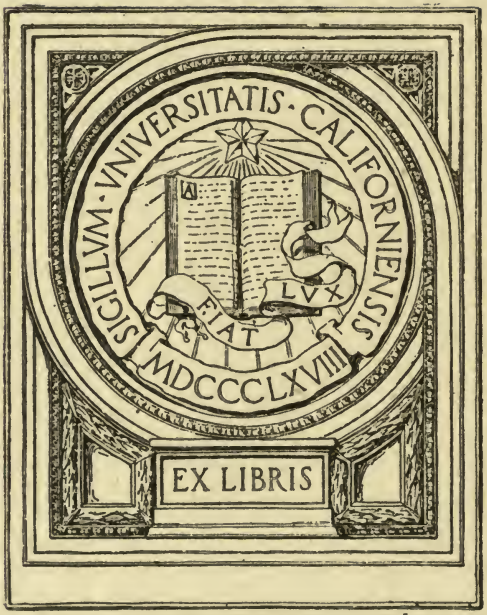
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CONTRIBUTIONS TO INTERNATIONAL LAW AND DIPLOMACY

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INTERNATIONAL CONVENTIONS AND THIRD STATES

INTERNATIONAL CONVENTIONS AND THIRD STATES

A MONOGRAPH

BY

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EDITORIAL INTRODUCTION

THE present monograph on *International Conventions and Third States* deals with an important problem which hitherto has nowhere been made the subject of thorough research. And there is no agreement among those writers on International Law who have given their attention to the matter at all. A number of them, in forming their opinion, are influenced by the Municipal Law under which they live and work. Consciously or unconsciously, they apply the principles of their Municipal Law concerning the question whether from a contract between two individuals rights can accrue to a third, to the question whether from International Conventions rights can accrue to third States. The same mistake is made here as with regard to numerous other questions of International Law. Authors belonging to different nations approach these questions biased by views of their national legislation and their national jurisprudence. They take it for granted that the principles and rules of International Law are to be construed and interpreted according to views upheld by their Municipal Law and their national jurisprudence. Many a controversy is due to this faulty attitude on the part

of those who expound the rules of International Law.

Under these circumstances the method which Mr. Roxburgh had to pursue in his research was a foregone conclusion. He had, in the first instance, to give a very brief outline of the several Municipal Laws, in so far as they deal with the question of contracts and third parties. He had, in the second instance, to give a critical summary of the opinions of those writers who have previously dealt with the problem of International Conventions and third States. Having thereby cleared the ground, he was ready to search for precedents in diplomatic practice from which the rules concerning the subject could safely be drawn. The reader will see that Mr. Roxburgh has thus brought together a considerable amount of material, and that he has come to very valuable conclusions which require thorough examination and consideration. Whether or no the reader agrees with all the results of Mr. Roxburgh's labour, so much is certain that any future attempt to throw more light on the problem must take the present work as the basis from which to start.

L. Oppenheim.

Cambridge,
March 22, 1917.

AUTHOR'S PREFACE

THIS monograph was written in the years 1913 and 1914, in accordance with the rules governing the Whewell International Law Scholarships in the University of Cambridge. Since then it has been revised and largely rewritten. I sincerely hope that the evidence collected in it will prove of some value to students of this subject.

Beyond this, I only wish to add that, while these pages have been passing through the press, the January number (1917) of the *American Journal of International Law* has come into my hands. It contains a report of the proceedings in the case of Costa Rica *v.* Nicaragua before the Central American Court of Justice. Costa Rica had lodged a complaint against the Bryan-Chamorro Treaty concluded between the United States and Nicaragua on the 5th August, 1914, on the ground that it violated rights previously acquired by Costa Rica. The Court pronounced in its favour against the Treaty, and declared that: "The Government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Cañas-Jerez Treaty, . . . by the Cleveland Award, . . . and by the Central American Treaty of Peace and Amity . . ."

This decision is in accordance with the conclusions reached in §§ 24 and 25 of this monograph.

Commenting upon this case in the *American Journal of International Law*, one of the editors observes: "The main question at issue was the right of Nicaragua to negotiate and enter into agreements with the United States concerning matters of direct or indirect interest to the other Republics of Central America." The actual proceedings, however, hardly seem to justify this observation.

RONALD F. ROXBURGH.

Middle Temple,
March, 1917.

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CONTENTS

CHAPTER I

INTRODUCTION

CHAPTER II

THIRD PARTIES AND CONTRACTS IN MUNICIPAL LAW

CHAPTER III

THE OPINIONS OF PUBLICISTS

CHAPTER IV

TREATIES UNFAVOURABLE TO THIRD STATES

CHAPTER V

TREATIES BENEFICIAL TO THIRD STATES

CHAPTER VI

THE INFLUENCE OF CUSTOM

CHAPTER VII

EXCEPTIONAL CASES

RESULTS

INTERNATIONAL CONVENTIONS AND THIRD STATES

CHAPTER I

INTRODUCTION

§ 1. *The Subject of this Monograph.*—The purpose of this monograph is to consider the position of third states as affected by International conventions. It is evident that many a treaty concluded between two or more powers may indirectly concern a large number of states which are not parties to it; and in the following pages an attempt has been made to determine whether such a treaty can impose *legal* obligations and bestow *legal* rights upon third parties in the absence of some special relationship with one of the contracting powers.

§ 2. *The Present Position of the Subject.*—The rules applicable to this matter which the International community has agreed to regard as obligatory in its mutual dealings appear to be imperfectly defined. Perhaps on this account, several writers of authority, while professing to expound International Law, have put before the student rules not based on International state practice, but derived from other sources. Vattel, for example, is criticised on this account by Pinheiro-Ferreira, who observes that

"L'auteur (*i. e.* Vattel), trop imbu des principes de jurisprudence civile, ne s'est pas aperçu que ce n'était pas toujours à cette source qu'il fallait chercher la solution des problèmes concernant le droit des gens, surtout en fait de conventions."[1]

So far as the present subject is concerned, even those Publicists who admit that municipal law cannot govern International Law do seem biased, perhaps unconsciously, by the municipal law of their own country. Anglo-American writers, for example, brought up under a system of law in which the maxim: *pacta tertiis nec nocent nec prosunt* prevails in full vigour, or has been but recently relaxed, hardly stop to refer to the effect of a treaty upon third parties.[2] On the other hand, writers belonging to those countries in which the Code Napoléon is in force, are prone to consider the position from the point of view of that code, with occasional reference to Roman law.[3]

[1] In a note on Vattel (liv. ii. chap. xii. § 153), quoted in Pradier-Fodéré's edition of Vattel. (Paris, 1863.) ("The author, too much permeated with the principles of civil law, did not realise that the solution of problems of International Law, especially with regard to treaties, should not always be sought from this source.")

[2] Thus Lawrence, *The Principles of International Law*, 4th ed., London, 1910; Davis, *The Elements of International Law*, New York, 1908; Halleck, *International Law*, edited by Sir G. S. Baker, Bart., 4th ed., London, 1908, and Kent, *Commentary on International Law*, edited by Abdy, 2nd ed., Cambridge, 1878, appear not to allude directly to the question at all. Hall, *A Treatise on International Law*, 6th ed., Oxford, 1909, and Westlake, *International Law*, 2nd ed., Cambridge, 1910 and 1913, dismiss it in a single sentence.

[3] The divergence between Roman Law and the French Code upon this matter is often overlooked.

For the whole subject *cf.* Pradier-Fodéré, *Traité de droit*

§ 3. *A Treaty is a Contract.*—It is true that treaties are the contracts of International Law. Most Publicists define them as such; and indeed they seem to present all the essential elements of contract as a legal conception.[1] It may be useful, therefore, to analyse this conception, and to consider briefly the analogous question of the position of third parties under a contract in various systems of municipal law. But this procedure can only tend towards the elucidation of our present subject, because the actual rules of the law of nations can be discovered neither by theory nor by analogy, but solely by reference to the practice of states.

Savigny defines a contract as "the agreement of several in an accordant expression of will, with the object of creating an obligation between them." ("Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch unter ihnen eine Obligation entstehen soll.")[2] According to this definition, the essential elements of a contract are (*a*) an agreement; (*b*) the intention to create an

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International Public, Paris, 1885–1906, vol. ii. p. 810, § 1127; Rivier, *Principes du droit des gens*, Paris, 1896, vol. ii. pp. 62, 89; Fiore, *Nouveau droit international public*, 2nd ed., traduit par Antoine, 1885, vol. ii. p. 387, §§ 1025–1031; and Heffter, *Le droit International Public de l'Europe*, traduit par Bergson, 1866, § 83.

[1] *Cf.* Oppenheim, *International Law*, 2nd ed., London, 1912, vol. i. p. 540, § 491; Pradier-Fodéré (*op. cit.*), vol. ii. p. 473, § 888; Hall (*op. cit.*), p. 317; Lorimer, *The Institutes of the Law of Nations*, Edinburgh, 1883, vol. i. p. 261; Woolsey, *International Law*, 5th ed., London, 1879, p. 166, § 101; Calvo, *Le Droit International*, 5th ed., Paris, 1896, § 1617.

[2] Savigny, *Obligationenrecht*, 1853, vol. ii. p. 8.

obligation ;[1] and these are also the essential elements of a treaty.

It may be stated at once that Anson considered it inconsistent with this analysis of a contract to hold that the contracting parties could affect the legal rights or duties of a stranger. "If the obligation takes the form of a promise by A to X to confer a benefit upon M, the legal relations of M are unaffected by that obligation. *He* was not a party to the agreement; *he* was not bound by the *vinculum juris* which it created; the breach of that legal bond cannot affect the rights of a party who was never included in it. Nor, again, can liability be imposed on M by agreement between A and X. In contract, as opposed to other forms of obligation, the restraint which is imposed on individual freedom is voluntarily created by those who are subject to it,—it is the creature of agreement."[2]

But the opinion of Anson, however weighty, must not prejudice the discussion of the position of third states under treaties. For in the first place, his words must be strictly construed. Although an attempt by A and X to confer a benefit on M could not, in theory, bestow any rights on M, since it is not possible in the theory of jurisprudence for two private individuals to alter the legal position of a third, even for his benefit, without his consent, yet it does not follow that if A and X agreed to confer a right on M, *and M assented*, it would be contrary

[1] Anson, *The Law of Contract*, 13th ed., Oxford, 1912, p. 2.
[2] Anson (*op. cit.*), p. 263. *Cf.* Holland, *The Elements of Jurisprudence*, 11th ed., Oxford, 1910, p. 255.

to the legal theory of a contract to allow M to acquire a right. Such a right might be acquired under an additional contract, consisting of a joint offer by A and B, accepted by M. That a contract could not be so made in English law, because there is no "consideration" moving from M, is no objection, since "consideration" is not an essential element in the conception of a contract in International Law.

Secondly, as Anson himself observed, his analysis of contract "must be limited in its application to a scientific system of Jurisprudence in which rights have been analysed and classified,"[1] and existing systems of law are apt to pay more attention to general convenience than to theoretical consistency. The fact remains beyond dispute that certain municipal systems *do*, in certain circumstances, allow A and B by contract to confer legal rights on M, as will appear in the next chapter.

[1] Anson (*op. cit.*), p. 2.

CHAPTER II

THIRD PARTIES AND CONTRACTS IN MUNICIPAL LAW

§ 4. *Roman Law.*—In Roman law, which has exercised such a wide influence in the formation of many modern legal systems, and which permeates the works of the early Publicists, such as Gentilis, Grotius, and Pufendorf, the rule: *pacta tertiis nec nocent nec prosunt* prevailed. A contract between A and B that C should act (or forbear to act), imposed no obligation on C.[1] Again, a contract between A and B that C should receive a certain benefit, as a rule conferred no legal rights on C.[2] "Alteri stipulari . . . nemo potest: inventae sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum si alii detur, nihil interest stipulatoris."[3]

§ 5. *English and Scotch Law.*—The general rule

[1] Moyle, *Imperatoris Justiniani Institutiones*, 5th ed., Oxford, 1912, p. 412.

[2] Moyle (*op. cit.*), p. 413.

[3] Institutes of Justinian, III. 19. § 19. ("No one can make a stipulation for another: for obligations of this kind have been devised so that each should acquire for himself what is in his own interest. But it is no benefit to the *stipulator* if the thing be given to another.")

Certain exceptions arise out of the law of agency, status, and succession in the Roman and all other municipal systems; but these are not relevant to the present discussion.

of English law is that a contract can neither confer rights nor impose obligations upon a third party. It was not always clear that a stranger could not acquire *rights* under a contract, and the point seems to have been first definitely settled in the case of *Price* v. *Easton* in 1833.[1] In spite of this decision, it was still believed that nearness of relationship might entitle the beneficiary to sue; but this view was definitely negatived by the case of *Tweddle* v. *Atkinson*,[2] in which it was decided that a stranger

[1] 4 *Barnewall and Adolphus's Reports*, p. 433. In that case Easton promised William Price that if he (William) would do certain work for him, he would pay John Price a certain sum of money. William did the work, and John sued Easton for the money. It was held that John could not recover, because he was a stranger to the contract.

[2] 1 *Best and Smith's Reports*, p. 393. In that case, in consideration of an intended marriage between the plaintiff and X, John Tweddle, father of the plaintiff, and William Guy, father of X, verbally agreed to give their respective children marriage portions. After the marriage the fathers, in order to give effect to their verbal promise, agreed in writing to pay certain moneys to the plaintiff, and it was further agreed in the memorandum that "the said William Tweddle (*i.e.* the plaintiff) has full power to sue the said parties in any Court of law or equity for the aforesaid sums." The plaintiff assented, and now brought an action against the defendant, as executor of William Guy deceased. It was alleged on behalf of the plaintiff that, although a stranger to the contract, he was entitled to sue on account of his near relationship to the promisor. This contention was overruled, and it was held that he had no right of action, even though the contracting parties had attempted to confer one upon him. "No stranger to the consideration," said Wightman, J. (at p. 398), "can take advantage of a contract, although made for his benefit."

One exception to this rule does, however, exist. Where a settlement is made in consideration of marriage, the issue of that marriage can enforce stipulations in it that are for their benefit, even though the settlement does not amount to a trust, but is merely an agreement to constitute a trust. (*Cf.* Ashburner, *Principles of Equity*, London, 1902, p. 527, and Pollock, *Principles of Contract*, 8th ed., London, 1911, p. 221). "As a rule the

to a contract cannot sue upon it under any circumstances, not even if the parties expressly attempted to confer upon him a right of action.

But although a contract cannot bestow rights upon a third party in English law, rights will be acquired by him if the contract amounts to *a declaration of trust*.[1] In fact the distinguishing characteristic of a trust is the fact that, as soon as the property is vested in the trustee, all the beneficiaries can enforce its terms.[2] Yet a trust seems to be merely a special kind of contract. It originates in agreement, and aims (*inter alia*) at creating obligations,[3] and it is sometimes convenient to regard a trust as in its origin a contract between the settlor and the trustee.[4] Although both Anson and Pollock point out that in other ways trust and contract are quite distinct,[5] Maitland says: "I think it impossible so to define a contract that the definition shall not cover at least three quarters of all the trusts that are created . . .

Court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract . . . the Court would probably enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement." (Per Cotton, L. J., *in re* D'Angibau, 15 Ch. D. at p. 242. *Cf.* also Fry, L. J., in Green *v.* Paterson, 32 Ch. D. at p. 106.) This exception admits of no extension at all. (Ashburner (*op. cit.*), pp. 527, 528.)

[1] No convenient definition of a trust is available. Speaking generally, a trust arises when property is vested in a person subject to an undertaking, express or implied, which the Court will enforce, to hold it for the benefit of some other person. (Strahan, *A Digest of Equity*, 2nd ed., London, 1909, p. 45.)

[2] *Cf.* Maitland, *Equity*, Cambridge, 1909, p. 44; Anson (*op. cit.*), p. 263; Strahan (*op. cit.*), p. 67.

[3] Anson (*op. cit.*), p. 263.

[4] Pollock (*op. cit.*), p. 219.

[5] Anson (*op. cit.*), p. 274; Pollock (*op. cit.*), p. 220.

The reasons why we still treat the law of trusts as something apart from the law of contract are reasons which can be given only by a historical statement."[1]

It is not sufficient, therefore, to say that in English law two parties cannot contract so as to bestow rights on a stranger without adding that they may do so if their contract amounts to a declaration of trust. Consequently, although a contract cannot confer rights on third parties, the practical inconvenience of this rule is obviated by the law of trusts, unknown to International Law, by which third parties *can* acquire rights under a contract creating a trust.

So much for English law. But, as Lord Haldane pointed out in the case of *Dunlop Pneumatic Tyre Company Limited* v. *Selfridge and Company Limited* (1915. A. C. 847, at p. 853) the principle: *pacta tertiis nec nocent nec prosunt*, does not equally hold good in the law of Scotland: "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam . . . [This principle is] not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland."

The law of Scotland upon this subject is set out by Lord Stair in the following passage[2]: "It is

[1] Maitland (*op. cit.*), p. 54.

[2] Stair, *The Institutions of the Law of Scotland*, Edinburgh, 1832, I. 10. 5.

likewise the opinion of Molina (Disp. 265), and it quadrates with our customs, that when parties contract, if there be any article in favour of a third party, at any time, *est jus quaesitum tertio*, which cannot be recalled by *either or* both *of* the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform. So a promise, though gratuitous, made in favour of a third party, that party, albeit not present nor accepting, was found to have right thereby."

It will be seen at once to what an important extent the law of Scotland differs from English law with regard to this matter.

§ 6. *The Law of the United States.*—Although the fundamental principles of the law of contract are the same in English law and in the law of the United States, the doctrine that a third party can acquire no rights under a contract made for his benefit has been considerably modified.

As a general rule, "no one can be bound by a contract who is not a party to it,"[1] and "the common-law rule is that no one can enforce a contract who is not a party thereto."[2] But the exceptions to this latter rule are wide. The doctrine that a stranger might sue upon the ground of near relationship with the promisee, eradicated from English law by the decision in *Tweddle* v. *Atkinson*,[3] still prevails in some of the State Courts.[4]

[1] Harriman, *Law of Contracts*, 2nd ed., Boston, Mass., 1901, p. 210.
[2] Harriman (*op. cit.*), p. 211.
[3] 1 *Best and Smith's Reports*, p. 393 (cited above, § 5, p. 7).
[4] Harriman (*op. cit.*), p. 212.

Secondly—and this is far more important—there has been in most States a modification of the common-law rule in favour of beneficiaries not related. In the case of *Lawrence* v. *Fox*,[1] the general proposition was confirmed that "where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." This rule has been widely adopted throughout the United States, and covers a number of cases, though not all. Indeed there is uncertainty as to the precise extent of its application; but it appears that (*a*) when the direct object of the contract is to benefit the third party; (*b*) where the performance of the contract must go in discharge of a legal obligation owed by a contracting party to the party suing, then the third party may sue; but not generally otherwise.[2]

Similar uncertainty prevails in the Federal Courts.

[1] 20. N. Y., p. 268, at p. 271 (quoted by Harriman (*op. cit.*), p. 213).

[2] Harriman (*op. cit.*), pp. 212, 213. Thus in Coster *v.* Mayor of Albany (43. N. Y., p. 399, quoted by Harriman (*op. cit.*), p. 213), a city had contracted with a State to pay damages for certain improvements, and a person damaged by these, not a party to the contract, successfully sued upon it, as being a contract made for his benefit.

Again, in Porter *v.* Richmond, etc., R. R. Co. (97. N. C., p. 46), quoted by Harriman (*op. cit.*), p. 215), a railway company had contracted with a city to pay the wages of a policeman. The policeman successfully sued the company upon the contract, since the performance of it was bound to go in discharge of the legal obligation owed by the company to the plaintiff.

On the other hand, in Davis *v.* Clinton Water Works Co. (54. Ia., p. 59, quoted by Harriman (*op. cit.*), p. 217), a water company had contracted to supply a city with water; but a citizen injured by the failure of the supply failed in an action against the company.

In *Hendrick* v. *Lindsay*,[1] the Supreme Court held that "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." In *National Bank* v. *Lodge*,[2] the Court observed that "the subject has been much debated, and the decisions are not all reconcilable."

In the United States, therefore, the law of contract with reference to third parties appears to be in some confusion, and seems to represent a transition from the rigour of the old rule of the common law to the more serviceable rule adopted by most foreign codes.

§ 7. *The Law of France, Belgium, Holland, and Italy.*—The French law of contract is embodied in the Code Napoléon; and its provisions, so far as they regulate the rights and liabilities of third parties, are in force not only in France, but also in Belgium,[3] Holland,[4] and Italy.[5]

The general rule of the Code Napoléon is, that a contract can neither impose liabilities nor confer rights upon a third party: "On ne peut, en général,

[1] 93. U. S., p. 143, at p. 149, quoted by Harriman (*op. cit.*), p. 224.

[2] 98. U. S., p. 123, at p. 124, quoted by Harriman (*op. cit.*), p. 224.

[3] Belgium, *Code Civil*, Art. 1119–1121 and 1165. During the German occupation, the Belgian codes appear to remain in force, except in so far as they are expressly abrogated by German legislation, or are inconsistent with the changed political conditions; *cf.* Huberich and Speyer, *German Legislation in Belgium*, The Hague, 1915, p. vii.

[4] Holland, *Civil Code*, Art. 1351–1353 and 1376.

[5] Italy, *Codice Civile*, Art. 1128–1130.

s'engager, ni stipuler en son propre nom, que pour soi-même." (Art. 1119.) However, if A, in stipulating in C's favour, has himself an interest in the performance of the stipulation by B, then the contract is valid: "On peut [pareillement] stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre . . ." (Art. 1121.) In such a case a right is acquired, not only by the promisee, but also by the beneficiary, so soon as he accepts the benefit, either expressly or tacitly.[1] "Le tiers, qui a accepté la stipulation faite en sa faveur, jouit d'une action directe, et à lui personelle, contre le promettant."[2] It follows, therefore, that after acceptance by him, revocation becomes impossible. "Celui qui a fait cette stipulation, ne peut plus la révoquer, si le tiers a déclaré vouloir en profiter." (Art. 1121.)

Thus, although a contract under the Code Napoléon can never impose an obligation on a stranger, yet it can confer a right on him, provided: (*a*) the promisee has an interest in its performance; (*b*) he, as beneficiary, accepts the benefit. "Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121." (Art. 1165.)

§ 8. *German Law.*—In German law, as elsewhere,

[1] Aubry et Rau, *Cours de Droit Civil Français*, 5th ed., Paris, 1897–1907, vol. iv. p. 527; Herman, *Code Civil annoté*, Paris, 1885–1898, p. 988 (14), vol. ii.

[2] Aubry et Rau (*op. cit.*), vol. iv. p. 529; Herman (*op. cit.*), p. 989 (21), vol. ii.

a contract cannot impose obligations upon third parties; but as regards the acquisition of rights, instead of laying down as a general principle: *pacta tertiis nec nocent nec prosunt*, and then subjecting it to modification in the interest of a beneficiary, German law makes the matter depend primarily upon the intention of the contracting parties as expressed in the contract.[1] "Durch Vertrag kann eine Leistung an einen Dritten mit der Wirkung bedungen werden, dass der Dritte unmittelbar das Recht erwirbt, die Leistung zu fordern."[2]

But in so far as the intention of the parties is not expressly embodied in the contract, whether a third party is to acquire a right under it, and consequently how far the contracting parties can revoke the benefit by mutual consent, is to be inferred from the intention of the parties, as evidenced by the surrounding circumstances.[1] "In Ermangelung einer besonderen Bestimmung, ist aus den Umständen, insbesondere aus dem Zwecke des Vertrags, zu entnehmen, ob der Dritte das Recht erwerben, ob das Recht des Dritten sofort oder nur unter gewissen Veraussetzungen entstehen und ob den Vertragschliessenden die Befugnis vorbehalten sein soll, das Recht des Dritten ohne dessen Zustimmung aufzuheben oder zu ändern." (§ 328.)

In §§ 329–331, the Civil Code lays down certain presumptions and rules of interpretation, which are

[1] *Cf.* Schuster, *The Principles of German Civil Law*, Oxford, 1907, p. 140, § 141.

[2] *Bürgerliches Gesetzbuch*, Book ii., Division ii., Title iii., § 328.

to apply subject to any expression of a contrary intention.

Under German law, the beneficiary acquires a right to the benefit bestowed upon him *ipso facto*, and without any act of acceptance on his part. However, if he expressly disclaims the right, he loses it: "Weist der Dritte das aus dem Vertrag erworbene Recht dem versprechenden gegenüber zurück, so gilt das Recht als nicht erworben. (§ 333.)

§ 9. *Swiss Law.*—The provisions of the Swiss code upon the matter resemble the German, and in Switzerland a third party can acquire rights under a contract, if such be the intention of the parties. Article 112 of the Code Fédéral des obligations (March, 1911), provides that: "Le tiers ou ses ayants droit peuvent [aussi] réclamer personellement l'exécution (d'une obligation en faveur d'un tiers) lorsque telle a été l'intention des parties ou tel est l'usage. Dans ce cas, et dès le moment où le tiers déclare au débiteur qu'il entend user de son droit, il ne dépend plus du créancier de libérer le débiteur."

§ 10. *The Law of Other Countries.*—Some other municipal codes may be briefly noticed.[1]

It appears that under the codes of Mexico and the Argentine a third party can never acquire rights under a contract. Article 1277 of the Mexican code provides that "contracts bind only the parties to them;"[2] and the Argentine code (Article 1199)

[1] *Cf.* Williston, in the *Harvard Law Review* (Cambridge, Mass.), vol. xvi. pp. 43–51.

[2] Quoted from the above article by Williston.

stipulates: "Los contratos no pueden oponerse á terceros, ni invocarse por ellos, sinó en los casos de los artículos 1161 y 1162."[1]

Under the Spanish and Japanese codes, a beneficiary may enforce a stipulation made in his favour, provided that he notifies the promisor before the stipulation is revoked. Article 1257 of the Spanish code stipulates that "les contrats ne produisent effet qu'entre les parties qui les forment et leurs héritiers . . . Si le contrat contient une stipulation en faveur d'un tiers, ce dernier peut en exiger l'accomplissement, du moment où il a fait connaître à l'obligé son acceptation avant qu'elle ait été révoquée."[2] The Japanese code provides (Article 537): "If a party is bound to make a prestation to a third person in accordance with a contract, the third person has a right to demand such prestation directly from the debtor. In the case of the preceding paragraph, the right of the third person comes into existence at the moment when he expresses to the debtor his intention to take and enjoy the benefit of the contract."[3]

Under the codes of Brazil, Uruguay, and Peru,[4] a beneficiary may similarly enforce a stipulation made for his benefit, provided that he accepts it.

Under none of these codes can a third party

[1] Argentine: *Código Civil* (7th ed., Buenos Aires, 1890. Félix Lajouane, editor.) (Articles 1161 and 1162 relate only to agency and ratification.)

[2] Spain: *Code Civil Espagnol* (traduit par Levé, Paris, 1890).

[3] *Japanese Civil Code* (translated by Becker, London, 1909).

[4] Brazil: *Civil Code*, Art. 1957; Uruguay: *Civil Code*, Art. 1230; Peru: *Civil Code*, Art. 1259. (Quoted from the above article by Williston, pp. 49–50.)

incur obligations under a contract to which he is a stranger.

§ 11. *Conclusions to be Drawn from Municipal Law.* It appears, therefore, that in none of those systems of municipal law which have been considered can a third party, not standing in any special legal relation to either contracting party, incur obligations under a contract. On the other hand, as to the acquisition of rights, there is no unanimity. Roman law can be summarized by the maxim: *pacta tertiis nec nocent nec prosunt.* The same maxim is applicable to England, and apparently to Mexico and the Argentine. However, the impossibility of bestowing rights on a third party by a contract has almost universally been found to be a drawback. English law, indeed, has not felt the inconvenience, because such rights can be bestowed by a contract amounting to a declaration of trust. But the Code Napoléon, while maintaining as a basis the maxim of Roman law, has created a wide exception in favour of a beneficiary; and the practice of the American Courts has engrafted on the common law a similar exception. Germany and Switzerland have, so far as the acquisition of rights is concerned, abandoned the old principle altogether, and make the acquisition of them depend upon the intention of the parties, as expressed in the contract, or as inferred by the Court.

Mr. Williston, who has made a study of this question in the *Harvard Law Review*,[1] arrives at

[1] *Harvard Law Review*, vol. xvi. pp. 43–51 (to which article the author is very greatly indebted).

the conclusion that "although the Roman law refused to recognise any legal right in the beneficiary of a contract, the modern civil law almost universally gives him a direct remedy."

Perhaps this short statement of municipal law will prove of assistance in approaching the subject of this monograph, which is the position of third states under International conventions.

CHAPTER III

THE OPINIONS OF PUBLICISTS

§ 12. *The Opinions of Publicists as to Obligations.* All writers on International Law agree that, as a general rule, a treaty cannot impose any liabilities upon a state which is not a party to it. In view of this unanimity of opinion, it seems unnecessary to quote extensively from their writings. Vattel,[1] Heffter,[2] Fiore,[3] Calvo,[4] Hall,[5] Martens,[6] Pradier-Fodéré,[7] Bonfils,[8] Despagnet,[9] Walker,[10] Rivier,[11] Oppenheim,[12] Cobbett,[13] Alvarez,[14] Phillimore,[15]

[1] Vattel, *Le droit des gens*, edited by Pradier-Fodéré, Paris, 1863, Préliminaires, § 24.

[2] Heffter (*op. cit.*), § 83. [3] Fiore (*op. cit.*), vol. ii. p. 389.

[4] Calvo (*op. cit.*), vol. i. p. 143, § 5, and vol. i. p. 160, § 29.

[5] Hall (*op. cit.*), pp. 8, 130.

[6] Martens, F. de, *Traité de droit international*, traduit du Russe par Léo, Paris, 1883, vol. i. p. 532.

[7] Pradier-Fodéré (*op. cit.*), vol. i. p. 86, § 27, vol. ii. p. 477, § 891, and vol. ii. p. 811, § 1128.

[8] Bonfils, *Manuel de droit international public*, 6th ed., edited by Fauchille, Paris, 1912, §§ 53, 849.

[9] Despagnet, *Cours de droit international public*, 4th ed., edited by Boeck, 1910, p. 696, § 448.

[10] Walker, *A Manual of Public International Law*, Cambridge, 1895, p. 85. [11] Rivier (*op. cit.*), vol. ii. pp. 62, 89.

[12] Oppenheim (*op. cit.*), vol. i. pp. 548, 563.

[13] Cobbett, *Cases and Opinions on International Law*, 3rd ed., London, 1909, pp. 7, 10.

[14] Alvarez, *La codification du droit international*, Paris, 1913, p. 147.

[15] Phillimore, *Commentaries upon International Law*, 3rd ed., London, 1879–1889, vol. ii. p. 126, § xcvi.

Reddie,[1] Westlake,[2] and Ilbert,[3] all agree that a third state[4] cannot incur obligations under a treaty to which it is a stranger.

At the Conference at the Hague in 1907, Renault, as the reporter of the *Comité de Rédaction*, at the 9th "Séance plénière," stated as an unquestionable principle that "les conventions ne sont obligatoires qu'entre les Puissances contractantes; ce n'est que le droit commun."[5] This statement was accepted by all the delegates without demur.

It must be added, however, that although all Publicists are in agreement upon the general rule, several have postulated certain exceptions; these will be discussed in subsequent parts of this monograph.

§ 13. *The Opinions of Publicists as to Rights: Grotius*, 1625.—The question whether third states can acquire *rights* under a treaty to which they are strangers has not been answered by text-writers with the same certainty. The earliest writers on International Law, basing their conclusions, not upon the practice of nations, but upon a combination of Roman law with the supposed "law of nature," left the question in an unsatisfactory position.

[1] Reddie, *Researches in Maritime International Law*, Edinburgh, 1844, vol. i. p. 7.

[2] Westlake (*op. cit.*), vol. i. pp. 130–131.

[3] Ilbert, *The Government of India*, 3rd ed., Oxford, 1915, pp. 399–400 note.

[4] Throughout this monograph the phrases "third party" and "third state" are used in a strict sense, and do not cover cases in which a state already stands in some special legal relationship to one of the contracting parties, or to the treaty.

[5] *Actes et Documents* (official publication of the Dutch Government), vol. i. p. 344. ("Treaties bind none but the contracting Powers; this is only common law.")

"Solent et controversiae incidere," wrote Grotius,[1] "de acceptatione pro altero facta: in quibus distinguendum est inter promissionem mihi factam de re danda alteri, et inter promissionem in ipsius nomen collatam cui res danda est."[2] ("It is also customary for questions to be raised with regard to an acceptance made on behalf of another. Here a distinction must be drawn between a promise made to me as to the giving of a thing to another and a promise made in the name of him to whom the thing is to be given.") Proceeding to deal with promises "de re danda alteri," Grotius continues: "Si mihi facta est promissio, omissa inspectione an mea privatim intersit, quam introduxit jus Romanum, naturaliter videtur mihi acceptanti jus dari efficiendi, ut ad alterum jus perveniat, si et is acceptet; ita ut medio tempore a promissore promissio revocari non possit; sed ego cui facta est promissio eam possim remittere." ("If the promise is made to me, it seems that by the law of nature, and without regard to the question whether it is beneficial to me personally, which was introduced by Roman Law, I, as the promisee, have the right to secure that the right should pass to the other, if he too should accept it. The result would be that the promisor could not revoke the promise in the

[1] Grotius, *De Jure Belli et Pacis*, translated by Whewell, Cambridge, 1853, lib. ii. cap. xi. § 18.

[2] This quotation shows that the matter had already been the subject of dispute, not indeed between conflicting states, but between contending jurists; and also that the promise to confer a benefit on a third party ("de re danda alteri") was often confused with the promise made by one *as agent* for another ("in ipsius nomen collatam cui res danda est").

meantime; but I, the promisee, could release it.") The references in this passage to "jus Romanum" and "the law of nature" ("naturaliter") show that Grotius is considering, not the practice of states, but a question of jurisprudence. The passage, therefore, though of historical interest, has no practical importance.

§ 14. *Pufendorf*, 1672.—Unfortunately the passage, which is quoted with approval by Pufendorf, is also ambiguous. The words "videtur mihi acceptanti jus dari efficiendi ut ad alterum jus perveniat, si et is acceptet" would be expected to mean that the third party by acceptance could acquire a legal right under the contract; and this interpretation finds support in the translation of Whewell (*op. cit.* vol. ii. p. 50), "that the right promised pass to the other person." But the passage was not so understood by Pufendorf, who paraphrased it by the words "ut ad alterum *res* perveniat,"[1] and the interpretation of Whewell is hardly reconcilable with the concluding words of Grotius: "sed ego, cui facta est promissio, eam possim remittere."

§ 15. *Klüber*, 1831.—Klüber seems to be one of the earliest writers who discusses as a question of practical International Law the effect of an attempt by treaty to bestow rights upon a third state: "Question de savoir si la tierce puissance acquiert par là (*i. e.* by being 'comprise dans un traité') des droits conventionnels? de même, si, et jusqu'à quel

[1] Pufendorf, *De Jure Naturae et Gentium*, lib. iii. cap. ix. § 5.

point, l'une des parties contractantes, ou toutes les deux, peuvent, à l'égard de la tierce puissance, se rétracter de leur offre ?"[1] Klüber, however, leaves the question unanswered.

§ 16. *Holtzendorff*, 1878, *and Hall*, 1880. Publicists of more recent date have held almost unanimously that a treaty cannot, as a general rule, confer rights on a third state. Some of these have merely stated the maxim: *pacta tertiis nec nocent nec prosunt* as a self-evident proposition; others have attempted to justify it by reference to municipal law.

Thus Holtzendorff, writing in the *Revue de droit international et de législation comparée*, says, "La règle: *Obligatio tertio non contrahitur*, appartient en effet au nombre relativement peu considérable des axiômes de droit international qui sont absolument incontestés."[2]

Again, Hall apparently never directly considers the question; but he observes incidentally, when dealing with another topic, "As a pact between two parties is confessedly incapable of affecting a third who has in no way assented to its terms . . ."[3]

§ 17. *Pradier-Fodéré*, 1885; *Bonfils*, 1894; *Rivier*, 1896.—Bonfils and Rivier both agree that a third state cannot acquire rights under a treaty to which it is a stranger. From the manner in which these writers open the subject, some other con-

[1] Klüber *Droit des Gens Moderne de l'Europe*, Paris, 1831, § 162, note.

[2] *Revue de droit international*, vol. x. (1878), p. 581.

[3] Hall (*op. cit.*), p. 8.

clusion might perhaps be expected. "Ne peut (un traité) faire par quelque clause favorable, acquérir quelque droit à cet État tiers? . . . sans aucun doute," writes Bonfils;[1] and Rivier begins by saying that:[2] "Pour les États tiers (le traité) est chose étrangère '*res inter alios acta*' *quae neque prodest neque nocet.* Telle est la théorie. . . . Dans le fait, le traité peut toucher les tiers de très près." However it afterwards appears that both these writers are only thinking of those cases in which the third state stands in some peculiar relationship to one of the parties, or becomes a party to the treaty by express accession. Bonfils, indeed, in conclusion, expressly asserts that, unless a treaty "renferme bien une stipulation pour autrui", (by which he appears to mean a clause permitting accession or adhesion), no third party can acquire any right under it.

Pradier-Fodéré deals with the subject at some length, but his exposition is largely concerned with deductions from the law of contract in municipal law. He arrives at the conclusion that a third state cannot acquire rights under a treaty to which it is not a party.[3]

§ 18. *Abribat*, 1902.—Abribat, in a monograph on the Straits of Magellan,[4] has to deal with a treaty which was intended to bestow rights and

[1] Bonfils (*op. cit.*), § 850.
[2] Rivier (*op. cit.*), vol. ii. p. 62, § 141.
[3] Pradier-Fodéré (*op. cit.*), vol. ii. pp. 810 *et seq.*, §§ 1127 *et seq.*
[4] Abribat, *Le détroit de Magellan au point de vue International*, Paris, 1902.

obligations on third parties.[1] His opinion is, therefore, probably the outcome of special study. He considers that: "Bien que les traités ne soient obligatoires que pour les Puissances signataires, beaucoup d'entre eux ont cependant de l'intérêt pour un nombre plus ou moins considérable de nations étrangères, à cause de certains effets, pour ainsi dire généraux, qu'ils produisent."[2] In applying this rule to the Straits of Magellan, while pointing out that third states are "interested in" or "favoured by" the treaty, he carefully avoids suggesting that the contracting parties are "juridiquement tenus" in favour of third states.

§ 19. *Despagnet*, 1894.—Some Publicists, however, while stating as a general rule that: *pacta tertiis nec nocent nec prosunt*, engraft upon that doctrine an important exception. Thus Despagnet, although he writes: "L'effet des traités, comme de tous contrats, est limité aux parties contractantes; il ne peut, par conséquent, être invoqué ni pour ni contre les autres États;"[3] makes an important qualification when he adds "La participation d'un État à un traité peut se manifester sous la forme d'une adhésion postérieure soit expresse, *soit tacite*."[4] By tacit adhesion he appears to mean what he himself calls "simple observation de ses dispositions." This doctrine that a third state can, by tacit observance, without express accession or

[1] See below, p. 61, § 41.
[2] Abribat (*op. cit.*), chap. vi. p. 290.
[3] Despagnet (*op. cit.*), § 448.
[4] Despagnet (*op. cit.*), § 59. (Italics are the author's.)

adhesion, and perhaps even in the absence of an "accession" clause, acquire rights under a treaty, is of course different from the accepted rule of law that a third state may accede to a treaty with the consent of the parties and in the manner prescribed.

§ 20. *Oppenheim*, 1905.—Oppenheim, again, suggests a very important exception to the general rule. "According to the principle *pacta tertiis nec nocent nec prosunt*," he writes,[1] "neither rights nor duties as a rule arise under a treaty for third states which are not parties to the treaty . . . The question arises whether in exceptional cases third states can acquire rights under such treaties as were specially concluded for the purpose of creating such rights, not only for the contracting parties but also for third states. . . . I believe that the question must be answered in the negative, and that nothing prevents the contracting parties from altering such a treaty without the consent of third states, *provided the latter have not in the meantime acquired such rights through the unanimous tacit consent of all concerned.*"

§ 21. *Heffter*, 1844, *and Fiore*, 1865.—Heffter and Fiore suggest another exception to the general rule. Heffter submits that a third power can acquire rights under a treaty "où une tierce adhésion a été réservée, comme la condition d'une stipulation qu'on faisait pour soi-même, *condition comprise implicitement dans toute convention passée au nom d'autrui.*"[2] Fiore writes: "Si toutefois les parties stipulaient

[1] Oppenheim (*op. cit.*), vol. i. p. 563, § 522. (Concluding italics are the author's.)

[2] Heffter (*op. cit.*), § 83. (Italics are the author's.)

quelque chose au profit d'un tiers, cette clause devrait valoir au même titre que toute convention faite au nom d'autrui, et se trouverait dès lors subordonnée à la condition de l'acceptation de la part du tiers. Le tiers pourrait toujours profiter de la disposition qui lui serait favorable en déclarant y adhérer." [1]

Their view must be carefully distinguished from the views of Despagnet and Oppenheim. It contends that a right to adhere is an implied term of every contract made on behalf of another. Its authors do not support it by any reference to the practice of states, and it seems to be deeply coloured by the Code Napoléon.

§ 22. *Recapitulation.*—It may be said, therefore, that all writers on International Law are agreed that third states cannot, as a general rule, incur obligations under a treaty, but that they are not in agreement as to the acquisition of rights. This question first emerged in text-books as one of scholastic interest, and it has been treated by later Publicists with brevity, generally without reference to the practice of states, and often with free use of municipal law. They all agree that, as a general rule, *pacta tertiis nec nocent nec prosunt;* but upon this Despagnet, Oppenheim, Heffter, and Fiore have engrafted important exceptions.

It is now time to consider whether there are any rules on this question which the Family of Nations has agreed to regard as obligatory. Municipal law, and the general principles of jurisprudence, can

[1] Fiore (*op. cit.*), vol. ii. p. 389.

only form a background for discussion, and the opinions of writers, however eminent, are but evidence. The basis of an International rule is the consent of nations; and of this their practice is the best evidence.

CHAPTER IV

TREATIES UNFAVOURABLE TO THIRD STATES

§ 23. *The Imposition of Obligations.*—In examining the evidence supplied by the practice of states as to the position of third parties under a treaty, let us first discuss the simplest case, and consider whether a treaty can impose *obligations* on a third state. Here the intention of the contracting parties may be expected to be immaterial; because, although some systems of law do sometimes permit two parties by agreement to alter the general rules of law in favour of a third party, they never allow such alteration to his detriment.

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.

By Article I of the Convention of London of July 13, 1841, the signatory powers[1] agreed to observe the rule, always enforced by Turkey, that the Bosphorus and Dardanelles were closed to warships of foreign states. This rule was confirmed by the Peace Treaty of Paris[2] (1856), the Treaty of

[1] Turkey, Great Britain, Austria, Prussia and Russia. Martens, *N. R. G.*, II. p. 129.

[2] Art. X. with Convention I. (annexed). Martens, *N. R. G.* XV. pp. 775 and 782.

London (1871),[1] and the Treaty of Berlin (1878).[2] The Government of the United States has always acquiesced in this rule, but has nevertheless consistently maintained that its acquiescence must be regarded as a matter of grace, since the treaties in question, to which the United States was not a party, could not be legally binding upon it. Thus, in 1859, the United States replied to a protest by Russia against the passage of an American warship through the Straits, by saying:[3] "There is no disposition to question the statement of Prince Gortchakoff that the Russian Minister at Constantinople, in protesting against the visit of the *Wabash* to that city, was actuated by a regard to the obligations of his Government as a party to the treaty of Paris. . . . As this Government, however, was not a party to that instrument, it is conceived that it could not, upon the occasion adverted to, or upon any similar one, be expected to act in conformity with the views of any other of those parties than the Sublime Porte."

Again, in 1871, the State Department instructed the Legation at Constantinople that, although the United States had observed the acquiescence of other powers, whose greater propinquity would suggest more intimate interests, in the usage by which vessels of war were excluded from the Dardanelles, the President deemed it "important

[1] Art. II. Martens, *N. R. G.*, XVIII. p. 305.

[2] Art. LXIII. Martens, *N. R. G.*, 2nd series, III. p. 465.

[3] Mr. Cass to Mr. Pickens, United States Minister to Russia, January 14, 1859. Moore, *A Digest of International Law* Washington, 1906, vol. i. p. 665.

to avoid recognizing it as a right under the law of nations."[1]

Again, when in November, 1872, the Turkish Government refused passage to the United States war vessel *Congress*, the Secretary of State wrote to the American Minister to Turkey as follows: "The abstract right of the Turkish Government to obstruct the navigation of the Dardanelles even to vessels of war in time of peace is a serious question. The right, however, has for a long time been claimed and has been sanctioned by treaties between Turkey and certain European states. A proper occasion may arise for us to dispute the applicability of the claim to United States men-of-war. Meanwhile it is deemed expedient to acquiesce in the exclusion."[2] In the following month a similar refusal to the *Shenandoah* was acquiesced in on similar grounds.[3]

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.

§ 24. *Treaties Incidentally Unfavourable to Third States.* — 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

[1] Mr. Fish to Mr. McVeagh, No. 29, May 5, 1871. Moore, (*op. cit.*), vol. i. p. 666.

[2] Mr. Fish to Mr. Boker, January 3, 1873. Moore (*op. cit.*), vol. i. p. 667.

[3] Mr. Fish to Mr. Boker, January 25, 1873. Moore (*op. cit.*), vol. i. p. 668.

to it, on account of the many points of contact between members of the Family of Nations.[1] But although a treaty may affect strangers, it does not follow that, because it 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 International Personality of the contracting parties.[2]

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,[3] (*b*) when it is inconsistent with the safety of the third state,[4] and (*c*) when it violates rights previously acquired by the third state.[5]

[1] *Cf.* Rivier (*op. cit.*), vol. ii. p. 89: "Le traité peut toucher les tiers de très près et . . . plus les liens entre les États se multiplieront, plus il en sera ainsi. Aujourd'hui déjà il est permis de dire que presque rien de ce qui peut se décider entre certains membres de la famille des nations, n'est entièrement indifférent aux autres." *Cf.* also Oppenheim (*op. cit.*), vol. i. p. 563, § 522.

[2] *Cf.* Oppenheim (*op. cit.*), vol. i. p. 188; Fiore (*op. cit.*), § 1030; Hall (*op. cit.*), p. 339; Rivier (*op. cit.*), vol. ii. p. 90; Martens, F. de (*op. cit.*), vol. i. p. 537.

[3] Hall (*op. cit.*), p. 339.

[4] *Ibid.*

[5] Martens, F. de (*op. cit.*), vol. i. p. 537.

(*a*) If a treaty violates an universally accepted rule of International Law, all other states have a right to intervene. For it is one of the limitations of the International legal system that, in the absence of a central authority to enforce the law, the states themselves have to punish offenders. "Self-help and Intervention . . ." says Professor Oppenheim, "are the means by which the rules of the Law of Nations can be and actually are enforced."[1]

(*b*) Hall[2] suggests that third states are entitled to intervene to prevent the conclusion of a treaty which would endanger their safety. This question has been widely argued, but cannot be discussed here. Professor Oppenheim suggests that intervention by a third power through motives of self-preservation can never be in the exercise of a *right*, although under certain circumstances International Law will excuse such intervention.[3]

(*c*) Whenever a state concludes a treaty which violates the existing rights of a third state, whether they be rights given by the general rules of International Law, or rights acquired previously by treaty between the delinquent state and the third state, the latter is entitled to intervene. All writers seem to recognize such intervention as justified; and the practice of nations supports it.[4]

[1] Oppenheim (*op. cit.*), vol. i. p. 13; *cf.* Bluntschli, *Le droit international codifié*, traduit par Lardy, Paris, 1874, p. 267, § 471; Fiore (*op. cit.*), vol. i. p. 518, § 592.

[2] Hall (*op. cit.*), p. 339.

[3] Oppenheim (*op. cit.*), vol. i. pp. 184, 185.

[4] The rule and its justification are succinctly stated by Vattel (*op. cit.* liv. ii. ch. xii. § 165): "Un souverain déjà lié par

§ 25. *Illustrations from the Practice of States.* By a treaty of the 3rd May, 1815, between Austria, Prussia and Russia, the town of Cracow was declared "cité libre, indépendante et strictement neutre, sous la protection des trois hautes Parties contractantes."[1] This treaty was incorporated into the Final Act of the Vienna Congress.[2] When by a treaty of the 6th November, 1846,[3] Austria, Prussia and Russia agreed to the annexation of Cracow by Austria, Great Britain and France protested against this infringement of the Vienna Treaty, and claimed the right to intervene.[4]

Again, a protest was successfully made by Great Britain against the Treaty of San Stephano of 1878,[5] on the ground that it conflicted with the Treaty of Paris of 1856[6] and the Convention of London of 1871.[7] The grounds of this protest were embodied in a circular note from the British Foreign Office to the British Ambassadors, dated

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un traité, ne peut en faire d'autres contraires au premier. Les choses sur lesquelles il a pris des engagements, ne sont plus en sa disposition." *Cf.* Bluntschli (*op. cit.*), p. 240, § 414; Fiore (*op. cit.*), vol. i. p. 518, § 592; Rivier (*op. cit.*), vol. ii. p. 90; Martens, F. de (*op. cit.*), vol. i. p. 537; Phillimore (*op. cit.*), vol. ii. pp. 78, 128; Woolsey (*op. cit.*), p. 70, § 103; Oppenheim (*op. cit.*), vol. i. pp. 190, 564; Pradier-Fodéré (*op. cit.*), § 1082.

[1] Martens, *N. R.*, II. p. 251.

[2] Article CXVIII. Martens, *N. R.*, III. p. 429.

[3] Martens, *N. R. G.*, IX. p. 374.

[4] W. B. Lawrence, *Commentaire sur Wheaton*, Leipzig, 1868, vol. i. p. 225; Wheaton, *History of the Law of Nations*, New York, 1845, p. 441.

[5] Martens, *N. R. G.*, 2nd series, III. p. 246.

[6] Martens, *N. R. G.*, XV. p. 770.

[7] Martens, *N. R. G.*, XVIII. p. 303.

1st April, 1878, which contains the following passage[1]: "By the Declaration annexed to the first Protocol of the Conference held in London in 1871, the Plenipotentiaries of the Great Powers, including Russia, recognized that 'it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement.' It is impossible for Her Majesty's Government, without violating the spirit of this Declaration, to acquiesce in the withdrawal from the cognizance of the Powers of Articles in the new Treaty which are modifications of existing Treaty engagements, and inconsistent with them."

Again, when in 1911 Great Britain contemplated a general arbitration treaty with the United States, she recognized that such a treaty would conflict with a treaty made with Japan in 1902, and renewed in 1905, and for this reason persuaded Japan to embody in a new treaty the following provision: "Should either High Contracting Party conclude a treaty of general arbitration with a third Power, it is agreed that nothing in this Agreement shall entail upon such Contracting party an obligation to go to war with the Power with whom such treaty of arbitration is in force."[2]

[1] Martens, *N. R. G.*, 2nd series, III. p. 256.
[2] Article IV. Oppenheim (*op. cit.*), vol. i. p. 596.

CHAPTER V

TREATIES BENEFICIAL TO THIRD STATES

§ 26. *Treaties Incidentally Beneficial to Third States.*—It has been seen that, although third states have a duty not to interfere with the execution of a treaty without good cause, they can never incur obligations under it, whatever the intention of the contracting parties. However, in considering the acquisition of rights by third states, the intention of the parties may be material, for it has already been pointed out[1] that there is no inherent unreasonableness in allowing two states to alter the general law in favour of a third party. But before discussing those cases in which the parties intend to confer a right, or even a benefit, upon a third state, it may be convenient to deal with treaties incidentally beneficial to third parties.

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.

§ 27. *The Treaty of Berlin.*—In 1895, the Great Powers, by virtue of Article LXI. of the Treaty of

[1] Above, p. 4, § 3.

Berlin (1878),[1] the provisions of which had been consistently ignored by Turkey,[2] took steps to prevent, if possible, the continuation of the atrocities in Armenia. Referring to these activities, and to the position of third parties under the Berlin Treaty, President Cleveland spoke as follows[3]: "By treaty several of the most powerful European Powers have secured a right and have assumed a duty . . . The Powers declare this right and this duty to be theirs alone, and it is earnestly hoped that prompt and effective action on their part will not be delayed."

In his annual message of the following year, the President again deprecated any attempt by the United States to enforce the treaty, as such an attempt "would be regarded as an interruption of their plans by the great nations who assert their exclusive right to intervene in their own time."[4]

The enforcement of Article LXI. of the Berlin Treaty would have been beneficial to the United States,[5] but the contracting parties did not intend that it should be enforceable by third powers,[6] and the United States acquiesced in that view.

Under Articles XLIII. and XLIV. of this same

[1] Martens, *N. R. G.*, 2nd series, III. p. 464.

[2] Holland, *The European Concert in the Eastern Question*, Oxford, 1885, p. 306.

[3] Annual Message to Congress, December, 1895. *British and Foreign State Papers*, vol. 87, p. 748.

[4] *British and Foreign State Papers*, vol. 88, p. 496.

[5] *Ibid.*, vol. 87, p. 748.

[6] As appears from the words of the Article, "Elle donnera connaissance périodiquement des mesures prises à cet effet *aux Puissances qui en surveilleront l'application.*"

treaty, the "recognition" of Roumania was made conditional upon the freedom from religious disabilities of all Roumanian subjects.[1] These articles were not designed to bestow any legal right on third powers, though doubtless their enforcement would be incidentally beneficial to many.

Roumania was considered to be evading these conditions,[2] and, in consequence, the United States in 1902 found itself suffering from an excessive immigration of Roumanian Jews. It thereupon addressed a note to Roumania, which admitted that "The United States may not authoritatively appeal to the stipulations of the treaty of Berlin, to which it was not and can not become a signatory."[3]

§ 28. *The Dardanelles and the Guarantee of Turkey.*—The various treaties regulating the position of the Dardanelles all contained a reservation in favour of the Sultan, "de délivrer des firmans de passage, aux bâtimens légers sous pavillon de guerre, lesquels seront employés, comme il est usage, au service des légations des Puissances amies."[4] At the end of the year 1895, the United States Legation asked permission from the Porte for the *Bancroft* to pass through the Straits, as that vessel had been authorized to remain at the disposal

[1] Martens, *N. R. G.*, 2nd series, III. p. 462.

[2] *Cf.* Rey, in the *Revue générale de droit international public*, (Paris), vol. x. (1903), p. 460.

[3] Moore (*op. cit.*), vol. vi. p. 365.

[4] Convention of London, Article II. Martens, *N. R. G.*, II. p. 129. Convention annexed to Peace Treaty of Paris, Martens, *N. R G.*, XV. p. 785. Treaty of London (1871), Martens, *N. R. G.*, XVIII. p. 305. Treaty of Berlin (1878), Article LXIII. Martens, *N. R. G.*, 2nd series, III. p. 465.

of the United States Legation at Constantinople. The Porte refused permission, on the ground that "only the signatory powers of the treaty of Paris enjoy the right to have vessels of war permanently at Constantinople at the orders of their respective embassies."[1]

The position of a third state incidentally benefited by a treaty not intended to confer rights upon it is further illustrated by a controversy which arose out of the guarantee of Turkey. Article VII. of the Treaty of Paris of the 30th March, 1856, to which Turkey was a party, guaranteed the independence of that state.[2] Whatever be the proper interpretation of that article, it is generally agreed that it does not bind the contracting parties to go to war with a power which infringes its stipulations; "there is no shadow of a promise to make non-observance by other Powers a *casus belli*."[3] But by a treaty signed at Paris on the 16th April, 1856, between Austria, France and Great Britain, for the purpose of guaranteeing the execution of the treaty of Paris of the 30th March, the contracting parties *did* stipulate that any infringement of the independence and integrity of Turkey, from whatever source, should be a *casus belli*.[4] Turkey, however, was not a party to this treaty. The question arose whether Turkey, a third party, but a beneficiary

[1] Mavroyeni Bey to Mr. Olney, January 16, 1896. Moore (*op. cit.*), vol. i. p. 668.

[2] Martens, *N. R. G.*, XV, p. 774.

[3] Lord Derby in the House of Lords, Hansard, Vol. CCXXXII. p. 41.

[4] Martens, *N. R. G.*, XV. p. 790.

under the treaty, could demand as of right its performance. The British Government answered in the negative. "It is not an engagement to which the Porte is a party," said Lord Derby in the House of Lords. "It does not therefore bind us in any way except to France and to Austria."[1]

It is submitted that these four cases establish the proposition that a third state cannot enforce a treaty to which it is a stranger, merely because it would be benefited thereby. As a treaty can inflict damage upon a third power without giving any legal right to redress, so can it confer a benefit, without conferring any legal right.

§ 29. *Treaties Intended to Benefit, but not to Confer Rights on Third States.*—The further question, however, arises whether a treaty intended to benefit, but not to confer any legal rights upon, a third state, gives that third state any right to claim performance. There is, indeed, no logical reason why it should; but some writers, perhaps through some confusion between the intention to confer a right and the intention to bestow a benefit, seem to suggest that it does.

§ 30. *The Aland Islands.*—By Article I. of a Convention signed at Paris on the 30th March, 1856, between Great Britain, France and Russia, and incorporated in the Treaty of Paris, to which Austria, France, Great Britain, Russia, Prussia, Sardinia and Turkey were parties,[2] Russia undertook not to fortify the Aland Islands. In 1906 there was some

[1] February 8, 1877, Hansard, Vol. CCXXXII. p. 41.
[2] Martens, *N. R. G.*, XV. pp. 788, 780.

apprehension that the treaty was about to be violated, and a discussion arose as to whether Sweden, a third state, enjoyed any rights under the treaty. Commenting upon this question in the *Revue générale de droit international public*,[1] Waultrin does, indeed, deny all rights to Sweden, but upon the ground that "Nul texte ne stipule, en effet, que la servitude établie par le Congrès de Paris l'ait été dans l'intérêt des tiers. La Suède ne peut donc juridiquement exercer non plus contre la Russie aucun recours direct." These words seem to suggest that perhaps this writer thought that, if the stipulation in the treaty had been expressly made "dans l'intérêt" of Sweden, that state could legally claim its enforcement.

But whatever may have been the opinion of Waultrin, it seems clear from the practice of nations, that an intention to benefit (as distinct from an intention to bestow legal rights upon), a third state, is not sufficient to give that state any rights under the treaty. For of the four cases discussed in § 27 and § 28, in which third states were found to have acquired no rights, the first two arose under the Treaty of Berlin, which was expressly made in the interest of third parties, as appears from the preamble declaring that the contracting powers drew up the treaty "désirant régler dans *une pensée d'ordre Européen* conformément aux stipulations du Traité de Paris . . . les questions soulevées en Orient."[2] Yet in these two cases no rights were

[1] *Revue générale de droit international public*, vol. xiv. (1907), p. 529. [2] Martens, *N. R. G.*, 2nd series, III. p. 449.

claimed by a third state concerned, and no case has been found which would support such a claim.

§ 31. *The Abrogation of Article V. of the Treaty of Prague*, 1866.—It is usual to support the proposition that a third state acquires no rights under a treaty intended to confer a benefit upon it by referring to the abrogation of Article V. of the Treaty of Prague, which was signed by Austria and Prussia on the 23rd August, 1866. That article provided that "His Majesty the Emperor of Austria transfers to His Majesty the King of Prussia all his rights acquired by the Peace of Vienna of October 30, 1864, over the Duchies of Holstein and of Schleswig, subject to the reservation that, if the populations of the Northern districts of Schleswig, by a plebiscite, vote in favour of union with Denmark, they are to be ceded to Denmark."[1] It was abrogated by the mutual consent of the contracting parties by a Convention of the 11th October, 1878.[2]

The abrogation of this article is commonly cited to show that a third state cannot acquire rights under a treaty even if it was an intended beneficiary. But though the proposition is sound, this case cannot be properly quoted in support of it. There was, indeed, considerable doubt as to who was the intended beneficiary; and it was widely believed that the article was merely inserted to gratify Napoleon III. Assuming, however, that it was intended to be in the interest of the populations of Northern

[1] Martens, *N. R. G.*, XVIII. p. 345. The above is an unofficial translation.

[2] Martens, *N. R. G.*, 2nd series, III. p. 529.

Schleswig, they, as individuals, are incapable of possessing International rights,[1] and the treaty must belong to the class of those incidentally beneficial to a third state. Under such a treaty, as was seen in § 27 and § 28, a third state is incapable of acquiring any rights, and Bismarck was justified in saying: "L'empereur d'Autriche seul a le droit d'exiger de nous l'exécution du traité de Prague."[2] Upon this most writers are agreed. Holtzendorff, writing in the *Revue de droit international*,[3] says: "C'est d'une manière absolument *lègale* que l'article V du traité de Prague a été abrogé par la commune entente des contractants . . . sans l'intervention de n'importe quel tiers . . . La règle: *Obligatio tertio non contrahitur*, appartient en effet au nombre relativement peu considérable des axiômes de droit international qui sont absolument incontestés . . . Que l'une ou l'autre des dispositions qui sont enoncées dans un traité ait été motivée par des considérations de justice, ou d'intérêt, ou de courtoisie envers un autre état, c'est, au point de vue juridique, tout à fait indifférent." Thudichum,[4] Oppenheim,[5] Rivier,[6] Bonfils,[7] and Pradier-Fodéré[8] also agree

[1] This is, however, a controversial point, and Rolin-Jaequemyns, writing upon this very episode in the *Revue de droit international*, (vol. ii. (1870), p. 325), maintains that individuals can possess International rights. But see Oppenheim (*op. cit.*), vol. i. p. 362, and the references there given.

[2] Speaking on behalf of Prussia in the *Diète Constituante*. Quoted by Thudichum in the *Revue de droit international*, vol. ii. (1870), p. 722.

[3] Vol. x. p. 580.

[4] *Revue de droit international*, vol. ii. (1870), p. 721.

[5] Oppenheim (*op. cit.*), vol. i. p. 364.

[6] Rivier (*op. cit.*), vol ii. p. 63.

[7] Bonfils (*op. cit.*), § 850.

[8] Pradier-Fodéré (*op. cit.*), vol. ii. p. 813, § 1129.

that the contracting parties were entitled to abrogate the treaty.

Rolin-Jaequemyns, however, dissents, and argues: "L'article V . . . signifie que (les droits de la Prusse) sont subordonnés à une condition résolutoire, qui est le vote libre des populations en faveur du Danemark. Mais, interprêtée *bonâ fide*, cette condition résolutoire a évidemment pour corollaire le *devoir* de la Prusse de consulter les populations."[1] In reply to this contention it may be suggested that Prussia certainly was under a duty to consult the inhabitants of Schleswig; but this duty was one which she owed, not to the inhabitants, as Rolin-Jaequemyns contends, but to Austria. And when he goes on to say that:[2] "(L') interprétation (de M. Thudichum) et celle de M. de Bismark, déniant tout droit aux habitants du Schleswig septentrional à se prévaloir d'une clause dans laquelle ils sont seuls intéressés, nous paraissent contraires au principe d'équité depuis longtemps admis dans le droit civil; savoir que le tiers même étranger à une stipulation a le droit de s'en prévaloir lorsqu'elle est la condition d'une stipulation qu'un des contractants fait pour lui même ou d'une donation qu'il fait à un autre," it appears that he is relying, not upon any rule of International Law, but upon municipal law.

Undoubtedly Austria and Prussia were entitled to abrogate the treaty, in accordance with the conclusions reached in § 27 and § 28. Even if the

[1] *Revue de droit international*, vol. ii. (1870), p. 325.
[2] *Ibid.*, vol. ii. (1870), p. 724.

treaty had been intended to benefit, not individuals, but some third state, it might still have been legally abrogated in accordance with § 29 and § 30.

§ 32. *Treaties Intended to Confer Legal Rights on Third States: with Accession Clause.*—Different considerations, however, apply when the contracting parties intend to confer legal rights on a third state. In such a case the treaty usually contains what is called an "accession" or an "adhesion" clause, and then the third state, by acceding or adhering in the manner prescribed by the clause, acquires rights and liabilities under the treaty.[1] It is not accurate, however, to say that a treaty containing an "accession" or an "adhesion" clause can confer rights upon a third state. For by accession or adhesion a third state may not only acquire rights but also incur liabilities; and although the contracting parties, by inserting such a clause, might be permitted to alter the general law in favour of a third party, they would not be allowed to prejudice him thereby. Therefore the proper explanation of accession or adhesion seems to be that the "accession" or "adhesion" clause is an offer by the contracting parties to enter into legal relationship with a third state, or states, upon the terms contained in the treaty; an offer, which, if accepted, constitutes a new treaty.[2] Consequently the rights and liabilities incurred by the third state are incurred, not under

[1] Oppenheim (*op. cit.*), vol. i. p. 568, § 532; Pradier-Fodéré (*op. cit.*), vol. ii. p. 829; Rivier (*op. cit.*), vol. ii. p. 91, § 150; Heffter (*op. cit.*), § 88.

[2] Oppenheim (*op. cit.*), vol. i. p. 569, § 532.

the old treaty, but under an additional treaty identical in terms with the old.

§ 33. *Difficulties in the Law of Accession and Adhesion.* — This explanation of the nature of "accession" will be helpful in dealing with two questions which have been debated by Publicists, (*a*) whether a third state can accede to a treaty containing an accession clause *without the consent* of the original parties, and (*b*) whether accession must be in the form prescribed by the treaty; or, if no particular form is therein prescribed, in any special form prescribed by International Law.

Upon the first question, Heffter seems to suggest that a third state can accede or adhere even without a previous invitation from the original parties,[1] and this view is impliedly supported by Fiore,[2] but rejected by Klüber[3] and Oppenheim.[4] Again, as to the second question, Oppenheim,[5] Heffter,[6] and Klüber[7] say that accession or adhesion must be "formal"; and this presumably excludes accession or adhesion by conduct. Despagnet, on the other hand, holds that accession or adhesion may be by "simple observation" of the terms of the treaty.[8]

[1] Heffter (*op. cit.*), § 88: "Une tierce puissance peut déclarer son adhésion . . . tant à la suite qu'en dehors d'une invitation préalable des parties principales."
[2] Fiore (*op. cit.*), vol. ii. p. 389.
[3] Klüber (*op. cit.*), § 161.
[4] Oppenheim (*op. cit.*), vol. i. p. 569, § 532.
[5] *Ibid.* p. 568, § 532.
[6] Heffter (*op. cit.*), § 88.
[7] Klüber (*op. cit.*), § 161.
[8] Despagnet (*op. cit.*), § 448.

Now since accession or adhesion constitutes a new treaty, in order to answer these questions, it is necessary to consider the ways in which a treaty may be concluded. A treaty has been defined as a contract, and as such is capable of analysis into an offer followed by an acceptance. "Every expression of a common intention," writes Anson,[1] "arrived at by two or more parties is ultimately reducible to question and answer. . . . As a promise involves something to be done or forborne it follows that to make a contract, or voluntary obligation, this expression of a common intention must arise from an offer made by one party to another who accepts the offer made, with the result that one or both are bound by a promise or obligatory expression of intention."

Therefore, it would seem that, apart from any special rule of International Law, a treaty could be made whenever *all* the parties could be shown to have consented to enter into it; and in no other circumstances. Consequently the view that a third party may accede to a treaty without the consent of the original parties is contrary to the true conception of accession as a new treaty. Since, therefore, it is unsupported by practice, it may be dismissed without further consideration.

Secondly, apart from any special restrictions imposed by International Law, a treaty would seem to be capable of conclusion in any manner in which consent can be proved. But since consent must be capable of proof, a distinction ought

[1] Anson (*op. cit.*), pp. 18–19.

to be drawn between the legal effect of mere passivity,[1] and of conduct implying consent. If two or more states make an offer to a third, and it does nothing from which acceptance can be inferred, no treaty would be expected to result. Mere mental acceptance will be insufficient to conclude it, since mental acceptance cannot be proved. "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man."[2] But so long as acceptance is evidenced properly, there seems no ground for arguing (apart from any special rule of International Law), that it must necessarily be express, or in writing. Speaking of the general theory of contract, Anson writes: "Conduct may take the place of written or spoken words, in offer, in acceptance, or in both . . . The intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case."[3] To the general principle, however, that acceptance can take place by conduct, Anson suggests an important exception. When the offeror prescribes the mode of acceptance, or when the character of the offer makes it reasonable that acceptance should be by words or in writing, he suggests that such an offer can *not* be accepted by conduct.

This exception seems to be equally applicable in the case of a treaty; and it would be in accord-

[1] The term "acquiescence" should be avoided, because it is commonly used to mean both an attitude of mere passivity and also acceptance by conduct.

[2] *Year Book*, 17. Ed. IV. 1, quoted from Anson (*op. cit.*), p. 28.

[3] Anson (*op. cit.*), pp. 22, 23.

ance with this legal analysis to argue that a treaty might be concluded by conduct implying consent, *unless* it in terms prescribed a special mode of acceptance. As many treaties by an "accession" clause do in fact do this, this proviso is very important.

However, it does not follow that these arguments based on the general theory of contract are rules of International Law. Many legal systems require certain formalities in the conclusion of contracts, and International Law might well have done this; but it has not.

§ 34. *The Congo and the Niger.*—The General Act of the Congo Conference (1885) to which Germany, Austria, Belgium, Denmark, Spain, France, Great Britain, Italy, Holland, Portugal, Russia, Norway-Sweden, and Turkey[1] were parties, provides for the free navigation of the Congo and Niger rivers by all nations. (Articles I., II., V.) These articles were drawn up, states the Preamble, by the signatory powers, "voulant régler . . . et assurer à tous les peuples les avantages de la libre navigation sur les deux principaux fleuves.[2] The treaty contains an "accession" clause.[3]

On the 30th April, 1887,[4] the Congo State, in pursuance, as it was alleged, of the above General Act, issued a decree requiring foreign vessels, when navigating the Congo, to fly the flag of the Congo State. The United States took exception to this

[1] The United States signed, but did not ratify, the General Act.
[2] Martens, *N. R. G.*, 2nd series, X. p. 414.
[3] Article XXXVII. Martens, *N. R. G.*, 2nd series, X. p. 426.
[4] Moore (*op. cit.*), vol. i. p. 652.

decree, as being contrary to the General Act; and as they were not parties to it, their protest was in effect a claim to enforce a treaty to which they were strangers. The resulting correspondence was long and important.

At the beginning of the correspondence, there was indeed no claim by the United States of any legal right under the treaty, and no admission of any by the Belgian Government. But in a despatch of the 4th February, 1888,[1] the United States referred to the enjoyment of free navigation as the "undisturbed enjoyment of a *right*." The Belgian Government never corrected this reference, nor suggested, anywhere in the correspondence, that the United States, as a mere licensee, must accept whatever terms the signatory powers chose to grant. There was certainly an inclination on the one side to claim rights under the treaty on behalf of the United States, and on the other to admit them.

However, as will be seen later,[2] when a subsequent controversy arose with respect to Article XXXIV. of this same treaty, the United States did not admit any obligation under it, and this would seem to show that, if any rights were claimed, upon whatever ground they may have been claimed, they cannot have been claimed by reason of any supposed tacit accession.[3] For by accession, the

[1] *Foreign Relations of the United States* (1888), Part I. p. 38.

[2] See below, § 60, p. 89.

[3] It is difficult to see upon what grounds they could have been claimed. The treaty differs from those to be discussed in the

acceding state, not only acquires rights, but also incurs liabilities.

In any case this episode is not sufficiently clear to establish any principle, and rather indicates some confusion in the minds of the contending diplomats. It seems that the general principles which have been applied in these two sections to vexed questions in the law of accession and adhesion are rules of International Law, and that, in the absence of precedent, the existence of an "accession" clause in a treaty will be held to preclude accession in any other manner.

§ 35. *Treaties Intended to Confer Legal Rights on Third States: no Accession Clause.*—There still remains the question how far third states can acquire rights under a treaty which was designed to confer legal rights upon them, but contains no "accession" clause.

Such rights might conceivably be acquired in one of two ways:

(i) It might be that the law of nations permitted the contracting parties, if they wished to confer upon a third state, not merely a benefit, but also a legal right, to alter the general rule of law, by express agreement, in favour of that state. Some systems of municipal law have, as has been seen,[1] done this.

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next section in that it contains an "accession" clause, and it had not been in force long enough at the time of this episode to have become the basis of a rule of customary law in the manner discussed in a subsequent part of this monograph. (See ch. vi. p. 72.)

[1] *Cf.* §§ 4–10.

(ii) It might be that the Family of Nations had consented to regard a stipulation in a treaty which was intended to confer a legal right on a third state as an offer to that state to enter into an additional contract, identical in terms with the original treaty; an offer capable of acceptance by conduct, so as to give the third state legal rights and liabilities.

These two propositions must be distinguished. The first would explain the acquisition of rights, but could not explain the imposition of obligations;[1] the second would explain both. Again, acceptance by the third state is an essential element in the second proposition, but not in the first. Thirdly, the second proposition necessarily involves the possibility of the conclusion of a treaty by conduct.

This matter is not entirely free from doubt. A great many writers agree with Hall that: "From the moment that consent on both sides is clearly established, by whatever means it may be shown, a treaty exists of which the obligatory force is complete."[2] Thus G. F. de Martens writes: "Le consentement peut être donné expressément ou tacitement, et, dans le premier cas, ou verbalement ou par écrit."[3] Again Bluntschli writes: "Les traités peuvent être conclus sous toutes les formes qui peuvent servir à formuler les intentions des états contractants."[4]

[1] *Cf.* § 23, p. 29.
[2] Hall (*op. cit.*), p. 321.
[3] Martens, *Précis du droit des gens*, edited by Pinheiro-Ferreira, Paris, 1864, § 49, p. 162.
[4] Bluntschli (*op. cit.*), § 422.

It must be admitted, however, that some writers hardly seem to contemplate the conclusion of a treaty by conduct.[1]

Passing from this question to the two propositions before us, we find three writers who support the second of them. Heffter, when he says that the third state's right to adhere is a "condition comprise implicitement dans toute convention passée au nom d'autrui,"[2] and Fiore, when he writes, "Le tiers pourrait toujours profiter de la disposition qui lui serait favorable en déclarant y adhérer,"[3] can only mean that the treaty amounts to an offer to the third party which is capable of being turned into an additional contract by acceptance. This view is endorsed and expanded by Diena in the *Zeitschrift für internationales Recht*,[4] in an article dealing with the Panama Canal. "In Ermangelung positiver, auf Vereinbarungen gestützter Rechtssätze," he writes, "oder gewohnheitsrechtlicher Regeln glaube ich, dass aus Verträgen der Staaten zugunsten Dritter ein dritter Staat kein wirkliches Recht erwerben kann, ohne eine von ihm ausgehende Willenserklärung. Aber ich bin der Meinung, dass diese Willenserklärung kein Adhäsionsakt zu sein braucht, dass es vielmehr genügt, wenn ein dritter Staat in irgendeiner Form, sei es auch stillschweigend, den Willen kundgibt, die ihm zugedachte Berechtigung als solche zu ergreifen und dadurch die ihm

[1] On the whole matter, see Oppenheim (*op. cit.*), vol. i. p. 550; Phillimore (*op. cit.*), vol. ii. p. 78; Klüber (*op. cit.*), § 143.

[2] Heffter (*op. cit.*), § 83.

[3] Fiore (*op. cit.*), vol. ii. p. 389.

[4] Vol. xxv. (1915), p. 20

eröffnete Rechtsposition zu erlangen; selbstverständlich mit allen Bedingungen behaftet welche in dem Begründungsvertrage aufgestellt sind."

The matter can, however, only be solved by reference to the practice of nations.

§ 36. *The Annexation of Bosnia and Herzegovina.* In the year 1908, Austria, in breach of Article XXV. of the Treaty of Berlin,[1] annexed Bosnia and Herzegovina; whereupon Serbia and Montenegro, which were not parties to the treaty, protested.

The Serbian protest contained the following passage: "Le gouvernement royal est persuadé que le traité de Berlin, d'autant plus que n'ayant pas eu part à sa création nous avons été obligés de le subir en tant qu'il affectait notre sort, doit faire loi, non seulement quand il impose des devoirs et obligations . . . mais aussi . . . quand il offre une protection à nos droits." [2]

In the Montenegrin protest appeared the words: "Puisque aujourd'hui les stipulations du traité de Berlin sont foulées aux pieds, . . . celles de l'article 29 . . . s'annulent de ce fait même, et n'ont plus de valeur pour le Montenegro." [3]

M. d'Aehrenthal, on behalf of Austria, refused to receive the protests of Serbia and Montenegro, on the ground that they were not parties to the Berlin Treaty; [4] and the Great Powers compelled them to

[1] Martens, *N. R. G.*, 2nd series, III. p. 457.
[2] *Revue générale de droit international public*, vol. xv. (1908), Documents, p. 37.
[3] *Ibid.*, vol. xv. (1908), Documents, p. 38.
[4] *Ibid.*, vol. xvii. (1910), p. 446.

withdraw.[1] Commenting upon this event, a writer in the *Revue générale de droit international public* asks: "Comment ne pas reconnaître la légitimité des moyens dont s'est servi M. d'Aehrenthal vis-à-vis des Cabinets de Belgrade et de Cettigne?"[2]

It appears, therefore, that Serbia and Montenegro were disposed, not only to claim rights, but also to admit obligations under the treaty, and that the Great Powers opposed their claim. But as the latter themselves acquiesced in the infraction of the treaty by Austria, it is permissible to surmise that their attitude was dictated throughout by considerations of state policy, and without strict regard to the legal position. The case, therefore, is not of much value as evidence.

§ 37. *Walachia and Moldavia.*—By Article XXII. of the Treaty of Paris of the 30th March, 1856,[3] confirmed by a Convention of the 19th August, 1858,[4] it was provided that the "Principalities of Walachia and Moldavia shall continue to enjoy, under the suzerainty of the Porte and the guarantee of the Contracting Powers, the privileges and immunities of which they stand possessed." These two treaties also subjected the Principalities to certain restrictions.

Since the Principalities were parties to neither of these treaties, it might be thought that these restric-

[1] Note of the 30th March, 1909, *Revue générale de droit international public*, vol. xvii. (1910), p. 447.

[2] Blociszewski in *Revue générale de droit international public*, vol. xvii. (1910), p. 446.

[3] *Cf.* Martens, *N. R. G.*, XV. p. 778.

[4] Martens, *N. R. G.*, XVI. Part II. p. 50.

tions could not bind them; and this is the opinion expressed by Arntz in the *Revue de droit international*.[1] However in 1866, the guarantors of the treaty of 1856 assembled in Conference, and demanded that the Principalities "should observe the treaties."[2]

This case much resembles the last, except that whereas there two smaller states were claiming rights against the Great Powers under a treaty to which they were not parties, here the Great Powers are attempting to impose obligations upon two small states under a similar treaty. In both cases it might reasonably be maintained that the attitude of the Great Powers was dictated solely by considerations of diplomacy, without any regard to the rules of International Law. Nevertheless it is not certain that the claims of the small states in the first case, and of the Great Powers in the latter case, cannot be justified in law. The question whether International Law regards a treaty intended to bestow legal rights on third states, but containing no "accession" clause, as an offer of a new contract with them, capable of acceptance by conduct, is one which must be further considered.[3]

§ 38. *International Settlements.*–Cases will not often

[1] Vol. ix. (1877), p. 37.

[2] *Revue de droit international*, vol. ix. (1877), p. 37.

[3] The explanation that the contracting parties expressly modified the general law in favour of these third states is not available, because not only rights but also obligations are involved, and it has been seen (above, § 23), that the contracting parties can never modify the general law to the detriment of third states.

arise in which a treaty intended to confer rights on a third state does not contain an "accession" or an "adhesion" clause; for by such a clause the object of the parties can most readily be attained. Thus the Hague Conventions generally contain an "accession" clause, and expressly declare that third states which do not avail themselves of it shall have neither rights nor duties under the Convention. In practice those treaties which are designed to bestow rights and obligations on third states, and yet do not contain an "accession" clause, will generally be found to be treaties which have been aptly called "International Settlements."[1]

In the words of Westlake, "Great Powers have by agreement among themselves made arrangements affecting the smaller powers *without consulting them*, and with the full intent that those arrangements should be carried into effect, although it has not been necessary to resort to force for that purpose because the hopelessness of resistance in those circumstances has led to an express *or tacit*, but peaceable, acceptance of the decrees of the states concerned. . . . If each of their proceedings be considered separately, the ratification subsequently conceded to it by the states affected saves it from being a substantial breach of their equality and independence."[2]

This passage explains that there is a class of treaties in which the Great Powers attempt to

[1] By Cobbett (*op. cit.*), vol. i. p. 11.

[2] Westlake (*op. cit.*), vol. i. pp. 321–322. (Italics are the author's.)

confer rights and impose obligations upon smaller powers, without making them parties to them, or inviting them to accede or adhere; that the smaller powers have acquiesced in these arrangements, sometimes expressly, sometimes by their conduct; and that as a result, in the opinion of Westlake, the legal situation is regularized. Among such treaties may be mentioned the Final Act of the Vienna Congress, 1815, the Treaty of London, 1831, the Treaty of Paris, 1856, the Treaty of London, 1867, the Treaty of Berlin, 1878, the General Act of the Berlin Congo Conference, 1885, and the Treaty of Constantinople, 1888.[1] Some of these have contained "accession" clauses, and to some the smaller states have been parties; but not all.

§ 39. *Cases of Permanent Neutralization.*—In the nature of International Settlements are also those treaties by which states have been permanently neutralized. In August, 1914, there were three permanently neutralized states—Switzerland, Belgium, and Luxemburg.

Since it is an essential feature of the legal conception of permanent neutralization that all states of political importance should have agreed to the neutralization of the neutralized state, some ground must be found for holding that such states as are not parties to the treaty of neutralization, are nevertheless bound by it. It has been suggested by some writers that third states come to be bound by the treaty in course of time, through the growth of a rule of customary International Law in the manner

[1] *Cf.* Oppenheim (*op. cit.*), vol. i. p. 587–595.

described in a later chapter of this monograph.[1] Thus Bonfils writes: "Les États neutralisés sont tenus d'observer leur neutralité même à l'égard des États non garants. Les États, non signataires du traité qui a établi la neutralité, bénéficient donc de ce traité; mais ils sont, par réciprocité, tenus de respecter une neutralité perpétuelle passée à l'état de coutume internationale, comme celles de la Suisse et de la Belgique."[2]

The difficulty in this view is, that a rule of customary law is essentially of gradual growth; and, therefore, if it be accepted, it would follow that permanent neutralization could never be secured instantaneously by any treaty to which a state of importance was not a party. Oppenheim suggests another view and writes: "If all the Great Powers do not take part in the treaty, those which do not take part in it must at least give their tacit consent by taking up an attitude which shows that they agree to the neutralization, although they do not guarantee it."[3]

These words suggest a further line of argument. A treaty permanently neutralizing a state is one intended to make an International Settlement; and to confer rights (and incidentally obligations) upon all members of the Family of Nations. May it not be that International Law regards a treaty of this class as an offer to third states capable of acceptance by conduct? If this were the case, third states

[1] Chapter vi. p. 72.
[2] Bonfils (*op. cit.*), § 359.
[3] Oppenheim (*op. cit.*), vol. i. p. 148.

would acquire rights and incur obligations under it so soon as they acted in such a way as to show their consent.

§ 40. *Conclusions based on* §§ 35–39.—There are, therefore, grounds for suggesting that in International Law a treaty intended to make an International Settlement, but containing no "accession" clause, is regarded as an offer to third states, capable of acceptance by conduct, and that by acceptance third states acquire rights and incur obligations. In the two cases of Bosnia and Herzegovina, and Moldavia and Walachia, discussed in §§ 36 and 37, rights were claimed, and obligations were sought to be imposed, under such a treaty; but in circumstances in which the legal question was obscured by diplomatic considerations. Westlake has pointed out, and it is an undoubted fact, that the Great Powers do make International arrangements which are intended to be effective with regard to smaller states which are not consulted; and it is suggested that this situation must be capable of legal, as well as diplomatic, justification. Again it is, as has been mentioned, an essential part of the legal conception of permanent neutralization that it should be respected even by states which have not expressly agreed to it. These difficulties would be explained if treaties making International Settlements were regarded as offers to third states capable of acceptance by conduct.

However this may be, there seems to be no evidence that any other class of treaty than International Settlements, which is intended to confer

legal rights on third states, but contains no "accession" clause, can effectively confer them, or be regarded as an offer to such third states capable of acceptance by conduct. There is, indeed, evidence to the contrary, as appears in the next section.

§ 41. *The Straits of Magellan.*—The treaty between the Argentine and Chile, dated the 23rd July, 1881, and purporting to neutralize the Straits of Magellan, may be quoted in support of this conclusion.[1] The attempted neutralization was intended to benefit, not only the contracting parties, but also third states, especially the United States, which had announced that it would "not tolerate exclusive claims by any nation whatever to the Straits of Magellan."[2]

Since a treaty between two or three states cannot, as a general rule, be an International Settlement, it would follow from the argument of the preceding section that third states could not by conduct acquire rights and incur obligations under this treaty. In this conclusion Abribat, who has studied the position of these Straits, concurs. He avoids in his monograph all phrases which might imply the possession of rights or duties by third parties, as when he says that the undertaking by the contracting Powers that no hostilities shall take place in the Straits "*favorise* les Puissances étrangères . . . car, quoique ces deux pays (Argentine and Chile) ne soient juridiquement tenus de la

[1] Martens, *N. R. G.*, 2nd series, XII. p. 491.
[2] Mr. Evarts, cited in Moore (*op. cit.*), vol. i. p. 664, § 134.

respecter qu'entre eux, il est fort probable, qu'ils l'observeront à l'égard de toutes les nations,"[1] or when he says that Article V. of the treaty "*intéresse* les Puissances étrangères."[2] He also expressly advises the abrogation by the contracting parties of some of the stipulations,[3] a course which they could not take if third parties had any rights under the treaty, or under any additional treaty in identical terms.

The legal position of the Straits recently came before the British Prize Court, in the case of the *Bangor*,[4] but the Court did not express any opinion upon it, basing its decision upon other grounds. A vessel was captured in the Straits more than three miles from the shore, and it was contended that the Straits were neutralized, and consequently that the capture took place in neutral waters. The Court, however, did not find it necessary to deal with this contention.

"I am content to decide the question of law . . ." said the President, "upon the assumption that the capture took place within the territorial waters of the Republic of Chile. This assumption, of course, does not imply any expression of opinion as to the character of the Strait of Magellan as between Chile and other nations. This Strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the Strait must be considered free for the commerce of all nations passing between the two oceans.

[1] Abribat (*op. cit.*), p. 291. (Italics are the author's.)
[2] *Ibid.*, p. 294.
[3] *Ibid.*, p. 299.
[4] 1916. P. 181.

"In 1879, the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the Strait. Later, in 1881, the Republic of Chile entered into a treaty with the Argentine Republic by which the Strait was declared to be neutralized for ever, and free navigation was guaranteed to the flags of all nations.

"I have referred to these matters in order to show that there is a right of free passage through the Strait for commercial purposes. It is not inconsistent with this that, during war between any nations entitled to use them for commerce, the Strait should be regarded in whole or in part as the territorial waters of Chile, whose lands bound it on both sides."[1]

§ 42. *The Panama Canal and the Hay-Pauncefote Treaty*, 1901.—It is instructive to apply the foregoing conclusions to the negotiations which led up to the Hay-Pauncefote Treaty of 1901.

The treaty, in its final form, was concluded between Great Britain and the United States on the 18th November, 1901, and Article III. reads as follows[2]: "The United States adopts, as the basis of the neutralization of such ship-canal, the following rules. . . The Canal shall be free and open to the vessels of commerce and of war of all

[1] At p. 184.

[2] Martens, *N. R. G.*, 2nd series, XXX. p. 632.

nations observing these Rules, on terms of entire equality . . ." The words demanding attention are "the vessels of all nations observing these Rules."

This treaty was preceded by a former treaty, concluded in February 1900, which, however, never became operative. In the former treaty the words "observing these Rules" did not occur; but there was an "adhesion" clause, in the following form[1]:—

Article III. "The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of other Powers, and invite them to adhere to it."

The Senate took exception to this clause, apparently upon the ground that other states, by adhering, would acquire contractual rights against the United States. Great Britain, on the other hand, disliked the treaty without this "adhesion clause," upon the two grounds following[2]:—

(*a*) "If that adherence were given, the neutrality of the Canal would be secured by the whole of the adhering Powers. Without that adherence, it would depend only upon the guarantee of the two Contracting Powers."

This contention is certainly good law.

(*b*) "The Amendment . . . not only removes all prospect of the wider guarantee, but places this country in a position of marked disadvantage com-

[1] Martens, *N. R. G.*, 2nd series, XXIX. p. 500.

[2] Lord Lansdowne to Lord Pauncefote, February 22, 1901, *British and Foreign State Papers*, 1900–1901, vol. xciv. p. 483.

pared with other Powers which would not be subject to the self-denying Ordinance which Great Britain is desired to accept . . . While the United States would have a treaty right to interfere with the Canal in time of war . . . and while other Powers could with a clear conscience disregard any of the restrictions imposed by the Convention, Great Britain alone . . . would be absolutely precluded from resorting to any such action or from taking measures to secure her interests in and near the Canal."

This is a proper application of the principle that a treaty between Great Britain and the United States could impose no obligations on third parties. But from this point the negotiations become less easy to understand.

§ 43. *The Amendments.*—In August, 1901, Lord Lansdowne wrote a memorandum[1] renewing the British objections, and pointing out that "while indifferent as to the form in which the point is met," the British Government was unwilling to be bound by rules of neutral conduct which were not equally binding upon other Powers. He suggested, as an amendment, the insertion after the words "all nations," of the words "*which shall agree to observe these rules*," believing that "this addition will impose upon other Powers the same self-denying ordinance as Great Britain is desired to accept, and will furnish an additional security for the neutrality of the canal."

[1] *Parliamentary Papers, U.S.A.*, No. 1 (1902), cd. 905, pp. 3–5.

Mr. Hay[1] felt that this amendment would be unacceptable to the Senate "because of the strong objection entertained to inviting other Powers to become Contract Parties to a Treaty affecting the Canal." He suggested, as an alternative amendment, the substitution of "*all nations observing these rules*" for the proposed "all nations which shall agree to observe these rules."

Mr. Hay's amendment was accepted by Great Britain; and Lord Lansdowne wrote that "His Majesty's Government were prepared to accept this amendment, which seemed to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other Powers, while they stopped short of conferring upon other nations a contractual right to the use of the Canal."[2]

It appears that the object of the United States in these negotiations was to prevent any third states from acquiring contractual rights against her; and the object of Great Britain was to avoid putting herself by treaty in a position less advantageous than that enjoyed by other states. For the attainment of these respective objects, Great Britain desired an "adhesion clause," and the United States desired its exclusion.

Undoubtedly, if there had been such a clause, adhering states would have acquired contractual

[1] See despatch of Lord Lansdowne to Mr. Lowther, September 12, 1901, *loc. cit.* p. 7.

[2] *Loc. cit.*, Lord Lansdowne to Lord Pauncefote, October 23, 1901.

rights. Moreover it is probable, as will be seen during the discussion of the growth of customary law in the next chapter, that, even without the "adhesion clause," third states would, after no very considerable lapse of time, have acquired rights through the development of a customary rule. But special attention must be directed to the two proposed compromises, to see how the words "*which shall agree to observe these rules*" differ in effect from the words "*observing these rules.*"

The Hay-Pauncefote Treaty is one purporting to neutralize a canal; but it was concluded between two states only, and it is generally thought that neutralization can only be brought about by a treaty to which the majority of states are parties. For the same reason, it is doubtful whether the Hay-Pauncefote Treaty can properly be called an International Settlement. It contains no "accession clause"; and one of the parties wished to avoid bestowing rights on third states. Under these unusual circumstances, we have to discover (*a*) what would have been the effect in law of the rejected amendment, the words "all nations which shall agree to observe these rules," and (*b*) what is the legal effect of Mr. Hay's accepted amendment, the words "all nations observing these rules."

§ 44. *The Rejected Amendment.* — Third states could only have agreed to observe the rules either expressly or by conduct implying consent. Express consent could hardly have been given except by adhesion or separate contract. If, therefore, Lord

Lansdowne contemplated express consent, it is hard to see how he expected this amendment to be more acceptable to the Senate than the original "adhesion" clause. On the other hand, according to our previous conclusions, the treaty cannot be regarded as an offer to third states to enter into legal relationship capable of acceptance by conduct. If, therefore, Lord Lansdowne contemplated agreement by conduct, it would appear that his amendment would have been without effect, except in so far as it might have given Great Britain a right to call upon the United States to close the Canal to nations which did not agree to observe the rules. However, the amendment was of an exceptional kind, and should similar words ever be inserted in a treaty, a delicate controversy might arise as to whether they amounted to an offer to third parties, capable of acceptance by user in accordance with the rules.

§ 45. *The Accepted Amendment.*—The effect in law of the accepted amendment is also obscure. According to the conclusions of § 29, third states can acquire no contractual rights under it. This is also the opinion of Knapp, who writes in the *American Journal of International Law*, with regard to this treaty, that: "to other nations its provisions are simply a declaration of Intentions,"[1] and of Oppenheim, who says:[2] "If 'interests' means 'rights,' it can hardly be said that the

[1] Knapp, in vol. iv. (1910), p. 355.

[2] Oppenheim, *Panama Canal Conflict*, 2nd ed., Cambridge, 1913, p. 46.

interests of third parties are concerned in the dispute, for the Hay-Pauncefote Treaty is one to which only Great Britain and the United States are contracting parties, and, according to the principle pacta tertiis nec nocent nec prosunt no rights can accrue to third parties from a treaty."

Two Japanese writers, Ariga and Terao, have studied the treaty from the Japanese point of view, and their conclusions, as summarized in a communication to the *Revue générale de droit international public*, are in the same sense.[1]

Nevertheless, it must have been intended by the parties that Mr. Hay's amendment should have some legal operation. Are we to suppose that it was merely intended to enable Great Britain to call upon the United States to close the Canal to nations which did not abide by the rules? Or are we to believe that when Mr. Taft said in his memorandum accompanying the Panama Canal Act, that "the right to the use of the Canal . . . depends upon the observance of the conditions by the nations to whom the United States has extended that privilege," he was voicing the intention of Lord Lansdowne and Mr. Hay?

Of course, as will be explained in the next chapter, it is very probable that in course of time this treaty will become the basis of a rule of customary International Law; by degrees a usage will grow up in accord with the treaty, accompanied by a conviction of legal necessity. This is the opinion

[1] Vol. xviii. (1911), p. 92.

of Oppenheim and Hains.[1] However, this process is necessarily of gradual growth; it is impossible to agree with Lawrence that the Canal "will be opened as an international waterway, neutralized by general consent, and adequately secured against infringement of its permanent neutrality."[2] Moreover, this process is independent of Mr. Hay's amendment, except in so far as it regulates the terms upon which the future customary rule is to grow up. It is, therefore, hard to believe that Mr. Taft was merely referring to the growth of a future customary rule, or that Mr. Hay's amendment had no further effect than this.

Diena, writing in the *Zeitschrift für internationales Recht*,[3] does, indeed, attach a far-reaching effect to the amendment, when he says: "Bevor der Panamalkanal . . . tatsächlich für die Schiffahrt verfügbar geworden ist, haben Mächte, welche dem Hay-Pauncefote-Vertrage nicht wirklich beigetreten sind, sicherlich keinerlei Recht gegenüber den Vertragsstaaten. Aber nach der Kanaleröffnung genügt es, wenn ein dritter Staat für seine Schiffe tatsächlich die Passagefreiheit fordert. Denn darin liegt die konkludente Aeusserung des Willens, das im Hay-Pauncefote-Vertrage den dritten Staaten angebotene Recht wirklich zur Entstehung zu bringen.

"Nicht erforderlich ist, trotz der entgegengesetzten Ansicht eines hochangesehenen Autors (*i.e.*

[1] Oppenheim, *Panama Canal Conflict*, p. 47; Hains, *American Journal*, vol. iii. (1909), p. 373.
[2] Lawrence (*op. cit.*), p. 605.
[3] Vol. xxv. (1915), p. 20.

Oppenheim, *loc. cit.*) dass der Kanal tatsächlich der Schiffahrt aller Seestaaten solange zugänglich geblieben ist, dass man im Sinne gewohnheitsrechtlicher Internationalität die Freiheit der Schiffahrt statuieren kann. Vielmehr ist es die besondere Strucktur des Vertrages zugunsten Dritter, welche für das Verhältnis massgehend ist, und welche dazu führt, dass durch blossen Willensakt des Dritten das diesem zugedachte Recht zur Entstehung kommt."

Diena, however, argues from a general proposition of law (see § 35, p. 53), which is not supported by the evidence quoted in this monograph. In spite of his opinion, therefore, it does appear that third states have at present neither rights nor duties under the treaty; that they cannot acquire any until a customary rule grows up; and that until that time the Canal cannot be said to be permanently neutralized, since the express or tacit consent of all states of importance is essential to permanent neutralization.

CHAPTER VI

THE INFLUENCE OF CUSTOM

§ 46. *Treaties as a Basis of Customary Law.*—It has been seen in the last chapter that a treaty cannot bestow rights or impose obligations on a third state, and that whenever rights and obligations appear to have been imposed, they owe their existence to some additional contract between the original parties and the third state. It now remains to be considered whether there can ever be anything in the subsequent history of a treaty which may give rise to rights and duties of another kind. Or, in other words, whether a treaty can be the basis from which customary law can grow.

It is important for this purpose to observe in advance the ambiguity of the term "tacit consent." The term is sometimes applied to the acceptance, by conduct implying consent, of an offer of contractual relationship. Such "tacit consent" operates, if at all, instantaneously, and brings about a contractual relationship. It has already been discussed in the last chapter. But the term is also applied to a rule of International Law which has arisen from the consent of the Family of Nations tacitly given. This kind of "tacit consent" cannot, in the nature of the case, be of instantaneous

operation, and gives rise, not to a contract, but to a rule of customary law.

§ 47. *The Importance of Tacit Consent in International Law.*—The importance of tacit consent, as creating a rule of law, springs from the peculiar nature of International Law as a legal system. It is, no doubt, true that every system of law has its ultimate source in the consent of the human beings to which it applies, subject to certain limitations which will be found in treatises on Political Philosophy. But whereas in most systems of law this ultimate consent is obscured by the existence of more immediate and obvious sources of legislation, in International Law it is not. In every municipal system there exists some legislative body which has power to create or amend the laws, and the Courts have no power to look behind the enactments of this legislature to discover whether, in the particular case, the enactment rests upon the consent of the community. But in the international system, at the present day, there is no such sovereign legislature; and, therefore, every single rule of law must be proved solely by reference to the consent of the community. "L'empire de la coutume est . . . beaucoup plus étendu dans le droit international que dans le droit privé, précisément parceque, pour le droit international, il n'y a pas de législation commune qui vienne restreindre cet empire, en formulant par écrit la règle de conduite."[1]

Thus it may come about that a rule which was

[1] Pradier-Fodéré (*op. cit.*), vol. i. p. 87, giving reference to Ortolan, *Diplomatie de la mer*, vol. i. ch. iv. p. 64.

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.

§ 48. *The Opinions of Publicists.*—That the stipulations of a treaty may, by the tacit consent of all concerned, grow into a rule of customary law under which third states will acquire rights and incur obligations, is a view supported by many Publicists. For instance, Oppenheim looks forward to a time when the Panama Canal shall have been in use for such a length of time "as to call into existence—under the influence and working of the Hay-Pauncefote Treaty—a customary rule of International Law according to which the Canal is permanently neutralized and open to vessels of all nations."[1] Again, Lawrence speaks of the rules contained in the Suez Canal Convention as "already accepted by all civilized powers either expressly or tacitly."[2] Reddie, whose treatment of these matters is very acute, explains that a treaty stipulation may "by subsequent imitation and adoption, without special

[1] Oppenheim, *Panama Canal Conflict*, p. 46. *Cf.* also Oppenheim, *International Law*, vol. ii. p. 360, for a similar passage concerning the Declaration of London.

[2] Lawrence (*op. cit.*), p. 605.

stipulation . . . have become a rule of common and consuetudinary International Law."[1] G. F. de Martens writes:[2] "Quelquefois même ce qui est réglé par traités avec telles puissances s'observe avec d'autres par un simple usage, de sorte qu'un même point peut être de droit conventionnel pour les uns, et de droit coutumier pour les autres." And Alvarez explains the process very graphically by saying: "Les règles ont changé de nature, on ne peut plus les considérer comme contractuelles, mais comme coutumières."[3]

In practice, this process of the extension of a conventional into a customary rule is not only possible, but of very constant occurrence. There is a tendency among states, as among individuals and animals, to follow their recognized leaders;[4] more especially where the contracting states are numerous and powerful and the third states are few and insignificant; or, again, where the matter immediately concerns the contracting parties, and only indirectly or remotely concerns third parties. In the words of Oppenheim:[5] "General International Law has a tendency to become universal because such States as hitherto did not consent to it will in future either expressly give their consent or recognize the respective rules tacitly through custom."

§ 49. *The Nature of Tacit Consent.*—There are many cases which illustrate the manner in which a

[1] Reddie (*op. cit.*), vol. i. p. 8.
[2] Martens, G. F. de (*op. cit.*), Introduction, § 7.
[3] Alvarez (*op. cit.*), p. 148.
[4] *Cf.* Cobbett (*op. cit.*), p. 11.
[5] Oppenheim (*op. cit.*), vol. i. p. 23.

treaty originally only conferring rights and duties upon the parties to it can, after lapse of time, and by the operation of tacit consent, become a rule of customary law. But their study requires a previous discussion of the precise nature of this tacit consent.

Tacit consent is given, in the words of Oppenheim, "through States having adopted the custom of submitting to certain rules of International conduct."[1] This much is generally admitted; but the proper definition of custom is often overlooked. Some writers define a custom merely as "the habit of acting in a certain way"; but this definition, as was long ago pointed out by Klüber,[2] only defines an usage. To constitute a custom, as distinct from an usage, there must be a conviction in the minds of the persons acting that it is legally necessary to act in that particular way. This very important point is noted by the more accurate writers. For instance, Oppenheim defines a custom as the "clear and continuous habit" of doing certain actions "under the ægis of the conviction that these actions are legally necessary or legally right."[3] Westlake writes, "Custom is that line of conduct which the society has consented to regard as obligatory."[4] Therefore, in order to prove the existence of a rule of customary

[1] Oppenheim (*op. cit.*), vol. i. p. 22.
[2] Klüber (*op. cit.*), p. 6, § 3.
[3] Oppenheim (*op. cit.*), vol. i. p. 22.
[4] Westlake (*op. cit.*), vol. i. p. 14. *Cf.* also the definition given by Lord Russell of Killowen in his address at Saratoga, 1896: "The sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another," judicially adopted in the case of West Rand Central Gold Mining Company *v.* Rex (1905), 2 K. B., at p. 407.

law, it is necessary in the first place to produce evidence to show that all the states alleged to be bound by the rule do in fact act in a certain way under certain circumstances. This, however, is not *per se* enough to establish even an usage; though how much more must be proved, in order to establish an usage, is doubtful, and depends greatly upon the circumstances of the case. Pradier-Fodéré suggests that an "usage non equivoque et constant" must be proved,[1] and it does indeed appear that it is necessary to show generally that the states in question not only act in a certain way to-day, but that they have done so for a reasonable time, and without any considerable intermission during that time. However this may be, it is necessary to prove also that the usage is a custom; or in other words, that the states concerned act in this way under a conviction that they have no choice or option in the matter, and fully believing that they have a duty imposed by the law of nations so to act.

§ 50. *How far Tacit Consent is a Question of Fact.* Writers usually allege that these three questions are entirely questions of fact; and no doubt there is much truth in this view. For of course it is never possible to lay down a rule of law which can be applied to particular circumstances by rule of thumb, so as to eliminate entirely the necessity for the exercise of discretion and judgment. Nevertheless, there is ground for believing that the entire absence in International Law of rules regulating and restricting the exercise of discretion by diplomatists,

[1] Pradier-Fodéré (*op. cit.*), vol. i. p. 86, § 28.

statesmen, arbitrators, and jurists, in applying the proper tests for discovering whether some particular usage is, or is not, a rule of law, is in part responsible for the slow development of the international legal system. For indeed the three questions cannot be altogether questions of fact. The human mind cannot reach any conclusion on any particular set of facts without exercising judgment; without applying to them, perhaps unconsciously, certain rules of evidence which are part of every man's mental equipment, and on which he habitually relies, whenever he expresses a considered opinion. These rules are of two kinds: there are rules by which he habitually determines the relative value or importance of each separate incident in the series which constitutes an episode; secondly, since nothing admits of absolute proof, there are rules for forming inferences and presumptions, to supplement the deficiencies of evidence, to connect the separate incidents to one another, and to divine the motives underlying them. International Law has hitherto laid down no rules of this nature by which a jurist is to be guided in deciding upon any particular facts whether a custom exists.

This state of affairs has one great advantage. Since no rules could be laid down which would be equally appropriate to *every* case, there will always be cases in which the application of rules must work injustice. The absence of rules of evidence in International Law gives an elasticity to the system which prevents this injustice. Nevertheless, although it is for this reason undesirable that the

international system of law, which at present enjoys absolute freedom from any rules of evidence, should become saddled with a rigid code of such rules; yet it would be an advantage if such conceptions as "tacit consent," "usage," "conviction of necessity," and others, received some further elucidation from the practice of states; and this might perhaps be done without sacrificing the present elasticity of International Law, or hampering the application of discretion to the facts of each particular case.

§ 51. *The Transition from Usage to Custom.*—At present it is often difficult to determine whether, when certain facts have been proved, they are sufficient in law to establish an usage; still more difficult to decide whether the facts as proved show that the usage was accompanied by a conviction of legal necessity. For whereas facts admit of proof, "the devil himself knows not the thought of man," [1] and the transition from usage to custom is consequently very elusive. In the words of Pollock,[2] "What has been done once is done again, not because it seems the best thing to do, but because there is an unreasoning tendency to do it, which in the absence of other and stronger motives will prevail. The more often it is done the stronger will be the expectation of its being done yet again on the next occasion, and this will at length become a sense of necessity."

It is at the moment when the expectation of an

[1] Brian, C. J., *Year Book*, 17. Ed. IV. 1, quoted by Anson (*op. cit.*), p. 28.

[2] Pollock, *Essays in Jurisprudence and Ethics*, London, 1882, p. 54.

act being repeated on the next occasion becomes a sense of necessity, that an international usage becomes a rule of customary law. How then can this precise moment be determined?

Oppenheim speaks of the necessity of a sharp eye, of historical insight, and of feeling the pulse of the age.[1] But even these rare qualities will not suffice. The state of a nation's mind is only a question of fact in a very strained use of the phrase; it is really a question of inference, based on overt acts supposed to be evidence of a certain mental state. It has been said that the state of a man's mind is as much a question of fact as the state of his digestion.[2] This is true; because the state of both these organs is generally inferred from their external manifestations. The only difference between the two cases is, that conclusive external manifestations of the latter may always be found, but of the former more rarely.

The state of a nation's mind is always difficult to probe, because the overt acts from which it can be inferred that it was prompted to act in a certain way by a conviction of legal necessity are, in the nature of the case, scarce. Sometimes, no doubt, such a conviction can be properly inferred from some authoritative utterance in a despatch; but more often no direct evidence of any kind is available.

[1] Oppenheim in *The American Journal of International Law*, vol. ii. (1908), p. 334.

[2] Per Bowen, in Edgington *v.* Fitzmaurice, 29 Ch. D. at p. 483.

§ 52. *Can a Conviction of Legal Necessity ever be Presumed?*—The question, therefore, remains whether, in the absence of direct evidence, it is ever right to "presume" that a nation acted in a certain way from a sense of legal necessity. No rule of International Law exists on this point; but perhaps such a presumption ought in certain circumstances to be made. As an illustration of circumstances which would perhaps justify such a presumption, let us consider the case of an International Settlement.

§ 53. *In International Settlements?*—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.[1] 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? It has already been discussed[2] how far such a treaty is an offer to third parties to contract with them, capable of acceptance by conduct. But putting aside this question, let us suppose that third states, knowing that the Settlement is to be part of the International

[1] *Cf.* Cobbett (*op. cit.*), vol. i. pp. 11 12.
[2] Above, § 38, p. 56.

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 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.

§ 54. *Acts Inconsistent with the Position of a Mere Licensee.*—Another case in which a presumption of a conviction of legal necessity ought perhaps to be made, is that in which a third state does any act in the enjoyment of the benefits conferred by a treaty which is inconsistent with the position of a mere licensee, but points to what English lawyers call "user as of right." Now if the circumstances are such that these acts cannot be said to amount to an acceptance of an offer to enter a contract, and yet the original parties to a treaty acquiesce in the usurpation of rights by a third party, having full knowledge of the facts, it seems that there is strong evidence, if not a presumption conclusive unless repelled, that all parties consider that the usage exists under the ægis of legal necessity, and is, therefore, a rule of customary law for them.

For, after all, if the third party is usurping a right, it is the natural course for the other parties to protest against the usurpation.

§ 55. *The Performance of Onerous Duties.*—In the case where a third state not only enjoys certain benefits under a treaty which is not such as to amount to an offer to third states to enter into contractual relations with them, but also performs onerous duties imposed by the treaty upon the contracting parties, a distinction must be drawn. If the onerous duty is strictly incidental to the enjoyment of the benefit, as for instance the payment of tolls for the navigation of a river, it would be natural to suppose that the third state performs these duties merely because such are the terms of his licence. If, on the other hand, the duties are not directly connected with the enjoyment of the rights which are enjoyed by the third state, but are part of the mutual arrangements effected by the treaty, and are the price paid by one party for some concession made by the other: then, if the the performance of such duties by the third state is tacitly accepted by the contracting parties, their acquiescence under circumstances in which they must have seen that the third state could only be performing duties under a conviction that it was legally bound to perform them, might well be sufficient to raise the presumption that they also believed that the treaty had become a rule of customary law.

§ 56. *Mere Long Usage?*—There still remains the question whether mere long usage can ever be

sufficient to dispense with the necessity of proving this conviction of legal necessity; whether, in the absence of any other evidence either way, a time comes in the history of an usage when it may legitimately be argued that it is an usage of such long standing that it is right to presume that states conform to it in the belief that they are bound to do so, at any rate unless those alleging the contrary can bring some evidence to support their contention. This is a very difficult question. It does seem that there are so many cases in which evidence is available to prove that the conversion of an usage into a custom after lapse of sufficient time is an universal process in International Law, that perhaps in those cases in which the conversion cannot be proved, it ought to be presumed. But this is doubtful.

In fact, *all these observations upon the legitimacy of making presumptions are mere suggestions, and do not profess to be rules which the Family of Nations have agreed to regard as obligatory.* The matter has not yet been regulated by International state practice.

§ 57. *Lawmaking Treaties and International Settlements.*—Although many treaties are of such a kind as to enable third states to become parties by tacit consent through the growth of a customary rule of law, it is obvious that some classes of treaties are more likely than others to be tacitly adopted by third states; and these treaties are, speaking generally, (*a*) those which Oppenheim calls "Lawmaking treaties," that is to say, treaties that "stipulate new rules for future international conduct, or confirm,

define, or abolish existing customary or conventional rules,"[1] and (*b*) those here described as International Settlements. This is so because treaties of this kind are those which third parties are more likely to think fit to adopt, and which the contracting parties are more likely to permit them to adopt. It is not any difference in the nature of the treaties themselves, but simply the probable attitude of the Powers toward them, that makes some treaties a more probable basis of rules of law than others.

§ 58. *The Practice of States: the Law of Legation.*—There are many cases in the practice of nations which illustrate the nature of that tacit consent by which the stipulations of a treaty become rules of customary law. Perhaps the best example of rules originally conventional, now customary, are the provisions of the Congress of Vienna,[2] and the Congress of Aix-la-Chapelle,[3] to amend certain parts of the law of legation. Originally introduced by express agreement between several states, these rules were adopted by all, or almost all, other nations, at first as a matter of convenience, and later under a conviction of legal obligation. A despatch of Mr. Davis to Mr. Wallace, of the 22nd May, 1883, not only furnishes evidence of the acquiescence of the United States in these rules, but also confirms the view here put forward that almost all other nations have concurred in them. He

[1] Oppenheim (*op. cit.*), vol. i. p. 23.
[2] Article CXVIII. Annexe XVII.; Martens, *N. R.*, II. pp. 430, 449.
[3] Martens, *N. R.*, IV. p. 648.

writes:[1] "The rules of the Congress of Vienna are understood to be accepted by all nations . . . except the Porte, which has a system of its own, only differing from the Vienna Rules by classing ministers resident and ministers plenipotentiary together."

All other nations have undoubtedly either expressly or tacitly adopted these rules.[2]

§ 59. *Treaties Relating to International Rivers.* There are many other treaties the stipulations of which have become, or are in process of becoming, customary law, and to which the suggested rules for the proof of tacit consent may be tentatively applied.

During the 19th century, many treaties were made, granting, to the vessels of commerce of all nations, the benefit of free navigation on International Rivers.[3] Upon the proper construction of

[1] Moore (*op. cit.*), vol. iv. p. 431.

[2] See Oppenheim (*op. cit.*), vol. i. p. 444; Despagnet (*op. cit.*), § 59.

[3] On the Rhine, by Article CIX. of the Final Act of the Vienna Congress. (Martens, *N. R.*, II. p. 427.)

On the Elbe, by two Conventions of 23rd June, 1821. (Martens, *N. R.*, V. pp. 714, 731; Hertslet (*op. cit.*), vol. i. pp. 671, 688.)

On the Po, by a treaty of 3rd July, 1849 (Hertslet (*op. cit.*), vol. ii. p. 1095), confirmed by the Treaty of Zürich, 1859. (Article XVIII., Hertslet (*op. cit.*), vol. ii. p. 1409.) But by the Treaty of Prague the Po came wholly within Italian territory, and its present position is doubtful. (*Cf.* Westlake (*op. cit.*), vol. i. p. 154.)

On the Danube, by the Treaty of Paris, 1856. (Article XV. Martens, *N. R. G.*, XV. p. 776.)

On the Parana and Uruguay, by treaties of 10th July 1853. (Moore (*op. cit.*), vol. i. p. 640.)

On the Amazon, by a treaty of 13th May, 1858. (Moore (*op. cit.*), vol. i. p. 645.)

these treaties many difficulties have arisen,[1] but this monograph is only concerned with two of them.

(*a*) In the first place, can it be said that these treaties, considered in the aggregate, and taken in conjunction with other circumstances, either prove, or create, a rule of law, whereby all states, *apart from treaty*, are entitled to enjoy freedom of commercial navigation on any and every International River? That is to say, are states generally in the habit of granting such freedom to all nations under a conviction that they are by law bound to do so? Both Hall and Westlake have dealt with this question.

Westlake, after a comprehensive survey which merits particular attention, concludes that:[2] "A sufficient consent of states exists to warrant the assertion that a right of navigation . . . exists as an imperfect right on navigable rivers traversing or bounding the territories of more than one state."

Hall, after a similar survey, concludes:[3] "It is clear therefore that the principle of the freedom of territorial waters, communicating with the sea, to the navigation of foreign powers has not been established either by usage or by agreements binding all or most nations to its recognition as a right."

On the Pruth, by a treaty of 3/15 December, 1866. (Hertslet (*op. cit.*), vol. iii. p. 1789.)

On the Congo and Niger, by the General Act of the Congo Conference of 1885. (Martens, *N. R. G.*, 2nd series. X. p. 414.)

[1] *Cf.* Engelhardt, *Du régime conventionnel des fleuves Internationaux*, 1879, p. 199 and *passim.*

[2] Westlake (*op. cit.*), vol. i. p. 160.

[3] Hall (*op. cit.*), p. 139.

It is not possible here to discuss the matter; but it seems probable that, since Hall denies that any right of free navigation exists, and Westlake does not claim the existence of more than an "imperfect" right, there is no customary rule whereby all nations are entitled to free commercial navigation on all International Rivers.

(*b*) However, the question still remains whether under each individual treaty third states have acquired rights by the tacit consent of all concerned, or, in other words, whether from the individual treaties have arisen rules of customary law. Each particular case depends upon its own particular facts; and it would be impossible here to discuss each treaty in detail. But two general observations may be made—

(i) The widespread conviction that to-day free navigation is postulated by an Universal International rule is strong evidence that where free navigation is *already enjoyed*, it is enjoyed of right apart from treaty; so that any attempt to close one of these rivers to a non-signatory power would be almost universally regarded as an infringement of right.

(ii) No attempt has ever been made by the parties to any of these treaties to differentiate unfavourably against third states. However, the practical difficulties of such a step, and the danger of retaliation by the states prejudicially affected, diminish the value of this fact as evidence that such an attempt would be legally unjustifiable.

§ 60. *Article XXXIV. of the Berlin Congo Con-*

ference.—Article XXXIV. of the General Act of the Congo Conference is another conventional stipulation which has become, or will become, a rule of customary law. It reads: "La Puissance qui dorénavant prendra possession d'un territoire sur les côtes du Continent Africain situé en dehors de ses possessions actuelles, ou qui, n'en ayant pas eu jusque-là, viendrait à en acquérir, et de même, la Puissance qui y assumera un protectorat, accompagnera l'acte respectif d'une notification adressée aux autres Puissances signataires du présent Acte, afin de les mettre à même de faire valoir, s'il y a lieu, leurs réclamations."[1] The words of this article show that (*a*) it is only intended to bind signatory powers, (*b*) it only applies to occupations on the coast of Africa, and (*c*) it does not require notification to be given to third parties.

Nevertheless, notification has in fact been given of occupations which are not on the African Coast. This has been done even by France, although at the time of signing the General Act, France and Russia expressly declared that the article did not extend to occupations not on the Coast of Africa.[2] However France, in notifying such an occupation, pointed out that the notification was given by courtesy, and not under a conviction of legal necessity.[3]

Secondly, notifications have been given to a third party, the United States. By a despatch of the

[1] Martens, *N.R.G.*, 2nd series, X. p. 426.

[2] Moore (*op. cit.*), vol. i. p. 268.

[3] M. Waddington to Earl of Rosebery, 26th June, 1886, *British and Foreign State Papers* (vol. lxxvii.), p. 940.

5th September, 1885, M. Roustan informed Mr. Bayard of the annexation of Ouatchis by France.[1] By a despatch of the 2nd August, 1888, Baron de Fava informed Mr. Bayard of the establishment of an Italian Protectorate over Zoula.[2] Both these despatches purport to be in conformity with Article XXXIV. of the General Act, and there is no suggestion in them that they are sent by courtesy, and not under conviction of legal necessity. Still more significant is the despatch of the 16th March, 1885, by which M. von Alvensleben informed Mr. Bayard of a German occupation in Africa. It contained the following words[3]: "The territories in question are situated within the extended zone of the conventional basin of the Congo provided for in Chapter I., Article I., sub-section 3 of the 'Acte Général de la Conférence de Berlin,' to which zone the signatory powers have pledged themselves to apply the provisions of that instrument. The Government of His Majesty the Emperor, in consequence hereof, assumes the obligation to see that the provisions of the Acte Général are executed within the German possessions lying in the said zone, and it claims, at the same time, the advantages for the said possessions which are guaranteed in Chapter III. of the Acte Général in respect to the neutrality of territories lying within the conventional basin of the Congo." This despatch seems almost to amount to an attempt to confer upon the United States, a non-signatory

[1] *American Foreign Relations* (1885), p. 389.
[2] *Ibid.* (1888), Part II. p. 1057.
[3] *Ibid.* (1885), p. 441.

to the General Act, the rights and duties of a contracting party. But whatever may have been the intention of Germany in this case, or of France and Italy in the two cases previously quoted, the United States absolutely refused to adopt the General Act, by replying in each case[1]: "Until the United States shall, by subsequent accession and ratification of the general act of the conference of Berlin in the manner therein provided, become a party to the stipulations thereof, it will be impossible to determine the due and proper weight to be given by this Government to the announcement made in your note."

Upon this evidence it seems reasonable to conclude that an usage is growing up to notify all members of the Family of Nations of an occupation,[2] wherever made. However this usage is not universal, and is not yet a custom, because the conviction of legal necessity is still absent.

§ 61. *The Declaration of Paris.*—Since a customary rule consists of an usage to which states conform under a conviction that they are legally bound to do so, it follows that when a state, in conforming with an usage, expressly states that it does so from motives of courtesy or convenience, this fact is conclusive proof of the absence of a conviction of legal obligation on the part of this state. Now, it often happens that a state on first adopting an usage makes a proviso of this kind,

[1] *American Foreign Relations* (1885), p. 442, and (1888) Part II. p. 1058.

[2] *Cf.* Hall (*op. cit.*), p. 116.

but subsequently continues to conform with the usage, without renewing the proviso, or without renewing it after a certain time. The question then arises how far a former declaration of this sort effectually prevents the growth of a conviction of legal necessity in the face of continued observance of the usage.

The attitude of the United States to the Declaration of Paris exemplifies the difficulties of this kind of question. It is generally said that the Declaration, though binding on a very large part of the Family of Nations, has not yet by tacit consent become Universal International Law owing to the attitude of the United States.

The United States originally refused to accede to it because the stipulation "La course est et demeure abolie"[1] was thought to be inadequate.[2] However, at the outbreak of the Civil War, the United States Government proposed to give an unconditional adhesion to the Declaration by separate conventions with several states.[3] But owing to difficulties with Great Britain and France the project was dropped.[4] Nevertheless, Mr. Seward in a despatch to Mr. Adams on the 7th September 1861, expressed himself as follows upon the probable adhesion of the United States:[5] "I believe that that propitious time is even now

[1] Article I.

[2] Annual Message of President Pierce, December 2, 1856 quoted in Moore (*op. cit.*), vol. vii. p. 565.

[3] Moore (*op. cit.*), vol. vii. p. 573.

[4] Earl Russell to Mr. Adams, August 28, 1861. Moore (*op. cit.*), vol. vii. p. 581.

[5] Moore (*op. cit.*), vol. vii. p. 582.

not distant: and I will hope that when it comes, Great Britain will not only . . . accept the adhesion of the United States . . . but will even go further."

During the Civil War the Confederates used privateers; but the United States Government did not, although they expressly reserved the right to do so: "(We) are content to have the weapon ready for use, if it shall become absolutely necessary."[1] During the Spanish-American War neither party used privateers; but both reserved their right to do so.[2] Spain has, however, since acceded to the Declaration.

It would seem that these repeated reservations, renewed on every occasion upon which the usage was observed, prevented it from becoming legally binding upon the United States. It is difficult to agree with Lawrence that "its adhesion may be inferred from half a century of conduct in strict conformity with the articles of the Declaration."[3] Thus, although more than forty states have acceded, and although the United States is the only important state which abstains, yet it seems that Holland,[4] Sir Sherston Baker,[5] and Hall,[6] are right in saying that the Declaration has not yet become Universal International Law by tacit consent.[7]

[1] Mr. Seward to Mr. Dayton, April 24, 1863. Moore (*op. cit.*), vol. vii. p. 557.

[2] Mr. Sherman, April 23, 1898, and Spanish War Decree in Moore (*op. cit.*), vol. vii. p. 558.

[3] Lawrence (*op. cit.*), p. 103.

[4] Holland, Letter to *The Times*, April 18, 1898. [5] *Ibid.*

[6] Hall (*op. cit.*), p. 519.

[7] It should be noted that Oppenheim (*op. cit.*, vol. i. p. 69)

On the other hand it is probable that in a short time the rules of this Declaration will become rules of customary law which will be binding even upon the United States. It often happens that a state, when first adopting a practice, reserves the right to discontinue the practice; but afterwards continues to conform, without expressly withdrawing its reservation. After a time, the original reservation is forgotten or ignored, and the state comes to act under a conviction of legal duty. In this way, in the words of Oppenheim, "it may . . . happen that a State at first protests, but afterwards either expressly or tacitly acquiesces in the act."[1] A protest, or other formal reservation, certainly loses its efficacy with lapse of time, unless it is renewed; but how often a protest must be renewed in order to be effective depends entirely upon the circumstances of each case.

§ 62. *Recapitulation.*—The conclusions reached in this chapter may be briefly recalled. All rules of law rest ultimately upon the consent of the community; but in the international system, owing to the absence of a legislature, the importance of this consent is more immediately obvious. A rule of International Law is one which the Family of Nations has agreed to regard as obligatory, and such agreement may be manifested expressly or

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leaves the matter doubtful. In the British Prize Court, the President recently said: "This Court ought to, and will regard the Declaration of Paris . . . as a recognized and acknowledged part of the law of nations."—(The *Marie Glaeser*, 1914. P. at p. 233.)

[1] Oppenheim (*op. cit.*), vol. i. p. 539.

tacitly. Consequently a rule originally introduced by express agreement may become the basis of a rule of customary law, and as such binding upon, and in favour of, many other states, by the tacit consent of all concerned. In order to show the existence of a customary rule, it is necessary to prove that the states concerned habitually act in a certain way under the conviction that they have a legal duty so to act. This conviction is essential to the conception of a customary rule, and must be strictly proved, except in those cases where it is tentatively suggested that it may be presumed. When a state in adopting a new practice makes an express proviso that it does so from motives of convenience or courtesy, this proviso will for a certain time prevent the growth of a conviction of legal duty; but if the practice is continued, and the proviso is not renewed, after lapse of time the proviso will cease to be effective, and a customary rule will grow up.

CHAPTER VII

EXCEPTIONAL CASES

§ 63. *Exceptional Cases in General.*—The general rules governing the legal operation of an International treaty upon the rights and duties of third states have now been considered; but there are certain exceptional cases which still remain to be discussed.

In the first place, a third state may incur special rights and obligations under a treaty by virtue of its special legal relationship to one of the contracting parties. Secondly, it is possible that a third state may incur special rights and duties under a treaty by virtue of the International Law of agency, (if such law exists, and is not merely the creation of text-books). Thirdly, under the law of International succession, a third state may incur special rights and obligations by substitution for one of the contracting parties. But such rights and duties do not result merely from the operation of a treaty, but arise by virtue of the law of status, agency, and succession respectively, and belong, not to the present discussion, but to discussions of those branches of the law.

There are, however, certain cases in which special rights and duties have been alleged to accrue to

third states under a treaty by virtue of the subject matter of the treaty, and these cannot be passed over without leaving the present discussion incomplete.

The first contention of this kind is that a third state can acquire rights and duties under a treaty upon the ground that the treaty is one regulating an "imperfect right" alleged to be already vested in it.

§ 64. "*Imperfect Rights.*"—The general nature of a so-called "imperfect right" can perhaps be most readily explained by reference to a passage in Westlake's *Chapters on the Principles of International Law*[1]: "For the full enjoyment of a right under the sanction of law it is often not enough that it should be recognized by the legislator, he must regulate it. Within a state, the regulation will accompany the recognition. The right will be recognized in certain circumstances and on certain conditions. Between states, the circumstances and conditions will in many cases bear no settlement by doctrine, none but by express agreement. . . . Therefore (these rights) must be imperfect rights, in the sense that conventions are indispensable to their due enjoyment. But it does not follow that there is in them no element of law, or of perfect right."

If this doctrine be in fact one which the Family of Nations has consented to admit into International Law, it might follow that, as often as a treaty regulated an imperfect right which is also enjoyed by third parties, the latter should have a right to

[1] Westlake, *Chapters on the Principles of International Law.* Cambridge, 1894, pp. 74, 75.

enjoy the benefits conferred by it; such a right would not be a contractual right created by the treaty, but an antecedent right the full enjoyment of which was contingent upon the subsequent conclusion of a treaty.

Many states have relied upon the existence of such "imperfect rights" in diplomatic controversy; and some writers have invoked them to justify the interference by third parties in the administration of a treaty. Moreover it has been frequently assumed in the Panama Canal controversy that such rights exist in International Law.[1] Nevertheless the doctrine seems to be a relic of the "law of nature," and open to many objections.

In the first place, Cobbett is undoubtedly justified in saying:[2] "The difficulty, of course, lies in recognizing as a 'legal' right what is after all only a claim to a conventional concession, as to the terms of and restrictions on which—the right being admittedly imperfect—the contracting parties may reasonably be supposed and allowed to differ."

Again, who is to decide what particular alleged rights are in fact rights? There would be almost as many lists of rights as there are writers. Thirdly, the measure of a state's obligation is not to be found in the dictates of an ideal, but in the actual rules of positive law.[3] Moreover, even if third parties did

[1] *E.g.* by Hains in *The American Journal of International Law*, vol. iii. (1909), p. 362; Kaufmann in the *Revue de droit international*, vol. xiv. 2nd series (1912), p. 586; Roosevelt in his Presidential Message to Congress (December 1903), Moore (*op. cit.*), vol. iii. p. 47.

[2] Cobbett (*op. cit.*), vol. i. p. 119.

[3] *Cf.* Hall (*op. cit.*), pp. 1–5.

enjoy an imperfect right to something which had been regulated as between other parties by convention, it would not follow that that regulation was the only possible regulation, and therefore the regulation to which third parties had an absolute right.

Upon these grounds it seems proper to reject the doctrine of "imperfect rights," and submit that the position of third parties under a treaty cannot be affected by it.

§ 65. *A Treaty as a Legislative Enactment.* Attempts have been made in the supposed interest of the development of International Law to extend the operation of a certain kind of treaties to third parties. Thus Bluntschli has maintained[1] that an European Congress, representing the greater number of states, and all the states of first importance, can legislate by convention for the absent European states, and even for a dissenting minority. Again, in the second volume of *The American Journal of International Law*, occur these words[2]: "Treaties which the great European powers make between themselves have certain advantages for those powers; for it leaves them free to declare either that they acted as the agents of all Europe, and hence bound by their action the non-participating powers, or to maintain that the treaty concerns the signatories alone — all other states being third parties."

Alvarez also shares the view of Bluntschli, and justifies it on grounds of analogy and convenience.[3]

[1] Bluntschli (*op. cit.*), § 110.
[2] Vol. ii. (1908), p. 398.
[3] Alvarez (*op. cit.*), p. 150.

The doctrine that a conference of the greater political powers can legislate by convention for a small and comparatively unimportant minority, besides being contrary to the practice of the Hague Conferences, violates the general rule that a state cannot incur obligations under a treaty to which it is not a party, and throws over the conception of the legal equality of states, and its corollary that "legally, although not politically, the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful."[1]

The doctrine of legal equality, which arose out of the historical circumstances surrounding the Peace of Westphalia,[2] was until recently held by the majority of writers. But it has lately been rejected by Lorimer[3] and Lawrence,[4] questioned by Westlake,[5] and modified by Cobbett[6] and Taylor,[7] upon the ground that it cannot be reconciled with the admitted primacy of the Great Powers. But Professor Oppenheim has pointed out[8] that there is really no incompatibility between legal equality and political inequality, if the conception of legal equality be properly understood. It means that, whenever a question arises to be settled by the

[1] Oppenheim (*op. cit.*), vol. i. p. 169.
[2] *Ibid.*, p. 62. *Cf.* Taylor (*op. cit.*), p. 98, § 69.
[3] Lorimer (*op. cit.*), vol. i. pp. 170 and foll.
[4] Lawrence (*op. cit.*), §§ 112–114. *Essays on Some Disputed Questions in Modern International Law*, Cambridge, 1885, 2nd ed., p. 232.
[5] Westlake (*op. cit.*), vol. i. p. 321.
[6] Cobbett (*op. cit.*), vol. i. p. 50.
[7] Taylor (*op. cit.*), p. 98, § 69.
[8] Oppenheim (*op. cit.*), vol. i. p. 170.

consent of the Family of Nations, every state is entitled to one vote, and one vote only; and that the vote of the state politically weak carries as much weight as the vote of the state politically strong.[1] The political relations of states and their resulting political inequality are things neither legal nor illegal, although International Law does not, and cannot, ignore their existence. But at a conference of nations, whatever pressure may be exercised by the more powerful states in inducing weaker states to give their consent to a particular matter, nevertheless that consent given in proper legal form must be secured, before a "conventional" rule of law can be made, which shall be binding upon them. Thus the doctrine of legal equality, so far from being irreconcilable with the political hegemony of the great powers, is at the basis of the present international system.

§ 66. *Conventional and Customary Rules.*—It is sometimes contended, even by those who admit that a conventional rule of law cannot be binding upon third parties, that a customary rule can exist even though a very few states have not consented to it. In this respect these writers draw a distinction between a customary and a conventional rule.

Thus Grotius writes:[2] "Jus gentium: id est quod gentium omnium aut multarum voluntate vim obligandi accepit. Multarum addidi quia vix ullum jus reperitur extra jus naturale . . . omnibus gentibus commune."

[1] *Cf.* Oppenheim (*op. cit.*), vol. i. p. 169.
[2] Grotius (*op. cit.*), lib. i. cap. i. § 14.

Again, Westlake writes:[1] "When one of those (customary) rules is invoked against a state it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consensus* of opinion within the limits of European civilization is in favour of the rule."

And Cobbett says:[2] "If, then, the usage in question has become the predominant usage, and if, in fact, it prevails amongst the great majority of States, it is conceived that it may fairly be regarded as part of international law, even though an exceptional practice may still be followed by a few States, especially if these be of minor importance."

It is not quite clear how far these writers mean that, in such a case, the states, if very few in number and of little importance, are legally bound by customary rules to which they have not consented, and how far they merely mean that these states, though not legally bound, are of too little importance to be considered in a work on the law of nations. For example, although Oppenheim says:[3] "'Common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever, and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to the

[1] Westlake (*op. cit.*), vol. i. p. 16.
[2] Cobbett (*op. cit.*), vol. i. p. 9.
[3] Oppenheim (*op. cit.*), vol. i. p. 16.

wills of its single members," he probably does not mean that a state which has not consented is legally bound by the customary rule, but merely that it may be neglected for practical purposes.

However, there certainly exists a vague impression among some writers that a customary rule, as distinct from a conventional rule, may bind a small dissentient minority. There seems to be no practice in support of this impression, and no good ground for the distinction. I should prefer to suggest that, strictly speaking, neither conventional nor customary rule can bind any state, however insignificant, which has not consented to it. So long as a single state dissents, a rule, whether conventional or customary, may indeed be a general rule, but cannot be an universal rule.

§ 67. *Rights in rem.*—Finally, the question arises whether rights and duties can accrue to third parties under a treaty upon the ground that it creates rights *in rem.*

In *any* system of law, rights may be properly divided into two kinds: rights which are available against a definite person or persons (often called rights *in personam*), and rights available against all persons indefinitely (often called rights *in rem*).[1]

As a general rule, rights created by a contract are merely rights *in personam;* but sometimes in municipal law a contract has the effect, not only of creating a contractual relationship between the parties, but also of transferring the *property* in the subject matter of the contract to one of the parties,

[1] Holland (*Jurisprudence*), pp. 142–143.

with the result that the transferee has not only rights *in personam*, but also proprietary rights *in rem*. Thus in English law, a "contract of sale" is one in which the property in the goods is transferred from the seller to the buyer[1]; with the result that the buyer acquires rights, not only against the seller, but also as owner against third parties, in fact, against the whole world.

Now it must be obvious that if there exists in International Law any kind of contract which has a legal operation similar to that of a contract of sale in English law, it would bestow obligations on third parties. Certain writers have suggested that there are such contracts; and Huber classes among them an executed treaty of cession.[2] "The nature of a treaty as being dispositive and having reference to territory," he writes, "does not *per se* take it out of the category of *jura personalia*," and as an example of a dispositive treaty which is still "personal" he instances an *executory* treaty of cession. "*But when a treaty of cession has been carried out* by tradition of the ceded part, *the treaty itself ceases to exist; but the rights which it has created remain inherent in the territory.*"[3]

In other words, the treaty coupled with the tradition of the ceded part operates to transfer the property in it; and although the treaty disappears, the effects of the transference of property remain;

[1] Anson (*Contract*), p. 91; Odgers, *The Common Law of England*, London, 1911, vol. ii. p. 660; (English) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), § 1.

[2] Huber, *Die Staatensuccession*, Leipzig, 1898, p. 62.

[3] Italics are the author's.

with the result that all third parties are bound to respect the proprietary rights of the transferee.

The class of treaties which are supposed to operate in this manner are called by Westlake "transitory or dispositive"[1]: "These are treaties which dispose of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating the right of way over it in the grantee. . . . Documents of title of this class . . . are called transitory, because their effect passes over (transit) into and forms a part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact, without being obliged always to refer to the dealings which created it."

According to this view, a transitory or dispositive treaty may, but need not, create what is called a servitude.

§ 68. *State Servitudes.*—The conception of a state servitude is accepted by the vast majority of Publicists; but it is rejected by some. It received very detailed consideration in the North Atlantic Coast Fisheries Arbitration. Mr. Turner, in presenting the American case before the tribunal,[2] cited twenty-seven Publicists as accepting the conception. Nevertheless, the argument of Sir W.

[1] Westlake (*op. cit.*), vol. i. p. 60.

[2] Official Report published by the Foreign Office, 1910, *Oral Argument*, Part I. pp. 332–412.

Robson against the existence of international servitudes is very suggestive,[1] and the Court practically pronounced against them.[2]

As this monograph is only incidentally concerned with state servitudes, it is impossible to enter the controversy, and we may assume, for the purposes of argument, that state servitudes exist.

In this case, since the owner of a servitude enjoys rights *in rem*, his rights must be available against all the world, and any one who infringes them is liable to make good the loss.[3] In this respect a treaty creating a servitude differs from all treaties hitherto considered. The point of difference is well explained by Baty[4]: "There is no rule of International Law preventing one state from taking a benefit from another, which that other has promised a third power not to confer. If France promises Holland not to cede Dunkirk to Germany, Germany does Holland no wrong in accepting the town. Holland can only complain of the conduct of France. But if France grants Holland a real right over Dunkirk, (assuming that to be possible,) Germany can no longer, without wrong, take the town over by cession from the French."

Secondly, from the same distinction between a *jus in rem* and a *jus in personam* it seems to follow that the grantor of a servitude incurs an obligation

[1] Official Report published by the Foreign Office, 1910, *Oral Argument*, Part II. pp. 1000 and foll.

[2] *Ibid.*, p. 1440.

[3] *Cf.* Anson (*Contract*), p. 7.

[4] Baty, *International Law in South Africa*, London, 1900, p. 48.

much wider than the promisor under an ordinary treaty. For the grantor of a servitude is bound to suffer the restriction upon his territory, not only in favour of the party with whom he has contracted, but apparently in favour of all parties to whom the original grantee may transfer the proprietary right.

Thirdly, even if state servitudes exist at all, it does not follow that a treaty can create a servitude in such a way that the ownership of it is vested in a state which is not a party to the treaty. A so-called servitude was created over Hüningen by the Treaty of Paris (1815) in favour of the Swiss Canton of Basle,[1] another over the Aland Islands by the Treaty of Paris (1856), probably in the interest of Sweden,[2] and a third by the Vienna Congress over Chablais and Faucigny in the interest of Switzerland.[3] But there is no evidence in the subsequent history of these or any other treaty stipulations to show that the ownership of a so-called servitude can be vested in a third party.

§ 69. *Transitory or Dispositive Treaties.*—Treaties creating so-called servitudes are merely one variety of the treaties which are supposed by some to create rights *in rem*, and are called by Westlake "transitory or dispositive." In fact one great objection to the conception of servitudes is, that it leaves other "transitory" treaties unexplained. Treaties creating restrictions on sovereignty would naturally be expected to be subject to the same

[1] Hertslet (*op. cit.*), vol. i. p. 346.
[2] Martens, *N. R. G.*, XV. p. 780.
[3] Martens, *N. R.*, II. p. 421.

rules as treaties creating restrictions on territory; but, according to the general theory of servitudes, this is not so. Accordingly an attempt has been made by Westlake to divide *all* treaties into two main classes: ordinary treaties, and "transitory or dispositive" treaties—the latter class including treaties which create servitudes, and being subject to certain special rules. "The dispositive character of a treaty may be shown by its vesting rights in individuals as well as by imposing a servitude on territory. . . . And we may go a step further, and detect something of a dispositive character in a treaty which . . . establishes between two states a condition of things intended to be permanent and by which the rights of individuals are affected."[1] In this class Westlake also includes treaties of cession.[2]

This attempt to differentiate between ordinary and dispositive treaties is open to many objections. In the first place, the differentiation is primarily attractive because it corresponds to a distinction between "contract" and "conveyance" made by the theory of jurisprudence,[3] and probably by most systems of municipal law. But warning has repeatedly been given of the danger of constructing International Law by analogy to municipal law or the theory of jurisprudence. International Law is based solely upon the consent of nations, evidence of which is to be gathered chiefly from the practice of states. International Law is an incomplete system; and the distinction between contract and

[1] Westlake (*op. cit.*), vol. i. p. 294. [2] *Ibid.*, p. 61.
[3] Austin, *Lectures on Jurisprudence*, 5th ed. 1885, vol. i. p. 373.

conveyance has not, it is submitted, been worked out. Secondly, there is no criterion of sufficient certainty by which dispositive treaties are to be distinguished from ordinary treaties. Thirdly, the peculiar relationship between a state and its territory suggest that it would be highly inconvenient to have International rights *in rem*, inherent in territory, and existing apart from rights merely personal to the sovereign state.

§ 70. *International Leases.*—The whole difficulty is illustrated by the case of International leases. By a Convention signed at Pekin in March 1898, China "ceded in usufruct" to Russia for a period of twenty-five years Port Arthur, Talienwan, and adjacent territory.[1] By the Treaty of Portsmouth of the 5th September, 1905,[2] Russia "transferred and assigned" to Japan the lease, "and all rights, privileges, and concessions connected with or forming part of such lease." By a treaty of the 6th March, 1898, China leased the district of Kiauchau to Germany,[3] and by a treaty of the 1st July, 1898, she leased Wei-hai-wei to Great Britain.[4] The recent practice of states supplies other examples.

A controversy has ensued as to whether the stipulations in these treaties are to be regarded as having a legal operation similar to a lease or usufruct in municipal law, or whether they are to be considered as almost equivalent to a transference of sovereignty by a treaty of cession. Several

[1] Westlake (*op. cit.*), vol. i. p. 134.
[2] Martens, *N.R.G.*, 2nd series, XXXIII. p. 3.
[3] Martens, *N.R.G.*, 2nd series, XXX. p. 326.
[4] Martens, *N.R.G.*, 2nd series, XXXII. p. 90.

writers, while remarking that in strict law the lessor retains a proprietary right in the territory leased, regard such leases as amounting, for all practical purposes, to treaties of cession disguised so as to spare the feelings of the lessor.[1]

The legal rights and duties of third states are liable to be affected by leases of this kind. What, for instance, are the belligerent rights, with regard to the leased territory, of a third state at war with the lessor or the lessee? As Lawrence points out,[2] the Russo-Japanese War shows that for this purpose the leased territory is to be considered as forming part of the dominion of the lessee. The question therefore arises whether the changes thus brought about in the rights and duties of third parties are to be attributed to the legal operation of a lease as such, or whether they are the consequence of a change in sovereignty, either partial or complete. I strongly incline to the latter view.

Sometimes a piece of territory is administered by a foreign power with the consent of the owner state. For example, from 1878 to 1908 the then Turkish provinces of Bosnia and Herzegovina were administered by Austria-Hungary.[3] In these cases, also, the resulting changes in the rights and duties of third states seem to be properly attributable to what is, for most practical purposes, a transference of sovereignty.

[1] *Cf.* Oppenheim (*op. cit.*), vol. i. p. 233, § 171; Cobbett (*op. cit.*), vol. i. p. 110; Westlake (*op. cit*), vol. i. p. 134; Lawrence (*op. cit.*), § 82; Hall (*op. cit.*), p. 90.

[2] Lawrence (*op. cit.*), § 82.

[3] Oppenheim (*op. cit.*), vol. i. p. 233, § 171.

Results

§ 71. *Recapitulation of Conclusions Reached.*—The conclusions reached in this monograph may now be briefly recapitulated.

A treaty cannot impose any obligations recognized by International Law upon a state which is not a party to it (§ 23); nevertheless a treaty may be incidentally detrimental to a third state, and the third state is in such a case generally without legal remedy (§§ 24, 25). The matter is, however, different when the treaty in question is contrary to International Law, when it conflicts with rights already vested in the third state, and perhaps when it endangers the safety of the third state; in these cases the third states adversely affected have a right of intervention (§§ 24, 25).

A third state cannot call upon the contracting parties to fulfil the terms of a treaty merely because the execution of the treaty would be incidentally beneficial to it (§§ 26–28); nor even because the parties intended the treaty to be beneficial to it (§§ 29–31). But to treaties intended to confer rights on third states different considerations apply. Such a treaty usually contains an "accession" or "adhesion" clause; in this case states availing themselves of it in the manner prescribed acquire rights and incur obligations under a new treaty between themselves and the original parties, identical in terms with the original treaty (§ 32). It has been submitted in the course of this monograph that the existence of an "accession" or an "adhe-

sion" clause in a treaty prevents third states from entering into a new contract of this kind by conduct amounting to acceptance of an offer held out to them. On the other hand, where a treaty is intended to be in the nature of an International Settlement, is intended to confer rights, and incidentally duties, upon third states, and does *not* contain an "accession" or "adhesion" clause, there are grounds for believing that such a treaty amounts to an offer by the original parties to third states to enter into an additional contract, an offer capable of acceptance by conduct. If it be so, third states accepting by conduct acquire rights and incur duties identical with those arising under the original treaty; but not otherwise (§§ 35–40).

Although apart from accession or adhesion, and apart from the case of International Settlements of this kind, third states cannot acquire rights or incur obligations under a treaty to which they are not parties, yet it frequently happens that a treaty becomes the basis of a rule of customary law, because all the states which are concerned in its stipulations have come to conform habitually with them, under the conviction that they are legally bound to do so. In this case third states acquire rights and incur obligations which were originally conferred and imposed by treaty, but have come to be conferred and imposed by a rule of law (§§ 46–62).

It has been submitted in the course of this monograph that "imperfect rights" do not exist in International Law. Consequently third states cannot acquire rights under treaties on the ground

that they merely regulate imperfect rights already vested in them (§ 64). Moreover, all attempts to extend the operation of certain treaties, so as to affect the legal position of third parties, on the ground that they embody the legislative endeavours of an International Congress, are without foundation in law (§§ 65, 66).

If, however, there exist in International Law treaties creating servitudes (and this is a doubtful matter), the legal effect of such treaties upon third parties is somewhat different. But not even such a treaty can vest the ownership of a servitude in a state which is not a party to it (§§ 67, 68). The legal position of third states is also affected by International leases, and by a treaty providing for the administration of a piece of territory by a foreigner with the consent of the owner state; but this is to be attributed to what is, for most practical purposes, a change of sovereignty (§ 70).

ALPHABETICAL INDEX

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