The Extent of the Commitment of Third States to International Treaties

Lecturer, Dr. Dawan Mohammed Jaza Abdullah[1]
1 Law Department, College of Law, University of Sulaimani, Law Department, University College of Goizha

dawan.jaza@univsul.edu.iq

پوختە

پەیماننامە نێودەوڵەتی یەکان بە یەکێك لە ڕێگا ڕوون و ئاشـــکراکان دادەنرێت بەشــێوەیەك کە دەتوانرێت لة ڕێگەیەوە ڕێســـای پابەندکراو بۆ دوو دەوڵەت یان زیاتری لێ بەرهەم بهێنرێت. پەیماننامە نێودەوڵەتییەکان بەشــێوەیەکی تایبەت ســوودی لێ دەبینرێت کاتێك دەوڵەتان پێویســـتییان بە گۆڕین یان دانپیادانانی پابەندبوونی یەکانیان دەبێت لەژێر ڕۆشـنایی یاسـای نێودةوڵەتی دا وەهەندێ جاریش پشـتی پێ دەبەسـترێت بۆ ڕەنگدانەوەی گۆڕانکارییەکان لە واقعی کۆمەڵگای نێودەوڵەتی دا. سروشتی پابەندی پایماننامەکان ەشت دەبەستێت بە بنەمایەکی عورفی یاسـای نێودەوڵەتی کەئەویش بنەمای گرێبەسـتەکان شـەریعەتن بۆ لایەنەکانی گرێبەسـتەکە، بەواتای ئەوەی ثەیماننامەکان هیچ پابەندبوونێك ناسـەپێنن یاخود هیچ مافێك نابەخشـن بە دەوڵەتی سێ یەم . یەکێك لە هەرە ئەو بابەتانەی کەجێگەی مشتومڕو گفتوگۆیەکی زۆرة سەبارەت بە یاسای پەیماننامەکان بریتی یە لە بابەتی پابەندبوونی دەوڵەتی ســێ یەم بە پەیماننامە نێودةوڵەتی یەکان. ئەم توێژینەوەیە ڕادەی پابەندبوونی دةولَەتی ســێ یةم بەپەیماننامە نێودەوڵەتییەکان لە ژێر ڕۆشـــنایي یاســـای نێودەوڵەتی لەســـەردەمی ئێســـتادا ڕوون دەکاتەوە . وەك بنەمایەکی گشـــتی پەیماننامە بریتییە لە ئامرازێك کە لەلایەن یاســـای نێودةوڵەتی یةوة حکوم دەکرێت ، هەرکاتێك پەیماننامە کەوتە بواری جێبەجێ کردنەوە تەنها لایەنەکانی پەیماننامەکە پابەند دةبن پێوەی لە ژێر ڕۆشـنایی یاسـای نێودەوڵەتی. هەروەها پەیماننامەی ڤێنا بۆ یاسای ڕێکەوتنامەکان سـاڵی ١٩٦٩ ئاماژەی بەم ڕێسـا گشـتییە کردووە وەك دەرئەنجامێکی راســتەوخۆی بنەمای قبوڵکردن و بنەمای ســەروەری و بنەمای ســەربەخۆیی. هەرچەندە کۆمەڵێك إستثناء هەیە لەسەر ڕێسای گشتی کە دەڵێت پەیماننامە پابەند نیە بۆ دەوڵةتی سێیەم. لە کۆتایی دا ئەم توێژینەوەیە گفتوگۆی ئەوە دەکات کە دەکرێت پەیماننامە پابەند بێت بۆ دەوڵەتی ســێ یەم ئەگەر ئەحکامەکانی پەیماننامةکە کۆکرابێتەوە لە عورفی نێودەوڵەتی دا یان دەوڵەتی سێیەم بە شێوەیەکی ڕاشکاوانە ئەو پابەندبوونةی قبوڵ کردبێت کە لە پەیماننامەکەوە سەرچاوەی گرتووە یاخود پەیماننامەکە سروشتی ڕێسای فەرمانکەری هەبێت.

الخلاصة

تعد المعاهدات الدولية إحدى أكثر الطرق وضـــوحًا التي يمكن من خلالها أن تنشـــأ القواعد الملزمة بين الدولتين أو أكثر. إنها مفيدة بشـكل خاص عندما تحتاج الدول إلى تغيير أو الاعتراف بالتزاماتها بموجب القانون الدولي، أو لتعكس الواقع المتغير للمجتمع الدولي في **بعض الأحيان. تســتند الطبيعة الإلزامية للمعاهدات إلى مبدأ القانون الدولي العرفي المتمثل في العقد شـــريعة المتعاقدين، بمعنى لا** تفرض المعاهدات أي التزام ولا تمنح أي حقوق على الدول الغير. واحدة من أكثر القضـايا إثارة للجدل فيما يتعلق بقانون المعاهدات تتعلق بالتزام الدول الغير بالمعاهدات الدولية. تبحث هذه الدراسـة في مدى التزام الدول الغير بالمعاهدات الدولية بموجب القانون الدولي المعاصـر. كمبدأ عام، تعتبر المعاهدة وثيقة تحكمه القانون الدولي، بمجرد دخولها حيز التنفيذ، لا تتحمل سـوى أطرافها الالتزامات القانونية الملزمة بموجب القانون الدولي. كما تشـــير اتفاقية فيينا لقانون المعاهدات عام ١٩٦٩ الى هذا المبدأ كقاعدة عامة والتي تعتبر نتيجة مباشرة لمبدأ الموافقة ومبدأ السيادة و الاستقلال. ومع ذلك، هناك استثناءات للقاعدة العامة وهي أن المعاهدات تكون ملزمة للأطراف الغير في بعض الحالات المعينة. وأخيراً، تُسلط هذه الدراسة الضوء على ان المعاهدة تكون ملزمة لطرف الغير إذا كانت أحكامها مدونة في القانون الدولي العرفي أو إذا أقبل الطرف الغير صـــراحةً الالتزامات الكتابية الناشئة عن المعاهدة ؛ أو إذا كانت المعاهدة تتميز بخصائص القواعد الآمرة.

Abstract

International treaties are one of the most evident ways in which rules binding on two or more states may come to existence. They are particularly useful when states need to change or recognize their obligations under international law, some times to reflect the changed reality of international community. The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding *pacts sunt servanda* i.e., treaties do not impose any obligations, nor confer any rights, on third states). One of the most controversial issues regarding the law of treaties concerns the obligation of third states to international treaties. The present paper examines the commitment of third states to international treaties under existing international law. As a general principle a treaty is an instrument governs by international law, once it enters into force, only the parties thereto have legally binding obligations under international law. In addition the Vienna Convention on the Law of Treaties 1969 refers to this as a general rule and it is a direct result of fundamental principle of consent and of sovereignty and independence. However, there are exceptions to the general rule that treaties are not binding on third parties. Finally, the current study discusses that a treaty would be binding on a third party if its provisions have either codified customary international law or if such third party expressly accepts in writing the obligations arising from the treaty; or if the treaty is a ‘dispositive’ treaty, or if a treaty has a characteristic of *jus cogens*.

Keywords: International Treaties; Third State, Customary International Law; *Erga Omnes*; Dispositive Treaties; International Obligations

I. Introduction

Treaties are evidence of the express consent of states to regulate their interest according to international law and they are one of the most important sources of international law (Dixon, McCorquodale and Williams, 2011: 55). The principle *pacta sunt servanda* has been mentioned as the basis for the binding nature of treaties. The whole point of making a binding agreement is that each of the parties should be able to rely on the performance of the treaty by the other party or parties. Treaties are one of the most appropriate method in which states may create binding obligation in a deliberate and conscious manner. Thus the majority of international legal relationships between states are now governed by treaties. Generally treaty can be regarded as an agreement between parties on

the international scene and once it enters into force the parties have legally binding obligation in international law. The law of treaty is the name given to that body of international law which transact with the procedural and essential rule governing and regulating the use of treaties as a source of international law **(**Dixon, 2007: 53**).** Treaties are known by a variety of differing names such as Conventions, International Agreement, Charters, Pacts, General Acts, Statutes, Declarations and Covenant. All these Terms refer to a generic description of the legal instrument by which states and other competent international legal persons crate binding international obligations.

The 1969 Vienna Convention on the Law of Treaties is the outcome of the International Law Commission and two sessions of the United Nations conference on the Law of Treaties held in Vienna in 1968 and 1969. The convention entered into force on 27 January 1980 and by 1995 Seventy Four states had become parties. Article 2 (1) (a) of the Vienna Convention on the Law of Treaties define treaty as " an international agreement concluded between states in written form and governed by international law, whether embodied in single instrument or in two or more related instruments and whatever it's particular designation" (Article 2 (1) (a) of Vienna Convention on the Law of Treaties 1969).

The general rule of treaty which is expressed in the maxim, *pacta tertiis nec nocent prosunt*, is that treaties are binding on states parties. The final draft of the International Law Commission and the Vienna Convention on the Law of Treaties 1969 refers to this as a general rule and it is a direct result of fundamental principle of consent and of sovereignty and independence (Hillier, 1998: 139). However, it is sometimes the situation that parties to treaty may intend to grant right or obligation on third states without the latter becoming treaty states (Dixon, 2007: 75). In addition, there are some major exceptions to this general rule such as 'dispositive' treaties which create legal regimes valid for the whole world (*erga omnes*), for example treaties dealing with territorial matters such as the delimitation of boundaries, international waterways e.g. Permanent Neutrality and Operation of Panama Canal Treaty 1978, also territorial status for instance *Aaland Island* case (*Aaland Island Case* [1920] L.N.O.J. Special Supp. No.3) and *Kasikili/Sedudu Island* case (*Kasikili/Sedudu Island case* [1999] ICJ Reports) establish an actual situations that must be recognized by all states whether or not they are parties to the treaty (Aust, 2007: 258). Another exception to this rule is that the treaty binds on third states if the provisions of that treaty have entered into customary international law. This article, firstly, examines the general principles of a law of treaties by examining the rights and obligation of third states. Secondly, it discusses and explains the major exceptions to the general rule of the law of treaties namely, *eraga omnes* status or regime ('dispositive' treaties). Finally it will explain the rules in treaty that becoming binding on third states through international custom.

II. General rule of the law of treaties

Consideration of the effect of treaties upon third states raises a number of controversial issues. It is perhaps useful to explain at the outset that a "third State", as used here, means any state which is not a party to a treaty. There is no doubt that the application of international treaties arranges international obligations only on their parties, but the effect of these treaties on third states remains a controversial issue under international law. If it is axiomatic that a party to a treaty is committed to what has been agreed in the treaty, it is equally axiomatic that a state which is not a party to a treaty under no such obligation. According to the prevailing opinion, the sovereign equality of states excludes any automatic effect of treaties on third states which remain for them (*res inter alios acta*) (Danilenko, 1993: 58). This is based on the principle of *pacta tertiis nec nocent nec prosunt* (i.e., treaties do not impose any obligations, nor confer any rights, on third states). This principle has been endorsed in various decisions of the international courts. For instance, as far back as 1925 in the *German Interests in Polish Upper Silesia case*, the Permanent Court of International Justice (PCIJ) held that a 'treaty only creates law as between states which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States' (*Certain German Interests in Polish Upper Silesia*, PCIJ (1926), Ser. A, No.7, at 29).

JZSB p-ISSN: 1813-0852, e-ISSN: 2617-3034

A point of considerable interest with reference to the creation of binding rules of law for international societies centers on the application and effects of treaties upon third states (Shaw, 2008: 928). The general rule is that treaties are binding only on the state parties to that treaty. The reasons for this rule can be found in the fundamental principles of the sovereignty and independence of states, which postulate that state must consent to rules before they can be bound by them. In addition, Article 38 (1) (a) of the International Court of Justice Statute which directs the court to apply "conventions, whether general or particular, establishing rules expressly recognized by the contesting states", implies that the court cannot rely on conventional rules which are not expressly recognized by the contesting parties.

The principle of the inadmissibility of treaties to third States is supported by the practice of national courts. The decision of the Swiss Federal Tribunal (1925) in the *Trampler v. High Court of Zurich case (Trampler v. High Court of Zurich*, Annual Digest 1925-1926, Case No. 235) proved that treaties are not binding on third parties (Richard, 2015: 220). In this case, two Frenchmen sued Mr. Trampler, a German national, on the issue of the payment of the debt in 1925 before the High Court of Zurich in which Mr. Tampler had lived since World War I. According to the Procedural law of Switzerland, the competent tribunal is that of the place of domicile of the defendant. In the proceedings, Mr. Trampler (the defendant) objected the competency of the Zurich Court and invoked Article 296 /Section III of the Treaty of Versailles on Debt 1919. The Treaty of Versailles stipulates that the proceedings of its kind should be exclusively the competence of special jurisdiction. In its decision, the Court dismissed Mr. Trampler's argument of the incompetency of Zurich Court. In addition, the Court also dismissed the legal argument of the applicability of the Treaty of Versailles which was submitted by Mr. Tramplar (the defendant) as Switzerland was not a party to that Treaty (*Trampler v. High Court of Zurich*, Annual Digest 1925-1926, Case No. 235 at para 351). There are decisions of the International Court on the principle of non-binding treaties to third parties. For instance, in the *Free Zones of Upper Savoy and the District of Gex case* between France and Switzerland, the Permanent Court of International Justice stated that "Switzerland cannot be considered bound by a treaty to which it is not a party" (*Free Zones of Upper Savoy and the District of Gex case* (France v. Switzerland) 1932, PCIJ, Ser. A/B, No. 46). Similarly, the decision that was made by the Permanent Court of International Justice in the *territorial jurisdiction of the River Oder Commission case*, emphasized that a treaty binds only on its parties when the Court concluded that Poland should not be bound by the provisions of the Barcelona Convention 1921 because it was not a party to it (The territorial jurisdiction of the River Oder Commission (1929), PCIJ, Reports Series. A, No.23, p.1). Furthermore, the arbitration decision that was issued by Max Huber in the case of *Palmas Island* between the Netherlands and the United States of America, stated that the Treaty of Paris 1898 which ended the war between the United States and Spain, under which Spain ceded the Philippines and the island of Palmas to the United States of America, could not be binding upon the Netherlands, because the later was not a party to that treaty (*Palmas Island case*,(1928), 2R.I.A.A, p.831). This, of course, is a general assumption and is not necessarily true in all cases.

The consensual nature of international law implied that states can only be bound by what they have expressly consented to themselves (Cannizzaro, 2011, P:86). This general rule is enshrined in Article 34 of the Vienna Convention on the Law of Treaties 1969 which provided " A treaty does not create either obligation or rights for a third state without its consent" (Article 34 of Vienna Convention on the Law of Treaties 1969). Thus a treaty whether bilateral or multilateral does not create rights or impose obligation on a third state without its consent.

The starting points of the debate are pertinent provisions of the Vienna Convention on the Law of Treaties 1969 in relation to third states i.e. Articles 34-38 of the convention. The general principle is codified in Article 34 of the convention which provides a treaty does not create right or obligation for third state without its consent. There follow separate articles specifying the conditions for the creation of an obligation and right with respect to a third state and the different ways of manifesting consent

to each (Chinkin, 1993: 33). The convention deals separately with obligation (Article 35) and right (Article 36) of the convention.

III. Right and obligation of third state

As a general rule, treaties are binding only on the state parties as recognized in Article 34 of the Vienna Convention on the Law of Treaties 1969; however it is sometimes the situation that parties to treaty may intend to grant right or obligation on third states without the latter becoming treaty states (Dixon, 2007: 75). Furthermore, as Sir G- Fitzmaurice, a special Rapportears on the law of treaties, argued there is nothing in international law to prevent two or more states from effectively creating a right in favor of third states. The question of the existence of a right acquired under an instrument drawn between other states is, therefore, one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favor of a third state meant to create for that state an actual right (Evans, 2010: 182). There are conditions to be fulfilled in order for a right to arise for the third state from a provision of a treaty applicable for third states. Firstly; the treaty intended to grant the right to third states; secondly, the third states give approval to the rights accorded to them by the treaty; third, the approval shall be taken for granted as the third states' act is not contrary to it; fourth, if the treaty obliges that a third state should express its consent in a certain way, the legal effect will only arise if this requirement has been fulfilled. If the treaty is silent on particular conditions, the assent may be presumed, providing there is no evidence to the contrary (Malgosia, 2002: 46).

Furthermore, there are two theories or approaches as to creation right for third states namely Collateral Agreement and Stipulation approach. The Collateral Agreement is an agreement established between states parties to the treaty, as one side, and third parties, on the other side and it appended to the main treaty. The said Agreement stipulates that both agreed on the rights arises by the treaty accorded to the third parties. This supplement agreement will be appended in the Treaty. According to Collateral Agreement approach the third state must accept the right which is conferred by state parties in order to become a right to its benefit. In other words, the third state only benefit in this sense if it expressly or implicitly assents to the creation of the right (Corten and Klein, 2011: 930). That is to say, a right will be created for that third state only when the treaty provision is intended to constitute an offer of a right to the third state which the latter has accepted. The International Law Commission (ILC) upholds that theory when obliged two conditions for a treaty that binds by third parties, namely; (first) the parties to the treaty intended to establish the rights and, (second) the third parties agreed to be bound by it. The International Court of Justice reaffirmed the need of assent of the applicability of a treaty to states not parties as stated in the *North Seas Continental Shelf case*, the court stated that "in principle, that is to say, a state which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form" (*North Sea Continental Shelf Cases (Germany v Denmark and the Netherlands)* 1969 ICJ Rep. 3, 25-26).

While a second approach is a Stipulation approach which was supported by some member of the International Law Commission, provides that the right which was intended to create in favor of third state is not conditional upon any specific act of acceptance of a third state (Brownlie, 2008: 928). In other words, a third state would enjoy the right that conferred by state parties without its acceptance. Some authority of this view was expressed in the judgment of Permanent court of International Justice (PCIJ) in the *Free Zone of Upper Savoy and the District of Gex case (Free Zone of Upper Savoy and the District of Gex case (Franc v. Switzerland) [1932] PCIJ Reports, Series A/B No.46)*. In this case the right contended for by Switzerland, viz., the benefit of a free custom zone in French territory under multipartite treaties to which France was a party but Switzerland was not, rested in fact on agreements from 1815 and 1816 to which Switzerland was a party(McNair, 1961: 311). However, the statement by the court appears to accept the rule that creation of right for third state is matter only

of intention of the grantor states(Brownlie, 2008: 928), when it stated that "It cannot be lightly presumed that stipulations favorable to a third state have been adopted with the object of creating an actual right in its favor. There is however nothing to prevent the will of sovereign states from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other states is, therefore, one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favor of a third state meant to create for that state an actual right which the latter has accepted as such" (*Free Zone of Upper Savoy and the District of Gex case (Franc v. Switzerland)* [1932] PCIJ Reports, Series A/B No.46, pp.147 and 148).

Article 36 of the Vienna Convention on the Law of Treaties 1969 creates a presumption as to the existence of the assent of third state, "A right arises for third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state or to group of states to which it belongs, or to all states and third states assents thereto. Its assent shall be presumed so long as the country is no indicated unless the treaty otherwise provides" (Article 36 of Vienna Convention on the Law of Treaties 1969). Thus, a right arises for third states from provision of treaty if the parties to it so intended and third state assents (Aust, 2007: 257). There are a number of examples of treaties establishing rights for third states, for instance the Constantinople Convention 1888 was for long time considered to give right of passage through the Suez Canal to states that were not parties to the convention. Article 1 of the Constantinople Convention 1888 provides as follows "The Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag" (Article 1 of the Constantinople Convention 1888). Thus, right of passage under the Constantinople Convention 1888 was conferred to all states and this was the intention of the parties to this convention and consent had been presumed simple by usage (Fitzmaurice, 2002: 101). Furthermore, the Panama Canal treaty 1978 between Panama and USA in Article 2 provides that "The canal shall remain open to peaceful transit by the vessel of all nations on term of entire equality" (Article 2 of Permanent Neutrality and Operation of Panama Canal Treaty 1978).

On the other hand, treaties may provide obligation for third states. Under Article 35 of the Vienna Convention on the Law of Treaties 1969 if the parties to treaty intend an obligation arising from treaty in order to be binding on a third state, it becomes binding if the third state expressly accepts that obligation in writing (Article 35 of Vienna Convention on the Law of Treaties 1969). However, treaties that have the characteristic of *jus cognes* nature might be regarded as an exception to the principle of acceptance (Consent) which means that there are some treaties that have been concluded and provide obligations for a third state without its acceptance such as The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, The Convention on the Prevention and Punishment of the Crime of Genocide 1948 and The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other 1949.

In regard with the principle of acceptance which is included in Article 35 of Vienna Convention on the Law of Treaties 1969 there is a much stricter requirement that underlines the practical difference between conferring a right and an obligation on a third state. In practice, this means that the conferral of the obligation is itself the subject of a second collateral treaty between the third state on the one hand and the parties to the original treaty on the other hand (Harrison, 2011: 7). Thus two conditions must be achieved before a third state can be bound by an obligation arising from a provision in a treaty to which it is not party(Fitzmaurice, 2002: 47). First, the parties to the treaty must have had intended the provision in question to be the means establishing the obligation for the third state. Second, the third state must have expressly agreed to be bound by the obligation in writing. In the status of *Eastern Carelia case (Eastern Carelia case [1923]* PCIJ , Series *B,* No.5) the PCIJ illustrated that states that not members of the League of Nations were not bound by the convention and from this fact the court concluded that "The submission, therefore, of dispute between third states and member of the League for solution according to the methods provided for in the convent, could

take place only by virtue of their consent" (Advisory opinion of 23 July 1923, Series B, no.5, PP27-28).

Moreover, there are procedural differences in the establishment of an obligation and right for a third state. The third state must accept an obligation in writing, as did Switzerland for many years when it implemented sanctions of the UN Security Council while it was not a member of the UN (Kolb, 2016: 117). Whereas in a case of right the assent of a third state is presumed unless the treaty provides otherwise or there is indication to the contrary (Article 36 of Vienna Convention on the Law of Treaties 1969). Furthermore, any obligation arising for a third states can be revoked or modified only with acceptance of the parties and third states unless it is established that they agreed otherwise (Aust, 2007: 259). While any rights for third state can be revoked or modified by the parties if it is established that the right was intended to be revocable or subjected to modification without the assent of the third state (D. Evans, 2010: 182).

IV. The major exceptions to the general rule of the law of treaty

States enter into a treaty arrangement as an expression of their sovereignty. Treaties bind the parties by mutual consent only and strangers to any treaty are legally unaffected by it (Chinkin, 1993: 26). The basic rule of treaties and third parties is *pacta tertiis nec nocent prosunt,* that a treaty applies only between the parties to it. This rule was established upon Roman law analogy to contract and the principles of independence and sovereign equality of state, which postulate that states must consent to rules before they can be bound by them (Shaw, 2008: 928). This is a general proposition and is not necessary true in all cases; however it does remain as a basic line of approach in international law. Article 34 of the Vienna Convention on the Law of Treaties 1969 echoes the general rule in specifying that a treaty does not create right or obligation for a third state without its consent (Article 34 of Vienna Convention on the Law of Treaties 1969). Thus the maxim *pacta tertiis nec nocent prosunt*, the fundamental rule that treaties are binding only on state parties, but there are some exceptions to this general rule such as 'dispositive' treaties which create legal regimes valid for the whole world (*erga omnes*) (Dixon, 2007: 75). In addition, there is another exception to this rule which is where the provision and rules of a treaty have entered into customary international law.

V. Erga omnes status or regime

In contrast to the general rule of law of treaties there are some treaties known as 'dispositive' treaties that usually dealing with territorial matters, either due to deemed consent or due to the nature of their subject matter. The most convincing explanation on the dispositive' treaties were made by Lord Mc Nair in his book "The Functions and Differing Legal Character of Treaties (1930)" who observed that certain kind of treaties produce effects beyond the parties to those treaties are recognized on the grounds either that the parties to them intend to offer contractual rights to third states, which may in course of time be willing to accept them by express or implied assent, or that third states acquire rights under them form example, in case of treaties concerning navigation on international river or through canals or treaties concerning maritime waterway (Azari , 2015: 47).

Furthermore, dispositive treaties create a legal regimes or status valid for the whole world (*erga omnes*) (Ragazzi, 1997: 24). For instance, treaties dealing with territorial matters such as the delimitation of boundaries, international water way e.g. Constantinople Convention 1888 and Permanent Neutrality and Operation of Panama Canal treaty 1978. Article 1 of the Constantinople Convention 1888 provides that "the Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag". In addition according to the Article 2 of Permanent Neutrality and Operation of Panama Canal treaty 1978 "The canal shall remain open to peaceful transit by the vessels of all nations on term of entire equality" (Article 2 of the Permanent Neutrality and Operation pf Panama Canal Treaty 1978), also in Article 2 (c) illustrated that "all vessels must comply with all rules and regulation, pay charges and not commit any act of hostility in the canal"(Article 2 (c) of Permanent Neutrality and Operation pf Panama Canal Treaty 1978). Moreover, the Antarctic Treaty 1959 creates a unique (or objective) regime for the area south of 60° south latitude, even though it has only forty-five parties (and of which

only twenty-seven have decision-making powers under the Treaty), but they come from all continents and include most of the major politically and economically important states (Aust, 2007: 258).

On the other hand, regarding treaties creating regimes of demilitarization which characterized as having an *erga omnes* nature, the *Aalan Island* case (*Aalan Island* case[1920] L.N.O.J. Special Supp. No3), is regularly referred to as the most significant precedent. The Aaland Island was demilitarized in accordance with the terms of the 1856 convention between the United Kingdom, France and Russia. In 1918 at the basis of a referendum, the majority of the population of the Aaland Island chose to be reunited with Sweden rather than to remain under sovereignty of Finland, which had gained independence from Russia. This led to dispute between Finland and Sweden and was then submitted to the League of Nations whose council referred it to an *ad hoc* committee of jurist since the Permanent Court of International Justice had not then come into existence (Fitzmaurice, 2002: 97). The committee supported the Swedish claim to be entitled to hold, Finland, regardless of the status of that state as a non-party state, to comply with the demilitarization regime imposed upon the island under the convention. The committee concluded that convention 1856 which had demilitarized the island remained effective and could be relied upon by third party, Sweden. In addition, the commission refused to characterize the demilitarization as an international servitude (Chinkin, 1993: 29), but held that a territorial arrangement made in the general European public interest (Harris, 2010: 219). Another case, which illustrated that a treaty may bind on third state, is *Wimbledon* case (*Wimbledon case* [1923] PCIJ, Reports.). In this case, the United Kingdom, French, Italian and Japanese governments filed an application with the registry of the Permanent Court of International Justice (PCIJ) in 1923 against Germany for refusing a steamship right of passage through the Kiel Canal, which passes through Germany and lines the Baltic and North Sea. On March 21, 1927 the English steamship "Wimbledon" under the charter of French company and shipping war material to Poland which was then at war with Russia, was refused access to the Kiel Canal by the German authority (Christian, 2005: 76). Germany argued that because Poland was at war with Russia, for Germany to allow passage would be in violation of German Neutrality Regulation. The United Kingdom, France, Italy and Japan took the Case to the PCIJ arguing that under Article 380 and 386 of the Treaty of Versailles 1919, Germany had to allow access to vessels of all nations. Article 380 of that treaty to which Russia was not party, provided that "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nation at peace with Germany on term of entire equality" (Article 380 of Treaty of Versailles 1919). Therefore, because the SS "Wimbledon" belonged to the state at that moment at peace with Germany, was entitled to free passage through the canal. In other words, the plaintiff argued that, the state charting the vessel was not at war with Germany and thus should have been permitted passage. Whereas, Germany argued that despite the Article of Treaty of Versailles 1919, they were under no obligation to allow the passage Wimbledon, because German Neutrality Regulation for Russo-Polish war would be breached by allowing weapons to be shipped to Poland. The court held that Germany had no right to refuse entrance to the SS. "Wimbledon" and the law of neutrality did not justify violation of Article 380 of the Treaty of Versailles 1919, so Germany had been wrong to deny access to the Kiel Canal (*Wimbledon case* [1923] PCIJ, Reports.). In addition, the court held that the Kiel Canal is not an internal waterway that are ruled at the discretion of the state they are housed in, but "the use of the canal by vessel of state other than the riparian state is left entirely to the discretion of that state and it has become international water way intended to provide under treaty guarantee easier access to the Baltic for benefit of all nation of the world" (PCIJ, Series A, No.1, 1923, P.22; ZAD, P.99). Thus, the *erga omnes* effect of such treaties was confirmed by the PCIJ in this case, which affects Article 380 of the Treaty of Versailles 1919, according to which Germany was to allow for free navigation of the Kiel Canal (Cannizzaro, 2011: 226).

Moreover, the Nuclear Non-Proliferation Treaty 1968 is a treaty to restrict the spread of nuclear weapons and currently 189 states party to it. In Article 1 of the treaty provides "Each nuclear-weapons state undertakes not to any recipient, nuclear, weapon, or other nuclear device, and not to assist any

non-nuclear weapon state to manufacture or acquire such weapon or advice" (Article 1 of Nuclear Non-Proliferation Treaty 1968). Thus, it seems that the treaty prevents each nuclear-weapons state, whether or not they are parties to the treaty, from supplying nuclear material.

Furthermore, the United Nations Charter (1945) contains a number of provisions that apply to non-member states, in particular Article 2(6) which create an obligations for non-member states when it provides that "The [United Nations] Organization shall ensure that states which are not members of the United Nations act in accordance with its principles so far as may be necessary for the maintenance of international peace and security". Switzerland, which was not then a party to the UN Charter, acted consistently with Security Council resolutions imposing economic sanction against Iraq during the first Gulf War. Therefore it is clear that UN Charter is a particular form of global constitution (O'Brien, 2001: 331) whose fundamental objective of securing peace would be frustrated if the reach of the treaty did not extend to non-members.

Moreover, another example of 'dispositive' treaties which create legal validity for the whole world (*erga omnes*) was illustrated in *Reparation for injuries suffers in the service of United Nation case(Reparation for injuries suffer in the service of United Nation case* [1949] ICJ, Reports). On September 1948, Count Bernadotte a Swedish national was killed in west Jerusalem at the time controlled by Israel. He was a chief UN Truce Negotiator in the area. In the course of deciding what action to take in respect of his death, the UN General Assembly sought the advice of the International Court of Justice (ICJ). Israel was admitted to the UN on May 1949 shortly after the court gave its opinion (Harris, 2010: 121). The court held that "UN Charter, by it is attributes, may have created an organization with objective legal personality, opposable to both member and non-member alike*"(Reparation for injuries suffer in the service of United Nation case*, [1949] ICJ, Reports, at p.174). This establishment of a factual situation which must, in practice, be recognized by all states whether parties to the treaties or not, is a creation of a dispositive treaty (Dixon, 2007: 75).

Unfortunately, the Vienna Convention on the Law of Treaties 1969 itself is silent on the issue of dispositive treaties, but this does not mean that such treaties cannot exist (Dixon, 2007: 75). The Vienna Convention on State Succession in Respect of Treaties 1978 provides that "the succession of a new state in the territory of former states does not affect certain treaty rights and obligations concerning boundaries and other territorial matters which the old state accepted"(Article 2 of Vienna Convention on State Succession in Respect of Treaties 1978). This is supported by the practice of new states, for instance Botswana and Namibia. There was a dispute between the government of Botswana and the government of Namibia concerning the boundary around Kasikili/ Sedudu Island and the legal status of that island. In *Kasikili/ Sedudu Island* case (*Kasikili/Sedudu Island case* [1999] ICJ Reports.), Botswana and Namibia asked the International Court of Justice (ICJ) to determine the sovereignty over island in the Chobe River "the main canal" based on the Anglo-German Treaty of I July 1890 and general principle of international law (Harris, 2010: 180). The parties accepted that the treaty of 1870 between Germany and Britain, which provided the basis for determining the line of the boundary, was binding on them as successor states to Great Britain and Germany. Thus, treaties which established objective legal regimes and have *erga omnes* character in particular dispositive treaties are applicable to third parties under international law.

On the other hand, it is necessary to indicate that the concept *juc cogens* (peremptory norms of international law) has been firmly established in international in regard with the commitment of international treaties. Article 53 of the Vienna Convention on the Law of Treaties provides that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Therefore it is clear that a treaty which has the nature and the characteristic of *jus cogens* such as Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 and Convention

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Weatherall, 2015: 58) or any other conventions that prevent serious violations of international humanitarian law, which oblige states to take universal jurisdiction over such violations wherever committed, will be binding on all states including these states that are not party to the treaty i.e. third states because of their importance in and to the international community regarding the protection of human dignity.

VI. Rules in treaty becoming binding on third states through international custom

Treaties are binding only on the parties to a treaty and a state which is not party to the treaty is not bound by the provision of that treaty, unless the treaty provisions have become customary law. In other words, another exception to the general rule of law of treaty is that the treaty binds on third states if the provisions of that treaty have entered into customary law. In such case, all states would be bound, regardless of whether they had been parties to the original treaty or not.

The most common interrelationship between a treaty and customary international law is codification of already existing norms of customary international law in a treaty but there has been a tendency in recent years to crystallize an emerging rule of customary international law into the treaty. This crystallization permanently contains the dual function of codification of existing customary international law and the gradual development of international law (Lauterpacht, 1955: 16). The treaty provision may constitute a focal point for a consistent subsequent practice of states in harmony with that provision to such an extent that the provision may in due course generate or become a rule of customary law (*North Sea Continental Shelf Cases (Germany v Denmark and the Netherlands)* 1969 ICJ Rep. 3, 38-39). Thus where a treaty codifies customary international law, then non-parties (third states) will be bound not under the treaty but because the obligations arise in customary international law. Therefore, states parties are doubly bound by the treaty and by custom; whilst third states are only bound by custom (Fitzmaurice, 2002: 61) and the International Court of justice confirmed this fact in *Nicaragua case* when the court stated that a rule of customary international law and treaty law may exist in parallel (*Nicaragua case,* [1984] ICJ, Reports, p.422-424).

In addition, where a treaty rules "incorporates existing customary international law, its binding force is attributable not only to the treaty *qua* treaty but also to the incorporated customary law, which remain binding on all states whether or not part to the treaty" (Luke T., 198: 553). In addition, nothing in the Vienna Convention on the Law of Treaties 1969 prevents a rule set out in a treaty from becoming binding upon third states as customary rules on international law if recognized as such (Article 38 of Vienna Convention on the Law of Treaties 1969). Thus, The wording of Art 38 ("from becoming binding") confirms that the provision only addresses the situation in which a treaty provision generates a new rule of customary international law that did not exist at the time when the treaty entered into force for its parties (Oliver and Kirsten, 2018: 748). A treaty may create a norm or set up a regime which later becomes generally accepted by states which are not parties to the treaty. The provision of this article will be applied when a treaty becomes binding on third states through the workings of customary rule of international law. Although "the words 'recognized as such', added at the Vienna Conference, are somewhat confusing, the sense of this provision remains clear enough: provisions of a treaty may become binding upon non-participating States through a customary process" (Tunkin, 1993: 539). This is in fact the case of the Vienna Convention on the Law of treaties 1969 itself; its provisions have frequently been applied by the international court, on the basis that such provisions state rules which apply to all states including non-party state as customary law (D. Evans, 2010: 100) .

In addition, the question whether a treaty provision crystallizes as a new principle or rule of customary law depends on whether the treaty provision is of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law and whether there is evidence of consistent state practice in line with treaty provision (O'Brien, 2001: 81). Therefore, the International Court of Justice in *Tunisia vs. Libya Shelf case* was prepared to accept that the concept of the exclusive economic zone stipulated in the Law of the Sea Convention 1982 had crystallized to

such an extent that it might be regarded as part of customary international law (*Tunisia vs. Libya Shelf case* (1982) I.C.J , P.18).

Furthermore, the fact that a particular rule contained in a treaty may acquire the status of customary norm (Vasciannie, 1989: 87) was explicitly acknowledged by the International Court of Justice (ICJ) in the *North Sea Continental Shelf case (North Sea Continental Shelf case* [1969] ICJ. Report 3.). In this case both Denmark and the Netherlands submitted an individual dispute with Germany to the ICJ involving claims to the North Sea Continental Shelf. Denmark and the Netherlands argued that the method of equidistance should be implemented and they claimed that the Geneva Convention on the Continental Shelf 1958 supported this method (Harris, 2010: 21). Furthermore, it was claimed to have been an antecedent rule of law, a rule of customary international law, and a general rule of conventional practicality. While Germany, who had not ratified the Geneva Convention, claimed that the rule of equidistance was unfair, also argued for an apportionment of the shelf that was proportional to the size of each state's adjacent land (Wallace, and Martin-Ortega, 2009: 277). In its judgment the court held that it was perfectly possible that a treaty provision "has constituted the foundation of, or has general a rule which, while only conventional or contractual in its origin, has since passed into the general rule corpus of international law, and is no accepted as such by the *opinio Juris*, so as to have become bind even for countries which have never, and do not, become party to the convention" (*North Sea Continental Shelf case* [1969] ICJ. Report 3, at para.71). Thus, according to the standards adopted by the ICJ in this case, in order to become rules of customary international law, provision of treaty would have to fulfill the following conditions: be of an essentially rule-creating character, such as could be considered as forming the basis of general rule of law (Fitzmaurice, 2002: 58); have passed into the general corpus of international law ; and be accepted as such by the *opinio juris* as have become bind even for countries which have never, and do not, become party to the convention" (*North Sea Continental Shelf case* [1969] ICJ. Report 3, at para.71). Thus, rule in a treaty may become binding on non-parties if it becomes part of customary international law. One example of this would be the law relating to warfare adopted by The Hague Convention 1899 and 1907, and perhaps, certain treaties governing international waterways fall within this category and now regarded as a part of customary international law (Shaw, 2008: 928).

This point arises with regard to Article 2 (6) of the United Nation Charter which states that "The organization shall ensure that states which are not members of the United Nation act in accordance with these principles so far as may be necessary for the maintain of international peace and security" (Article 2 (6) of United Nation Charter 1945). It is sometimes maintained that their provisions create binding obligation rather than being merely a statement of attitude with regard to non-member of the United Nation (McNair, 1961: 218). This may be the correct approach since the principle counted in Article 2 of UN Charter, can be regard as a part of customary international from the view point of the fact that treaty may legitimately provide for lawful sanction for violation of the law which are to be imposed on the aggressor state.

Bearing in mind in contemporary international law, broadly ratified multilateral treaties are more likely than a series of bilateral treaties to generate the argument that treaty rules have become customary law binding on third states.

However there is a question arises whether is there any preferable between treaties and international custom in regard with theirs binding obligations on third states especially when the content of the treaty is opposed to the rule of international custom which establishes a public principle in international law? It has been suggest that there is no priori hierarchy between treaty and international custom as a source of international law (McBeth, 2010: 23). However in the application of international law, relevant norms deriving from a treaty will prevail over norms deriving from customary international law.

VII. Conclusion

A treaty is essentially a legal binding agreement between two or more subjects of international law. It is an instrument which is regulated and governed by international law and once it enters into force, the parties thereto have a legally binding obligation in international law. The 1969 Vienna Convention on the Law of Treaties is the outcome of the International Law Commission and two sessions of the United Nations conference on the Law of Treaties held in Vienna in 1968 and 1969. The general rule of treaty which expressed in the maxim, *pacta tertiis nec nocent prosunt*, is that treaties are binding on states parties .This rule is affirmed in Article 34 of The Vienna Convention on the Law of Treaties 1969. However, there are some major exceptions to this general rule i.e. treaty may create rights and obligations for a third state under two conditions namely, first; the states parties to the treaties intended to establish the obligation for third states, and second; the third states agree to be bound by it. One of the major exception to this general rule is 'dispositive' treaties which create legal regimes valid for the whole world (*erga omnes*), for instance treaties dealing with territorial matter such as the delimitation of boundaries, international waterways e.g. Permanent Neutrality and Operation of Panama Canal Treaty 1978 and the Constantinople Convention 1888 was for long time considered to grant right of passage through the Suez Canal to the states that were not parties to the convention. Furthermore, Nuclear Non-Proliferation Treaty 1968 prevents each nuclear-weapons state, whether or not they are parties to the treaty, from supply nuclear material.

Any obligation arising for a third state cannot be revoked or modified without the acceptance of the parties and third states as well, whereas any rights for a third state can be revoked or modified by the parties if it is established that the right was intended to be revocable or subjected to modification without the consent of the third state.

Another exception to the general rule is where the provision and rules of a treaty have entered into customary international law. It means that its applicability to the third parties is not due to the jurisdiction of the treaty in question but merely third state bound by it by the custom. It is well accepted in public international law that a rule of treaty law may influence the legal position of third states in two respects, namely as evidence of a corresponding norm of customary international law, or as constituting the starting point for the development of new customary law. Finally it should be remembered that the rules contained in treaties might bind on third states as rules of customary international law either in situations where the treaty is itself a codification of existing international law or whether the treaty leads to the piecemeal development of new rules of custom.

VIII. Recommendation

1- We suggest that the United Nations should regulate the treaties that have the nature of *jus cogens* by enacting an independent article in the UN Charter provides that any treaty which has the characteristic of *jus cognes* must be binding on all states including the third state in order to prevent states which are not parties to these treaties from committing serious violations of international law regarding human dignity and escape from international responsibility under the guise of the concept of the third state.

2- We suggest that the Vienna Convention on the Law of Treaties 1969 should contain provisions that would make a third state party to the treaty when the parties to that treaty intend an obligation arising from the treaty in order to be binding on that third state if expressly accepts that obligation in order to prevent escaping third states from international responsibility when they breach the obligation arising from that treaty on the grounds that they are not parties to that treaty.

3- It is necessary to determine and codify treaties that are binding on third states through customary international law whether in the Vienna Convention on the Law of Treaties 1969 or in any other international documents and treaties as a new means of applying the rules of international law on the subject because this approach aims to stay away from the problems of the international custom in regard with the implementation of these kinds of treaties on third states especially the problem of uncertainty in international custom i.e. formation of customary international law which includes two main elements namely states practice and *opinio juris* .

4- The United Nations should impose sanctions on state parties to a treaty and make them internationally responsible when they try to make the third state to be binding to the treaty without its acceptance, especially these treaties that concluded between major countries such as the Unites States of America and Russia in regard to the Middle East countries issues.

List of References

1-Aust, A *Modern Treaty Law and Practice* 2nd ed. (Cambridge University Press 2007)

2-Aaland Islnd Case [1920] L.N.O.J. Special Supp. No3

3-Brownlie, I *Principle of Public International Law* 7th ed. (Oxford University Press 2008)

4-Cannizzaro, E *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011)

5-Certain German Interests in Polish Upper Silesia, PCIJ (1926), Ser. A, No.7, at 29

*Eastern Carelia case [1923] PCIJ , S*eries B, No.5

6-Chinkin, C *Third Parties In International Law* (Oxford University Press 1993).

7-Constantinople Convention 1888

8- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984

9- Convention on the Prevention and Punishment of the Crime of Genocide 1948

10- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other 1949

11-Corten, O and Klein, O *The Vienna Convention on the Law of Treaties: A commentary volume I* 1st ed. (Oxford University Press 2011).

12-Danae Azari, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford University Press 2015).

13-D. Evans, M *International Law* 3rd ed. (Oxford University Press 2010).

14-Dixon, M *Textbook on International Law* 6th ed. (Oxford University Press 2007)

15-Dixon, M and McCorquodale, R and Williams, S *Cases and Materials on International Law* 4th ed. (Oxford University Press 2003).

16-Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011).

17-Fitzmaurice, M *Third Parties and the Law of Treaties* (6 Max Planck Yearbook of United Nations Law 2002).

18-Free Zone of Upper Savoy and the District of Gex case (Franc v. Switzerland) [1932] PCIJ Reports, Series A/B No.46

19-Gennadi Mikhailovich Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers. London, 1993).

20-Harris, D Cases and Materials on International Law 7th ed. (Sweet & Maxwell 2010).

21-Hillier, T *Sourcebook on Public International law* 1st ed. (Cavendish Publishing Limited 1998).

22-James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011).

23-John O'Brien, *International Law* (Cavendish Publishing Limited. London 2001) McNair, A *The Law of Treaties* (Oxford: Clarendon Press, 1961).

24-Kasikili/Sedudu Island case [1999] ICJ Reports.

25- Kolb, R *The Law of Treaties: An Introduction* (Edward Elgar Publishing. Cheltenham, 2016).

26- Lauterpacht, H "Codification and Development of International Law' (1955) American Journal of International Law 49(1).

27-Lee, Luke T. 'The Law of the Sea Convention and Third States' (1983) American Journal of International Law 77 (3).

28- McBeth, A *International Economic Actors and Human Rights* (Routledge. London and New York, 2010).
29-Nicaragua case, [1984] ICJ, Reports, p.422-424
30-North Sea Continental Shelf case [1969] ICJ. Reports
31-Nuclear Non-Proliferation Treaty 1968
32-Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018).
33-Palmas Island case,(1928), 2R.I.A.A, p.831
34-Permanent Neutrality and Operation of Panama Canal Treaty 1978
35-Ragazzi, M *The Concept of International Obligation Erga Omnes* 1st ed. (Oxford Clarendon Press 1997).
36-Reparation for injuries suffer in the service of United Nation case [1949] ICJ, Reports
37-Richard A. Falk , *Status of Law in International Society* (Princeton University Press 2015).
38-Shaw, M *International Law 6th* ed. (Cambridge University Press 2008).
39-Tams, Christian J. *Enforcing Obligation Erga Omnes In International Law* (Cambridge University Press 2005).
40-The *territorial jurisdiction of the River Oder Commission* (1929), PCIJ, Reports Series. A, No.23, p.1
41-Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015).
42-Treaty of Versailles 1919
43-Trampler v. High Court of Zurich, Annual Digest 1925-1926, Case No. 235 at para 351
44-Tunisia vs. Libya Shelf case (1982) I.C.J , P.18
45-Tunkin, G 'Is General International law Customary Law Only?' (1993) European Journal of International Law 4 (4).
46-Vasciannie, S 'Part XI of the Law of the Sea Convention and Third States: Some General Observations' (1989) C.L.J 48(1).
47-Vienna Convention on the Law of Treaties 1969
48-Vienna Convention on State Succession in Respect of Treaties 1978
49-Wallace, M and Martin-Ortega, O *International Law* 6th ed. (Sweet & Maxwell 2009).
50-Wimbledon case [1923] PCIJ, Reports

JZSB p-ISSN: 1813-0852, e-ISSN: 2617-3034