered". In giving this decision, Professor Verzijl, as umpire, said:[27]

"The non-member State is wholly a stranger to the undertakings assumed by the members... Mexico, not being bound in any way by the provisions of Article 18, and these provisions being in consequence incapable of prejudicing it in any way, Mexico *per contra* can equally not derive from these provisions any argument in its favour in order to escape from international engagements which it has assumed by a Convention that, so far as Mexico is concerned, is entirely valid."

15. The line taken in the above-cited decisions and opinions abundantly reflects the line taken in the practice of States. In this respect it will perhaps be sufficient for present purposes to cite Roxburgh, who discussed a considerable number of concrete cases, and in relation to them says[28] that

"The practice of States fully confirms the unanimous view of Publicists that a third State cannot incur legal obligations under a treaty to which it is not a party."

and he adds[29]

"Many other cases can be found in the practice of States to show that a treaty cannot impose obligations on a third party; but it is unnecessary to labour an undisputed point".

Equally, in relation to rights, Roxburgh says:[30]

"No Publicist has ever suggested that a third State can ever acquire rights under a treaty which benefits it merely incidentally, and the practice of nations supplies evidence to show that it cannot do so."

This last citation, however, involves a point that will be more fully considered in due course.

16. *Paragraph 2.* This is self-explanatory—and see article 2 (3) and the commentary to it in para. 9 above.

ARTICLE 4. APPARENT OR QUASI-EXCEPTIONS OR QUALIFICATIONS TO THE PRINCIPLE *pacta tertiis nec nocent nec prosunt*

17. *Paragraph 1.* Despite the more or less absolute character of the principles discussed in the preceding paragraphs—absolute at any rate in the case of obligations (the case of rights, as will be seen in due course, is not quite so absolute), these principles are nevertheless subject in practice to certain qualifications. These are specified in Division C of the text, and will be commented on in that connexion. Reference may, however, be made here to paragraphs 3 and 4 of the introduction to the present report. The phrase "exceptions or qualifications" is all the same not entirely satisfactory. Possibly "qualifications" is reasonably apt, but none of them amount strictly to an *exception*; or, if they are exceptions, it is only in the indirect or incidental sense that they can be said so to be. At the most they are quasi-exceptions. This will become clearer when the actual provisions dealing with the matter are considered, but it would be truer to say that all these exceptions or qualifications are really in the nature of glosses on the basic principles, which in themselves remain entirely unaffected. But the gloss exists, for as Rousseau[31] says, harking back to his earlier *dictum* (see para. 7 above), "...the affirmation of principle according to which international treaties have but a relative effect must not be taken literally". What this means is that while the treaty may not, purely in and of itself, either oblige or entitle the third State, the latter may become separately obliged or entitled, in a manner similar or parallel to the treaty provisions, or may be affected by its provisions in a manner that has legal consequences, or may, under general international law, be or become

[26] Opinion of Lord Stowell as King's Advocate, of January 2nd, 1796, cited in A. D. NcNair, *The Law of Treaties: British Practice and Opinions* (Oxford University Press, 1938), p. 309.

[27] Cited in Verzijl, *Jurisprudence*, p. 161: Special Rapporteur's translation of the passage cited.

[28] *Op. cit.*, p. 29.

[29] *Ibid.*, p. 31.

[30] *Ibid.*, p. 36.

[31] *Op. cit.* in note 3 above, p. 462 – Special Rapporteur's translation of the passage cited.

possessed of certain obligations or rights *in relation to* the treaty.

18. *Paragraph 2.* This paragraph defines the terms "(effects) *in detrimentum*" and "*in favorem, tertiis*", which, as indicated in paragraph 6 of the introduction, are used throughout the text as convenient portmanteau expressions whenever it is not desired to indicate any particular effect, but to cover the whole of the very considerable range of the different classes of effects that a treaty provision may have. Not every such provision simply imposes an active obligation or confers an active right. This paragraph is otherwise self-explanatory.

19. *Paragraph 3.* No particular comment is required.

ARTICLE 5. PRINCIPLES UNDERLYING THE CASES IN WHICH TREATIES MAY HAVE, OR RESULT IN, EFFECTS *in detrimentum*, OR *in favorem tertiis*

20. *Paragraph 1.* This is so largely self-explanatory that to comment on it would only result in repetition, in a more extended form, of what is already there. It is a question of trying to discern and isolate the main principles on the basis of which, despite the *pacta tertiis* principle, and without infringing it, treaties can be said to have certain effects *in detrimentum*, and *in favorem, tertiis*. The main principles are stated in this paragraph, and are four in number (or five, if the principle that where there is *damnum sine injuria* there is no legal claim in any case where no basis of absolute liability exists, be included: this might have been mentioned as a sub-division of the principle numbered (iv), since it is relevant in connexion with the position whereby a third State has no legal cause of complaint if it incidentally suffers damage or detriment from a treaty which is in itself lawful, and does not infringe any *legal* right of the State concerned). In a certain sense, the principle of non-intervention is also involved.

21. Some of the principles mentioned are obvious, as for instance, that a third State will incur obligations, and similarly obtain rights or benefits, if it enters into a separate treaty to that effect with the parties. It is then of course under this separate treaty that the actual effects arise, and it is under this treaty alone that the third State is obliged or can claim. Others of the principles indicated are not so self-evident. In the books, many individual instances or classes of concrete case are mentioned—such as those of treaties containing international settlements, or demilitarizing some area, or transferring territory, or creating a servitude; but this is often done without relating these classes of cases to any general principle, such, for instance, as that of a duty to respect valid international acts not infringing the legal rights of the third State. The principle of this duty covers respect for acquired rights, recognition of the "dispositive" effects of treaties under executed clauses, and much else. In the same way, it is often stated that "as a general rule" treaties establishing régimes for international waterways operate *erga omnes*, but without relating this fact to the principle that if use is made for purposes of passage of a waterway passing though the territory of another State, such use must necessarily conform to any valid treaty provisions governing the navigation of the waterway. A more or less automatic entailment—"because rights, then obligations"—is involved here, and there is really no need to have recourse to the idea of a treaty by nature "*erga omnes*". Whether the Special Rapporteur has indicated the right or the best principles to account for the different concrete instances is another matter. It can easily be seen that a different view could be taken on certain points. The essential thing is that some basis of principle should be sought and found.

22. A word may be added about the headings lettered (A) and (B) in paragraph 1 of article 5. It is evident that the effects of treaties for third States can be divided into two main groups. There are, on the one hand, those effects which, in a variety of ways, lead to or consist in a position in which the third State is found to be carrying out or enjoying, if not the very obligations and rights of the treaty itself as such, at any rate similar, analogous, or parallel ones. If the treaty says "Do A", the third State will in due course be found doing A, not under the treaty as such, but for example because, through the medium of the treaty, "A" has been received into the general body of international customary law, and has in that form, for that reason, and in that way, become incumbent on all States even though they were not parties to the original treaty. On the other hand, there is the other main category of "effects". The third State is not found carrying out the treaty provisions at all, either directly or by analogy, or for any reason or in any guise. The "effect" is simply that the third State is called upon to take up a certain attitute towards the treaty and its contents or consequences—an attitude of recognition, respect, non-interference, tolerance, sufferance, as the case may be. The principle of non-intervention could be invoked here. But the duty is really a broader one—of respect for valid international acts. The latter principle is also a far more satisfactory one than the idea that certain types of treaty have an inherent effect *erga omnes*. In any case, the distinction between the two above-mentioned types of "effects" is a well marked one, even if there are certain areas of slight overlap, and recognition of it contributes greatly to a retention of direction in this subject.

23. *Paragraph 2.* This has been inserted in order that the point should be borne in mind even at this stage. Comment on it is reserved until later.

DIVISION B. RIGHTS AND OBLIGATIONS *INTER SE* OF THE PARTIES TO A TREATY IN CONSEQUENCE OF PROVISIONS RELATING TO THIRD STATES

ARTICLES 6 AND 7. CASES OF *pacta in detrimentum* AND *in favorem tertiis*, RESPECTIVELY

24. It will be convenient to consider these two articles together. It is clear, though often not specifically referred to in this literature of the subject, that the question of third States in relation to treaties to which

they are not parties has two distinct aspects. The more usual aspect, or at any rate that which more frequently gives rise to problems, is that of the position of the third State itself—how far that position is or can be affected by the treaty, and in what circumstances, if any, the third State can be under any obligations, or derive any rights, by reason of the treaty, though not a party to it. The other aspect relates, not to the position of the third State, but to the position of the parties *inter se,* in those cases where the treaty provides, for instance, that one or more of the parties shall take certain action regarding, or afford certain treatment to, a third State.

25. The general principle of articles 6 and 7 is quite clear, and indeed self-evident, in the case of a treaty conferring rights or benefits on third States. If, under a treaty, one of the parties undertakes to confer a certain benefit on a State which is not a party to the treaty, this is presumably because the other party has a direct interest in the third State concerned receiving that treatment or benefit, and, consequently, if it is not afforded, that other party has a right of recourse.

26. *Paragraphs 1 and 2 of article 6.* In principle the position is exactly the same where a treaty purports to confer, not rights, but rather to impose liabilities or disabilities on, or to create a situation unfavourable for, a third State. Of course, such action may be illegal, which would raise another issue. For present purposes it must assumed that no illegality is involved. It may be, for instance, that the parties, having under the treaty assumed certain obligations, undertake in addition that they will use their best endeavours to secure similar conduct on the part of third States. This indeed is precisely the principle embodied in Article 2, paragraph 6, of the United Nations Charter—and see also the somewhat similar provision embodied in the recently concluded Antarctica treaty, cited in paragraph 54 below. In such cases—and many others can be imagined—the fact that the third State is not, and cannot be under any direct obligation in the matter, not being a party to the treaty concerned, does not of itself absolve the parties to the treaty, so far as they are able, and can do so without any illegality, from endeavouring to secure that the third State conforms its conduct or action to the provisions of the treaty. Any party to the treaty failing to make this attempt in relation to the third State will, in the circumstances, commit a breach of the treaty, in respect of which the other party or parties will have a right of recourse against it. It must nevertheless be emphasized that this situation cannot create any actual obligations for the third State (and see para. 28 below).

27. It must equally be emphasized that in such a situation, the third State, though not under any legal obligation, has correspondingly no legal right of redress in case the provisions of the treaty can be and are carried out in relation to it, unless indeed those provisions are in some way unlawful, or their performance involves illegality. This last point is discussed in the next paragraph.

28. "... and so far as they can do so without infringing any other applicable treaty or general rule of international law...". It goes without saying that provisions of the kind here under discussion can only be applied to the third State either with its consent, or else only if, or in so far as, it is possible to do so lawfully without such consent—i.e. without infringing any other applicable treaty or general rule of international law. The parties to a treaty cannot arrogate to themselves the right to apply measures to, or enforce conduct by, a third State, in contravention of applicable treaties or general rules of law. It is not considered that paragraph 6 of Article 2 of the United Nations Charter is intended to have any different effect, despite its somewhat peremptory wording; and, Article 103 *ex hypothesi* can only apply in respect of treaties between Member States. It must be assumed that the Charter, of all instruments, falls to be interpreted in such a way as not to lead to contraventions of treaties or general rules of law.

29. *Paragraph 3 of article 6.* Not only does the fact that the treaty creates disabilities or disadvantages for a third State not absolve parties from their obligations under it *inter se,* but so equally are they not absolved merely by reason of the fact that the third State itself declares its refusal to accept the treaty provision concerned. Only in two cases, it would seem, would the attitude of the third State be material to the obligation of the parties, namely where it is a condition of the treaty that the third State must accept the liability or other situation created for it by the treaty, or else where the treaty provision is of such a character that its object, and the carrying out of that object, would be unlawful without the consent of the third State concerned.

30. *Article 7* deals with the case of treaties by which the parties engage themselves to afford certain rights or benefits to a third State, such as a treaty providing for a transfer of territory to a third State, or for the exercise by it of certain rights in the territory of one of the parties, or for the restoration of certain property to the third State. Peace treaties often contain such provisions. It is possible, as will be seen later, that the effect of a treaty of this kind may be actually to confer upon the third State itself certain direct rights, in such a way as to afford to that State a right of recourse in case the treaty is not carried out in relation to it. The point is that, whether this is the case or not, and even if the third State cannot itself be said to enjoy, by reason of the treaty, any direct right which the third State itself could, to use the French term, *faire valoir,* the parties to the treaty remain under an obligation *inter se* to grant to the third State the stipulated rights or treatment. In short, if one of them fails to do so, there would be a breach of the treaty, and the other party or parties would have a right of recourse against it, even though the third State itself might have no legal right of action.

DIVISION C. POSITION OF THIRD STATES IN RELATION TO THE TREATY [32]

SUB-DIVISION I. PRESUMPTIONS AND METHODS OF CLASSIFICATION

ARTICLE 8. PRESUMPTIONS

31. *Paragraph 1.* Owing to the force of the principle *pacta tertiis nec nocent nec prosunt,* which is itself a derivative of the fundamental principle of consent as the foundation of the international obligation (though not, as has been observed elsewhere in this series of reports [33] of the antecedent rule that consent does create obligation), there must be a natural presumption that any given treaty does not have any effects *in detrimentum,* or *in favorem, tertiis*; and in case of doubt this presumption will govern.

32. *Paragraph 2.* But clearly the presumption can only apply to the question whether the third State is affected by the actual provisions of the treaty, e.g. must carry out like obligations or is entitled to enjoy the benefits. It cannot relate to or affect obligations (or rights) which, under general principles of law, it may have in relation to the treaty, if lawful and infringing no legal right of the third State; e.g. not to interfere with its due execution, to respect its dispositive clauses etc. This type of obligation on the part of a third State in relation to a treaty is of an independent, objective, character, and is not affected by presumptions.

33. *Paragraph 3.* The presumption is in any case weakened, and may be entirely negatived, in the case of certain treaties such as those embodying international settlements, or containing neutralization or demilitarization clauses which are frequently regarded (though perhaps with doubtful warrant (see end of para. 22 above)) as having effect *erga omnes.* This must be a matter for appreciation in the individual case.

34. *Paragraph 4. Per contra,* the presumption is greatly strengthened, and may become virtually absolute, in those cases where the third State has the possibility of becoming a party to the treaty in question, by ratification or accession, or by any other special procedure that may have been provided. Such cases are clearly different from those where the third State possesses no inherent faculty of participation, and could not become a party at all unless the parties to the treaty themselves made some special *ad hoc* provision to that effect, or specifically and *ad hoc* admitted it as a party. No authority on the proposition enunciated in the paragraph exists. Nevertheless, as a matter of principle, it is believed to be correct, and to furnish a substantial aid to determining the circumstances in which an *in detrimentum* or *in favorem* effect for third States can reasonably be implied—or not implied. This is because it seems clear that when a treaty itself makes provision for the admission of third States, then the correct method of procedure, if those third States wish to benefit from, or to enjoy the rights provided by the treaty or if they are prepared to assume its obligations, is for them to avail themselves of the faculty of becoming parties. In these circumstances, therefore, and in relation to this type of treaty, there would be a rather strong *prima facie* (though perhaps not always necessarily conclusive) presumption that third States were not, so long as they remained such, intended to derive any benefit from the treaty, or equally to be placed under any liability by reason of it. Where, on the other hand, a third State is in some way affected by a treaty to which it can never become a party except by some special dispensation of the existing parties, it may be easier or more natural, or more equitable, as the case may be, to regard the treaty as producing indirectly or incidentally certain effects in relation to that party. Naturally, as implied at the beginning of paragraph 1 of article 8, all must depend on the interpretation of the treaty in the context of the surrounding circumstances.

35. *Paragraph 5.* This is merely consequential. Paragraph 4 only applies to third States who could sign and ratify or accede. It is not sufficient for the treaty simply to contain accession clauses. For paragraph 4 to apply, the third State concerned must come within the scope of the provisions concerned, if those provisions are limited as to the class of State entitled to accede.

ARTICLE 9. METHODS OF CLASSIFICATION

36. *Paragraphs 1-5 and 7.* This article, like corresponding ones in previous drafts, is purely analytical. It need not figure in any eventual draft completed by the Commission, but has been included at the present stage because it affords by far the best means of seeing what the topic as a whole really involves, and also what are the different legal principles underlying the various aspects of the subject. As in the case of the topic of termination of treaties, there is a natural tendency to confuse processes and principles [34] —in the present case to confuse the processes by which effects for third States may be produced, with the legal principles that cause these processes to produce the effects in question. A third and interesting method of classification is that based on the nature of the effects themselves. For purposes of comparison, a separate and alternative set of articles covering the material figuring in Sub-division II of Division C of the text will be furnished at a later stage. A fourth, but less important, method of classification, is according to the character of the treaty in respect of which the effects for third States are being produced. Since the basis and effect of the various methods of classification are clearly

[32] As the logical counterpart of the title of division B, this might have been called something like "Relations of the parties with third States". But this would not have been quite correct. The third State has, in certain respects, a relation to the treaty, rather than to the parties.

[33] See for instance in the fourth report (A/CN.4/120), printed in the *Yearbook of the International Law Commission, 1959,* vol. II, para. 15 of the commentary to article 3 (1) of the text.

[34] See the Special Rapporteur's second report, *Yearbook of the International Law Commission, 1957* (United Nations Publication, Sales No.: 57.V.5,Vol.II), p. 43, para. 39.

apparent from the text of the relevant paragraphs of article 9, it is not proposed to expound them further here. It is evident, however, that each method of classification is capable of covering broadly the same, and the whole, ground.[35] It is merely a matter of convenience or elegance which is selected (see further in para. 38 below).

37. *Paragraph 6.* This points out something that would otherwise perhaps be overlooked, and which in any case refers to one of the distinctions that are among the most important for the understanding of the subject as a whole. Some "effects" of treaties for third States, if appropriately brought about—e.g. by consent—are active and positive: the third State does something—it carries out an obligation or exercises a right. Other "effects" are purely passive or negative: the third State recognizes, respects, tolerates, refrains from intereference, etc.

38. *Paragraph 7.* As so often, there are difficulties or drawbacks in practice in adhering rigidly to any one of the different methods of classification outlined, considered purely in themselves; and for immediate purposes at any rate, it seems best to adopt a somewhat mixed and eclectic form of arrangement. The one actually adopted is neither wholly logical nor the most elegant, but it has the merit of spreading the subject out to the utmost possible extent, so that it can be fully inspected, as it were. It is principally based on method (iii)—nature of the concrete acts or processes whereby effects are produced for third States—since this is how the matter mostly comes up in practice; but it has elements drawn from the other methods also, more particularly method (ii). As the nature of this classification will be clear from the various sub-division and section headings, etc. of the text, it need not be commented on here. But these headings should be carefully studied, for in a sense they contain in themselves a pocket exposition of the whole subject. One point may be specially mentioned. The selected method has the advantage, for study purposes, of keeping mainly to the presentation of the subject that will be found in the books, while at the same time trying to make its structure and foundation of principle clearer. For this purpose, it keeps entirely separate the *in detrimentum* and the *in favorem* situations. This is, however, somewhat artificial and a matter of convenience rather than essential. While there are one or two points peculiar to the case of obligations only, or to the case of rights only, in general it is possible to include both obligations and rights (or rather *in detrimentum* and *in favorem* effects) together, under each head and sub-head.

[35] For example, selecting on the basis of method (iv) the type of treaty which is producing effects for third States, it may be said that the process whereby the provisions of a so-called "law-making" treaty come to be regarded as applicable *erga omnes*, can variously be regarded purely as a process (method (iii)), based on the principle (method (ii)) that the *pratique constante* brings a general rule into being as a rule of customary international law, and that the type of effect thereby produced (method (i)) is that the third State must observe the same rule as is contained in the treaty, though it observes it as a customary, not a treaty, rule (it has merely become customary *via* the treaty).

SUB-DIVISION II. EFFECTS OF TREATIES IN DETRIMENTUM *AND* IN FAVOREM TERTIIS

SECTION 1. EFFECTS *in detrimentum tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES, *in detrimentum tertiis*—OBLIGATIONS WHICH THE THIRD STATE MAY ACQUIRE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN THE TREATY

Rubric (a). In detrimentum *effects brought about by the volition of the third State*

Sub-rubric (*a*) 1. Effects directly brought about by the third State

39. The present section deals exclusively with *in detrimentum* effects, and the present sub-section deals with active or positive, as opposed to passive or negative, effects. Rubric (*a*) covers the case of *in detrimentum* effects of this kind produced by the volition of the third State itself. This volition may manifest itself in two ways—directly (the third State consents) or indirectly (the third State does something else which, by a process of entailment, involves for it *in detrimentum* effects under or arising out of the treaty). Sub rubric (*a*) 1 deals with the one case; sub-rubric (*a*) 2—see paragraphs 48-54 below—with the other.

ARTICLE 10. POSITION OF A THIRD STATE SIGNATORY OF, BUT NOT YET A PARTY TO, A TREATY, IN REGARD TO THE FORMAL CLAUSES OF THE TREATY AND, IN PARTICULAR, TO PARTICIPATION BY OTHER STATES HAVING A FACULTY OF PARTICIPATION UNDER THE TREATY

40. *Paragraph 1.* This is a relatively minor matter. Yet it does constitute a case where a State which is technically a third State (in that it is not yet a party, though not wholly a stranger to the treaty concerned), has obligations under the treaty. This can, of course, be explained on the basis that signature of a treaty, while only involving a provisional consent to the substantive provisions of the treaty, involves what is really a final and definitive consent to its formal clauses, or those of them which deal with such matters as ratification, accession and coming into force. Thus the third State might be said to be a party to that part of the treaty that contains the formal clauses and therefore not a third State in respect of that part of the treaty. That may be so, but the case seems worth inclusion here.

41. *Paragraph 2.* This seems worth separate mention as an important application of the rule.

ARTICLE 11. CASE OF SPECIFIC AGREEMENT BY THE THIRD STATE WITH THE PARTIES TO THE TREATY, OR WITH ONE OR SOME OF THEM, OR WITH ANOTHER INTERESTED THIRD STATE

42. A third State can, of course, as already stated, never incur an obligation or become subject to a direct liability by reason of a treaty to which it is not a party—that is to say, it can never be placed in this position simply by reason of the treaty itself. It may, however, be placed in that position by its own acts, in which case it becomes a consenting party and there is no violation of the rule that States can only be bound by their consent. (Though irrelevant in the immediate

context, it may be added that it is also possible that in certain circumstances a general rule of international law will operate to place a third State in the same position—of having to conform to provisions contained in a treaty to which it is not itself a party; but then, of course, States are held to be *ipso facto* and *a priori* consenting parties to the accepted general rules of international law. In general, Rousseau says [36] that "Without even mentioning the case where certain treaty provisions are applicable in the guise of customary law to States which did not participate in the framing of them... there are fairly frequent situations in which one sees treaties ... imposing themselves on such States".)

43. *Paragraph 1.* A third State may agree by a separate instrument to be bound, or may, by virtue of a separate instrument, become bound, by a provision of a treaty to which it is not a party. This type of case has already been illustrated by the references to and citations from the decisions of the Permanent Court of International Justice in the cases of the *International Commission of the River Oder* and *Treatment of Polish Nationals in Danzig* (see paragraphs 11 and 12 above). It is strictly immaterial whether (see cases (*a*), (*b*) and (*c*) of this para.) the agreement is with the parties to the treaty, or one or some only, or with another interested third State. The third State is in any event bound.

44. *Paragraph 2.* Clearly, the obligation of the third State arises and continues solely under the separate agreement and not under the original treaty. But this position is sometimes obscured because the third State agrees (though separately) in the form that it undertakes to carry out the provisions of (or observe) "Article X of treaty Y"—which may seem to make it a sort of party to treaty Y. Of course, it is not: it merely subscribes to a similar or analogous undertaking, as would be clear if the undertaking took the form (as it always could do) of reciting the *ipsissima verba* of article X of treaty Y, without referring to it.

ARTICLE 12. CASE WHERE THE THIRD STATE ASSUMES OBLIGATIONS OR LIABILITIES, OR ACCEPTS OTHER EFFECTS *in detrimentum*, BY MEANS OF A UNILATERAL DECLARATION

45. *Paragraph 1.* It is no doubt a question whether binding obligations can be assumed by means of a purely unilateral declaration. That, however, is a separate issue. This paragraph is intended to be so worded as not to prejudge the question of the circumstances in which a purely unilateral declaration can, under international law, create binding obligations for the declarant State. This question, as has already been mentioned elsewhere, [37] is not really a part of the present subject, because a unilateral declaration, although it may be one of the means by which obligations are created for States, is not a treaty, and there are, of course, various ways (and the unilateral declaration may be one of them) in which obligations can arise for States otherwise than through an actual international agreement such as a treaty. The point involved in the present sub-head is simply that in so far as a State can assume obligations by a unilateral declaration in a manner which will be legally binding upon it, then it must necessarily, by that means, be able to bind itself to carry out the provisions of some already existing treaty, or to assume obligations or responsibilities under it. Indeed, declarations of this kind have not been uncommon. It will not be overlooked, however, that in this case, as in those coming under article 11 (see para. 44 above), the third State concerned still remains a third State. It still does not become a party to the treaty in relation to which it assumes obligations. Its obligation still does not derive from that treaty as such, but from the unilateral declaration it makes. Consequently, there is still no exception to the basic principle that treaties cannot directly create obligations for third States.

46. *Paragraph 2.* This needs no further comment than is contained in paragraph 44 above, in relation to the parallel situation arising under article 11.

47. *Paragraph 3.* This raises a point of some importance. However, it arises even more definitely in the case of treaty provisions having effects *in favorem tertiis*, and as the principle involved is exactly the same, comment may be reserved until later (see paras. 90, 93, 101, 103 and 105 below).

Sub-rubric (c) 2. Effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty

ARTICLE 13. RULES APPLICABLE IN RESPECT OF ALL TREATIES

48. *Paragraph 1.* Apart from the fact that the consequences indicated in this paragraph would seem to follow as a matter of principle, there is some authority for the view that a State which conducts itself in this manner—i.e., by availing itself of the benefits of a treaty, or exercising rights under it—thereby also incurs the corresponding obligations, even if no more than the general obligation to conform to it and not infringe its terms. This seems to be the opinion of Roxburgh, who cites Despagnet, who would apparently regard the case as one of a sort of tacit accession to the treaty by conduct. [38] If this is correct, then it is again a case of consent (that is to say, implied consent) by the third State in respect of the obligations concerned. Equally, the third State does not thereby become a party to the treaty, or directly incur any obligations under it. The case is in a sense akin to that dealt with in article 12. It is a sort of unilateral taking up of position by conduct on the part of the third State.

[36] *Op. cit.* in note 3 above, p. 462: Special Rapporteur's translation of the passage cited.

[37] See the Special Rapporteur's first report, *loc. cit.*, p. 117, para. 8; and see article 1, para. 4, of the articles on treaties adopted by the International Law Commission in 1959: *Report of the International Law Commission covering the work of its eleventh session* (A/4169), p. 6; and para. 10 of the commentary thereon (*ibid.*, p. 9).

[38] Roxburgh, *op. cit.*, pp. 25 and 26.

49. *Paragraph 2.* The rule indicated in the first paragraph of the article is conditioned by the words "... in circumstances necessarily implying and involving ..." etc. This condition seems requisite. Nevertheless, there would seem to be a *prima facie* presumption in any given case that it is fulfilled.

ARTICLE 14. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

50. *Paragraph 1.* This case is usually classed with those coming under article 18 of the text, and of course it does have certain features in common with those cases or with the class they represent. There is, in particular, the superficial resemblance involved by the type of instrument under which the user régime is established. Nevertheless, to the Special Rapporteur, these cases—i.e. those coming under the present article 14—appear to belong to a distinct category. In the article 18 type of case, the third State is not, in general, called upon to do more than recognize, accept, not intervene or obstruct the functioning of the régime (e.g. of demilitarization) or status (e.g. of neutrality) set up by the treaty, or the treaty's dispositive clauses (e.g. a transfer of territory), and so on. In the article 14 type of case, on the other hand, something more active is involved. The third State, or its nationals or vessels, wishes to make use of the land or maritime territory concerned, and to make use of the provisions of the treaty for that purpose. It is basically the same case as that of article 13, and really a special instance of it. Again, therefore, an automatic entailment must be involved. The third State, its nationals or vessels, wishes to avail itself of the treaty: it must consequently conform to its provisions and the conditions laid down.

51. The classic case is, of course, that of treaties regulating the use of a means of international communications, in particular a waterway, running through the territory of one or more States. This is frequently treated by writers as an independent and objective case of a class of treaty producing effects *erga omnes*. It is, of course, really only one particular instance of the general type of treaty with which article 14 is concerned. But it tends to receive special mention because it is a frequent and important instance of the class, and one in relation to which the principle of article 14 comes almost daily into play. However, as indicated, most authorities (mistakenly in the Special Rapporteur's view) tend to treat the case as an example of treaties which in their nature have effects *erga omnes*. Thus, Rousseau says: [39]

> "It has happened on a number of occasions that treaties relating to communications, fluvial as well as railroad, have been regarded as binding equally all riparian or interested States, which are deemed to constitute a special group and on that basis, to be subject to a common ordinance valid even without express consent."

To the Special Rapporteur it seems very doubtful whether any treaty can be regarded as having automatic effects *erga omnes*, unless the system it establishes is one that third States can simply recognize and respect without having to engage in the carrying out of specific obligations that would require their active consent. Treaties about international waterways would seem to belong rather to the latter than to the former category. But the point is that the necessary consent can be implied automatically from the exercise of the rights or facilities provided by the treaty. Alternatively, these rights or facilities may be regarded as being in the nature of what the common lawyer calls an "easement", and therefore, according to normal principles, subject to the conditions of the easement.

52. Nevertheless, it is certainly true that as a matter of practice and fact, the instruments governing the use of such international rivers as the Rhine, Danube, and Oder, and such seaways as the Suez and Panama Canals, the sounds and belts, and the Dardanelles and Bosphorus, to take some of the more prominent cases, have all come to be accepted or regarded as effective *erga omnes*, and this of course is still more so as regards the question whether they confer universally available rights of passage (see later in connexion with article 26 of the text, and paragraphs 104 and 105 below). It is automatic, in any case, as already indicated, that, if they give rights to third States, they should also bind, for that arises out of the actual use of these waterways which cannot in practice be effected without conforming to the conditions governing it. Furthermore, it is precisely the willingness to conform, and the fact of habitual conformity, that gives the country concerned the necessary *locus standi* for protest in case of abuses, discrimination, etc. on the part of any riparian State. Lord McNair [40] cites an interesting case considered in 1850, illustrating both the principle of rights and of obligations for third States in respect of the use of an international river—a striking illustration as regards the latter question, since the third States regarded as obliged were actually riparian States and not States merely making a passage use of the waterway concerned. This was the Po, at that time still an international river, flowing through territory that was Austrian, and territory belonging to various Italian States. Under the general Vienna settlement of 1815, the Po was placed under the same navigational régime as that provided for other international rivers by the Treaty of Vienna; but only Austria among the riparian States of the Po was an original party to that Treaty. Sardinia and Parma subsequently acceded to it, but Modena and the Papal States did not. Lewis Hertslet, the Librarian of the Foreign Office [41] putting to the Queen's Advocate the question of the position of British vessels using the Po, and after referring to the fact that the territories of the Papacy and of Modena had been restored to their Rulers by the efforts of the Allies, and confirmed

[39] *Op. cit.*, vol. I, p. 481: Special Rapporteur's translation of the passage cited.

[40] *Op. cit.*, pp. 319 and 320.

[41] At that time the Foreign Office had no resident legal advisers. The "Librarian and Keeper of the Papers", as custodian of treaties, would frame any question of treaty interpretation for consideration by the Law Officers of the Crown and/or the Queen's Advocate. As to the office of the latter, see note 44 below.

to them by the Treaty of Vienna (a fact which he seemed to suggest might be regarded as sufficient to render them subject to the provisions of that Treaty) [42] went on as follows: [43]

"It is declared by Article 96 of the Congress Treaty that the General Principles adopted by the Congress of Vienna, for the Navigation of Rivers, shall be applicable to the River Po.

"Among the Bases of those General Principles, it is established by Article 109, that the Navigation of Rivers along their whole course, from the point where each of them becomes navigable, to its Mouth, shall be entirely free, and (shall) not be prohibited to anyone, in respect of commerce—the Regulations with regard to the Police of the Navigation being respected.

"And by Article 110, it is further established that the System for the collection of the Duties, and for the maintenance of the Police, shall be as nearly as possible the same, along the whole course of the River, and also along that of its Branches and Junctions which separate or traverse different States.

"British Commercial Vessels are therefore, it would appear, entitled to the freedom of Navigating the Po; subject to the payment of the Duties of Customs and Police, which may be established by the several States through whose Territory the River passes—agreeably to the Regulations for that purpose, which should be, if they have not already been, concluded between their Commissioners, in pursuance of Articles 96 and 108 of the Congress Treaty."

In answer to this the Queen's Advocate [44] replied simply: [45]

"I am of opinion that it is obligatory upon the Governments of Rome and Modena although not Parties to the Treaty of Vienna to permit the Nagivation of the Po, as mentioned at the conclusion of the Memorandum drawn up at the Foreign Office dated the 2nd of May last."

In a later case instanced by McNair, Lord Phillimore, then Queen's Advocate, made the following statement of the principle involved, namely that certain situations are of general interest and concern to all States: [46]

"It is true, indeed, that in ordinary circumstances a third State would have no right to interfere in the question of the construction of a Treaty between two other States; but this important subject of transit over the Isthmus of Panama, and generally of the communication between the Atlantic and Pacific Oceans, has of late years been recognised as affecting the interests of all civilised States, and has been the subject of various negotiations and treaties."

The Special Rapporteur cannot deny that these citations lean somewhat heavily on the side of the "international status", having effects *erga omnes*, theory, although he feels that the better view in the case of the use of waterways and other communications running through State territory, and governed by treaty, is that the act of user implies consent to the conditions of use.

53. *Paragraph 2* of article 14. Treaties providing for common international user of an area. It is difficult to say whether this particular type of case—to some extent novel—should be regarded (in respect of the position of third States not parties to the basic treaty of establishment, but making, or wishing to make, use of the territory concerned) as an article 18 or an article 14 type of case—as an "implied consent", or as a "status *erga omnes*" case, in regard to the obligation of the third State to conform to the treaty conditions as to user. In practice, it can no doubt be said that where all the States having, in respect of a given region or area, territorial rights or claims to such rights, or a possible basis of claim, or otherwise directly interested, have established by treaty a régime of permanent or quasi-permanent common user of the region or area, in such a way that the position of other States is not prejudiced or impaired, nor their general international law rights affected, it is extremely likely that the treaty will be regarded, or will come to be regarded, as being effective *erga omnes*.

54. Despite these considerations, cases of this type would seem to belong more properly to the article 14 type (although the concluding words of this paragraph of article 14 do—perhaps somewhat illogically—import an *erga omnes* test). Cases of this type are infrequent, and must in any event be distinguished from the more familiar cases of purely temporary special régimes for a particular area placed under an international authority for a specific purpose (e.g. the holding of a plebiscite) or pending a certain event (e.g. the conclusion of a treaty).[47] The recently concluded treaty on Antarctica, signed in Washington on 1 December 1959, [48] affords an example of the type of treaty under discussion. While specifically reserving all questions of sovereignty, neither admitting nor denying any claims, it provides for the joint use of the whole of Antarctica between latitude 60 south, and the Pole, for scientific, exploratory and other similar purposes, and sets up machinery to supervise and facilitate this process. It makes provision for accession by other countries, but at the same time does not seem to exclude non-parties from the area within the limits of the concept of use for scientific and geographical purposes. Nor does it purport specifically to impose any obligation on non-parties. Yet it is difficult to believe that any non-party which, for instance, sent a scientific expedition to Antarctica,

[42] Hertslet was not a lawyer, and this was clearly a political rather than a valid legal argument.

[43] *Loc. cit.* in note 40 above, p. 320.

[44] John Dodson. The nature of the office of Queen's Advocate was explained in a footnote to paragraph 76 of the commentary in the Special Rapporteur's fourth report (footnote numbered 69 in the version in A/CN.4/120).

[45] *Loc. cit.* in note 40 above.

[46] McNair, *op. cit.*, p. 317: report of 13 February 1866.

[47] One might instance the Saar, Upper Silesia, Trieste, etc. at different times.

[48] The treaty is actually called "The Antarctic Treaty", and, together with the Final Act of the Washington Antarctica Conference is printed as a White Paper by H. M. Stationery Office, London, as "Miscellaneous No. 21 (1959)", cited as Command Paper 913 of 1959.

would not (particularly, but not only, if it made use of facilities provided by, or arranged for with, one or more of the contracting parties, or through the joint periodical meetings of the parties provided for by the Treaty) consider itself, and be regarded, as bound to conform to the conditions of the user of Antarctica laid down by the Treaty, such as demilitarization of the area, prohibition of nuclear tests, provision for inspection of bases, etc., immunity from jurisdiction of all inspectors, etc. There is also a significant clause (see art. 6 of the present text and para. 26 above) by which the parties undertake to "exert appropriate efforts ... to the end that nobody engages in any activity in Antarctica contrary to the principles or purposes" of the Treaty.[49] At the root of such a position, as a causative element affecting the attitude of the third State, lies the existence of a simple if indirect sanction—the test of what it is practicable for it to do, except in co-operation with the parties—and this is itself but an offshoot of a principle fundamental to the "imperfect" character of international law, as law lacking fully adequate means of central enforcement—the principle of effectiveness —of what can or cannot effectively be done by States acting individually.

Rubric (b). In detrimentum *effects brought about by operation of law.*

Sub-rubric (*b*) 1. The third State in effect is or becomes a party to the treaty by operation of law

ARTICLE 15. CASES OF STATE SUCCESSION, AGENCY AND PROTECTION

54A. Whereas articles 10-14 in rubric (*a*) deal with the case where a third State, necessarily having no direct obligations under the treaty, incurs such obligations, or rather similar obligations, by virtue of its own separate act or conduct, the present article attempts to specify the cases in which, by operation of law, a State will directly incur obligations in relation to a treaty to which it is not, or was not in the ordinary sense, a party.

55. *Sub-head* (a). A State may succeed to obligations under a treaty in circumstances in which the law of State Succession governs the matter. In many cases the State concerned thereby becomes an actual party to the treaty, thereby ceasing to be a third State in relation to it, so that no true exception exists. But this is not necessarily always the case. If, for instance, by a cession or other mode of transfer, a piece of territory passes to a State subject to a servitude originally created by a treaty between the State to which the territory formerly belonged and some other State, the State taking the cession may become subject to the obligation, i.e. to the servitude, without becoming a party to the treaty which created it. It can perhaps be said that in such a case that State becomes a party to the obligation though not to the treaty. But the case is more properly simply one of a right *in rem* relating to the territory, effect to which must be given by whatever State is in possession. In any case, it seems worth while drawing attention to State succession as possibly giving rise to something in the nature of a qualification to the general principle of *pacta tertiis.*

56. *Sub-head* (b). Here again, there is not a true exception because the State in question becomes or must be deemed to be an actual party to the treaty. In form, however, it would seem to be possible, and cases would seem to have occurred, in which State A enters into a treaty on behalf of State B, by virtue of a general power conferred by B on A to act for it in the foreign sphere (B nevertheless retaining full sovereign independence), and without B itself actually signing or ratifying the treaty.[50] Roxburgh,[51] though expressing some doubt whether there exists such a law, says "... it is possible that a third State may incur special rights and duties by virtue of the International Law of agency". There is certainly some warrant for this idea in the authorities, and the following passage from Alphonse Rivier[52] is worth noting:

> "... it may happen that a State contracts in the name of another, as mandatory or agent... It may happen that one Power includes [covers] another, its ally, in a treaty of peace. A State can make a *sponsio* for another, or answer for it."

57. *Sub-head* (c). This also is not a real exception, since the protected State is directly bound by the treaty, although not *eo nomine* a party to it. The case is, nevertheless, a quasi-exception, and worth mentioning.

Sub-rubric (*b*) 2. The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law

ARTICLE 16. CASE OF CUSTOMARY INTERNATIONAL LAW OBLIGATIONS MEDIATED THROUGH THE OPERATION OF LAW-MAKING OR NORM-ENUNCIATING TREATIES

58. *Paragraph 1.* This article attempts to describe a process rather than to formulate a rule. Whether the treaty concerned will have the effects stated, must depend on a number of uncertain factors, such as its precise terms, the nature of its subject matter, the circumstances in which it was concluded, the number of States subscribing to it, their importance relative to the subject matter of the treaty,[53] the history of the treaty subsequent to its conclusion, and of the topic to which it relates—and so forth. That a number of important "law-making" or norm-enunciating

[49] It is also of interest having regard to what is said in para. 28 above, that this provision expressly says that "the appropriate efforts" to be exerted by the Parties are to be "consistent with the Charter of the United Nations".

[50] The relationships between Switzerland and Liechtenstein; France and Monaco; Italy and San Marino for instance are not relationships of protecting State and protectorate.

[51] *Op. cit.*, p. 96.

[52] *Principes du droit des gens* (Paris, 1896), vol. II, p. 89: Special Rapporteur's translation of the passage cited.

[53] Thus a treaty to which only a relatively small number of States became parties might nevertheless have a general "law-making" effect, if those States were the States whose influence or interest was preponderant in relation to the subject-matter of the treaty. Some striking examples of this are given in para. 59 below.

("normative") treaties have had such an effect is well known. As Roxburgh[54] says:

> "In practice, this process of the extension of a conventional into a customary rule is not only possible, but of very constant occurrence."

Some of these treaties have largely codified or reflected existing customary law, some have formulated new rules regarded by the States concluding the treaty as being desirable or appropriate. Many have done both. In the former case the rules contained in the treaty, embodying, as they will do, existing customary law, will already be binding on all States as part of general international law, and what really occurs in these cases is that the particular formulation of the existing rule as enunciated in the treaty comes, whether more or less gradually, to be universally accepted as a correct statement or formulation of it. In the latter case, if the new rules 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. Thus F. de Martens says:[55]

> "Sometimes indeed what is regulated by treaty with certain Powers is observed vis-à-vis others through a simple usage, in such a way that the same point can be one of treaty law for some, and of customary law for others."

Similarly, Alejandro Alvarez says[56] that in such cases

> "The rules have changed their character—they can no longer be regarded as contractual, but as customary."

59. Amongst the best known treaties of this kind, or that seem likely to prove to be of it, are the following:

The Vienna *Règlement* on Diplomatic Rank and Precedence drawn up at the Congress of Vienna 1814-15 and the Congress of Aix-la-Chapelle, 1818;

The Declaration of Paris, 1856, on Privateering, Blockade, and related matters;

The Hague Conventions of 1899 and 1907 on the Laws of War, Neutrality and so forth;

The Declaration of London, 1909, on similar matters;

The Paris (1919) and Chicago (1944) Air Navigation Conventions;

The International Load Line and Safety of Life at Sea Conventions;

The Geneva Red Cross Conventions of 1929 and 1949 on Prisoners of War and related maters;

The Geneva Law of the Sea Conventions, 1958.

Included in this list are some instruments, such as the Vienna *Règlement* and the Declaration of Paris, the original parties to which, at least, were few in number; but since these included in the first case the members of the Concert of Europe and in the second the principal naval powers of the day,[57] the treaties had sufficient prestige to secure general acceptance of their provisions as received law. Similarly one instrument, the Declaration of London, was never ratified and did not come into force. Yet much of it was in fact applied during the First World War, until the circumstances of the war changed in such a way as to make this impossible. *Per contra,* there have been treaties essentially of a law-making character, which have been signed by a considerable number of countries, but which have nevertheless failed to secure universal acceptance as embodying generally received rules of law, such as the Brussels conventions on State-owned ships. These facts show that the process here under discussion is not governed by formal considerations but by elements of an imponderable character.

60. Where the process does occur, it may be likened by way of illustration to what happens when lexicographers compile a dictionary.[58] The lexicographer ascribes a certain meaning to a particular word because, in his view, that meaning represents the existing and already received signification of the term in question, as a matter of general and common usage. In short, he "codifies". Alternatively, if the existing usage is uncertain, or there is controversy as to the generally received meaning, he gives it that which, in his view, is on balance the best, most appropriate, or most useful ("legislation" or "progressive development"). But in either case, once in the dictionary, and if the latter is a work generally regarded as authoritative,[59] the word will tend to be used in its dictionary sense because it is there, and is so defined there. The dictionary which, to its compilers (the "parties"), had been an end-process, becomes for other ("third States") a point of departure and a source of authority ("law").

61. The analogy is not complete, and must not be pressed too far. Reverting to treaties, it is important to be clear as to the exact sense in which the type of treaty under discussion may be a source of law. Where it codifies existing general law, it does not make but only declares or evidences the law, and acts as a sort of catalyst through which a particular formulation of the law is mediated. Where the treaty does make new law, it does so, strictly, only for the parties to it. If what it provides comes to receive universal acceptance,

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[54] *Op. cit.*, p. 75.

[55] *Précis du droit des gens*, Introduction, para. 7 – Special Rapporteur's translation of the passage cited.

[56] Alejandro Alvarez, *La codification du droit international* (Paris, 1912), p. 148: Special Rapporteur's translation of the passage cited.

[57] The United States (perhaps not then as prominent in the naval sphere as later) was however not amongst the signatories.

[58] For this idea the Special Rapporteur is indebted to an article by C. Douglas McGee of Vassar College, New York (*A Word for Dictionaries*) in the leading philosophical journal *Mind*, vol. LXIX, No. 273 (January, 1960) at pp. 14–30.

[59] Clearly, the view taken by such a publication as the Oxford English Dictionary will tend to carry special weight; and this parallels the special weight that would be attached in the formulation of general rules of law through treaty, to the participation of those States possessing a particular experience, expertise, or interest in the field concerned.

this is because other States have (voluntarily in the first instance) conformed their practice to it, thereby assisting in creating a new rule of customary law; and it is this rule rather than the treaty that binds the non-parties; and it is custom rather than treaty which is the formal source of the law—the treaty being the material source of the custom. This process has been aptly described by Roxburgh[60] as follows:

> "Thus it may come about that a rule which was originally introduced by express agreement between certain parties may, in process of time, and subject to limitations to be considered, be extended by the consent of the contracting parties and of third parties into a rule of International Law, binding upon those states which have tacitly consented to it. The rights and duties so acquired by third states are not contractual rights and obligations, but rights and obligations which owe their origin to the fact that the treaty supplied the basis for the growth of a customary rule of law."

62. *Paragraph 2.* But whether it is a case of new law, as described by Roxburgh, or of a treaty codifying and declaring existing law—in either case the treaty acts simply as a vehicle. It never as such directly binds non-parties—a position concluding words of paragraph 2 of article 16 seek to bring out. The Special Rapporteur may perhaps be permitted to close the discussion on this subject by quoting from what he has said elsewhere:[61]

> "... the treaty may be an instrument in which the law is conveniently stated, and evidence of what it is, but it is still not itself the law—it is still formally not a source of law but only evidence of it. Where a treaty is, or rather becomes, a material source of law, because the rules it contains come to be generally regarded as representing rules of universal applicability, it will nevertheless be the case that when non-parties apply or conform to these rules, this will be because the rules are or have become rules of general law: it is in the application of this general law, not of the treaty, that non-parties will act. For them, the rules are law; but the treaty is not the law, though it may be both the material source of it, and correctly state it."

SUB-SECTION (ii). PASSIVE OR NEGATIVE EFFECTS OR CONSEQUENCES *in detrimentum tertiis*—OBLIGATIONS INCUMBENT ON THE THIRD STATE, NOT UNDER, BUT IN RELATION TO THE TREATY

Rubric (a). In detrimentum *effects resulting from the application of the principle of respect for lawful and valid international acts*

Sub-rubric (*a*) 1. In the case of all lawful and valid treaties

ARTICLE 17. GENERAL DUTY OF ALL STATES TO RESPECT AND NOT IMPEDE OR INTERFERE WITH LAWFUL TREATIES ENTERED INTO BETWEEN OTHER STATES

63. *Paragraph 1.* It is probably true to say that by inference at any rate, international law does impose on States certain general duties in relation to valid treaties entered into by other States, and an attempt is made in this paragraph to list these.

64. *Sub-head* (a). Roxburgh,[62] citing various authorities,[63] says of third States:

> "They have a general duty not to interfere with the due execution of the treaty, so long as it does not violate international law or their vested rights. Even though they may suffer damage, they are without a legal remedy; they have incurred *damnum sine injuria,* and any attempt to interfere would be a violation of the international personality of the contracting parties."

The second sentence of this passage is more relevant to the subject matter of article 19 of the text, namely that States must accept the fact that certain treaties may have the effect of impairing their position in some way. The first sentence is, however, apt in relation to the more general point dealt with in article 17, which involves a duty of non-intervention in the carrying out of lawful and valid treaties between other States based on the broader obligation of respect for lawful and valid international acts. But, as the sub-head indicates, this does not of course apply where a treaty impairs the actual legal rights, or purports to create legal liabilities or disabilities for the third State without its consent. The different case where a treaty places a State at a disadvantage or impairs or affects its position disadvantageously in some way without impairing its actual legal rights or purporting to create for its liabilities of a legal character, is considered in connexion with article 19.

65. *Sub-head* (b). In the same way, States would appear to be under a general duty to respect, and if necessary recognize, rights which treaties create for other States, provided again that the same conditions prevail, namely that the object of the treaty is lawful and that no impairment of legal rights or creation of legal liabilities etc. is involved. A fuller discussion of this matter will be found below (paras. 70 *et seq.*) in connexion with the related questions arising under article 18.

66. *Sub-head* (c). This is possibly controversial, but it would seem that a State which has signed a treaty, though it has not yet become an actual party by ratification, is nevertheless under a certain duty in relation to the treaty, so long at any rate as there is still a possibility that it may ratify, and no decision not to do so has been taken. It would be anomalous for a State in such a position, and having just participated in the framing of the treaty, and having gone so far as to give the provisional acceptance of it that was involved by signature, then to proceed to take action that might impair the value of the treaty, or frustrate its objects, if and when it came into force. But once a decision not to ratify has been taken, any special duty

[60] *Op. cit.*, pp. 73 and 74.

[61] See *Symbolae Verzijl* (The Hague, Nijhoff, 1958), pp. 158 and 159.

[62] *Op. cit.*, p. 32.

[63] Oppenheim, Fiore, Hall, Rivier, F. de Martens.

arising out of the principle of this sub-head ceases.

67. *Paragraph 2.* This paragraph deals with a point relating to the general question of the validity of treaties, and indicates that it is not a ground of the invalidity of the treaty that it operates to the disadvantage or detriment of a third State—provided always that the treaty is otherwise valid according to the rules governing the substantive validity of treaties.[64] The point is similar, but considered from a slightly different angle, to that which forms the subject of article 19, for the commentary on which see paragraph 79 below *et seq.*

Sub-rubric (*a*) 2. In the case of treaties embodying international régimes or settlements, or of a dispositive character

ARTICLE 18. GENERAL DUTY OF ALL STATES TO RECOGNIZE AND RESPECT SITUATIONS OF LAW OR OF FACT ESTABLISHED UNDER LAWFUL AND VALID TREATIES

68. *Paragraph 1.* Many of the considerations which were discussed in connexion with article 16 apply *mutatis mutandis* to the type of case contemplated by the present article. In contrast with article 16, however, what is here involved is not so much that third States will come to be bound by obligations similar to those incumbent on the parties under the treaties concerned, as that they will be called upon, or will find themselves obliged, to accept, or anyhow will accept, and in that sense be bound by, the situation of law or fact, or the settlement or status, created by the treaty. Whether this is by virtue of some inherent character of these treaties as having effect *erga omnes,* or the consequence of a simple duty for all States to recognize and respect lawful and valid international acts, is a question that has already been touched upon (see para. 22 above) and will be discussed later.

69. Of course in some cases normally classed under this head, but which the Special Rapporteur has placed under article 14, an element of active, even if tacitly manifested, consent is present as was indicated earlier (see paragraph 51 above). Thus if a régime is created for a waterway by the riparian and other directly and principally interested States (e.g. the chief users of the waterway) other States using it, but not having taken part in the framing of the treaty, and not being actually parties to it, must yet abide by the conditions of user established by the treaty: an implied consent to these conditions arises out of the user itself.

70. *Sub-head* (a). "*International Settlements*". With regard to the view that certain types of treaties have a sort of inherently legislative effect *erga omnes,* while such a view is frequently discussed, sometimes with approval, in the literature of the subject, other authorities approach it with a good deal of caution, as, for instance, in the following passage from the *Harvard Research* volume on treaties:[65]

> "According to some writers an exception to the general principle that treaties cannot impose obligations on third States is recognized in the case of collective treaties in the nature of 'international settlements'. Such treaties find their justification not upon legal principles but upon the acquiescence, of the States upon which they are imposed, or upon the ground that they are intended to serve the general interest. Examples of such treaties as those regulating the status or use of international waterways, treaties imposing a régime of neutralization or demilitarization upon a State, and others of a like character. As to treaties of permanent neutralization, there is some difference of opinion as to whether they may create obligations for third States, some authors holding that they do, while others deny it, although at the same time admitting that they may become binding upon third States through the operation of custom. Charles de Visscher *(Belgium's Case,* 1916, p. 17), speaking of the treaty for the neutralization of Belgium observes that it embodied an 'objective rule of international law', from which it would follow that it was binding upon third States as well as upon the parties.
>
> "Professor Quincy Wright has expressed the opinion that, while the provisions of treaties in the nature of international settlements which are intended to establish a permanent condition of things may be of universal obligation, this results from the general acceptance and acquiescence in their terms by all States, not from the treaties themselves. 'Conflicts Between International Law and Treaties', 11 *American Journal of International Law* (1917), p. 573."

Roxburgh is also very non-commital and leans more to the tacit consent theory:[66]

> "An International Settlement is an arrangement made by treaty between the leading Powers, intended to form part of the International order of things, either defining the status or territory of particular states, or regulating the use of International waterways, or making other dispositions of general importance, and incidentally imposing certain obligations or restrictions on International conduct. Such a treaty may or may not contain an 'accession' clause; but in any case it is intended to be binding upon, and in favour of, the whole International Community. What is the position of third States under such a Settlement?... let us suppose that third states, knowing that the Settlement is to be part of the International order, abide by its terms, and in the course of time they come to believe that they are legally bound by it, and entitled to benefit under it: but that this conviction of legal obligation and

[64] See, as to this, the Special Rapporteur's third report (substantive validity of treaties), articles 16–20 and commentary thereon: *Yearbook of the International Law Commission,* 1958, vol. II (United Nations Publication, Sales No.: 58.V.1, Vol. II), pp. 26–28, 39–45.

[65] Harvard Law School, *Research in International Law,* III, *Law of Treaties,* Supplement to the *American Journal of International Law,* vol. 29, 1935, pp. 922–923.

[66] *Op. cit.,* pp. 81 and 82.

legal right does not admit of convincing or direct proof. The question then arises whether it may be presumed. The difference between tacit consent as a source of contractual obligation and tacit consent as a basis of law is here excellently illustrated. Not only is it true that the former is of immediate operation, and the latter of gradual growth; to establish the latter a conviction of legal necessity must be proved or presumed, whereas for the operation of the former no such conviction is necessary."

Rousseau, however, is more categorical and states:[67]

"It happens fairly frequently that treaties establishing a political and territorial régime are regarded as being good against Powers other than the signatory States."

He cites a number of concrete instances but points out that the type of case in which one State, such as Germany under the Treaty of Versailles, undertakes to recognize territorial settlements effected by other countries under other treaties, is not a true instance of the principle now under discussion. It is rather a case coming under the head of article 11 of the present text.

71. To the Special Rapporteur, the considerable lack of enthusiasm evinced over the supposedly inherently "legislative" effect of some kinds of treaties, is evidence of a certain uneasiness at the idea. Exactly which classes have this effect, and why and how? It is easy to see that some treaties trigger off, so to speak, a law-making process (article 16 of the text). Again, some treaties are valid as against third States because the latter actively avail themselves of the treaty (articles 13 and 14). It is less easy to see why others, even if they do embody "international settlements" should be regarded as having an automatic effect *erga omnes*. The Special Rapporteur does not deny that, in the result, they do; but it seems to him preferable to reach this conclusion, not on the esoteric basis of some *mystique* attaching to certain types of treaties, but simply on that of a general duty for States—which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided)—to respect, recognize and, in the legal sense, accept, the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense. It is not of course denied that a third State which dislikes an international act and which is not a party to it, is entitled by legitimate political means to seek to procure its modification or termination. That is what political assemblies such as that of the United Nations, are, *inter alia,* for. But that is a different thing from denying the legal validity of the act or claiming a right to disregard it.

72. *Sub-head* (b). *Case of treaties providing for the demilitarization of an area.* The classic type of treaty, or international act, on whichever basis it is placed, is that providing for the demilitarization of an area; and the classic instance of it is that of the Aåland Islands which, by the Treaty of Paris of 30 March 1856, were placed under a permanent régime of demilitarization, the original parties to this act being France, Great Britain and Russia followed by Austria, Prussia and Turkey. The Islands were then under Russian sovereignty, in virtue of Russian sovereignty over Finland to whom they basically belonged. After the First World War, Finland became separated from Russia, and the question of the need to continue the demilitarized status of the Islands was raised and referred to the Council of the League of Nations. Various legal questions were involved, and the Council appointed a Committee of Jurists to consider them. The chief question was one of rights not obligations—i.e. the right of Sweden, not a party to the Treaty of 1856, to insist on continued demilitarization,[68] and this will be considered under Section 2 below (*in favorem* position). But a possible question of obligations for a non-party was also involved[69] and the Committee of Jurists was led to consider and pronounce on the general juridical nature of the Aåland Islands settlement under the Treaty of 1856. Adverting to the fact that although Sweden was not a party to this Treaty, it was entered into largely in the Swedish interest,[70] the Committee said:[71]

"An examination of the political conditions in which this agreement was entered into shows that the convention in reality has a much more extended bearing ... the provisions settled upon in Paris between the Powers and Russia went beyond the ambit of purely Swedish interests. What was involved was a European interest deriving from the great strategic importance of the Aåland group...."

The Committee, which also referred to the "objective nature of the settlement of the Aåland Islands question by the Treaty of 1856",[72] further declared that

"... any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarization established by these provisions."

Nor did the Committee see anything unusual in such a situation, for it said:[73]

"The Powers have indeed, in numerous cases since 1815... sought to establish a true objective law, and true political régimes the effects of which make themselves felt even outside the circle of the contracting Parties."

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[67] *Op. cit.*, p. 478: Special Rapporteur's translation of the passage cited.

[68] The group is very close to the Swedish coast, and the original treaty — although Sweden was not a party, nor mentioned in it — was made largely in the Swedish interest.

[69] Finland, covered by the original treaty as part of Russia, but not, as such, a party.

[70] See note 68 above.

[71] *League of Nations Official Journal*, Special Supplement No. 3 (October, 1920), pp. 17 *et seq.*

[72] *Ibid.*, p. 18.

[73] *Ibid.*

It is clear that the Committee leaned very much in the direction of the theory of the inherent character of certain treaties as creating an objective situation good *erga omnes*. The Special Rapporteur has already explained in paragraph 71 above why he thinks a different theory is to be preferred, even though it may lead to much the same practical result. In any event, whether a particular treaty will have, or come to have, effects *erga omnes*, must depend on the general situation, and, as the paragraph states, the terms of the treaties themselves and of any other relevant treaties; and equally on other factors, such as the legitimacy of the objects of the treaty, how far they affect and may impair the vested rights of other States, and so on.

73. Somewhat similar to the case just discussed is that of treaties providing for the neutralization of territory. An interesting pronouncement illustrative of the "general interest" theory or principle, made by the English Law Officers of the Crown in 1859 is cited by Lord McNair. After reciting the facts and treaty provisions relating to the neutrality of Switzerland, and the simultaneous neutralization of a portion of Sardinian territory "as if it belonged to Switzerland", the Law Officers continued as follows:[74]

> "It results from these Premises (1) That the Neutrality of Switzerland was established and guaranteed on the ground of the general interest of Europe, quite independently of Switzerland herself, or of Sardinia; and by an Instrument to which they were not originally parties. (2) That the Territory in question (north of the line to be drawn from Ugine) whatever may be its limits geographically or in point of fact, is *quoad* such Neutrality, to be considered as if it belonged to Switzerland, although in all other respects Sardinian Territory. (3) That Sardinia and Switzerland, which were not parties to the Treaty (which first established and guaranteed the Neutrality of Switzerland in the 'general interest') cannot by agreement 'inter se' made for their separate interest, as opposed to the general interest of Europe, retain to themselves any optional or 'facultative' power of actually de-neutralizing, or of permitting the de-neutralization either of any portion of Switzerland (proper) or of any portion of the Territory in question, which is (*quoad* Neutrality) to be considered as if it belonged to Switzerland. As against the other European Powers (especially Austria) this has however been done improperly in the existing war. Switzerland and Sardina could not rightfully, either as against the other Powers, or as against Austria, have permitted French Troops to pass (say) through the Canton of Ticino —such an act would have been a clear violation of the Neutrality of Switzerland; but the territory in question is to be considered for this purpose *as if it belonged to Switzerland.*"

It is perhaps difficult to say that the mere fact that a State declares itself to be neutral, or that certain territory is neutralized and its neutrality guaranteed by certain other States, suffices *per se* to create a status of neutrality *erga omnes*. It tends very strongly to do so, however, in all cases where the assumption of neutrality is not inconsistent with any other status or obligations of the country or territory concerned, and a general tacit acceptance of it will speedily create a legally operative situation. Employing the theory advanced by the Special Rapporteur, however, it seems reasonable to postulate an international duty for all States to recognize and respect any status of neutrality validly created and not in contravention of the rights of any other States or of any relevant existing treaty obligations.

74. *Sub-head (c). Treaties having a "dispositive" character.* It is fairly clear, and needs no argument, that treaties containing clauses that take effect immediately and become "executed", such as transfers of territory, are *ipso facto* "good" against any third State, unless such State has itself a valid and relevant claim—e.g. to territory purported to be transferred by the treaty.

75. A special case is that of treaties creating a "servitude". It is not the Special Rapporteur's intention to discuss the theory of the general range of questions subsumed under the term "international servitudes". He is well aware of its possibly invidious and displeasing connotations. But, as Dr. F. A. Váli shows in a valuable recent re-edition of his work on the subject,[75] such considerations—which are largely considerations of terminology—are irrelevant to the substance of the matter, which relates to the cases in which (usually by treaty) one State possesses or exercises rights in or relative to the territory of another—often to the mutual advantage of both States. The simple point is that, assuming the treaty in question to be valid, it tends to have effects *erga omnes*, or alternatively comes within the category of treaties which other States have a general duty to respect. An excellent illustration, discussed by Dr. Váli,[76] is that of the Costa Rican/Nicaraguan rights in the San Juan River. By the so-called Cañas-Jerez Treaty of 1858, Costa Rica in effect renounced all claims to sovereignty over any part of the San Juan River separating her from Nicaragua, and accepted that the boundary should run along the Costa Rican shore. In return for this renunciation, she was granted certain rights of free navigation on the river. By the subsequent Bryan-Chamorro Treaty, Nicaragua granted the United States what might be called an option to construct an inter-oceanic canal (Atlantic-Pacific) by way of the Great Lake of Nicaragua and the San Juan River, in such a way that if the United States had exercised this option (which in fact it never did, as the canal was constructed in the Panama zone) this would, or almost certainly must, have prejudiced or interfered with Costa Rican navigational rights. Costa Rica protested to Nicaragua and the matter

[74] Opinion of 18 May 1859: cited in McNair, *op. cit.*, p. 314.

[75] *Servitudes of International Law*, Second Edition (London, Stevens, 1958).

[76] *Ibid.*, pp. 147–152.

was referred to the Central American Court of Justice. The Court said:[77]

> "With respect to the legal effects of the treaty in so far as they concern Costa Rica, a third party that took no part in its negotiation, consideration must be given to the situation existing between that country and Nicaragua in the *sphere of territorial* rights prior to the date on which the canal treaty was raised to the category of a law for the high contracting parties, in order to judge the full effect and scope of the violation of rights that is the subject of Costa Rica's action before this Court."

Continuing as to the position regarding the San Juan River, the Court said:[78]

> "It is clear ... that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute nor unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica—the more so if it is considered that such rights, exercised for revenue and defensive purposes, are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium*; such a concession is equivalent to a *real right of use,* perpetual and unalterable, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory."

Dr. Váli, commenting, says that this judgement merits attention from two points of view:[79]

> "First, it is clearly recognised therein that the Costa-Rican navigation rights on the San Juan River constitute a real, i.e. absolute, right. It has been given to Costa Rica as a *quid pro quo* for the abandonment of a territorial claim, that to the full sovereignty of the right half of the above river. The court compares the Costa-Rican rights in foreign territory in its nature to the Nicaraguan rights of sovereignty over the San Juan River.
>
> "Secondly, the court ruled that the Costa-Rican rights are based upon a territorial arrangement; therefore the engagements of Nicaragua with third parties cannot effect, diminish or annihilate these rights."

In short, this case is an illustration both of the principle that a treaty between States A and B (Nicaragua and the United States) cannot impair the rights of State C (Costa Rica) not a party to it; but also of the principle that a treaty between States A and C, giving C rights equivalent to rights *in rem* relating to the territory or waters of A, is good *erga omnes*, and good therefore against B.

76. "... as respects such of their provisions as specifically establish the régime or settlement, or create the status or situation concerned"—a point of detail but an important one. A treaty usually consists of a mixed bag of provisions. The effect of article 18 is, of course, confined to those which are of the particular kind contemplated.

77. *Paragraph 2.* Certain treaties have a specifically regional or group character. Their effects cannot go beyond the region or group. But within those limits they may produce, in relation to third States within the group, the same effects as are set out in paragraph 1.

78. *Paragraph 3.* This paragraph seems desirable as a necessary corrective to any idea that the type of treaty provision contemplated by this article could affect third States in the sense of creating active and positive obligations for them.

Rubric (b). Effects incidentally unfavourable to a third State, resulting automatically from the simple operation of a treaty

ARTICLE 19. DUTY OF STATES TO ACCEPT AND TOLERATE THE INCIDENTALLY UNFAVOURABLE EFFECTS OF LAWFUL AND VALID TREATIES

79. This is really the commonest of all the cases in which a question may arise as to the situation of a third State in relation to a treaty to which it is not a party. As Rivier says:[80] "Treaties may very closely affect third States, and... the more the bonds between States are multiplied, the more will this be so. Already today it can be said that hardly anything of what may be determined between one group of members of the family of nations is entirely indifferent to the others." In these cases, the treaty imposes no obligations on the third State and has no direct effect of any kind on it, but it operates to its disadvantage—or else is "aimed" at it (for instance a pact of mutual assistance between two States in the event of attack by a named third). There may be cases in which such treaties have an unlawful object and are therefore invalid, or impinge on or purport to impair or ignore the rights of one or more third States, and would therefore be—or to that extent be—invalid. But if this is not the case, the third State has no legal ground of complaint merely by reason of the adverse effect that may result for it from the treaty. A common case would be commercial privileges mutually granted to one another by two States, detrimentally affecting the trade or commercial position of a third, which, however, possesses no treaty right to similar treatment. The theory of the matter is very well stated by Roxburgh as follows under the head of *Treaties Incidentally Unfavourable to Third States*:[81]

> "Nevertheless, although a treaty cannot impose obligations on third parties, it may be detrimental to them in various ways. Many a treaty is bound to 'affect' states which are strangers to it, on account of the many points of contact between members of the Family of Nations. But although a treaty may affect strangers, it does not follow that, because it

[77] Judgement, p. 218; cited by Váli, *op. cit.*, p. 151.
[78] Judgement, pp. 219–220; Váli, *op. cit.*, p. 152.
[79] *Op. cit.*, p. 152.
[80] *Op. cit.*, p. 89: Special Rapporteur's translation of the passage cited.
[81] *Op. cit.*, pp. 31–32.

benefits them, they have a right to enforce it, nor that, because it is detrimental to them, they have any legal right to redress.

"On the contrary, they have a general duty not to interfere with the due execution of the treaty, so long as it does not violate International Law, or their vested rights. Even though they may suffer damage, they are without legal remedy; they have incurred *damnum sine injuria,* and any attempt to interfere would be a violation of the Internatonal Personality of the contracting parties.

"If, on the other hand, the treaty infringes the legal rights of a third state, that state is immediately entitled to intervene. In practice, there seem to be three classes of cases in which such rights are liable to be violated: (*a*) when the treaty violates an universally accepted rule of International Law, (*b*) when it is inconsistent with the safety of the third state, and (*c*) when it violates rights previously acquired by the third state."

With reference to the concluding paragraph of this quotation, the phrase "that State is immediately entitled to intervene", apt at the time when Roxburgh was writing, could today be replaced by some such phrase as "that State would at once stand possessed of a right of recourse". Nor probably would Roxburgh's three heads of exception (*a*), (*b*) and (*c*) now be formulated in just that way. But the principles involved remain the same.

80. *Treaties of guarantee and mutual assistance.* Rousseau points out that a number of these were entered into after the First World War, some naming a specific third State contemplated by them, others cast in general terms. "Can it not be said...", he asks, "that such treaties affected third States as assumed or potential aggressors, and thus possessed validity *erga omnes*?"[82] He continues, however, "But here too it must be observed that these treaties only applied to the third State in so far as the latter brought their mechanism into play by its own act. The treaties of guarantee did not operate *ipso facto,* their operation being necessarily subordinated to the illicit act (aggression) of the third State."[83] It is in the same light that such a provision as Article 17 of the League of Nations Covenant has to be seen. This provided that in the event of a dispute between a member and a non-member State, if the non-member refused an invitation of the League Council to become a member for the purposes of the dispute, and resorted to war with the member State, the sanctions provided for by Article 16 of the Covenant should be applicable. This is not, however, properly to be regarded as an attempt to subject the non-member to the provisions of a treaty it was not a party to. Rather was it the creation of a situation potentially unfavourable to the third State in circumstances which, nevertheless, could only come about by the act or omission of the third State itself—and doubly so, because either by accepting temporary membership, or by not resorting to war, these consequences could be averted by it. In a certain sense no doubt, such a treaty does create a liability for a third State—but not in an illegal way. The well known explanation of this matter given by Dionisio Anzilotti[84] is still the best:

"The juridical content of these provisions does not bear on relationships with third States but with the relationships [*inter se*] of the members of the League: these provisions primarily authorize the Council, in the general interests of peace, and in the special interests of one of several members, to perform acts which may heavily engage the responsibility of the League; in the second place they impose on the associated States duties connected with the action of the Council, duties amongst which figures one of the most serious character, namely to come to the aid of a member State in the circumstances contemplated by paragraph 3. [But] in the relationships between the member States and the non-member States it is customary international law which remains in force."

81. *Extradition treaties.* Lord McNair[85] cites these as constituting a case in which incidental effects are produced for a third State—or rather for its nationals—by a treaty to which that State is not a party. This is true, but as these effects arise from the presence of the individual concerned in the territory of one of the parties to the treaty, the same situation can result from many other types of treaties affecting individuals. The case of extradition treaties is cited by McNair because the English Law Officers have fairly frequently been called upon to pronounce on it. Various views were expressed, but the correct one appears undoubtedly to be that given by the Queen's Advocate, Dodson, in 1849 as follows:[86]

"Mr. Clark states that he is advised 'that as a British Subject his arrest under a Treaty between Belgium and France is a Breach of International Law, a Treaty between those two Countries, although by it made applicable to Foreigners in each Country, being inoperative against a British Subject unless ratified by a Treaty with Great Britain, which in respect to the charge of Fraudulent Bankruptcy is not the case'.

"I do not think that Mr. Clark has been correctly advised in this respect; I am of opinion that a British Subject residing in France is amenable generally to all the Laws of France whether founded on Treaties between France and other Countries, or not, and that the accession of Great Britain to the Treaty is not requisite to give Validity to the Treaty between France and the other Contracting Country."

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[82] *Op. cit.*, p. 483: Special Rapporteur's translation of the passage cited.

[83] *Ibid.*

[84] *Corso de Diritto Internazionale*, 3rd ed. (Rome, 1928) French translation by Gidel (Paris, Sirey, 1929), pp. 415 and 416: Special Rapporteur's translation from the French of Gidel.

[85] *Op. cit.*, pp. 320–326.

[86] Report of 10 December 1849: cited in McNair, *op. cit.*, p. 322.

SECTION 2. EFFECTS *in favorem tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES *in favorem tertiis*—RIGHTS WHICH THE THIRD STATE MAY HAVE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN THE TREATY

Rubric (a). In favorem *effects brought about by the act of the parties to the treaty alone, or of a single grantor*

Sub-rubric (*a*) 1. Act of the parties to the treaty

ARTICLE 20. THE *stipulation pour autrui* (RIGHTS OR BENEFITS EXPRESSLY CONFERRED ON A THIRD STATE BY THE TREATY ITSELF)

82. *Paragraph 1.* The "*stipulation pour autrui*", giving direct rights to the third party concerned, is, in one form or another, known to most systems of law based on Roman law; and although not known as such in the Common Law systems, can be achieved *aliter* by what is known as the declaration of trust.[87] Moreover, there is in principle no reason why a trust should not be created by a contract between the settlor and the trustee, to which the beneficiary is not a party; and although the normal method is by deed of trust or under a will, some authorities[88] regard a trust, which certainly originates in agreement (requiring as it does the consent of the settlor and the trustee) as being "merely a special kind of contract ... between the settlor and the trustee"[89] for the benefit of the *cestui que trust*. There seems to be no reason why a similar position should not obtain in international law, provided the conditions specified in paragraph 1 of article 20 are satisfied, and it would seem that the principle of the *stipulation pour autrui* is in fact received in international law—see further below.

83. The point is that there must be a "*stipulation*" definitely and intentionally made "*pour autrui*". Article 20 in no way breaches the rule that, in principle, third States cannot any more claim rights under a treaty to which they are not parties, than they can be subjected to obligations under it. The parties to the treaty must intend to confer rights or benefits on the third State in such a way that it can be said that they have agreed that the third State can claim them as of right. They must in effect intend to create what amounts to a legal relationship between themselves and the third State, though it may not be of a contractual character—just as under the Common Law system there is a very definite legal relationship between the trustee and the beneficiary, though it is not a contractual one (the contractual element operating only between the trustee and the creator of the trust). Another way of looking at the matter in international law would be to regard it as an extension of the position whereby a single State may, by a purely unilateral declaration, give undertakings or assume obligations in favour of another State, or *erga omnes*, which may in certain circumstances be legally binding on it. If one State, acting alone, can do this, there seems to be no reason why two or more acting jointly should not do so. In short, what operates as a contract between the parties *inter se*, also operates *vis-à-vis* the third States as a species of joint and binding unilateral declaration.

84. Although a contrary view has been expressed by authorities of the eminence of Anzilotti,[90] it would seem that the above conclusion, and the rule suggested in paragraph 1 of the present article 20, correspond to the view expressed by the Permanent Court in the *Free Zones* case. In the preliminary phase of the case, the Court, having come to the conclusion that it could find in favour of Switzerland's "right to the Free Zone of Gex ... simply on the basis of an examination of the situation of fact in regard to this case", considered that the Court "need not decide as to the extent to which international law takes cognizance of the principle of 'stipulations in favour of third Parties'".[91] Commenting on this, however, the *Harvard Research* volume says:[92]

> "Notwithstanding the somewhat cautious manner in which the Court expressed itself regarding the place in international law of the principle of *stipulations pour autrui*, it would seem that its order in so far as concerned the Zone of Gex was, in fact, based on a recognition of the principle that in this particular case, the Powers having by treaty created for the benefit of Switzerland, a free customs zone within the territory of one of the parties to the treaty, Switzerland was entitled to enjoy that right, and could not be deprived of it without her consent."

Next, in its subsequent (final) judgement in the *Free Zones* case,[93] the Permanent Court, while again able to find in favour of Switzerland on independent grounds, made certain general observations on the subject of stipulations *in favorem tertiis*. After uttering a warning to the effect that "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour",[94] the Court continued:[95]

> "'There is, however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.'"

Apart from the last seven words, which are clearly redundant (since if the third State claims the right at

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[87] See the English case of *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Co.*, (1915) Appeal Cases 847, at p. 853.

[88] See Roxburgh, *op. cit.*, p. 8, citing so distinguished a constellation as Maitland, Pollock, and Anson.

[89] *Ibid.*

[90] *Op. cit.*, p. 424.

[91] Publications of the Permanent Court of International Justice, *Reports*, Series A, No. 22, p. 20.

[92] *Op. cit.*, p. 932.

[93] Publications of the Permanent Court of International Justice, Series A/B,No.46.

[94] *Ibid.*, p. 147.

[95] *Ibid.*

all, it *ipso facto* accepts it), this passage exactly expresses and endorses the view on which paragraph 1 of the present article is based. Article 18 (*b*) of the Harvard Draft [96] equally embodies this idea and in commenting on it the *Harvard Research* volume says:[97]

> "It is believed that the conclusions of the majority of the court are sound, and that they will be approved by the majority of jurists. It may be emphasized in this connection that the increasing practice of inserting in treaties stipulations for the benefit of third States is a fact which cannot be ignored, and that international law should be interpreted in such a way as to bring it into harmony with the actual conditions which this tendency is producing. Reference may be made here to the pertinent observation of Hoijer (*Les Traités Internationaux, 1926,* p. *280*), that, while the principle of *res inter alios neque prodesse neque nocere potest* is one of the most generally accepted principles of international law, it is necessary to avoid attributing an absolute effect to it which would be in contradiction with the increasing interdependence of nations and contrary to the realities of international life. The conclusions of the majority of the court go no further than to affirm that a treaty may stipulate for a benefit in favor of a State which is not a party to that treaty, and if it does so, such State is entitled to claim and enjoy the benefit. But it would seem that the benefit must be expressly stipulated for in the treaty; in the language of the Court it cannot be 'lightly presumed' to have been the intention of the parties to accord it."

Sir Eric Beckett equally concluded [98] that

> "The [Permanent] Court must have held, therefore, that international law does—in some circumstances—take cognizance of the principle of stipulations in favour of third parties."

85. It must be admitted that Rousseau, to whose views the Special Rapporteur attaches great weight, appears to reject altogether the principle of the *stipulation pour autrui* in international law, which he characterises as "foreign to international law",[99] and concluding after a long examination of the international practice and decided cases in the matter that "... it does not seem that the institution of the *stipulation pour autrui* should be admitted in international law".[100] In the course of this examination he says: [101]

> "It makes no difference that the benefit for the third State has been foreseen and taken into account by the Parties, even were it to the point of constituting the purpose of the stipulation: even in that case, the third State acquires no 'right' to demand the execution of the treaty. There exists in that event an advantage for the third State, but not a right."

This view has the curious result that Rousseau almost appears to admit more readily that a treaty can impose a liability on a third State than that it can create rights in its favour, and although this would not be a fair description of his conclusions, it does seem to the Special Rapporteur that they perhaps do not give sufficient weight to the cumulative effect of the decided cases which he cites,[102] and which afford at least some element of support for the notion of the *stipulation pour autrui*. The Rapporteur himself feels that the view taken in the Harvard Draft, and in the present text, is more in accordance with realities in the international sphere. When international law in so many ways contains analogies with private law, and reflects or applies private law doctrines,[103] it is difficult to see why that possibility should be regarded as wholly excluded in the case of the *stipulation pour autrui*.

86. *Paragraph 2.* As the *Harvard Research* volume says,[104] "... it hardly seems essential... that the State in whose favour the benefit was stipulated must be specifically named in the treaty, when it is manifest from its terms or the attendant circumstances ... that the benefit was intended for a particular State and that no other State could have possibly been intended or could have availed itself of the benefit". One could go further: there are many ways in which a State can be designated without being indicated *eo nomine,* e.g. if it belongs to a clearly specified class.

87. *Paragraph 3.* This is of course the essential consequence of paragraph 1. If the third State had no right of recourse exercisable independently of the action of either or any of the parties, it could not be said strictly to possess any actual right. The right would then lie only in the parties to the treaty, to insist *inter se* on the performance of the treaty stipulation. If they failed so to insist, the third State would have no recourse. Hence if the principle of paragraph 1 is to constitute a reality, a direct right of recourse for the third State must exist.

88. "... provided always ... etc.". As the *Harvard Research* volume says,[105] "Obviously, if a treaty stipulation for the benefit of a third State lays down conditions under which the benefit is offered, compliance with those conditions by the third State is necessary before it is entitled to claim the benefit".

89. *Paragraph 4.* It might be maintained that, as a matter of logic, if a third State once has a right on the basis discussed above, it cannot be deprived of it without its consent, and must therefore be a party to any abrogation or modification of the treaty provision concerned. But this would be to make the third State the equivalent to an actual party to the treaty itself,

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[96] *Op. cit.*, p. 661.
[97] *Ibid.*, p. 935.
[98] In the *British Year Book of International Law*, vol. 11 (1930), p. 14.
[99] *Op. cit.*, p. 477: Special Rapporteur's translation of the passage cited.
[100] *Ibid.*: Special Rapporteur's translation of the passage cited.
[101] *Ibid.*, p. 469: Special Rapporteur's translation.
[102] *Ibid.*, pp. 471–473.
[103] See the striking collection of instances contained in H. Lauterpacht's *Private Law Sources and Analogies of International Law* (London, Longmans, Green & Co., 1927).
[104] *Op. cit.*, p. 935.
[105] *Ibid.*, p. 936.

at any rate as respects the provisions under which it claimed; and it has never been suggested that the *stipulation pour autrui* can have this effect. In general, the possibility is categorically denied. Thus Rousseau (p. 470) says: "Il paraît impossible de reconnaître ce droit à l'Etat tiers". The Harvard Draft article 18 (*b*), which, as already indicated, provides:[106] "If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation..."; adding that "so long as the stipulation remains in force between the parties to the treaty". Commenting, the *Harvard Research* volume says:[107]

> "As to the duration of the benefit, the meaning of paragraph (b) is clear: the third State is entitled to the benefit stipulated in its behalf only so long as the stipulation remains in force between the parties. It may, therefore, be extinguished by the abrogation or termination of the treaty or the benefit stipulation therein ... or its enjoyment may be suspended, or it may be impaired or otherwise modified by an alteration of the treaty—in each case without obtaining the consent of the third State."

The reasons for this view were cogently stated by Judges Altamira and Sir Cecil Hurst in their dissenting opinion in the *Free Zones,* when they said:[108]

> "In conclusion, we wish to make every reservation in regard to a theory seeking to lay down, as a principle, that rights accorded to third Parties by international conventions, to which the favoured State is not a Party, cannot be amended or abolished, even by the States which accorded them, without the consent of the third State; such a theory would be fraught with so great peril for the future of conventions of this kind now in force, that it would be most dangerous to rely on it in support of any conclusion whatever."

Evidently basing itself on this expression of judicial opinion, the *Harvard Research* volume comments:[109]

> "To require the consent of a third State in whose favor a benefit has been stipulated for, as a condition of the abrogation or modification of a treaty by the parties who have entered into it, would be contrary to one of the basic principles underlying the whole treaty system... If it were admitted that the consent of a State, merely because it is the beneficiary of a stipulation in a treaty between other States, but which is not itself a party thereto, were necessary before the treaty could be abrogated or altered by the parties who made it, it is safe to say that few if any treaties containing such stipulations would ever be entered into in the future. It would seem to be a sound principle, therefore, that when a State not a party to a treaty is nevertheless the beneficiary of an advantage or privilege derived from such treaty, the advantage or privilege must be regarded as a precarious one, to be enjoyed only so long as the parties choose to maintain the treaty in force between themselves, and to execute its stipulations. The State which accepts and avails itself of the benefit must do so with full knowledge of the precariousness of its duration and subject to any risk which may be involved in its reliance upon the assumed continuance of the benefit."

90. *The exceptions to the principle of paragraph 4.* The correctness of the view just described is incontestable. Nevertheless it seems to the Special Rapporteur that, in the circumstances set out in sub-paragraphs (*a*) and (*b*) of paragraph 4 of the article, certain exceptions to the principle should be admitted. The third State enjoying the rights in question is (as noted above —para. 89) not a party to the treaty: yet there is a legal relationship, which might be regarded as having a quasi-contractual character, between it and the parties. If—*Case* (a)—the parties have undertaken to maintain the treaty in force indefinitely or not to terminate or modify it without the consent of the third State, then this is part of the very right which the third State enjoys objectively in consequence of the treaty. It stands on the same footing as the substantive content of the right. If—*Case* (b)—the clauses of the treaty in favour of the third State are of a "dispositive" character (e.g. provision for a transfer of territory to it), and have been executed, there can be no going back upon them except by a new international act, to which the third State would have to be a consenting party. This is the normal legal effect of dispositive clauses. If—*Case* (c)—the third State would, as a result of the cessation or modification of the substantive right, suffer detriment going beyond the simple consequences of such termination or modification—in short, if it would not merely be put back into the position it occupied before it had received and exercised the right, but into a *worse* position, then again, it is suggested, its consent ought to be sought before any change is effected—seeing that the right or benefit was deliberately conferred on it by the parties. If none the less it were considered to be going too far to give the third State what might amount to a veto in the matter, it should at least be provided that in a case of this kind, no change in the position would be brought about without previous consultation with the third State, and without its views being taken fully into account—and also there should be provision for the payment of compensation.

Article 21. Treaty provisions removing or modifying a disability or prohibition previously existing for a third State

91. This is clearly an important and quite frequent case, and therefore, though strictly governed by the principle of article 20, worth dealing with in a separate article. The parties to the treaty may, by the treaty, not only confer active rights or benefits on a third State, but release it from some disability or prohibition (e.g. not to cede certain territory without consent, not to enter into a customs union with another country,

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[106] *Ibid.*, pp. 661 and 924.
[107] *Ibid.*, pp. 936 and 937.
[108] Publications of the Permanent Court of International Justice, Series A/B, No. 46, p. 185.
[109] *Op. cit.*, p. 937.

etc.), under which it previously lay. This disability or prohibition will itself probably have been imposed by a treaty to which the third State was a party; but the method of the original creation is immaterial. The point is that once the release has taken effect, this, according to the usual principle of executed clauses referred to in paragraph 90 above, is irreversible, except by a new international act, to which the third State would have to be a consenting party.

Sub-rubric (*a*) 2. Act of a single State

ARTICLE 22. UNILATERAL DECLARATIONS CONFERRING RIGHTS ON OTHER STATES

92. *Paragraph 1.* This is the counterpart in the sphere of rights of article 12, except that, of course, the third State cannot, as in the article 12 case, be the declarant State, since no State can unilaterally confer rights on itself. But the third State can be the beneficiary of a unilateral declaration made by another State, if this effectively creates legal rights. Accordingly, this article, without prejudging this last issue, provides that if and when one State does, by a unilateral declaration, assume binding legal obligations, this creates rights for third States.

93. *Paragraph 2.* This is entirely speculative. There seems to be no authority on the point. In the case of obligations assumed by means of a purely unilateral declaration, and consequently without any *quid pro quo,* it seems peculiarly difficult to deny the right of the declarant State in all circumstances to rescind or modify the declaration, unless this was itself stated to be irrevocable; but in the circumstances mentioned in the paragraph it may be reasonable to expect the payment of compensation or the making of other appropriate reparation.

Rubric (b). In favorem *effects brought about with the participation of the third State itself*

Sub-rubric (*b*) 1. Effects directly brought about by the parties and the third State conjointly

ARTICLE 23. EXERCISE BY THE THIRD STATE OF A FACULTY OF PARTICIPATION IN THE TREATY ITSELF BY THE THIRD STATE

94. *Paragraph 1.* While still technically a third State (according to the definition of that term contained in article 1 of the text) though not a stranger to the treaty, a country can become a party to it in the circumstances stated in this paragraph, though of course the effect and the purpose is to cause it to cease to be a third State. It can of course be maintained, as has been noticed in connexion with the corresponding case in article 10 of the text (see paragraph 40 above), that the third State is not truly a mere third party in respect of the formal clauses of the treaty, under which the right of substantive participation arises. The case is included here, however, because it is a case in which the third State, while still not a party to the treaty, enjoys a right in virtue of it—namely to become a party.

95. *Paragraph 2.* This paragraph is speculative and the idea involved in it has already been considered elsewhere.[110] The idea is not unreasonable in itself, but involves difficulties. The right cannot in any case continue indefinitely, or a sort of veto would be retained by a State which might never ratify. Hence the time limitation.

96. *Paragraph 3.* In connexion with the topic of the conclusion of treaties, it was seen that States, other than the original signatories of a treaty, have no basic right to become parties to it.[111] This must depend on the terms of the treaty and any other relevant circumstances. It is equally the case that the mere fact that a third State enjoys rights or benefits in virtue of the treaty can confer no such right.

ARTICLE 24. CASE OF SEPARATE AGREEMENT BETWEEN ALL, OR ONE OR MORE OF THE PARTIES, AND A THIRD STATE, PRODUCING FOR THE LATTER *in favorem* EFFECTS SIMILAR TO THOSE OF THE TREATY

97. *Paragraph 1.* The case mentioned in subhead (*a*) of this paragraph is merely the counterpart of that contained on the side of obligations in article 11. It involves no theoretical difficulties, since it is entirely by virtue of the separate agreement that any rights are enjoyed.

98. *Most-favoured-nation clauses.* Worth noticing as a common example of rights under treaty A being acquired by a third State under a separate treaty B, is the case of a most-favoured-nation clause. X contracts with Y under treaty B to give Y the benefit of any treatment it accords to another country. Subsequently by treaty A, X grants certain treatment to Z. X must then grant the same treatment to Y, although Y is a third State so far as treaty A goes, and has no direct rights under it.

99. As regards subhead (*b*), there would seem to be no reason, in principle, why only one or some of the parties should not agree to give the third State the treatment in question—so far as such party or parties could, without the co-operation of the other or others, do so.

100. *Paragraph 2.* It might of course be inconsistent with the terms or objects of the treaty for one or some of the parties to agree to afford rights or benefits under it to a third State. Any attempt to do so would then involve a conflict that would fall to be resolved according to the ordinary rules for resolving conflicts between different treaties or other agreements.[112]

101. *Paragraph 3.* It is clear that in cases coming under paragraph 1 the third State's right, if any, to object to the treaty being abrogated or modified without its consent would depend entirely on the separate

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[110] See the Special Rapporteur's first report, articles 29 and 30 and commentary thereon: *Yearbook of the International Law Commission, 1956,* vol. II (United Nations Publication, Sales No.: 56.V.3,Vol.II), pp. 112 and 113, 122.

[111] Article 34, para. 2, and commentary thereto in the Special Rapporteur's first report: *loc. cit.,* pp. 114, 125.

[112] See article 18 and the commentary thereon in the Special Rapporteur's third report: *Yearbook of the International Law Commission, 1958,* vol. II (United Nations Publication, Sales No.: 58.V.1, Vol.II), pp. 27, 41–44.

agreement, and such right, if any, would lie solely against the other party or parties to this separate agreement. The position might well be that in spite of the termination or modification of the main treaty, the third State would still be entitled to the same rights or benefits under the separate agreement, and as against the other party or parties to that agreement, unless it consented to forgo them.

Sub-rubric (*b*) 2. *In favorem* effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with, the provisions of, the treaty, by the third State with the consent, express or tacit, of the parties

ARTICLE 25. RULE APPLICABLE IN THE CASE OF ALL TREATIES

102. *Paragraph 1.* There is no particular authority for this provision. But it seems reasonable and logical in the circumstances specified.

103. *Paragraph 2.* Clearly third States cannot (unless the case is an "article 26 case") insist on the indefinite maintenance of rights or benefits they have only indirectly come by under paragraph 1 of this article. But a right to receive compensation or other appropriate reparation may be reasonable in the circumstances indicated.

ARTICLE 26. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

104. *Paragraph 1.* This article is simply the counterpart of article 14, and needs no comment beyond what was made in connexion with that article. The provisions of this paragraph of the present article are believed to correspond to fact, i.e. to what actually happens in the case e.g. of an international waterway (river, canal) passing through national territory.

105. *Paragraph 2.* It would also seem that in a number (though not necessarily all) of these cases, long continued usage has given rise to what amounts to a right to the continued enjoyment of the facilities or benefits concerned, unless there is general international agreement to terminating or changing them. Even where this is not the case, there would seem to be occasion to provide for compensation or other appropriate reparation. Furthermore, since the essence of the loss or damage would consist in the very cessation or diminution of the right, there would seem to be no ground for limiting the right to reparation to the article 20 4 (*c*) type of case, where the third State has to show loss or damage over and above that caused by such cessation or diminution.

Rubric (c). In favorem *effects brought about by operation of law*

Sub-rubric *(c)* 1. Because the third State in effect is or becomes a party to the treaty by operation of law

ARTICLE 27. CASES OF STATE SUCCESSION, AGENCY AND PROTECTION

106. This is simply the counterpart of article 15, and requires no comment beyond what was made in connexion with that article.

Sub-rubric (*c*) 2. *In favorem* effects consequent on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law

ARTICLE 28. CASE OF CUSTOMARY INTERNATIONAL LAW RIGHTS MEDIATED THROUGH THE OPERATION OF A LAW-MAKING OR NORM-ENUNCIATING TREATY

107. It follows automatically that if, through the process described in article 16, a third State is or becomes subject to certain rules, as rules of customary international law, though they have acquired recognition as such through the mediating effects of a treaty, such State is entitled to all the benefits of the rule.

SUB-SECTION (ii). INDIRECT OR INCIDENTAL EFFECTS OF CONSEQUENCES *in favorem tertiis*—EFFECTS NOT UNDER, BUT IN RELATION TO, THE TREATY

ARTICLE 29. *In favorem* EFFECTS RESULTING FROM THE APPLICATION OF THE PRINCIPLE OF RESPECT FOR LAWFUL AND VALID INTERNATIONAL ACTS

108. *Paragraphs 1 and 2.* This again is the counterpart in the sphere of rights or benefits of articles 17 and 18. It is however very possible that in relation to these matters no question of rights or benefits will arise. For instance, in the case of many of the treaties coming within the ambit of article 18, what happens is simply that the régime, status, settlement or disposition concerned is valid and applies *erga omnes*. But in some cases there is a concomitant. For instance, in the case of a demilitarized area, the concomitant of respecting the demilitarization provisions is the right to have them respected by others. In the case of waterways, as has been seen, the concomitant of respecting and conforming to the conditions of passage and user may be, and usually is, the enjoyment of a right of passage and user. This must of course depend on the terms of the treaties concerned, the circumstances, the actual practice followed, and so on. The principle involved was well stated by the Committee of Jurists in the *Aåland Islands* case [113] as follows: [114]

> "As concerns Sweden, no doubt she has no contractual right under the provisions of 1856 as she was not a signatory Power. Neither can she make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty, since—though it may, generally speaking, be possible to create a right in favour of a third party in an international convention—it is clear that this possibility is hardly admissible in the case in point, seeing that the Convention of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly by the provisions. Nevertheless, by reason of the objective nature of the settlement of the Aåland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested,

[113] This case has already been discussed as regards the obligations aspects, in connexion with article 18 of the text see para. 72 above.
[114] *Ditto.*

insist upon compliance with the provisions of this Treaty in so far as the contracting parties have not cancelled it. This is all the more true owing to the fact that Sweden has always made use of it and it has never been called in question by the signatory Powers."

Rousseau also, despite the doubts referred to in paragraph 85 above, recognizes the existence of rights or benefits for third States where international communications are concerned, and, instancing a number of cases, says: [115]

"The law relating to communications tends in effect to accord free passage as a right, and not as a favour, to all the States of the world, whatever the declaring or contracting States. The right of passage is for the benefit of all, third States as well as signatory States. This is particularly so in the matter of fluvial and maritime communication (international rivers and canals)."

109. *Paragraph 2.* Here something more is involved than the mere right to expect that other States also will respect the situation of law or of fact concerned. How far can the third State purport to insist on the continuance of that situation? This is a different case from that of "law-making" or norm-enunciating treaties of the kind contemplated in articles 16 and 28 of the text. These can, of course, *quâ* treaties, be modified, or even terminated. But the rules they embody, or have come to be regarded as embodying, as general rules of customary international law, can, as such, only be modified in a manner that is valid *erga omnes* by the means recognized by international law for the modification or creation of customary rules of law.

110. As regards international settlements, it is obvious that some, e.g. territorial settlements, can be modified at will by the parties. The passage quoted in paragraph 108 above from the Report of the Committee of Jurists in the *Aâland Islands* case suggests that the same would be the case with a treaty demilitarizing or neutralizing an area. It seems to the Special Rapporteur, however, doubtful whether this view is entirely correct. As has been seen (para. 105 above), it would not appear, in principle, to be correct as regards the case of international waterways that have been in common and general use over a long period. It would seem that, in principle, a somewhat similar position ought to obtain in the case of any other treaty of the international settlement type, if it is one which has come to be accepted as having an *erga omnes* character—at least to the extent suggested in paragraph 2 of the article, namely that directly interested States [116] which are duly conforming to the provisions of the régime or settlement, are entitled to expect to see it continue, or at least to be consulted before it is terminated or modified.

111. *Paragraph 3.* The third State still does not have any rights under the treaty, though it may have certain rights respecting it.

ARTICLE 30. EFFECTS INCIDENTALLY FAVOURABLE TO A THIRD STATE RESULTING AUTOMATICALLY FROM THE SIMPLE OPERATION OF A TREATY

112. There are of course numerous, and even innumerable, ways in which a treaty may incidentally or indirectly benefit a third State. Thus a treaty between A and B which has the effect of limiting certain exports from A into B may create greater opportunities for the same line of exports from C into A. It is, however, obvious that not the remotest right is conferred on C as the result of this, and it goes without saying that C can have no right to require the continuance of the treaty or to object to its termination or modification. This article naturally only applies to cases where the third State does not, under any previous article of the text, enjoy more concrete rights, or a more favourable position.

[115] *Op. cit.*, p. 463: Special Rapporteur's translation of the passage cited.

[116] It would have been very different in the *Aâland Islands* case, for instance, if the third State concerned had not been Sweden, but some geographically remote State that took the matter up.