ABHANDLUNGEN

International Treaties and Third States

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1. Introduction

Sovereign equality of all States is one of the most fundamental principles of contemporary international law. In the society of States – a society legally structured by the co-ordination of its members – the legal capacity of some States to prescribe, by way of treaty, rules of behaviour for States not belonging to the group of contracting parties, would be in open contradiction to the principles of equality and independence of all States. Therefore, as Lord McNair observed, "both legal principle and common sense are in favour of the rule *pacta tertiis nec nocent nec prosunt*, because as regards States which are not parties (commonly referred to as 'Third States') a treaty is *res inter alios acta*"[1]. It is in the application of this old Roman law principle, now commended and accepted world-wide, that the Vienna Convention on the Law of Treaties (hereafter Vienna Convention)[2] formulates as the "general rule" regarding treaties and third States that "a treaty does not create either obligations or rights for a third State without its consent" (Art.34). This general rule is to be regarded as the principal guideline when we begin to examine the relationship between international treaties and States not parties to them.

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Abbreviations: EPIL = Encyclopedia of Public International Law, ed. by Rudolf Bernhardt; RdC = Académie de Droit International, Recueil des Cours; SEMP = Sovetskij ezegodnik meždunarodnogo prava [Sowjetisches Jahrbuch des Völkerrechts]; SGP = Sovetskoe gosudarstvo i pravo [Sowjetstaat und Recht]; YILC = Yearbook of the International Law Commission.

[1] Lord McNair, The Law of Treaties (1961), p.309.

[2] Doc. A/CONF.39/27 in A/CONF.39/11/Add.2, p.289 *et seq.*; reprinted in ZaöRV vol.29 (1969), p.711 *et seq.*

The old rule *pacta tertiis nec nocent nec prosunt* is, however, as Wengler correctly remarks[3], in any case misleading. The rule is valid in its whole range only in regard to treaties which are really of no concern to non-participating States, and therefore these kinds of treaties – other than their general identification and after confirming that they represent the bulk of international agreements – are of no further concern for an examination of "Treaties and Third States". On the other hand there exist treaties which are either detrimental or useful for other States and this in two possible ways: they may have a retroactive effect either on the interests or on the legal position of States not party to them. It is this kind of treaties we have to deal with.

Referring to a possible retroactive effect on the interests of other States is to signify that the title of this article covers more than those problems which are regulated in Arts.34 to 38 of the Vienna Convention, because it is not confined to the scope of "treaties providing for obligations and rights for third States", and therefore this article is not restricted to an analysis of Part III, Section 4 of the Vienna Convention.

As an introductory remark we have to point briefly to legal institutions which are within the range of the topic under consideration but which are not genuinely covered by it because none of the States concerned is a "third State" in the terminology used here, i.e. the terminology of the Vienna Convention. The definition of "third State" in Art.2 (1) (h) of the Vienna Convention as "a State not a party to the treaty" is a definition not only for the purposes of the Vienna Convention but a commonly used one.

A State A being connected with a State B by a treaty with a most-favoured-nation clause is not a "third State" in relation to a more favourable treaty that State B concludes with a State C, because it is not the latter treaty which establishes a claim for State A but the former one to which State A is a party; the subsequent treaty is only the prerequisite for the application of the former treaty[4]; thus the ILC as well as the Vienna Diplomatic Conference on the Law of Treaties were right not to deal with the most-favoured-nation clause under the heading of "Treaties and Third States"[5].

A second legal institution within the range of the present topic is the

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[3] W. Wengler, Völkerrecht, vol.1 (1964), p.244.

[4] R. G. Wetzel, Verträge zugunsten und zu Lasten Dritter nach der Wiener Vertragsrechtskonvention (1973), p.25.

[5] YILC 1966 II, p.177 para.32. Cf. also A. A. Talalaev, Pravo meždunarodnych dogovorov. Dejstvie i primenenie dogovorov [The Law of International Treaties. Operation and Application of Treaties] (Moscow 1985), p.68.

accession clause of a treaty, which is sometimes regarded as a treaty in favour of those States to which the accession clause is addressed[6]. But an accession clause is an offer to join the treaty and if the "third State" makes use of it, it becomes a party to the treaty and loses its position of a "third State".

2. *Treaties with Effects on the Interests of Third States*

Treaties which in no way affect the legal status of a third State may nevertheless touch upon the political, economic, security or other interests of third States. Examples usually mentioned in this connection are military alliances which are perceived by potential adversary States as being detrimental to their security interests; or trade agreements with favourable customs clauses which may have a negative effect on export possibilities of third States. As far-reaching as the deterioration of inter-State relations in consequence of the conclusion of such treaties may be, from the legal point of view one can only comment that States, having of course due regard to peremptory norms of general international law (Art.53 Vienna Convention) are free to conclude whatever treaties they wish to conclude and third States have to respect them as a legal fact[7]. One cannot argue with the Soviet author I.S. Pereterskij who wrote that it is natural "that the third State cannot remain indifferent to such a treaty and the formula that the treaty is only a matter for the contracting States cannot be applied here"[8]; but this is true only politically speaking. Legally the third State has no instrument at its disposal to oppose a treaty having a detrimental effect only on the third State's interests.

Politically the third State is at liberty to oppose the treaty – whether it be its conclusion or its application – during normal foreign-policy intercourse under the condition, however, that the third State does not use illegal means, especially illegal pressure[9].

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[6] See for example I. Seidl-Hohenveldern, Völkerrecht (4th ed. 1980), p.79; A. Verdross, Völkerrecht (5th ed. 1964), p.146; Meždunarodnoe pravo [International Law] (4-e izdanie) otv. red. F. I. Koževnikov (Moscow 1981), p.120; H. Ballreich, Treaties, Effect on Third States, EPIL, Instalment 7 (1984), p.477.

[7] P. Cahier, Le problème des effets des traités à l'égard des Etats tiers, RdC 1974 III, p.589 *et seq.*, at p.599.

[8] I.S. Pereterskij, Značenie meždunarodnogo dogovora dlja tret'ego (ne zaključivšego etot dogovor) gosudarstva [The Importance of an International Treaty for a Third (not concluding this treaty) State], SGP 1957 No.4, p.71 *et seq.*, at p.73.

[9] Wengler (note 3), p.245 note 1.

Two cases, one of which is already historical, the other being more topical, are apt to illustrate these abstract considerations. The North Atlantic Treaty and the Western European Union (WEU) Treaty are legally valid agreements; according to their wording they are defence alliances on the basis of Art.51 of the UN Charter. Both treaties had and have a retroactive negative effect on the political and security interests of the Soviet Union as the potential adversary. It is quite natural that the Soviet Union cannot – to use Pereterskij's words – "remain indifferent" to these treaties and their application. Thus the Soviet Union by a declaration to the Turkish Government of November 11, 1951 tried to discourage Turkey from joining the North Atlantic Treaty[10]; and just recently, in an *aide-mémoire* of July 10, 1984 to the Government of the Federal Republic of Germany, the Soviet Union pointed to the "negative consequences" which would follow if the Federal Republic made use of the modification of Annex III to Protocol No. III of the Western European Union Treaty, i.e. build up its own "long-range missiles and guided missiles" or "bomber aircraft for strategic purposes"[11]. These reactions of the Soviet Union as a third State to the said treaties are purely political in their nature and thus demonstrate that a third State can only use political means but not legal instruments in case the treaty violates the mere interests of the third State. These reactions of the third State may be qualified by the States parties to the treaty as "interference in internal affairs"[12], but such interference is not illegal, it does not overstep the threshold of forbidden intervention.

A second situation concerns treaties which can be regarded as having a positive effect on the interests of third States. The usual examples are primarily treaties which provide not for rights but simply for benefits for third States; they raise the problem of delimiting genuine from merely apparent treaties in favour of third States.

But the group of treaties which call for our attention here are those which, although not containing an accession clause addressed to certain States, arouse so great an interest for these States that they would like to participate in the treaty. This situation comes within the scope of our topic because the interested State is a "third" State as long as its wish to participate in the treaty is not fulfilled.

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[10] Pravda of November 4, 1951 (cited by Pereterskij, note 8, p.74).

[11] Izvestija of July 13, 1984; and Document 961, Recommendation 380 on the application of the Brussels Treaty and Reply of the Council to Recommendation 380.

[12] Thus the *aide-mémoire* of the Government of the Federal Republic of Germany, in Der Tagesspiegel of July 13, 1984.

This problem was heatedly discussed at the Vienna Conference on the Law of Treaties under the heading "Universal participation in general multilateral treaties"[13]. The political incentives for this discussion[14] are meanwhile largely a matter of the past, but the legal problem of the debate is still unsettled; many contributions alone in the Soviet literature of international law are witness to this[15]. In its essence the "principle of universality" as it was discussed in Vienna is the question of a right to participate in "general multilateral treaties"; at best it lies at the edge of the complex of problems which are usually debated under the title "Treaties and Third States", and it is therefore not accidentally that the Vienna Conference did not treat the problem under this title. Nevertheless a short commentary on this problem should not be omitted completely, if only because it is treated with high topicality in Soviet literature.

In view of the well-known interdependency of all States, the need to cooperate world-wide in order to solve world-wide problems, and the desirability for a real universal legal order, the principle of universality deserves great sympathy. But if we have to answer the question whether a "right to participate" in general multilateral treaties does exist today the following observations have to be considered:

The Vienna Convention on the Law of Treaties did not create such a right. It is not convincing when, for example, Lichatchev points to Art.6 of the Vienna Convention and to the Vienna "Declaration on Uni-

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[13] Cf. the discussions on a "proposed new article 5*bis*" in A/CONF.39/11/Add.1, p.229 *et seq.*

[14] They were plainly identified by the representative of the Lebanon: "It was the problem of the political divisions and opposing régimes in China, Germany, Vietnam and Korea. It was the problem that both the Eastern and the Western Powers had failed to solve by political and diplomatic means over a period of twenty years, and that the Eastern States were now attempting to solve by presenting it to the Conference in the respectable guise of a problem of the progressive development of international Law". A/CONF. 39/11/Add.1, p.249.

[15] Cf. I. I. Lukashuk, Parties to Treaties – the Right of Participation, RdC 1972 I, p.230 *et seq.;* N. N. Ul'janova, Obščie mnogostoronnye dogovory v sovremennych meždunarodnych otnošenijach (Kiev 1981); *idem,* Ponjatie obščego mnogostoronnogo dogovora, SEMP 1974, p.90 *et seq.;* V. N. Lichatchev, Mesto Principa univeral' -nosti v sisteme principov meždunarodnogo prava, SEMP 1975, p.100 *et seq.;* M. V. Filimonova, Osobennosti universal'nogo dogovora, kodificirujuščego normy meždunarodnogo prava, SEMP 1978, p.113 *et seq.;* M. A. Korobova, Obščij mnogostoronnyj dogovor i buržuaznye koncepcii meždunarodnogo zakonodatel'stva, Vestnik MGU, Serija 11 Pravo 1983 No.3, p.48 *et seq.;* G. V. Ignatenko, Velikaja Oktjabr-skaja socialističeskaja revoljucija i sovremennoe meždunarodnoe pravo, SEMP 1977, p.11 *et seq.*, at p.24 *et seq.*

versal Participation"[16] as allegedly confirming (russ.: *podverždajuščij)* this right[17]; to "possess capacity to conclude treaties" (Art.6 Vienna Convention) does not mean having the right to be a party to certain treaties, just as the legal capacity to marry gives no claim to marry a certain woman or man. The "Declaration on Universal Participation" is not a legally binding instrument[18]; thus it is not even necessary to point to its qualified wording[19]. Apparent contradictions in the writings of authors who assert the existence of a "right to participate" are apparent. Thus Lukashuk in his Hague Lectures said on the one hand that "the right of each State to participate in universal treaties became one of the principles of the law of treaties" and on the other hand that "the opponents of universality succeeded in preventing this principle from being embodied in the Vienna Convention"[20].

What then remains is to try to derive the "right to participate" from general principles of international law. Here the principle of sovereign equality is the most apt point of reference. But then the arguments of the sponsors of a "right to participate" are more focused on the sovereign equality of the "third" State and less on that of the contracting States which do not want the establishment of treaty relations with the "third" State. The reference to the possibility to declare reservations[21] does not offer a solution because reservations can only modify certain provisions of the treaty but do not prevent the establishment of treaty relations in their entirety. A "right to participate" derived from the principle of equality can only be accepted correspondingly with a "right to decline" the establishment of treaty relations with the "third" State.

A similarly blinkered attitude can be observed when reference is made to the "duty of States to cooperate with one another". Here just the other

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[16] Text in A/CONF.39/11/Add.2, p.285.

[17] Lichatchev, SEMP 1975, p.102.

[18] St. Verosta, Die Vertragsrechtskonferenz der Vereinten Nationen 1968/69 und die Wiener Konvention über das Recht der Verträge, ZaöRV vol.29 (1969), p.681 *et seq.*

[19] According to the Declaration general multilateral treaties "should" (not "shall") be open to universal participation.

[20] Lukashuk (note 15), RdC 1972 I, pp.308, 310. Similarly Lichatchev, SEMP 1975, p.108, who endeavours to prove the existence of a "right to participate" as emanating from general principles of international law and at the same time demands that this principle "should be included in the general system of principles of contemporary international law".

[21] Cf. for example G. Czerwinski, Das Universalitätsprinzip und die Mitgliedschaft in internationalen universalen Verträgen und Organisationen (1974), p.119; D. Mathy, Participation universelle aux traités multilatéraux, Revue belge de droit international 1972, p.529 *et seq.*, at p.563.

way round, this principle is focused on the States parties to the treaty which, due to this principle, are said to be obliged to enter into treaty relations with the "third" State[22]. Discussions on the duty of the "third" State to co-operate are usually perfunctory[23]. If a "right to participate" in general multilateral treaties can really be derived from the duty to co-operate then this duty rests not only on the States parties to the treaty but likewise on third States still holding aloof from general multilateral treaties. In consequence this would mean that all States are obliged to participate in general multilateral treaties, for example in the Vienna Convention on the Law of Treaties. No State supports such an obligation, and this means vice versa that there is also no "right to participate" in general multilateral treaties – at least not on the basis of the "duty of States to cooperate with one another".

Even more doubt must be cast on the assertion that "most directly interested States" have "the right to participate in any multilateral, regional or global convention" and that a "restricted multilateral treaty" concluded without the participation of the most interested State "is null and void"[24]. This assertion is true only in one case: when the treaty is to establish a legal régime for a certain area then it cannot be concluded without the participation of the territorial sovereign of that area; e.g. the Panama Canal régime cannot be established without Panama's participation. But to make "direct interests" in general the indicator of the existence of a "right to participate" would put an end to the freedom of States to choose their treaty partners independently, because where is the limit for a State to declare itself "directly interested"? Especially for the great powers such limits do not exist. Exemplifying a "direct interest" Lukashuk writes: "Grounds for the highest and the most direct interest can serve the special responsibility of a State for the state of affairs in different fields. The special responsibility of the great powers in securing world peace and security and in carrying out the aims of the United Nations serves as the most widely known example of this kind"[25]. It is of course useful for the establishment and maintenance of peace and security when the great powers can in common solve international problems by concluding common treaties. But to derive from their "direct interest" a "right of participation" in any restricted multilateral treaty would mean extending the legal

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[22] Cf. for example Lichatchev, SEMP 1975, p.106.
[23] But see Ignatenko, SEMP 1977, p.32 *et seq.*
[24] Thus Lukashuk, RdC 1972 I, p.312 (emphasis added).
[25] *Ibid.*, p.312.

inequality between the great powers and the rest of the international community of States, as institutionalized in the UN Charter, into the field of treaty-making capacity with the result that some States would have more (legal) capacity to conclude treaties than others. This contradicts the principle of sovereign equality.

Besides, it is not comprehensible why a "right to participate", if acknowledged at all, on the basis of "direct interests" should be restricted to multilateral treaties. Bilateral treaties can have an effect on the "direct interests" of third States too. For example, on June 1, 1984 the GDR and the Korean Democratic People's Republic signed a „Treaty on Friendship and Cooperation"[26]; according to its Art.8 the contracting parties will "undertake all efforts in order that in the interest of an acceleration of the independent peaceful unification of Corea the foreign forces stationed in South-Corea together with their whole military equipment, inclusively nuclear weapons, be completely withdrawn and the cease-fire agreement in Corea be replaced by a treaty of peace". The Federal Republic of Germany is a "most directly interested" State in all questions concerning the unification of divided States. According to this theory the Federal Republic should have a "right to participate" in the East-German/North-Korean treaty. Does not this example demonstrate the dubiousness of the theory that a "right to participate" exists on the basis of "direct interests"?

3. Treaties with Effects on Rights and Obligations of Third States

Treaties with effects on rights and obligations of third States can be divided into two main categories:

3.1. The first category comprises those treaties which, without especially providing for in their very wording rights or obligations for third States, nevertheless modify legal rights and obligations of third States[27]. Here again is proof that the maxim *pacta tertiis nec nocent nec prosunt* is a misleading one. The legal basis for the effect on third States' rights and obligations here is not the treaty itself but other rules of general (customary) international law.

The modification of third States' rights and obligations may be a direct one. Thus peace treaties bring to an end the rights and obligations which had to be observed by neutral States during the time of the armed conflict.

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[26] Full text in Außenpolitische Korrespondenz of June 8, 1984, and Gesetzblatt der DDR 1984 II, p.22.

[27] Wengler (note 3), p.245.

Treaties on cessation of territory alter automatically the duties of third States *vis-à-vis* the ceding State and the transferee as regards the respect of territorial jurisdiction and citizenship.

To the category of the treaties under discussion here belongs, too, the case of successive treaties relating to the same subject-matter when the parties to the later treaty do not comprise all the parties to the earlier treaty; the excluded parties to the earlier treaty are third States with regard to the later one. Their rights and obligations are especially affected when the later treaty is incompatible with the former.

The first problem arising here is the question of the validity of the later treaty. This question must be answered in the affirmative. The ILC admittedly dealt with the question of successive treaties originally from the angle of the validity of treaties, but placed it finally under the section "Application of Treaties", as did the Vienna Convention[28].

Proposed amendments aiming at connecting Art.30 paras.4 and 5 of the Vienna Convention with Art.26 *(pacta sunt servanda)*[29] were not accepted, and the section on "Invalidity of Treaties" does not contain a provision invalidating a treaty which contradicts an earlier one. The grounds for invalidating a treaty listed in the Vienna Convention are intended to be exclusive (see Art.42).

Although the later treaty contradicting the earlier one is valid it has to be regarded nevertheless as an internationally wrongful act[30]. This is a curious situation, but that is what the Law of Treaties says.

The conclusion of a later treaty not compatible with an earlier one affects the legal position of third States which are parties only to the earlier treaty in that they can make use of the rights provided for in Art.60 para.2 of the Vienna Convention (in connection with Art.30 para.5), raise claims on the basis of State responsibility, or launch protests or reprisals.

Treaties which do not especially provide for rights and obligations for third States can modify the legal position of third States also indirectly. Here we have to consider the situation which is dealt with in Art.38 of the Vienna Convention: the treaty can be a possible starting point for the generation of new customary law. The source of rights and obligations the creation of which eventually modifies the legal position of third States is

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[28] A. N. Talalaev, Pravo meždunarodnych dogovorov (Moscow 1980), p.274.

[29] Soviet Union's amendment A/CONF.39/C.1/L.202: for its reasoning see A/CONF.39/11, p.164 (Talalaev).

[30] Cf. Arts.1, 3 and 16 of the "Draft Articles on State Responsibility" as adopted by the ILC in the first reading, YILC 1980 II (Part 2), pp.30–34. A. Verdross, Die Quellen des universellen Völkerrechts (1973), p.78.

not the treaty directly but custom; in order that a treaty rule "should become binding upon a third State, the latter must recognize it as a customary rule of international law"[31]. There is no effect of a treaty rule on the legal position of a third State unless this rule "follows the usual course of custom-creation in international law"[32]. The interplay of treaties with custom has been widely discussed in legal literature[33]. Reference shall be made here only to the principal problem which was resuscitated at the Vienna Conference, namely "the age old problem of the binding character of the rules of customary international law"[34]. Does the recognition of the rule by a great number of States, the "specially interested" ones included, suffice to make this rule binding upon all and every State (general recognition or "liberal" approach) as the ICJ held in its judgment of February 20, 1969 in the *North Sea Continental Shelf* Case[35], or is it necessary that the rule be specifically recognized by a third State in order to be binding upon it (individual recognition or "rigid" approach)? In analysing the preparatory work of Art.38 of the Vienna Convention Rozakis came to the conclusion that this article "is open-ended, comfortably allowing both interpretations to be considered as legitimate", but he added, and the present author is prepared to concur with Rozaki's reasoning, that he "is inclined to believe that the rigid one is more consonant with the spirit of Art.38 as revealed by the circumstances of its preparation and the general sociopolitical conditions which dictated the amendment to the Commission's draft"[36]. To apply the "liberal" approach would in fact mean passing over Art.34 of the Vienna Convention (the general rule regarding third States) under the guise of a different source of the (treaty) rule being applicable to third States. The Soviet author Korobova who supports the rigid approach deserves consent when writing: "In essence we are

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[31] T. O. Elias, The Modern Law of Treaties (1974), p.68.

[32] C. L. Rozakis, Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law, ZaöRV vol.35 (1975), p.1 *et seq.*, at p.30. The same position is held by Talalaev (note 5), p.70.

[33] R. R. Baxter, Treaties and Custom, RdC 1970 I, p.31; A. D'Amato, The Concept of Custom in International Law (1971), p.103 *et seq.*; I. F. I. Shihata, The Treaty as a Law Declaring and Custom-Making Instrument, Revue égyptienne de droit international, vol.22 (1966), p.51 *et seq.*; K. Doehring, Gewohnheitsrecht aus Verträgen, ZaöRV vol.36 (1976), p.77 *et seq.*; G.M. Danilenko, Sootnošenie i zaimodejstvie meždunarodnogo dogovora i meždunarodnogo obyčaja [Correlation and Interaction of International Treaty and International Custom], SEMP 1983, p.12 *et seq.*

[34] Rozakis (note 32), p.31.

[35] ICJ Reports 1969, p.42.

[36] Rozakis (note 32), pp.32 and 34.

talking here about forcing rules, created by a group of States, upon States which do not recognize them. Because a customary and a treaty rule are equal with respect to their juridical force, for a State upon which a rule is forced, independent of its origin, the essential factor is simply that obligations are imposed on it without its consent ... Proceeding from the principles of equality and sovereignty of States, from the essence of a customary norm as an agreement among States, it is without doubt that, just as in the case of treaties, no norm of customary law can be extended to a State which has not recognized this norm"[37].

This statement of Korobova is true also with respect to treaties having great importance for the maintenance of world-wide peace and security, as for example the Test Ban Treaty of 1963 and the Non-Proliferation Treaty of 1968. These treaties must be mentioned here because some Soviet authors regard them as belonging to a special category of treaties said to be binding on third States, because of their special significance for international peace and security, because without their being generally observed their purpose would be frustrated and because they have the character of generally recognized principles and norms[38]. The first two considerations are surely true from the viewpoint of legal policy, but neither the special political significance of a treaty, nor the wish to prevent non-member States from frustrating a treaty, can serve as arguments to explain the binding force of a treaty on third States. The inclusion of generally recognized principles and norms of international law in treaties under discussion here cannot have the effect of bringing third States within the newly established treaty relations. The binding force of these principles and norms on third States does not flow from the (new) treaty but from other general treaties or general customary law. Besides, the extension of the binding force of such treaties to third States would signify an extension of even those treaty provisions which do not have a generally recognized character. One cannot but assent to Talalaev's view that such an approach "would lead to a vindication of forcing upon States against their will and wish

[37] M. A. Korobova, Obščij mnogostoronnyi dogovor, meždunarodnyj obyčaj i ne učastvujuščie ve dogovore gosudarstva [The General Multilateral Treaty, International Custom and Non-Participating States], SEMP 1981, p.93 *et seq.*, at pp.106–107.

[38] A. P. Movčan, Kodifikacija i progressivnoe razvitie meždunarodnogo prava [Codification and Progressive Development of International Law] (Moscow 1972), p.27 *et seq.*; I. I. Čeprov, Novye problemy meždunarodnogo prava [New Problems of International Law] (Moscow 1969), p.28; G. A. Osipov, Problema ukreplenia režima nerasprostranenija jadernogo oružija [The Problem of Strengthening the Régime of Non-Proliferation of Nuclear Weapons], SEMP 1981, p.71 *et seq.*

treaty norms to which they do not consent. This is contrary to the sovereignty of States"[39].

3.2. The other category of treaties with effects on rights and obligations of third States are those treaties which provide for such rights and obligations in the very wording of their texts, i.e. that category of treaties which the Vienna Convention deals with in its Arts.34–37.

The *raison d'être* of the *pacta tertiis* rule as formulated in Art.34 and according to which "a treaty does not create either obligations or rights for a third State without its consent" rests on the sovereignty and independence of States[40]. International treaties are binding only upon their parties; if they could extend their binding force on third States without their consent then indeed, as Talalaev writes, "a vast field would be opened to force the will of States by others, which contradicts the essence of international law as a coordinated inter-State law"[41]. The Vienna Convention "not only rejected some tendencies towards releasing international law from its strict consensual framework, but, moreover, adopted a quite harsh line in this respect"; it "is apparently returning to the safe haven of rigid consensualism with which, anyway", international law "has never really parted"[42]. Thus it is not exaggerated when Section 4 of Part III of the Vienna Convention is said to be "one of the bulwarks of the independence and equality of States"[43].

It would surely mean misjudging the rigid consensualism of the Vienna Convention to treat Arts.35 and 36 as exceptions to Art.34; they are not exceptions but mainly applications of the general rule stated in Art.34 which requires the consent of the third State[44]. The rigid consensualism in Arts.35 and 36 is expressed two-fold: firstly, there must be the consent of the States parties to the treaty (i.e. their common "intention") to confer obligations or rights on third States, and secondly, in order that such obligations and rights actually arise for third States, these too must consent, i.e. "accept" the obligation or "assent" to the right. Thus it is not the

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[39] Talalaev (note 5), p.74. Cf. also the general remark of Danilenko (note 33), p.23: "Customary norms regulate the relations of States not being parties of a codifying convention and the relations of these States with States Parties. If these customary norms are analogous to norms contained in the convention then they belong to so-called mixed norms of international law".

[40] Elias (note 31), p.59.

[41] A. N. Talalaev, Meždunarodnye dogovory v sovremennom mire [International Treaties in the Contemporary World] (Moscow 1973), p.136, *idem* (note 5), pp.65/66.

[42] Rozakis (note 32), pp.4 and 38.

[43] Elias (note 31), p.60.

[44] Cf. Elias, p.67.

treaty itself which brings into existence obligations or rights for third States but rather the collateral agreement between the third State and the contracting parties[45].

The rigid consensualism continues in Art.37: an obligation established by the collateral agreement cannot be revoked or modified without the consent of the parties, and the same is true with respect to a right, which cannot be revoked or modified without the consent of the third State. Thus the Vienna Convention outlaws not only the genuine direct effect of treaties on outsiders but also the arbitrary revocation or modification of "arisen" rights and obligations by the parties to the original treaty alone.

The Senior Legal Adviser to H. M. Foreign and Commonwealth Office, Ian M. Sinclair, stated in his commentary written immediately after the Vienna Conference:

> "Articles 34–38 of the Convention ... do not call for extensive comment. The maxim pacta tertiis nec nocent nec prosunt is supported both by general legal principle and by common sense ... Such problems as exist in international law about the relationship of third States to a treaty concern the scope of the exceptions to the general principle"[46].

Thus the further deliberations shall be focused on the exceptions, or rather on those types of treaties or single treaty rules often cited as exceptions. In the first place we must mention here, of course, those types of treaties which are deemed to create so-called objective régimes; treaties for neutralization or demilitarization of particular territories and areas, and treaties providing for freedom of navigation in international rivers and interoceanic canals fall within this concept. At the end of his analysis of this type of treaty in his Hague lecture Philippe Cahier made this observation: «On a l'impression que la notion de traité établissant des situations objectives est surtout une création de la doctrine»[47]. This observation deserves great sympathy. The reasoning that the problem of treaties establishing "objective régimes" has remained unresolved by the Vienna Convention[48] because it does not mention them is not convincing. The Vienna Convention has indeed solved this problem. The majority of the ILC denied that "objective régimes" are a special concept or institution of the law of treaties[49] and the Vienna Conference adopted this line. The omis-

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[45] This demonstrates clearly the difference between the "acceptance" of an accession clause and the "acceptance" of merely single rights and obligations provided for by the treaty for third States: the genuine third State remains outside the contractual bonds of the treaty.

[46] I. M. Sinclair, The Vienna Convention on the Law of Treaties (1973), p.76.

[47] Cahier (note 7), p.677.

[48] Cf. for example, Ballreich (note 6), p.478. [49] A/CONF.39/11/Add.2, p.51.

sion of any reference to "objective régimes" in the Vienna Convention does not mean that this type of treaty is not covered by the Convention; such treaties are governed by Arts.35, 36 and 38[50]. This reading is not in contradiction with the practice of States. To cite Cahier once more:

> «Dans la pratique on ne la rencontre que deux fois, dans des affaires des îles d'Aland et de la Namibie. On voudra bien admettre que deux précédents sont insuffisants pour établir l'existence d'une règle coutumière d'après laquelle les traités établissant des situations objectives lieraient les Etats tiers. Ces deux affaires sont d'ailleurs peu concluantes car la première peut s'expliquer par l'application des règles relatives à la succession d'Etats, et pour la seconde le recours à la notion de statut objectif était inutile. Par là, nous sommes en accord complet avec la Commission du droit international et la Conférence de Vienne qui ont rejeté cette notion et soumis cette catégorie de traités aux règles habituelles du droit des traités: un Etat tiers ne peut être lié que par son consentement»[51].

The most recent comprehensive study on treaties providing for "objective territorial régimes" written by E. Klein has shown that no such treaty has effect *erga omnes* solely by itself. As a sound basis to explain the obligation of third States to respect an "objective régime" Klein considers the coming into existence of an "objective status" under customary international law (Art.38 of the Vienna Convention) or by individual submissions to the régime (tacit accession, explicit or implicit recognition, acquiescence, and also estoppel)[52]. These explanations for the binding force of "objective régimes" on third States are all within the framework of the Vienna Convention, or that of general international law (principle of estoppel). Klein, however, thinks that these considerations are not adequate to all cases of "objective régimes" and he therefore favours the opinion which regards the power of the treaty parties to settle a matter with effect *erga omnes* as "a competence which is attributed to them" *(zuerkannte Kompetenz)*[53], by the third States. This explanation, however, again does not mean transcending the framework of consensualism, because the "attribution of competence" to settle a matter can easily be interpreted as involving the consent of the third States, though it be postulated or given in blanc. Thus treaties establishing "objective régimes" cannot be considered as exceptions to Arts.34–38 of the Vienna Convention.

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[50] Elias (note 31), p.67.

[51] Cahier (note 7), p.677.

[52] E. Klein, Statusverträge im Völkerrecht, Rechtsfragen territorialer Sonderregime (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.76) (1980).

[53] *Ibid.*, p.209 *et seq.*

A second kind of treaty said to be an exception are those establishing an "objective international personality". This was brought into discussion by the ICJ's advisory opinion in the *Reparation for Injuries* Case. The well-known passage of this opinion qualifying the United Nations as an "objective international personality"[54] has been rightly criticized because of its lack of juridical argumentation. The ICJ advanced only the great number of States parties to the UN Charter; but such a mere quantitative criteria is not at all convincing. The ICJ's assertion is still less convincing when we realize its paradoxicality: since under international law States are not obliged to recognize each other, why should they be obliged to recognize a secondary subject of international law created by themselves[55]? State practice since 1949 does not support the thesis that there is an obligation of third States to recognize an international organization as an "objective international personality". The non-recognition of the EEC by many socialist States may serve as an example.

Furthermore, certain provisions of the UN Charter mentioning non-member States, and occasionally cited as allegedly imposing obligations on third States, again prove to be no exceptions. Thus Art.2 (6) of the UN Charter imposes an obligation only upon the Organization itself, and Art.93 (2) of the UN Charter is nothing but an offer to third States to become party to the ICJ Statute[56]. Observations in the jurisprudence of

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[54] ICJ Reports 1949, p.174 *et seq.* E. Klein, Reparation for Injuries suffered in Service of UN, EPIL, Instalment 2 (1981), p.242.

[55] Thus Cahier (note 7), p.705 *et seq.*

[56] Cahier, p.709; Tunkin, Teorija meždunarodnogo prava (Moscow 1970), p.184; Talalaev (note 5), p.66; Verdross (note 6), p.533. Besides the UN Charter there may be cited other treaties mentioning non-member States. Thus, Art.45 of the International Coffee Agreement of 1983 (Bundesgesetzblatt 1984 II, p.382) stipulates: "To prevent non-member countries from increasing their exports at the expense of exporting Members, each Member shall, whenever quotas are in effect, limit its annual imports of coffee from non-member countries ...". The execution of this provision will surely have a negative effect on the export possibilities of the non-member (third) States; but this effect is only the factual consequence of the observance of treaty obligations by the parties to the agreement. The agreement itself does not impose obligations (coffee export restrictions) on the non-member countries. A second example is the Single Convention on Narcotic Drugs of 1961 (Bundesgesetzblatt 1977 II, p.124 *et seq.)* which stipulates in Art.12 (2) that "the Board shall, in respect of countries and territories to which this Convention does not apply, request the governments concerned to furnish estimates in accordance with the provisions of this Convention"; in Art.14 it states: "If ... the Board has objective reasons to believe that the aims of the Convention are being seriously endangered by reason of the failure of any Party, country or territory to carry out the provisions of the Convention, the Board shall have the right to propose to the Government concerned the opening of consultations or to request it to furnish explanations. If ... a Party or a country or territory has become ... an important

the ICJ about the existence of "obligations *erga omnes*"[57] do not lend support to the idea that "treaties of general interest" can impose obligations on third States. The ICJ did not expressly reveal the source of these *erga omnes* rules, and the examples it cited (prohibition of aggression and genocide, basic rights of the human person, especially prohibition of slavery and racial discrimination) are not only treaty rules but general customary rules of international law and as such valid *erga omnes civitates*[58].

The last case cited as an exception to Art.34 *et seq.* of the Vienna Convention is that derived from Art.75 of the Vienna Convention. According to this article, it is said, States can impose obligations on an aggressor State by a treaty to which the latter is not a party[59].

With regard to the future application of Art.75 it has been doubted whether it really excludes the consent of the third State, necessary in principle, because if "measures" are "taken in conformity with the Charter of the United Nations", the aggressor State as a party to the Charter had given its consent in advance; and if measures against the aggressor State are taken outside the United Nations then Art.75 of the Vienna Convention is not applicable and the usual rule, Art.35 of the Vienna Convention, has to be followed[60]. Others have argued that the provisions on treaties and third States will scarcely come within the orbit of Art.75 because obligations imposed upon the aggressor State by the competent organ of the United

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centre of illicit cultivation, production or manufacture of, or traffic in or consumption of drugs, the Board has the right to propose to the Government concerned the opening of consultations". After taking action according to this provision "the Board, if satisfied that it is necessary to do so, may call upon the Government concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of this Convention". Further: "If the Board finds that the Government concerned has failed to give satisfactory explanations ... or to adopt any remedial measures ... or that there is a serious situation that needs cooperative action at the international level with a view to remedying it, it may call the attention of the Parties, the Council and the Commission to the matter". It is clear from these provisions that the Parties to the Convention on Narcotic Drugs aimed at making the Convention effective *vis-à-vis* non-member States too. But it is equally clear that the contracting States refrained from imposing any obligations on non-member States. The contracting States only empowered the Board, established by the Convention, to take certain actions in order to induce third States to comply with the Convention. Thus both treaties cited here cannot be regarded as an attempt to depart from the general rule regarding treaties and third States.

[57] ICJ Reports 1970, p.32 (*Barcelona Traction* Case).

[58] Cahier (note 7), p.653.

[59] Cf. e.g. Ju.M. Kolosov, Otvetsvennost v meždunarodnom prave [Responsibility in International Law] (Moscow 1975), p.130; Talalaev (note 5), p.67.

[60] Cahier (note 7), p.650.

Nations or a regional agency are not treaty obligations[61]. If the treaty instrument is used as a "measure" against the aggressor State it is hardly conceivable that the States will content themselves with a treaty providing only for obligations for the aggressor State instead of including that State itself as one of the parties to a (peace) treaty. The importance of Art.75 for Art.34 *et seq.* of the Vienna Convention seems indeed to be rather exceptional. This is proved if we look at the preparatory work of Art.75 of the Vienna Convention.

Art.75 traces back, as is well known, to suggestions made by the members of the ILC, Tunkin and Lachs, who had in mind the agreements regarding Germany concluded by the Allied Powers at the end of the second World War, especially the Potsdam Agreement[62]. Is this agreement really a convincing example of a treaty binding upon a third State which had been an aggressor? This question is indeed not a brand new one and with respect to the territorial provisions of the Potsdam Agreement it has lost much of its political acuteness after the conclusion of the treaties on normalization between the Federal Republic of Germany on the one hand and the Soviet Union and Poland on the other in 1970. But discussing the topic "Treaties and Third States" one should not only point to the old issue but add some words of discussion, especially when recent acts in the relations between the Soviet Union and Western Germany demonstrate that this question is apparently not completely an issue of the past. Reference is made here to the already mentioned *aide-mémoire* of the Soviet Government of July 10, 1984 which says it is, "according to the spirit and letter of the Potsdam Agreement", the "duty of the Government of the FRG" to contribute to disarmament[63].

The legal quality of the "Report on the Tripartite Conference of Berlin" as an international treaty cannot seriously be disputed. It follows from the clear wording of the "Report" that the conference powers "reached" several "agreements". But it also follows from the clear wording of the "Report" that the conference powers abstained from formulating agreements which should have the direct effect of creating legal obligations for defeated Germany. This is true with respect to the "Political and economic principles to govern the treatment of Germany" as well as the territorial provisions. The "Report" says: "Agreement has been reached ... on the

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[61] M. Bothe, Consequences of the Prohibition of the Use of Force, ZaöRV vol.27 (1967), p.507 *et seq.*(516).

[62] YILC 1964 I, p.71; cf. Wetzel (note 4), p.162 *et seq.*

[63] Cf. note 11.

political and economic principles of a coordinated Allied policy towards defeated Germany ...". This means the conference powers agreed upon principles of their policy to be pursued by them towards a third State, Germany. They committed only themselves, not Germany as a third State. The same is true with respect to the territorial provisions, which have been so frequently analysed that the author refrains from further comment; that the conference powers here too did not intend to commit Germany directly is revealed not only in the provisions themselves but also in the protocol of the Potsdam Conference published by the Ministry of Foreign Affairs of the USSR[64], as well as in Art.3 of the Soviet-Polish Treaty concerning the Soviet-Polish State frontier, signed immediately after the Potsdam Conference on August 16, 1945[65].

Even if, however, the opinion that the Potsdam Agreement had a direct legal effect on Germany could be sustained then the issue should not be limited to obligations imposed upon Germany. The Potsdam Agreement contains several provisions which in comparison with later developments turned out to be in favour of Germany. The Agreement provides that "all democratic political parties with rights of assembly and of public discussion shall be allowed and encouraged throughout Germany"; that "certain essential central German administrative departments shall be established"; that "Germany shall be treated as a single economic unit". Under the assumption of a direct legal effect on Germany of the Potsdam Agreement it would be interesting to analyse whether those provisions contain rights in favour of Germany.

To sum up: the Potsdam Agreement is not a fruitful example to demonstrate the effect of Art.75 of the Vienna Convention on Art.34 *et seq.* of the Vienna Convention, simply because it is not a treaty providing for obligations for the aggressor State Germany. But even if it were such a treaty the following simple reasoning could demonstrate that it is not the treaty which represents the basis for the obligations of the aggressor State: imagine that Germany had been defeated and completely occupied only by one of the victorious powers, for example the Soviet Union, and that the Soviet Union had issued a declaration with the material content of the Potsdam Agreement. This declaration would not be a treaty. The basis of its legal effect on the defeated aggressor could not be the aggressor State exception of treaty law, but only other norms provided for by international law for

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[64] Sovetskij Sojuz na meždunarodnych konferencijach prioda Velikoj Otečestvennoj Vojny 1941–1945 gg, tom VI (Moscow 1980), pp.162, 236, 249, 256, 292 *et seq.*

[65] UNTS vol.10 (1947), p.193 *et seq.*

this case: State responsibility and the rights of belligerent occupation[66]. These rules represent the measure for the obligations incumbent upon the defeated aggressor State, whether they are formulated in a unilateral act or in a multilateral instrument of the victorious powers. At least with respect to Art.34 of the Vienna Convention Art.75 is irrelevant.

The exceptional situation of a defeated aggressor State, characterized by the absence of a peace treaty due to disagreement of the victorious powers, was the incentive for the exceptional rule in Art.75 of the Vienna Convention. It is still due to this exceptional situation that the Soviet Union on the one hand and the Western powers on the other, as victims of the aggression, have at their disposal only unsuitable legal instruments to prevent further armaments in the Western or Eastern part of Germany. At a time when disarmament is the ideal goal, the abolition, as procured by the modification of Annex III to the Protocol No.III of the WEU Treaty, of existing legal provisions on arms limitations is an historical absurdity. But in the case of West Germany the attempt to prevent the possible consequences of this absurdity by making use of the Potsdam Agreement is diplomatically futile. A solid legal basis for obligations of a former aggressor State is a peace treaty. Where there is a peace treaty there is no need for treaties providing for obligations for a third (i.e. aggressor) State.

The mentioning of the rights of belligerent occupation prompts to point additionally to another treaty which might give rise to assuming an exception to the rule *pacta tertiis nec nocent nec prosunt:* the Quadripartite Agreement on Berlin of September 3, 1971. The position of the two German States *vis-à-vis* this agreement is a very extraordinary one. The German States concluded a Transit-Traffic Agreement which, by being listed in the Final Quadripartite Protocol, became part of the Quadripartite Agreement; by that fact, however, the two German States themselves did not become parties to the Quadripartite Agreement. They had concluded the Transit-Traffic Agreement on the basis of an authorization given by the negotiating States of the Quadripartite Agreement in their capacity as occupation powers[67]. The four powers are the "masters" of the Transit-Traffic Agreement although it was concluded by the German States in their own names. The four powers not only determined many details of this

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[66] In the last resort prominent soviet authors too reach this conclusion, cf. G. I. Tunkin, Pravo i sila v meždunarodnoj sisteme [Law and Force in the International System] (Moscow 1983), p.176; Talalaev (note 5), p.67.

[67] H. Schiedermair, Der völkerrechtliche Status Berlins nach dem Viermächte-Abkommen vom 3.September 1971 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.64) (1975), p.76 *et seq.*

agreement; its duration also depends solely on them. Nevertheless with respect to the transit-traffic provisions of the Quadripartite Agreement the conclusion of the German-German special agreement makes the consent of the two German States to these provisions obvious. But the Quadripartite Agreement contains further provisions providing for obligations and rights for the Federal Republic of Germany as well as for the GDR. Both German States are legally bound to respect these dispositions not simply because the Quadripartite Agreement contains them but because the contracting States in their capacity of occupation powers are entitled to prescribe them[68]. In relation to the Quadripartite Agreement the two German States are not in the ordinary position of a "third" State in the sense of Art.34 *et seq.* of the Vienna Convention but legally subordinated to the four powers because of their continuing rights of belligerent occupation.

Finally attention should be drawn to the Law of the Sea Convention of 1982, especially to an article published by Luke L e e under the title "The Law of the Sea Convention and Third States"[69]. Because of the use by the Law of the Sea Convention of such expressions as "all States", "any State" and "every State" instead of only "States Parties" Lee raises the question whether non-signatories of the Convention (third States) will be entitled to claim and enjoy treaty provisions beneficial to them. With reference to Art.36 of the Vienna Convention he does not overlook that "the critical question is whether or not states parties indeed i n t e n d e d that third states should enjoy rights under the Convention"[70] and he suggests that this "intent may most appropriately be ascertained from official statements" such as "speeches delivered by individual delegations represented in Montego Bay, and declarations made pursuant to Article 310 of the Convention"[71]. Lee admits that an overwhelming majority of the prospective parties to the Convention denies third States rights under the Convention, but he notes that Art.36 (1) of the Vienna Convention "does not preclude the possibility of divergent intentions on the part of state parties to accord rights to third states" and he comes to the conclusion: "As far as these parties are concerned, it may thus be assumed that third states are entitled to claim certain rights and benefits under the Convention"[72]. This seems to be a rather contrived argumentation, too contrived to be convincing. In trying to ascertain the "intent" of the parties to the treaty

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[68] *Ibid.*, pp.105 *et seq.*, 206.
[69] AJIL vol.77 (1983), p.541 *et seq.*
[70] *Ibid.*, p.546 (emphasis added).
[71] *Ibid.*, p.547.
[72] *Ibid.*, p.549.

only from some circumstances of its conclusion, and only from unilateral instruments (speeches and declarations), Lee disregards the rules of treaty interpretation as laid down in Art.31 *et seq.* of the Vienna Convention. Read in the context of the Convention the expressions "all States", "any States" and "every States" are not opposed to the expression "States parties" but to such minor groups of States as "coastal States", "land-locked States", "archipelagic States" "developing countries". The Convention purports to be "generally acceptable" (preamble) and therefore it is surely "more plausible to contend that these terms refer to all States and every State that do become parties to the Convention"[73]. Lee's interpretation completely disregards further the famous "package-deal character" of the Convention which is to be guaranteed by its Art.309 (prohibition of reservations). To make use of the benefits of the Convention by assenting to them as a third State via Art.36 of the Vienna Convention while otherwise remaining aloof would mean paralysing Art.309 of the Law of the Sea Convention. One cannot imagine that this would be in accordance with the intent of the prospective States parties to the UN Convention on the Law of the Sea.

Equally unconvincing as Lee's "pick-and-choose" approach is the attempt to bestow the Law of the Sea Convention of 1982 with a quasi binding force on third States. Here it is argued that while the Convention of 1982 is no exception to the *pacta tertiis* rule (undeniably true), third States shall "respect" (russ.: *uvažat'*) the Convention to the same extent that they must respect border treaties and "objective régimes"[74]. But the Convention cannot be equated with border treaties because in that case the contracting States, owing to their national jurisdiction, have a title to regulate their common border, whereas the main objects of the Law of the Sea Convention are outside national jurisdictions. That "objective régimes" need the consent of third States to become binding upon them has already been discussed above[75]. It is rather astonishing to read in another pertinent article of a Soviet author that the literature on the Law of Treaties has until now not paid sufficient attention to the legal significance of obligations contained in multilateral treaties which are signed but not yet in force[76].

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[73] M. Molitor, AJIL vol.78 (1984), p.424.

[74] Talalaev (note 5), pp.75–77.

[75] Cf. p.665 *et seq.*

[76] A. P. Movčan, Konvencija OON po morskomu pravu – vklad v progressivnoe razvitie meždunarodnogo prava [The UN Law of the Sea Convention – a contribution to the progressive development of international law], SEMP 1982, p.41 *et seq.* (p.50).

Here we have only to point to Art.18 of the Vienna Convention which the author cited does not even mention[77]. But we can agree with the author when he comes to the conclusion that those rules of the Law of the Sea Convention which reflect generally recognized principles and rules of the traditional law of the sea are binding also on non-parties. They are binding as customary rules. However, which rules of the Law of the Sea Convention of 1982 have to be regarded also as (traditional or new) customary rules is a question the discussion of which has already started[78]; discussion will surely continue until the Law of the Sea Convention of 1982 has been universally ratified.

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[77] Two recent pertinent articles may be cited here: M. A. Rogoff, The International Legal Obligations to an Unratified Treaty, Maine Law Review, vol.32 (1980), pp.263–299; P. Cahier, L'obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur, in: Mélanges Fernand Dehousse, vol.1 (1979), pp.31–37.

[78] Cf. for example J. K. Gamble/M. Frankowska, The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning, San Diego Law Review, vol.21 (1984), pp.491–511.