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(p. 1236) 1969 Vienna Convention

Article 54

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

- (a) **in conformity with the provisions of the treaty; or**
- (b) **at any time by consent of all the parties after consultation with the other contracting States.**

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Bibliography

Capotorti, F., 'L'extinction et la suspension des traités', *RCADI*, 1971-III, vol. 134, pp 417-588

Kontou, N., *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford: Clarendon Press, 1994)

Nahlik, S. E., 'The Grounds of Invalidity and Termination of Treaties', *AJIL*, 1971, pp 736-56

Plender, R., 'The Role of Consent in the Termination of Treaties', *BYBIL*, 1986, pp 133-67

Vamvoukos, A., *Termination of Treaties in International Law* (Oxford: Clarendon Press, 1985)

A. General characteristics

Object and purpose

1. The purpose of Article 54 is to set out a quite obvious rule: the termination of a treaty or the withdrawal of a party may take place if the parties agree to it, whether this agreement is expressly stated in the treaty (Art. 54(a)), or at any other time under any other form (Art.

54(b)). Thus, both paragraphs express the same requirement of consent and (p. 1237) specify when it must be expressed and, with regard to Article 54(a), the form it must take.¹

2. Article 54 belongs to the third section of Part V (Termination and Suspension of the Operation of Treaties) and comes within the long list of Articles of the Vienna Convention dedicated to the total or partial suspension of the effects of a treaty. In a general way, the ILC opted for a long but exhaustive list of potential causes leading to the limitation or extinction of the effects of a treaty. According to the Commission, this exhaustiveness would serve ‘as a safeguard for the stability of treaties’;² an opinion that was both supported and decried in doctrinal writings.³ Leaving aside this controversy, the purpose of the Commission's list of Articles clearly was to preserve the stability of treaties. A close examination of Article 54 also reveals that it is presented more in the form of an adaptation rather than an exception to the *pacta sunt servanda* principle. The first paragraph of the Article simply recalls this principle, and specifies that it applies to the provisions of the treaty governing its termination or the withdrawal of a party. The second paragraph clearly states that an agreement between States that has materialized in a treaty can be undone by another agreement. However, with regard to this second arrangement, the Convention does not impose the formalities required by the treaty itself.⁴ Consequently, the way in which Article 54 was worded tends to reinforce, rather than weaken, the rule established in Article 26.⁵

Customary status

3. Before analysing the customary dimension of Article 54 in detail, it must be emphasized that the practice of the International Court of Justice (ICJ) suggests, to a certain degree, a presumption of conformity of the provisions of the 1969 Vienna Convention with customary rules. The provisions in Part V of the Convention, to which Article 54 belongs, are not an exception to the rule, as shown by the Court's choice of language in the *Gabc'ıkovo-Nagymaros Project* case. Asked to resolve a dispute focused on an issue pertaining to the law of treaties, but unable to apply the 1969 Vienna Convention as such, the Court declared that it:

Has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62.⁶

(p. 1238) The cautious assertion of the customary character of the provisions of the Convention is largely applicable to Article 54.

Article 54(a)

4. Paragraph (a) of Article 54 states that the termination of a treaty or the withdrawal of a party may take place ‘in conformity with the provisions of the treaty’. Thus, Article 54(a) serves as a reminder of the *pacta sunt servanda* rule,⁷ and affirms that this rule applies to the provisions of the treaty governing its termination or the withdrawal of a party. The application of the *pacta sunt servanda* rule to termination and withdrawal was not contested during the *travaux préparatoires* of the Convention. In addition, many members of the Commission stressed the obvious—or useless—character of this provision,⁸ which was even momentarily removed from the project,⁹ only to be finally reinserted for the sake of clarity.¹⁰ Moreover, no State contested this notion during the preparatory phase of the Convention and some even noted its evident character.¹¹ As a simple reminder of the

principle *pacta sunt servanda*, Article 54(a) shares with this principle its recognized customary character.¹²

Article 54(b)

5. Article 54(b) requires the fulfilment of two conditions to terminate a treaty or allow a party to withdraw from it: first, all parties must consent to the termination or withdrawal; secondly, the other contracting States must be consulted. The termination of or withdrawal from a treaty on the basis of Article 54(b) will only take effect after these two conditions have been fulfilled. It seems that concerning termination or withdrawal by consent, the customary rule is only constituted by the first obligation (consent of all States parties). The obligation to consult the 'other contracting States' must essentially be considered a conventional rule.

6. The doctrine generally considers that the obligation to obtain the consent of the totality of parties to a treaty to extinguish its effects originates in the 1871 London Declaration:

it is an essential principle of the Law of the 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 Parties by means of an amicable arrangement.¹³

(p. 1239) 7. Within the framework of a bilateral treaty, the customary character of this rule cannot be challenged. Indeed, the ICJ declared in the *Gabc'ıkovo-Nagymaros Project* case:

The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the Parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. *It would be otherwise, of course, if the Parties decided to terminate the Treaty by mutual consent.*¹⁴

The Court thus affirmed the possibility of extinguishing the effects of the treaty on a supposedly customary basis.¹⁵

8. Concerning multilateral treaties, it may be argued that the consent of a majority of States parties would suffice to terminate the treaty or allow the withdrawal of a party. In fact, the Commission had contemplated this option. However, the discussions show that, at the time, the Commission was working *de lege ferenda*, which indicates the *de lege lata* nature of the unanimous consent rule that the Commission finally decided to retain. Certain members did not hesitate to affirm the customary character of the unanimity requirement.¹⁶ Others opposed the inclusion of this requirement in the Convention,¹⁷ essentially to preserve the evolutionary capability of international law,¹⁸ but abstained from challenging the customary character affirmed by other members. Eventually, the discussions of the Commission resulted in a consensus and the unanimous consent rule was adopted.¹⁹ All States accepted this requirement without question.²⁰ Judging from States' positions in the 1871 London Declaration or the preparation of the Convention, there is no convincing trace in the Commission's debates, or in any other circumstances, of a practice or *opinio juris* militating in favour of a rule less stringent than that of unanimous consent. As such, it can be said that custom requires the consent of *all* the States parties for the extinction of the effects of a treaty or the withdrawal of a party by way of consent.

9. Based on custom, it seems that the consent of all the States parties is not only a *necessary* but also a *sufficient* condition to terminate a treaty or allow for the withdrawal of a party.

(p. 1240) **10.** The Commission had already noted during its *travaux* that in practice there is no trace of a supplementary obligation forcing States parties to consult the 'other contracting States', as envisaged by Article 54(b).²¹ It should be borne in mind that Article 54(b) requires the consultation of the 'other contracting States' to terminate a treaty or allow the withdrawal of a party on a consensual basis. The definition of the 'other contracting States' can be inferred from Article 2 of the 1969 Vienna Convention. The expression 'contracting State' refers to a State which has consented to be bound by a treaty, whether or not the treaty has entered into force.²² The expression 'party' refers to a State which has consented to be bound by a treaty and for which the treaty is in force.²³ In view of the definitions in the Convention, the 'other contracting States' must logically be those which have expressed their consent to be bound but for which the treaty has not yet come into force. The consideration of the 'other contracting States' in Article 54(b) resulted from the justification to an amendment suggested by the Dutch representative who proposed this interpretation of the phrase.²⁴ The president of the Drafting Committee defined the expression in the same terms just before the Plenary Commission approved it,²⁵ and this aspect of the Article was not discussed afterwards.²⁶ Therefore, the expression 'other contracting States' specifically designates the States which have consented to be bound by a treaty but for which its entry into force is not yet effective, for example because the treaty imposes a delay between its ratification and entry into force, or because a State has conditioned the entry into force of the treaty to a prerequisite, such as the realization of an event or the passage of a certain period of time.²⁷

11. As has been emphasized, during its *travaux* the Commission did not come across a practice supporting the customary character of a rule that would consider the opinion of the 'other contracting States' necessary to terminate a treaty. On the contrary, the discussions clearly indicated that an Article requiring the consideration of those States' positions conveyed a new rule.²⁸

12. With regard to termination and withdrawal, the absence of a practice that supports considering the opinion of the other contracting States is not surprising. As will be discussed later, the purpose of Article 54(b) is to cover the cases of termination and withdrawal by way of express or tacit consent. Even if the 'other contracting States' could be consulted as part of a termination or withdrawal process based on express consent (as for example in the case of a negotiation of a new treaty intending to extinguish the effects of (p. 1241) a preceding treaty), it is difficult to imagine how States parties could demand the opinion of the 'other contracting States' as part of a tacit consent, which is based, by definition, on what is left unsaid. Accordingly, a practice in favour of consulting the other contracting States, as part of a termination or withdrawal process based on tacit consent, is not only non-existent but also impossible.

13. With regard to tacit consent, two cases concerning the General Act of Geneva for the Pacific Settlement of International Disputes of 1928 militate in favour of a customary rule requiring only the consent of the parties, without consultation of the other contracting States, to extinguish the effects of a treaty.²⁹ In these two cases, the discussion focused on the obsolescence of the Act, a notion the Commission treated as a termination by way of tacit consent.³⁰ It should be borne in mind that this Act, concluded in 1928, could not be subject to the 1969 Vienna Convention due to its non-retroactive character,³¹ hence the reasoning of the ICJ judges was therefore supposedly based on custom.

14. In the *Nuclear Tests* case, Australia applied to the Court for provisional measures based on Article 41 of the Statute of the Court and, in the alternative, based on Article 33 of the General Act of 1928. In response, France sustained that this Act had fallen into desuetude. The Court finally based the decision on its Statute and did not address the potential desuetude of the Act of 1928. Nevertheless, in their Joint Dissenting Opinion, Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock sustained that the Act of 1928 had not fallen into desuetude because the conduct of *the parties* could not lead to the

conclusion that they had consented to abandon the Act.³² In the *Continental Shelf of the Aegean Sea (Greece v Turkey)* case, Turkey also affirmed that the Act was not in force. Once again, the Court did not respond to this submission directly. Instead, it rejected the application on the basis of a Greek reservation excluding the jurisdiction of the Court in relation to territorial disputes. In their Dissenting Opinion, Judges de Castro and Stassinopoulos took the same position as the four dissenting judges mentioned in the *Nuclear Tests* case.³³ In their decision based on custom, the judges at no time referred to an obligation to consult the other contracting States. As has already been stressed, this obligation is an impossibility in the case of tacit consent.

15. In view of the preceding elements and particularly the absence of concordant practice, it must be understood that, with regard to terminating a treaty or allowing the withdrawal of a party, the customary rule is satisfied by the consent of all States parties. Thus, the obligation to consult the other contracting States—which is essentially of a procedural nature—only constitutes a conventional obligation.³⁴

(p. 1242) B. Terminology

16. The Vienna Convention defines the notions of termination and withdrawal by the effects they produce.³⁵ While the termination of a treaty frees *all* parties from the obligation to continue to execute the treaty, a withdrawal only liberates the withdrawing State in its relation to each of the other parties which remain bound by the obligation to execute the treaty in their mutual relations. The notions of termination and withdrawal are very close, as both are characterized by a suspension of the effects of a treaty. The only difference between the two concepts is the number of contracting parties that will be liberated from the obligation to execute the treaty. Thus, a withdrawal is simply the termination of a treaty limited to one of its States parties,³⁶ which may explain why the Convention treats withdrawal and termination as almost identical.

17. The indirect approach used in the Vienna Convention to define termination and withdrawal has at least two consequences. First, the distinction between termination and withdrawal only makes sense in the case of a multilateral treaty, since in the case of a bilateral treaty, the withdrawal entails the suppression of the obligation to execute the treaty by *all* the parties, effectively becoming an extinction.³⁷ Secondly, the fact that the Convention does not define the phrase ‘termination of the treaty’ but only its effect on the parties leaves a doubt as to the very existence of the treaty after its termination. Does the treaty continue to exist when no State party has the obligation to respect it?

18. This *prima facie* eminently theoretical question has indirectly resulted in the development of a substantial debate within the ILC. The members of the Commission feared that potential parties would be deprived of their option to adhere to a treaty, in the case where only a small number of States had ratified a treaty and then, once they had become parties to it, terminated it. After ‘termination’, other States would not be able to ratify the treaty. Thus, without saying it, the members of the Commission contemplated the term ‘termination’ as meaning the sheer extinction of the treaty. Only Mr Briggs noted that the unsaid postulate of ‘extinction’ of a treaty would not entail consequences in practice:

...If some hundred States participated in a conference to draw up a treaty which only required two ratifications to enter into force...and the two ratifying States agreed to terminate it before any others had had time to ratify...other States which had participated in the drawing up of the treaty could still bring it into force between themselves.³⁸

As a result of this intervention, the other members of the Commission abandoned the issue. In effect, nothing prevents States which are not parties to a terminated treaty from consenting to be bound by it and this must be presumed to be possible. Moreover, the (p. 1243) Convention does not provide that the depositary of the treaty eliminates the option to ratify it once it has been extinguished,³⁹ which also leads to the conclusion that after termination, the treaty continues to exist and may be the object of ratification.

C. Interpretation problems

Termination of and withdrawal from a treaty according to its provisions

19. The obvious character of the obligation set out in Article 54(a) has already been emphasized. This Article does not pose any particular problem of interpretation. As the commentary to the draft Article notes:

The majority of modern treaties contain clauses fixing their duration or the date of their termination or a condition or event which is to bring about their termination, or providing for a right to denounce or withdraw from the treaty. In these cases the termination of the treaty is brought about by the provisions of the treaty itself, and how and when this is to happen is essentially a question of interpreting and applying the treaty.⁴⁰

Does the consent of States parties to the treaty permit derogation from its provisions?

20. There is no doubt that Article 54(a) cannot prevent Article 54(b) from producing effects. The commentary to the final draft of the ILC is clear on this issue:

the Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the Parties to agree together to put an end to the treaty.⁴¹

In the commentary, the ILC insisted on the necessity of obtaining the consent of *all* parties because, unlike a simple modification, the end of a treaty 'necessarily deprives all the parties of all their rights and, in consequence, the consent of all of them is necessary'.⁴²

What form must the consent of the States parties take?

21. The consent of the States parties to terminate a treaty or allow the withdrawal of a party does not require a specific formality. Regardless of its form, the certainty of the consent is what matters.

22. The theory of the '*acte contraire*',⁴³ according to which an agreement can only be terminated by an agreement in the same form or of the same importance, was rejected (p. 1244) from the beginning by the Special Rapporteur.⁴⁴ This initial view was retained in the final commentary of Article 54.⁴⁵ In other words, the consent to extinguish the effects of a treaty or allow the withdrawal of a party *can* be expressed in the form of a treaty, but in no case does this constitute an obligation. For example, the consent may be conveyed by express acceptance of all the parties, without necessarily being stipulated in written form.⁴⁶

23. Does a tacit agreement suffice to extinguish the effects of a treaty or allow the withdrawal of a party? According to the Commission, there is no doubt that this is possible and it is even the reason which was preferred for retaining the term 'consent' rather than 'agreement' in Article 54(b):

...the phrase 'by consent of all the Parties', which had been substituted for 'by agreement of all the Parties', was intended to take account of tacit consent to terminate—one of the main causes of obsolescence and desuetude.⁴⁷

24. The emergence of a new customary rule can serve as an element of proof to establish the (tacit) consent of States to extinguish the effects of a treaty, as was affirmed by the arbitral tribunal in the case regarding the delimitation of the continental shelf between the United Kingdom and France (also known as the *English Channel Arbitration (United Kingdom v France)*). France submitted that the Geneva Convention on the Law of the Sea had fallen into desuetude because of the emergence of a new customary rule spurred by the UN Conference on the Law of the Sea. The tribunal rejected this submission and affirmed that the grounds to terminate a treaty were not based on custom per se, but on the fact that custom denoted the consent of the parties to end the treaty.⁴⁸

The role of the 'other contracting States'

25. The role of other contracting States regarding termination or withdrawal was widely debated by the Commission.⁴⁹ Although they are not parties to the treaty, these States have the right to become parties to it, and in some way have an 'interest in the matter' when the extinction of the effects to a treaty or the withdrawal of a party are being contemplated.⁵⁰ For this reason, the Commission focused on draft Articles offering the best protection possible to this 'entitlement to become party to the treaty'. However, after the *travaux* of the Commission ended, none of the protection systems devised by the Special Rapporteur were retained.⁵¹

(p. 1245) **26.** In the end, the Article submitted to the Vienna Conference by the Commission only required considering the opinion of the States parties. Nevertheless, during the Conference the Netherlands proposed an amendment requiring the '*consent* of all the contracting parties' to end a treaty.⁵² After resending the draft Article to the Drafting Committee, the term 'consent' was replaced by 'consultation'. The president of the Committee justified this change as follows:

The Drafting Committee considered that the contracting States which were not yet Parties to the treaty should not have the power of decision in connexion with the termination of a treaty, but that they had the right to be consulted in the matter.⁵³

27. The Plenary Commission approved the Article after this statement without further comments.⁵⁴ This Article was never again debated during a plenary session.⁵⁵ Consequently, the Convention establishes that the 'other contracting States' do not have the power to prevent the termination of the treaty or the withdrawal of a party, but they must be consulted on this issue.

VINCENT CHAPAUX *

Footnotes:

1 The ILC itself insisted that both parts of the Article were conceptually similar and that essentially, they only differed in form: 'A treaty may be terminated or a Party may terminate its own participation in a treaty by agreement in two ways: (a) in conformity with the treaty, and (b) at any time by consent of all the Parties'. Commentary to Art. 51 (future Art. 54), *YILC*, 1966, vol. II, p 249, para. 5.

2 See *YILC*, 1966, vol. II, p 236.

3 See, for a reminder of these debates, I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984), pp 162–4.

4 See *infra* para. 21 ff.

5 See M. E. Nahlik, ‘The Grounds of Invalidity and Termination of Treaties’, *AJIL*, 1971, p 746 and B. Simma, ‘Termination and Suspension of Treaties, Two Recent Austrian Cases’, *GYBIL*, 1978, p 74.

6 *Gabc'ıkovo-Nagymaros Project (Hungary/Slovakia) case*, *ICJ Reports 1997*, p 38, para. 46. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports 1971*, p 47, para. 94 and *Fisheries Jurisdiction (United Kingdom v Iceland)*, Jurisdiction of the Court, Judgment, *ICJ Reports 1973*, p 18. See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, *ICJ Reports 1980*, pp 95–6, paras 45–50. In the *Gabc'ıkovo-Nagymaros Project* case, Slovakia upheld that many provisions of the Vienna Convention reflected customary law, particularly for Part V of the text (*Gabc'ıkovo-Nagymaros Project case, supra*, p 37, para. 43). On the overall customary character of Part V of the Convention, see also the Dissenting Opinion of Judge Barwick, *Nuclear Tests (Australia v France)*, Judgment, *ICJ Reports 1974*, p 404.

7 See M. E. Nahlik, *supra* n 5, p 746 as well as the Report of the Sixth Committee to the General Assembly, 4 November 1965, A/6090, para. 39.

8 See the interventions of Messrs Ago (*YILC*, 1963, vol. I, 688th meeting, p 96, para. 44), Castrén (*YILC*, 1966, vol. I, Part One, 829th meeting, p 49, para. 77), Tounkine (*ibid*, para. 86), Verdross (*ibid*, para. 89). See also the opinion of the Drafting Committee delivered by Mr Waldock (*ibid*, 836th meeting, p 96, para. 53).

9 *YILC*, 1966, vol. I, Part One, 841st meeting, p 122, para. 9.

10 *YILC*, 1966, vol. I, Part Two, 876th meeting, pp 224 and 225, paras 91 ff.

11 The US representative noted that ‘[t]he rules laid down in draft Article 38 (*termination of a treaty under its provisions*), on the other hand, appeared self-evident and might well be omitted from a simplified convention’ (Sixth Committee, 784th meeting, A/C.6/SR.784, para. 31). The evident character of the Article was also noted by Finland, Israel, Sweden (*YILC*, 1966, vol. II, p 25), and the Special Rapporteur (*YILC*, 1966, vol. I, Part One, p 41, para. 66). The doctrine also sometimes qualified this provision as obvious. See R. Plender, ‘The Role of Consent in the Termination of Treaties’, *BYBIL*, 1986, p 136.

12 See, in this work, the developments on the customary status of the *pacta sunt servanda* principle, in the commentary on Art. 26.

13 Excerpt of the London Declaration of 17 January 1871 as cited by D. J. Bederman, ‘The 1871 London Declaration, Rebus sic Standibus and a Primitivist View of the Law of the Nations’, *AJIL*, 1988, p 3. Mr Jiménez de Aréchaga referred to this declaration to affirm the need of consent of all the parties to end a treaty (*YILC*, 1966, vol. I, Part Two, 861st meeting, p 130, para. 8). The London Declaration was signed by the United Kingdom, France, Italy, Russia, Turkey, and Northern Germany.

14 *Gabc'ıkovo-Nagymaros Project case, supra* n 6, p 37, para. 114, emphasis added.

15 See para. 3 of the commentary to the present Article.

16 See interventions of Messrs Ago (*YILC*, 1963, vol. I, 690th meeting, para. 95) and de Luna (*ibid*, para. 96). Both agreed that, concerning the issue of termination, the unanimity requirement constituted a *de lege lata* rule. See also the intervention of Mr Amado who, while pleading that the Commission make a declaration *de lege ferenda* and abandon the

unanimity requirement, recognized *a contrario* the customary character of this requirement (ibid, para. 97).

17 On the perverse effects of the unanimity requirement, see Messrs Ago (ibid, para. 32), and de Luna (ibid, para. 38). For real opposition to this principle, see Messrs Bartoš (*YILC*, 1963, vol. I, 709th meeting, para. 46) and Amado (*YILC*, 1963, vol. I, 690th meeting, para. 97). See also the debates of the 861st meeting (*YILC*, 1966, vol. I, 861st meeting, pp 129 ff). For another opposition to the principle, see F. Capotorti, 'L'extinction et la suspension des traités', *RCADI*, 1971-III, vol. 134, p 511.

18 See eg the intervention of Mr Bartoš in *YILC*, 1963, vol. 1, 709th meeting, p 242, para. 46.

19 Commentary on Art. 51 (future Art. 54), *supra* n 1, para. 3.

20 See the intervention of Mr Jiménez de Aréchaga (*YILC*, 1966, vol. I, Part Two, 861st meeting, para. 51) who reported on the comments of States on the draft Articles.

21 Commentary on Art. 51 (future Art. 54), *supra* n 1, p 74.

22 Vienna Convention, Art. 2(1)(f).

23 Vienna Convention, Art. 2(1)(g).

24 Intervention of Mr Geesteranus (Netherlands), United Nations Conference on the Law of Treaties, Official Records, Summary Records, 1st session, 58th meeting, p 335. See also the Report of the Committee of the Whole, United Nations Conference on the Law of Treaties, Official Records, Official Documents, 1st and 2nd sessions, Art. 51.

25 Intervention of Mr Yasseen, United Nations Conference on the Law of Treaties, Official Records, Summary Records, 1st session, 81st meeting, p 476, para. 6.

26 See United Nations Conference on the Law of Treaties, Official Records, Summary Records, 2nd session, 20th plenary meeting, p 108, para. 82.

27 See examples given by Mr Geesteranus (the Netherlands), United Nations Conference on the Law of Treaties, Official Records, Summary Records, 1st session, 58th meeting, pp 335 ff

28 On this issue, see the debates within the Commission in *YILC*, 1963, vol. I, 690th meeting, pp 107 ff; particularly the intervention of Mr de Luna, who noted that the Commission would recognize a new rule by requiring the consideration of the opinion of States that were not yet parties to the treaty (p 113, para. 81).

29 *International Legislation*, vol. IV, Washington, Carnegie Endowment for International Peace, 1931, pp 2529 ff.

30 '...while "obsolescence" or "desuetude" may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the Parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty' (Commentary on Art. 39, *YILC*, 1966, vol. II, p 237, para. 5).

31 See commentary on Art. 4 of the Convention in this work.

32 *Nuclear Tests (Australia v France)*, *ICJ Reports 1974*, p 338. See also N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford: Clarendon Press, 1994), p 26; R. Plender, *supra* n 11, p 141.

33 *Aegean Sea Continental Shelf*, *ICJ Reports 1978*, p 62 (de Castro) and p 72 (Stassinopoulos). See the same type of problem in the *Trial of Pakistani Prisoners of War*, Interim Measures of Protection, *ICJ Reports 1973*, p 328.

34 R. Plender, *supra* n 11, p 152.

35 See commentary on Art. 70 of the Convention in this work. Capotorti defines termination in the following terms: 'Le phénomène que l'on décrit par "extinction d'un traité" consiste en ce qu'un traité cesse d'être en vigueur, ou plus exactement que des effets prennent fin', F. Capotorti, *supra* n 17, pp 451-3. See, leading towards the same conclusion, G. Morelli, 'Observations', *Ann IDI*, 1967-I, vol. 52, pp 290-1.

36 The formula mildly modifies Gaetano Morelli's statement that 'a withdrawal is simply the termination of a treaty limited to one of its contracting States' in G. Morelli, *ibid*, p 291. Morelli wrote before the adoption of the Vienna Convention. Nowadays, the expression 'contracting States' must be replaced by 'States party' as shown by the terminology used in Art. 70(1).

37 Article 70, which addresses the consequences of the termination of a treaty, only discusses the consequences of withdrawal from a multilateral treaty.

38 Intervention of Mr Briggs (*YILC*, 1966, vol. I, Part One, 829th meeting, p 49, para. 82). The representative of Luxembourg wanted expressly to include in the Convention the option to ratify a terminated treaty (*YILC*, 1966, vol. II, p 312).

39 Vienna Convention, Art. 77. The summary of practice of the Secretary-General as depositary of multilateral treaties (available at: (<http://untreaty.un.org/English/overview.asp>)) does not provide that the Secretary-General must eliminate the possibility of ratifying a terminated treaty either.

40 Commentary on Art. 51 (future Art. 54), *supra* n 1. For other examples, see *ibid* as well as the document the United Nations dedicates to final clauses of multilateral treaties (available at: (<http://untreaty.un.org/English/FinalClauses/english.pdf>)).

41 Commentary on Art. 51 (future Art. 54), *supra* n 1.

42 *Ibid*.

43 The theory of the '*acte contraire*' is based on a telegram addressed to the French government by the British Secretary of State for External Affairs in 1907, according to which the revocation of an agreement required an instrument 'of equal authority and solemnity'. Reported by A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp 506-7. See also Ch. Rousseau, *Droit international public* (Paris: Sirey, 1953), p 206. Both authors noted that a contrary practice existed. See also F. Capotorti, *supra* n 17, p 492.

44 See the commentary on Art. 18 in *YILC*, 1963, vol. II, p 71. Overall, the Commission welcomed the idea of the Special Rapporteur. See, nonetheless, for a contrary opinion, the intervention of Mr Yasseen (*YILC*, 1963, vol. I, 690th meeting, p 108, para. 22).

45 Commentary to Art. 51 (future Art. 54), *YILC*, 1966, vol. II, p 249. See also, for developments on this issue, I. Sinclair, *supra* n 3, p 183.

46 F. Capotorti, *supra* n 17, p 491.

47 *YILC*, 1966, vol. I, Part Two, 876th meeting, p 225, para. 94.

48 *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf, Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978*, *ILM*, 1979, vol. 18, p 417, cited by R. Plender, *supra* n 11, p 142.

49 For a precise definition of the 'other contracting States', see para. 10 of the commentary on this Article.

50 The expression is taken up from the commentary on Art. 51 (future Art. 54), *supra* n 1, para. 4. See also the intervention of Mr de Luna who specified that States not yet parties to a treaty did not have the right, but an 'expectation of rights', concerning the treaty (*YILC*, 1963, vol. I, 690th meeting, para. 37).

51 See the commentary on Art. 18 in *YILC*, 1963, vol. II, pp 70 and 71 (for an overview of the systems envisaged by the Special Rapporteur); *YILC*, 1963, vol. I, 690th meeting, pp 107 ff and *YILC*, 1966, vol. I, Part One, 829th meeting, p 45 (for the commentaries of members of the Commission); commentary on Art. 51 (future Art. 54), *supra* n 1, para. 5 (for the evolution of the opinion of the Commission on this issue); *YILC*, 1966, vol. II, pp 28-31 (for the reaction of States).

52 Intervention of Mr Geesteranus (the Netherlands), United Nations Conference on the Law of Treaties, Official Records, Summary Records, 1st session, 58th meeting, p 335, paras 4 and 5, emphasis added.

53 Intervention of Mr Yasseen, United Nations Conference on the Law of Treaties, Official Records, Summary Records, 1st session, 81st meeting, p 476, para. 4.

54 United Nations Conference on the Law of Treaties, Official Records, Summary Records, 1st session, 81st meeting, p 476, para. 6,

55 United Nations Conference on the Law of Treaties, Official Records, Summary Records, 2nd session, 20th plenary meeting, p 108, para. 82.

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