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(p. 1585) 1969 Vienna Convention

Article 70
Consequences of the termination of a treaty

1. **Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:**

(a) **releases the parties from any obligation further to perform the treaty;**

(b) **does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.**

2. **If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.**

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A. General presentation of the Article

Object and purpose

1. Article 70 aims to determine the consequences of the termination of a treaty, whatever the causes and content of the treaty. The term ‘consequence’ is here used as a synonym of ‘effect’; it constitutes the perfect counterpart to the term ‘cause’, which is frequently used in domestic law to qualify the motive justifying the end of a contract. As for the term ‘termination’, the Convention uses it to cover all cases where a treaty comes to an end. This, in any case, is its meaning in the heading of Section 5 of Part V of the Convention, which sets out a series of possible causes for terminating or suspending a treaty. Article 70 necessarily refers to causes thus defined and cannot include any extra cause for, according to Article 42(2) of the Convention, ‘[t]he termination of a treaty…may take place only as a result of the application of the provisions of the treaty or of the present Convention’.[1] The phrase specifying ‘under its provisions or in accordance with the present Convention’ in the first sentence of Article 70(1) merely confirms this requirement.

2. The purpose of Article 70 therefore seems clearly circumscribed by the interpretation of the terms of its title. However, there is one cause of termination that Article 70 does not cover: the emergence of a new peremptory norm (Art. 64). The latter is indeed mentioned in the list of causes in Section 3 of Part V, and the consequence of its existence is the fact that the treaty ‘terminates’. However, its effects are foreseen in Article 71(2) (‘In the case of a treaty which becomes void and terminates…’). The content of the latter Article moreover displays an undoubted kinship with Article 70. The Article devoted to the consequences of termination (Art. 70) is therefore flanked by two Articles devoted to the consequences of invalidity (Arts 69 and 71), for in reality, Article 71 deals, on the one hand, with a lack of validity *ab initio* and, on the other hand, with an acquired lack of validity leading to the end of the treaty. The two aspects have been grouped together because they both result from the effects of peremptory norms in international law, that are in conflict with a treaty. However, there was a time, during the *travaux* of the ILC, when the possibility was raised of dealing with the second aspect in the context of an Article devoted to the ‘legal consequences of the termination of a treaty’,[2] an option that could have enabled grouping (p. 1587) together the current Article 70 and the current Article 71(2). The choice ultimately made manifests a certain awkwardness regarding the exact nature of the phenomenon envisaged in Article 64. Placing it in Section 3 rather than in Section 2 of Part V was tantamount to defining it more as a situation of termination than a situation of

invalidity, but dealing with its consequences in a specific Article instead of in Article 70 amounted to mixing the two aspects up once again. In our opinion, this remorse was judicious and should even have gone further, for invalidity and termination remain two distinct notions. The first sanctions the (initial or acquired) lack of validity of an act, whilst the second fixes the limit *ratione temporis* of the opposability of an act. In the first case, the act is reputed never to have had legal force, whilst in the second, this force is not brought into question but only limited in time. We can therefore consider that Article 70 should be reserved to termination alone, while Article 71(2) corresponds more closely to the acquisition of a lack of validity. The particularity of this type of invalidity, the motive of which appears *a posteriori*, implies indeed that it is necessary strongly to attenuate the usual effects of invalidity, to the point that the latter become quite comparable to those of termination. However, the analogy remains relative, for we cannot account for the exception of Article 71(2)(b) *in fine* in the context of termination.[3]

3. Other Articles in the Vienna Convention should also be taken into consideration to determine the object of Article 70. Several general clauses in Section 1 of Part V, other than Article 42(2) already mentioned, are particularly significant. Article 43, first of all, aims at ensuring the continuation of obligations contained in the treaty when a State is moreover subject to them under other norms from international law. It is true that this transversal clause, relevant for the consequences of invalidity as well as those of termination or suspension, avoids repetition.[4] It is nevertheless appropriate to bear the clause constantly in mind when examining the consequences of the termination of a treaty, notably in the case of denunciation of or withdrawal from codification conventions. The situation also arises whereby certain denunciation clauses suggest a continuation of obligations independently of the fate of the convention or agreement.[5] Article 44, on the other hand, sets out the principle of the inseparability of the clauses of a treaty, notably for the purpose of termination, all the while allowing exceptions whereby certain clauses may be considered as separable from the rest of the treaty. The partial termination of a treaty is therefore, in theory, possible, in accordance with either Article 60 of the Convention (termination as a consequence of breach) or the third paragraph of Article 44. An attentive reading of Article 60 makes it possible to conclude that inseparability (p. 1588) relates only to suspension and not termination; the only ambiguity concerns multilateral treaties, but we will see that this is not really a problem of separability ‘of the provisions of a treaty’, in other words, its content, but rather the separability of the convention or agreement itself.[6] As for Article 44, paragraph 3 authorizes the termination of certain clauses of a treaty only if (a) they are separable with regard to their application, (b) they do not condition the acceptance of the whole of the treaty, and (c) application of the remaining clauses is not ‘unjust’ (sic). It is possible to identify the effects of this paragraph with those of the clauses in Article 70 foreseeing exceptions to the cessation of the effects of the terminated treaty.[7] The joint reading of Articles 44(3) and 70(2) should thus allow uncertainty about the effects of separability in the context of termination to be quelled by shifting questioning to the problem of the consequences of termination. However, this interpretation seems to be extremely debatable, as the continuation of certain obligations under Article 70 arises from justifications entirely different from those that can be put forward for dividing up a treaty and the effects are not necessarily identical. We will therefore examine this issue in greater detail later in this commentary.[8]

4. Finally, a considerable share of problems in the law of treaties has been excluded from the field of application of the Convention by Part VI. According to Part VI, the provisions of the Convention do not prejudge questions that may arise ‘in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States’ (Art. 73) and are ‘without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's

aggression' (Art. 75). Several classic issues concerning the termination of treaties are thus left unresolved.[9] The first issue, that of State succession, allows envisaging the disappearance of one of the parties to a treaty as a cause of the latter's termination, subject to an automatic succession in respect of the treaties or certain treaties. The ILC considered that it was not possible to deal with this issue unless the topic of State succession was codified.[10] The second issue is that of the effects of war on treaties, seemingly ruled out by a supposed specificity of law during wartime as opposed to law during peacetime in the area of treaties.[11] The third issue relates to an act of aggression attributable to a State, which would justify the United Nations Security Council imposing the termination of certain treaties while acting within the scope of Chapter VII of the Charter[12]—but we know that this situation has never yet arisen. On top of these exclusions, it may also be fitting to add certain customary law rules on termination, if indeed the Vienna Convention allows them to subsist. Obsolescence, abrogative custom, the execution of the treaty, and renunciation are thus apparently causes of termination that can still be envisaged.[13]

(p. 1589) **5.** In fact, it may well be that none of the cases mentioned *supra* may have any implications for the *consequences* of termination, since they only relate to potential extra *causes* of termination. It even seems that rules contained in Article 70, insofar as they set up a uniform regime for the consequences of termination, may well apply in all cases, whether or not the causes are included in the Vienna Convention on the Law of Treaties. This obviously would be an extension by analogy of their scope of application, and not an effect of the Vienna Convention itself.[14]

Principles

6. As in the case of many other provisions in the Convention, rules relating to the consequences of termination are suppletory; an application of the *lex specialis* principle is evident here. It is common for treaties to include denunciation clauses, notably for setting out time limits for giving notification. Certain treaties furthermore foresee the extension of certain effects of the treaty beyond the date at which it ends for the denouncing party. The ILC *travaux* cite the example of Article XIX of the Convention on the Liability of Operators of Nuclear Ships of 25 May 1962, according to which responsibility for a nuclear incident will continue for a certain time after the termination of the Convention for ships the operation of which was licensed while the Convention was in force.[15] The denunciation provision of the Geneva Conventions (Art. 63/62/142/158) also illustrates this case; it specifies that if the denouncing party is a State involved in a conflict, the denunciation 'shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated'. Moreover, the situation may arise where denunciation of a treaty produces effects on other treaties on the strength of convention provisions included in the latter. Article 15 of the European Convention on the Suppression of Terrorism thus provides that '[t]his Convention ceases to have effect in respect of any Contracting State which withdraws from or ceases to be a member of the Council of Europe…'. Conversely, the denunciation of a basic treaty can bring consequences upon a group of related treaties, such as additional protocols,[16] or a body of complementary agreements.[17] Provisions of the Vienna Convention do not limit the autonomy of the will of parties in this domain.

7. Rules relating to the consequences of termination are based on the principle of non-retroactivity.[18] In this way, they differ from those relating to the consequences of invalidity, which relies on the opposing principle. This is justified by the general idea that invalidity operates *ex tunc*, whereas termination operates *ex nunc.* [19] However, retroactivity (p. 1590) is a more complex principle to apply as it necessitates a reconstruction of the past and a setting-up of arrangements for numerous exceptions to take into account acts carried out in good faith. As non-retroactivity allows these difficulties to be eluded, a certain sense of self-evidence dominated the body of *travaux* on the topic.[20] Therefore, from 1963 onwards, the ILC considered, in its commentary on the draft Article corresponding to current Article 70,

that the consequences of termination did not ‘pose any particular problem’.[21] The content of Article 70 apparently is essentially the fruit of simplicity and common sense.[22] We however posit that problems in inter-temporal law are equally significant when non-retroactivity is the principle followed, insofar as it is not necessarily easy to distinguish which legal situations derive from before or after the event precisely situated in time that constitutes the termination of the treaty (*infra* Section B). In addition, the desire to produce a rule applicable to all types of treaties is in part hampered by diversity in form and content (*infra* Section C). Finally, litigation relating to a terminated treaty raises specific problems due to the overlapping of provisions on content and provisions on procedure (*infra* Section D).

Customary status

8. It is possible to assert that the rules set out by Article 70 have, at the very least, acquired a customary character due to their codification. The principles were in fact established from the time of Sir Gerald Fitzmaurice's Second Report,[23] and while the terms subsequently evolved, it was above all with the aim of achieving greater precision. The draft Articles on the consequences of invalidity and termination formulated by Sir Humphrey Waldock in 1963 have therefore been progressively improved and restructured, following commentaries made by States and then the Drafting Committee.[24] The draft Article adopted by the ILC 1966 has not subsequently undergone any substantial modification. During the Vienna Conference, only the French version evolved on a minor point, in such a way as to make it conform more closely to the original in English.[25] The only amendment submitted was not maintained during the second session.[26] Only several criticisms with regard to the imprecision of sub-paragraphs (a) and (b) in paragraph 1 were expressed by certain delegates, without calling into question the general approach and without having any consequences during voting time.[27] Article 70 was (p. 1591) therefore adopted unanimously during a plenary session.[28] Following the procedure, the *opinio juris* thus appeared sufficiently widespread for an ensuing custom to almost entirely crystallize.

9. As far as the situation preceding the ILC *travaux* is concerned, the existence of a custom is cause for greater debate. On the one hand, practice seems to have been extremely limited.[29] On the other hand, while the principle of non-retroactivity was accepted in broad terms, its technical implementation gave rise to doubts and confusion that only codification was able to resolve. The apparent self-evidence or supposed logic of the solution, noted on many occasions, would doubtless today act as an argument to resolve contentions regarding treaties terminated before the Vienna Convention came into force—and this despite the non-retroactive character of the latter (Art. 4). This probably explains the assertion made in no uncertain terms by the arbitration tribunal convened for the *Rainbow Warrior* case, according to which:

> certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty, and Article 70, which deals with the legal consequences of the expiry of a treaty.[30]

10. Moreover, the content of Article 70 can be presented as flowing from a general principle of law, that of legal security, existing in all systems of domestic law and transposable to the international legal order. The necessary work of adapting this notion to the law of treaties was accomplished by the drafters of the Vienna Convention, and led to the establishment of non-retroactivity as a principle for Articles 4, 28, and 70. Legal security can thus appear as a foundation independent of rules expounded in those Articles,

a fact that may notably allow extending the scope of Article 70 to the consequences of terminations of treaties for causes not envisaged by the Convention.[31]

B. Problems in inter-temporal law

11. The rule developed in sub-paragraphs (a) and (b) of Article 70(1) aims at resolving problems in inter-temporal law triggered by the end of a convention relationship. It seems that the formulation settled on results from the fusion and evolution of two theories: that of the distinction between executory stipulations and executed stipulations, on the one hand, and that of acquired rights, on the other hand. Indeed, Sir Gerald Fitzmaurice took the opportunity to link the two by presenting both as 'general principles' guiding the consequences of the termination of a treaty.[32] To provide further explanations, each of these theories will here be presented in turn.

(p. 1592) Distinction between executory stipulations and executed stipulations

12. The distinction between executory stipulations and executed stipulations is at the heart of the work carried out by the Special Rapporteur Sir Gerald Fitzmaurice on the topic of the consequences of termination. It appears to stem directly from an earlier distinction between executed treaties and executory treaties, notably highlighted by Arnold McNair in his lecture at the Hague Academy of International Law in 1928. Lord McNair gave the following explanation to define an executed treaty:

> When a treaty tending to create or transfer rights relating to property or personal status has been applied, or when a treaty tending to recognise the existence of such rights has duly come into force, it is considered as 'executed'; that is, it has established or recognised a permanent state of affairs; its object has been achieved and no future breakdown in the relationships between contracting parties can have the result of undoing what it has done.[33]

As for executory treaties, these are 'those that create an obligation to act or to refrain from acting, on an ongoing and permanent basis'.[34] The distinction was then sharpened by Fitzmaurice who applied these adjectives to obligations imposed by treaties and for 'all corresponding rights, faculties and benefits'.[35] Recourse to the term 'stipulation' allows breaking down the content of the treaty into a series of complex rights/faculties/obligations that belong to either the 'executed' or the 'executory' category. Executed stipulations continue to produce effects; executory stipulations cease to produce effects upon termination.

13. In fact, the adjectives 'executed' and 'executory' remain approximate, which is no doubt why they were abandoned in the version adopted by the ILC in 1963. Indeed, in treaty stipulations, there are both obligations the execution of which is limited to specific moments in time—instantaneous obligations—and obligations the execution of which extends over a long-term period—continuous obligations.[36] For instantaneous obligations, termination can only put an end to an obligation to execute if the whole execution must take place at a date following the end of the treaty. For continuous obligations, termination can only produce an effect for the part that remains to be executed after the date marking the end of the treaty. However, termination does not in any way affect any instantaneous obligations entirely or partially executed or which should have been executed by this date, nor does it affect the continuous obligations already executed or which should have been executed by this date. It is in this way that one should understand a more precise formula, used in another context by Sir Gerald Fitzmaurice, who stated that 'the termination of a treaty…can only affect the continuing obligations, and cannot per (p. 1593) se…undo or reverse anything effected by any clause of an executed character in the treaty'.[37] Nevertheless, the wording in the Vienna Convention is also somewhat confused, as the

‘obligation further to perform the treaty’ from which paragraph 1(a) of Article 70 releases the parties upon termination corresponds more exactly to the end of the obligation to execute that should be executed following the date when the treaty terminates. Otherwise, the obligation to execute the provision is still present, for the treaty has not lost its validity.[38] It may therefore be preferable to refer to the notions of facts and situations that belong to the past or have been accomplished (*facta praeterita*), facts that are ongoing (*facta pendentia*), and facts that are yet to come (*facta futura*).[39] The rule in Article 70(1) thus appears as a combination of a principle of non-retroactivity and a principle of immediate effect. On the one hand, non-retroactivity, present in sub-paragraph (b), targets everything that belongs to the past—for instantaneous obligations—or has been already accomplished—for continuous obligations. Immediate effect that ends the obligation to execute, present in sub-paragraph (a), targets everything that is ongoing—for continuous obligations—or to come—for both continuous as well as for instantaneous obligations.

14. Illustrations of executed stipulations were provided by Sir Gerald Fitzmaurice himself. According to Fitzmaurice, a payment that has been made in conformity with a treaty does not become reimbursable; a contention settled by a treaty cannot be re-opened; a border limit cannot be questioned anew; the cession of a territory cannot be cancelled out.[40] Strictly speaking, the last two examples are debatable, for it is perfectly possible to imagine a situation whereby a territorial treaty is terminated by a new territorial agreement established by the same parties which modifies an established border and proceeds to a new cession or retrocession of territory. It is difficult to analyse territorial obligations in any way other than as continuous obligations.[41] As a result, only the part preceding the termination is ‘executed’, whereas the part following the termination is merely ‘executory’. The obligation can nevertheless persist beyond the termination, but independently of the treaty, due to rules of customary international law that stabilize the territorial divisions effected: rules dealing with territorial title, the principle of effectiveness, the principle of *uti possidetis*. [42] This was precisely the position of the International (p. 1594) Court of Justice (ICJ) in the *Territorial Dispute* (*Libya v Chad*).[43] On the other hand, the payment of a sum of money constitutes a typical example of instantaneous obligation; it therefore corresponds entirely with the notion of executed stipulation.

15. The case of the *Rainbow Warrior*, in the developments relating to the two French agents in Hao Atoll, provides an example of termination in respect of a continuous obligation. According to the terms of the agreement of 9 July 1986 between France and New Zealand, Major Mafart and Captain Prieur were to stay on the island for a period of three years starting from the date of their transfer. This transfer took place on 22 July 1986, a date marking the beginning of an obligation which, according to the arbitration tribunal, could not be suspended; the obligation was therefore to terminate on 22 July 1989, and along with it, the treaty itself. The contention concerned the anticipated return of the two agents to France. This therefore emerged as a relatively simple case where the obligation, while continuous in nature, was limited in time with a set beginning and end, and the end of the obligation corresponded to the end of the treaty's lifetime. The Tribunal made its pronouncement after 22 July 1989, the date on which the treaty terminated. Despite the termination, and in conformity with Article 70(1)(b) of the Vienna Convention, it ruled that ‘France continues to be liable for the breaches which occurred before 22 July 1989’.[44] The tribunal furthermore established, on this occasion, a link between the notion of continuous obligation in the context of the law of treaties and that of continuous violation in the context of the law of responsibility.[45]

16. Other than these examples, it is possible to use the denunciation clauses of certain treaties to define the effects of Article 70, although the latter is suppletory. For this to occur, such clauses must be sufficiently clearly attached to the Article and provide complementary and non-derogatory elements. In this regard, Article 317(2) of the United Nations Convention on the Law of the Sea is particularly interesting, as this convention

creates an international organization and foresees legal relationships with private persons. According to the Article:

> A State shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a Party to this Convention, nor shall the denunciation affect any right, obligation or legal situation of that State created through the execution of this Convention prior to its termination for that State.

Far from providing a waiver, the first part of the clause appears more like an explanation and an adaptation of the second part which echoes the rule set out by the Vienna Convention. It is common to find similar clauses covering financial and contractual aspects.[46]

(p. 1595) **17.** This being the case, in complex situations, new negotiations and technical agreements may prove necessary to determine in detail the consequences of a treaty's termination. Hence, following the denunciation by Switzerland of the 1878 Monetary Convention constituting the Latin Monetary Union—a denunciation that led to the dissolution of the latter—Belgium, France, Greece, Italy, and Switzerland adopted a monetary convention in 1885 to deal with unresolved questions (currency stock and monetary surpluses).[47] The conclusion of agreements could even emerge as a legal obligation, resulting from the principles of legal security and good faith. This, in any case, was the opinion officially supported by France during the 1885 Conference.[48] It seems that Sir Gerald Fitzmaurice also bore this in mind in one of his reports,[49] although this idea did not subsequently appear in the various draft Articles that the ILC elaborated. Certain withdrawal clauses foresee an obligation to act in this manner when the withdrawal from an international organization threatens to raise significant technical problems.[50]

18. It is clear that the phenomenon analysed here bears no relationship to the separability of the treaty,[51] for this is a case where certain obligations *included* in the treaty rather than part of the treaty are perpetuated as a legal agreement. It is perfectly possible for the treaty as a whole to terminate without having any effect on executed stipulations—this, moreover, is the function of Article 70(1). In addition, for continuous obligations, those Articles that should be executed before termination and that must no longer be executed afterwards are one and the same. It is therefore not possible to explain the fact that these clauses have until then generated legal rights, obligations, and situations by using the notion of the separability of a treaty, as it would otherwise be necessary to conclude that they must continue to generate rights, obligations, and situations—a flagrant contradiction of Article 70(1). However, it can theoretically be envisaged that part of a treaty persists in a situation such as that described in Article 44(3).

Acquired rights

19. The expression ‘acquired rights’ does not appear as such in the Convention, but was present in the draft of the clause proposed by Sir Humphrey Waldock in 1963. At that time, the equivalent of Article 70(1)(b) provided that termination ‘shall not affect the validity of any act performed or any right acquired under the provisions of the treaty prior to its termination’ (draft Art. 28(1)(b)). The wording was not retained by the Drafting Committee which, amongst other modifications, substituted ‘acquired rights’ with the term ‘situation’ (‘resulting from the application of the treaty’),[52] to which would subsequently be added the adjective ‘legal’. It seems that the cause may have been a debate relating to the establishment of such rights, as the 1963 commentary mentions ‘different opinions’ on this issue. As no answer was arrived at on this ‘theoretical point’, the ILC considered that (p. 1596) the clauses of the Article simply followed ‘logically from the legal act of the termination of the treaty’.[53] It is no doubt possible to state that obligations persist in the

application of convention norms, even though the treaty as a legal act may have terminated. This explains why the formerly constituted rights of parties remain perfectly valid.

20. The evolution of vocabulary in the draft, presented as almost harmless, nevertheless has an extremely significant consequence: it pushes aside the most delicate point, that of the rights of third parties. Although the issue had been foreseen by Sir Gerald Fitzmaurice,[54] it was deliberately cast aside as the final draft only mentions the legal rights, obligations, or situations of 'the parties'. The 1966 Commentary from the ILC furthermore underlines that the clause 'is not in any way concerned with the question of the "vested interests" of individuals'.[55] Nevertheless, pushing aside the problem does not necessarily mean denying the existence of such rights. Instead, the difficulty comes from the fact that the relevance of the theory of acquired rights when envisaging the effects of a treaty on the rights of individuals remains subject to discussion.[56]

21. The protection of goods possessed by foreigners has long appeared as the example par excellence, or even the sole example, of acquired rights.[57] The Permanent Court of International Justice (PCIJ) was called on to deal with this issue on several occasions and notably stated the existence of a 'principle of respect for acquired rights' in general international law.[58] The question has been raised whether the specific context of State succession does not define and limit the scope of the *dicta* of the PCIJ on the subject.[59] However, it has been pointed out that in former decisions, the US Supreme Court did not hesitate to mention acquired rights in a different context. In the 1817 case *Chirac v Chirac*, the Opinion of the Court delivered by Judge Marshall stated generally that '[i]f a treaty or any other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right' (relating to the Franco-American Accord of 30 September 1800).[60] In the 1823 case *Society for the Propagation of the Gospel v New Haven* where the issue of the termination of the 1783 Treaty of Peace between Great Britain and the United States as a result of war was discussed, the Opinion delivered by Judge Washington specified that '[i]f real estate [was] purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate'.[61] More recently, the ICJ has also referred, albeit implicitly, to acquired rights in its judgment on *The Northern Cameroons* of 2 December 1963, in the context of the end of a trusteeship agreement. It cites 'property rights' as an example of rights obtained upon the basis of a treaty and consolidated before the latter terminates.[62] This approach amounts to presenting, as in some earlier doctrine, property rights thus established as real rights or (p. 1597) *jus in rem.* [63] However, controversies dating from the decolonization period have greatly weakened the scope of these precedents. The general evolution of international law since the codification of the law of treaties seems to be marked by the quest for a new equilibrium, suggesting that the principle of acquired rights, all the while inspiring certain practices, does not engender any formally restrictive obligation.[64] It can further be said that the function of a 'principle' in a system of law is not necessarily to bring rigid normative consequences. In this particular case, the principle only seems to urge States to manage, as far as possible, the consequences of termination in such a way as to protect the rights of individuals. Today, the two domains particularly affected are international investment law and international human rights.

22. Contemporary law on foreign investments has reconstructed, on a conventional rather than a customary basis, a regime that is highly favourable for foreign investors. The termination of a bilateral investment convention may therefore raise problems for the continuation of rights granted in analogous terms.[65] Short of a response provided by the Vienna Convention, analysis of practice can offer several elements contributing to an answer. One can observe that these conventions often contain clauses aiming to soften the consequences of termination, rather than to confirm the existence of acquired rights. In this way, the model used by the United States for its network of bilateral investment conventions provides that investments constituted before the denunciation will benefit from

protection '[f]or ten years from the date of termination'.[66] The same applies for other convention networks, with variable durations generally ranging from five to 20 years. This carry-over effect, also qualified as a 'remanence effect',[67] pleads in favour of an orthodox interpretation of such agreements, excluding the doctrine of acquired rights under the treaty. The prolongation of favourable effects for the investors relies on conventional practice and derives from the drafting of specific clauses. It goes without saying that customary rules may also prolong certain obligations, notably in the domain of expropriation, but this would be to move out of the area of the law of treaties—even if the investment in question was made at the time when the treaty was in force and/or was placed for a certain time under its protection.

23. The theory of acquired rights has furthermore inspired certain international organs dealing with the protection of human rights in recent times. The latter have had the tendency to describe State obligations corresponding to recognized rights for (p. 1598) individuals as 'objective obligations', which notably allows them to interpret the law of treaties in a way that favours the inseparability and permanence of the said obligations. Therefore, in favour of inseparability, the Inter-American Court of Human Rights considered, in the cases *Ivcher Bronstein* and *Constitutional Court (Competence)*, that Peru could not limit itself to denouncing acceptance of the Court's compulsory jurisdiction without denouncing the whole of the American Convention[68]—unlike the situation regarding acceptance of the compulsory jurisdiction of the ICJ, for example. In favour of permanence, one of the most daring positions was established by the Human Rights Committee, in its General Comment no. 26 of 8 December 1997 following the denunciation of the Covenant by the Democratic People's Republic of Korea on 23 August 1997.[69] According to the Committee:

> The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view…that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

The Committee concluded that North Korea could not denounce the Covenant, in the absence of an explicit clause authorizing it to do so. Here, the rights of individuals appear close to real rights.

24. Conceiving human rights on an international level as the rights of third parties placed under an interstate guarantee can be technically helpful.[70] It is nevertheless doubtful that the consequences would be identical to those under the previous theory of acquired rights. While there undeniably exists a tendency to favour the continuation of rights of individuals, this tendency, for the moment, remains limited to problems raised by State succession and the separability of groups of treaties. Thus, denunciations of the optional Protocol to the International Covenant on Civil and Political Rights by Jamaica, Trinidad and Tobago, and Guyana, which relied on a denunciation clause, did not raise any objections.[71] Individuals can no longer invoke the protection offered previously. In the same way, the denunciation by Trinidad and Tobago of the American Convention of Human Rights on 26 May 1998, uncontested, clearly had the effect of depriving individuals of the rights recognized in this agreement. This is no doubt counterbalanced by the fact that this State remains bound by the American Declaration of the Rights and Duties of Man and by protection mechanisms established within the Organization of (p. 1599) American States (OAS); however, it should

be pointed out that the continuity of rights is thus only assured selectively, pragmatically, and partially.[72]

25. Other categories of third parties are not targeted any further by paragraph 2 of Article 70. The Convention nevertheless offers the starting point for a solution in relation to the rights and obligations of third States. Taking into consideration the clauses of Section 4 of Part III of the Vienna Convention ('Treaties and Third States'), such third States, when they are subject to rights and obligations, are not in reality considered as genuine third parties but as parties to a collateral agreement. In this way, it is tempting to apply Article 70 as such to each of these relationships and to conclude that there is no need to distinguish between the rights, obligations, and legal situations of parties and those of third States.[73] However, in doing so, we would fail to pay attention to the most important legal problem, that of the consequences of the termination of the main treaty on any collateral agreements dependent upon it. Two interpretations of this situation can be envisaged. The first consists in conceiving each collateral agreement as binding a third State to the group of States parties to the main treaty. As the existence of this group depends on the said treaty, the termination of the latter would have the effect of terminating all collateral agreements. This set of collateral agreements would obviously be placed under the safeguarding of customary international law, in particular when there are territorial treaties or treaties relating to the internationalized spaces in question. The other interpretation consists in considering the cluster constituted by the main treaty and various collateral agreements as a multilateral convention construction. In this case, the effects of the termination of the 'main' legal relationship would be far more uncertain, for they would depend on the content of the convention provisions.[74] Therefore, 'third parties' would no longer be able to demand the respect of rights corresponding to the continuous obligations of States that cease to be 'parties' to the main treaty. In the same way, in cases where only rights have been conferred to 'third parties', all legal relationships would cease to continue if all States withdrew from the main treaty, as it is they that bear the corresponding duties. However, cases where third parties bear duties as well as rights, or cases where there is only one State party to the main treaty, are problematic. It seems conceivable to imagine that in these cases, the whole convention does not come to an end, but only certain legal relationships within this whole.[75]

(p. 1600) C. Uniformity of effects and diversity of treaties

Diversity due to the number of parties

26. The second paragraph of Article 70 takes into account the diversity of treaties resulting from the number of parties, as it is dedicated to multilateral treaties. The category of 'plurilateral' treaties was briefly mentioned during the ILC *travaux*, without any particular definition, before disappearing, probably as a result of the difficulty of distinguishing it from that of multilateral treaties from a purely classificational point of view.[76] It was again the aim of a French amendment proposal during the first session of the Vienna Conference, calling for usage of an expression equivalent to 'restricted multilateral treaty'. This was a matter of creating an exception to the provisions of paragraph 2, implying the termination of the whole treaty in the case where one of the parties withdraws. The analysis of this proposal was referred to the second session, during which the amendment was finally withdrawn.[77] Once again, determining the number of parties beyond which a plurilateral treaty became multilateral was extremely complex. From the time when it was established that the sole criterion of distinction to be retained in the Convention was the number of parties, only two categories could be envisaged: bilateral treaties and multilateral treaties.

27. Whatever the cause of termination invoked, the bilateral treaty necessarily appears to require termination for both parties.[78] Curiously, the Vienna Convention has not taken the trouble to specify this, unlike, for example, the draft Convention proposed by Harvard jurists in 1935.[79] However, one can consider that this is an implicit result of the drafting and structure of Article 70. As the second paragraph deals only with multilateral treaties, the first paragraph can be interpreted as either having a general application or as dealing specifically with bilateral treaties. Whatever the case, the legal construction imagined in the first paragraph functions on the basis of a bilateral treaty situation—and we will see *infra* that in fact this is the case of the whole Article. Nevertheless, mention is consistently made of *parties*, never of *the party* to a treaty. The choice of the plural underlines that the treaty is conceived as a meeting of at least two wills, therefore as a relationship, and not as a juxtaposition of isolated wills. As a result, a treaty which has no more than a single party would not be worthy of being considered as a treaty, nor the single party as a party.

28. For multilateral treaties, the principle is apparently reversed: denunciation or withdrawal does not have the effect of terminating the treaty for all parties. According to Charles Rousseau, denunciation of a multilateral treaty can be analysed ‘comme un *retrait* qui, sans mettre fin au traité lui-même, fait simplement sortir l'Etat dénonçant du régime juridique établi par le traité, lequel continue de lier les autres signataires’.[80] However, this distinction cannot be conceived as a true opposition, despite the suggestion of the author who argues that a collective treaty cannot be reduced to a ‘schéma civiliste d'un contrat (p. 1601) international’.[81] Indeed, paragraph 2 of Article 70 has the effect of deconstructing a multilateral treaty into a network of bilateral treaties linking States parties two by two. The rule mentioned *supra* for bilateral agreements thus becomes applicable, that is, the convention relationship terminates entirely as the State that withdraws is one of the parties. However, other bilateral convention relationships are not affected, thus the subsistence of the multilateral treaty itself. In a certain manner, one can speak of the separability of the treaty, but this relates to separability of the form of the treaty and not its content, which is envisaged in Article 44 of the Convention. The Vienna Convention furthermore proceeds to an analogous deconstruction for the mechanism of reservations or for the *exceptio non adimplenti contractus*, with several adaptations absent here.[82]

29. This solution remains both extremely conventional and privatist in inspiration. It is founded on the understanding of a treaty as a strictly *reciprocal* instrument, as well as on a complete indifference as to the content of the treaty. As a result, the denunciation of, or withdrawal from, a multilateral treaty by a State party is conceived more precisely as an ‘extinction subjectivement limitée’.[83] By drawing a multilateral treaty into a ‘bilaterizable’ form, Article 70(2) reinforces rather than weakens the purpose of uniformity of the effects of termination. As a result, it appears that only a clause specifically included in the treaty or an agreement between all parties will necessarily lead to the end of the whole multilateral treaty. The permanence of legal relationships between the States that remain parties must be presumed.[84] This is the case even when the number of parties falls below the number necessary for the entry into force of the treaty, in conformity with Article 55 of the Vienna Convention. As for the case where, following successive denunciations, the number of parties falls below two, this constitutes a false exception: the end of the treaty is certainly inevitable in this case, but this is explained by the fact that before the final denunciation, there only remains a single bilateral convention relationship.

Diversity due to treaty content

30. The uniform approach described *supra* can nevertheless raise problems in the case where the multilateral treaty draws close to the category previously called “treaties-statutes” (*traités-lois*), as distinguished from “treaties-contracts” (*traités-contrats*), that is, when the specificity is material and no longer linked to the number of parties. Drawing a parallel with Articles of the Vienna Convention relating to reservations and *exceptio non adimplenti contractus* is, in this regard, enlightening, for exemptions with respect to the

general rule are mentioned here, allowing account to be taken of the material specificity of certain treaties. However, no equivalent is found in relation to the consequences of termination. Sir Gerald Fitzmaurice had nevertheless elaborated a material classification of obligations and treaties which, according to him, should lead to different consequences as a result of termination. His classification was founded on three categories: reciprocal (an ordinary case), interdependent, and integral. According to the Special Rapporteur, the characteristic of the interdependent obligation is that a breach of a treaty obligation 'by one party will justify a corresponding non-performance generally (p. 1602) by the other parties' and that of the integral obligation is that it is 'self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others'.[85] The consequence was that for multilateral treaties, the whole treaty would not come to an end when the treaty was a reciprocal type, whereas it would for interdependent types and termination would only concern the State ceasing to participate in the treaty when it was an integral type.[86] The idea was completely abandoned following the nomination of Sir Humphrey Waldock as Special Rapporteur, as this change corresponded with a reorientation of the ILC *travaux* towards a convention draft and no longer a simple guide for the benefit of States. Rightly or wrongly, the material classification of treaties would be considered overly complex to be accepted in a compulsory instrument.[87] The absence of the slightest development regarding the consequences of termination would subsequently appear either as an incitement to the drafting of adapted denunciation clauses or as a regrettable lacuna.

31. For treaties containing interdependent obligations, the silence of Article 70(2) prevents one from imagining the termination of the whole treaty. It is possible that the attempt to introduce a derogation rule for the category of plurilateral treaties—mentioned in paragraph 26 *supra*—may also have been an attempt to maintain the category of interdependent treaties, in the endeavour to find a formal criterion equivalent to the material criterion. However, in practice, the link between the limited number of parties and the interdependence of obligations is far from systematic. As a result, a rejection of the proposal was preferred and one is led to conclude that if States are concerned with underlining the interdependent character of obligations undertaken, they should take the precaution of introducing a specific denunciation clause in the treaty. This clause should provide for the end of the whole treaty in case of denunciation by one of the parties.[88] In the absence of such a clause, the treaty will continue to bind the States that remain parties, even if its content could *a priori* imply that it were an interdependent treaty—this is notably the case of certain defence, neutralization, or disarmament agreements.[89] Technical difficulties will then undoubtedly arise, for example for treaties which distribute resources or income by defining fixed amounts or quotas. Respect for the principles of legal security and good faith should then lead to renegotiation between State parties in such a way that either the whole treaty is terminated or its content reorganized.

32. As far as integral obligations are concerned, it is more difficult to accept the contingency of parties or an obligation to negotiate, so great is the specificity of the effects of denunciation. Indeed, in this case, denunciation produces effect only towards the denouncing State and not towards the other States.[90] This idea is perfectly illustrated (p. 1603) by the Articles in the 1949 Geneva Conventions relating to denunciation (Art. 63/62/142/158), which state that 'denunciation shall have effect only in respect of the denouncing Power'. As a consequence, parties to an armed conflict will continue to bear the same obligations as before, including vis-à-vis nationals of that State. Far from being explained by the presence of a specific clause, such an effect seems inherent in the structure of these obligations which do not establish a transactional balance of the *do ut des* type, but rather a legal regime common to the parties. The effect limited to the denouncing party alone should therefore be considered as generally applicable, despite the

silence of Article 70 of the Vienna Convention on this aspect. This particularly affects treaties relating to humanitarian law and human rights.

D. Consequences on litigation

Continuation of litigation

33. A dispute on the execution of a treaty continues even after the termination of this treaty. As pointed out by Judge Hersch Lauterpacht in his Opinion attached to the Advisory Opinion of the ICJ on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, this is a classic situation in judicial practice.[91] The ICJ moreover implicitly recognized in the *Northern Cameroons* case that in theory there is no reason to reject requests on rights and obligations resulting from an extinct treaty.[92]

34. Justification of this continuation relies on an understanding of the dispute as a legal situation. In this regard, Lord McNair asserted, in his Opinion attached to the judgment in the *Ambatielos* case *(Preliminary Objection)*, that 'such claims acquire an existence independent of the treaty whose breach gave rise to them'.[93] Disputes may therefore fall under Article 70(1)(b), as a 'legal situation of the parties'. This idea was explicitly upheld by the arbitration tribunal constituted in the *Rainbow Warrior* case, which drew on both the Opinion of Lord McNair and Article 70(1)(b) of the Vienna Convention, to conclude: '[c]onsequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches'.[94]

35. However, the *Northern Cameroons* case seems to offer an exception to the principle of the continuation of litigation. Even though the case does not deal with a treaty between States but between a State and an international organization—in this case, the trusteeship agreement for the Territory of the Cameroons binding the United Nations to the United Kingdom—it deserves to be analysed here. The Court considered that while it had jurisdiction to adjudicate the dispute, its judgment would be devoid of any practical consequence as it could not have the effect of bringing the expired trusteeship agreement back into force. Moreover, a declaratory judgment on this agreement would (p. 1604) have been all the more difficult given that neither the United Nations nor Nigeria were parties to the dispute before the Court. As a result, according to the Court, handing down a decision unlikely to 'affect existing legal rights or obligations of the parties' would be contrary to the 'essentials of the judicial function'.[95] In our opinion, such a conclusion seems difficult to generalize. Where the reasoning of the Court is unacceptable is when it appears to justify a *non liquet* by the fact that a treaty is extinct.[96] Indeed, the solution lies more in the highly specific nature of the contention.[97] For this was not a case of litigation about responsibility but a type of objective dispute, purely declaratory, relating to the validity of a territorial transfer.[98] Furthermore, Cameroon was not a party to the extinct agreement, which raised the unresolved problem of the rights of third parties. Finally, trusteeship agreements are distinguished by a *sui generis* character. These uncertainties and the desire not to question a territorial settlement that had been executed no doubt explain the conclusion reached by the Court. In a more classic context of State responsibility, the arbitration tribunal to which the case of the *Rainbow Warrior* was referred did not hesitate to settle the dispute although the treaty had terminated and, consequently, could not be brought back into force. Moreover, the award visibly did not affect any right or *existing* obligation, as the obligation in question was not only continuous but, further, had lapsed at the same time as the treaty itself. The simple declaration of violation was nevertheless considered as a form of possible redress, in conformity with the rules of general international law.[99]

Transitory effect of dispute-settlement clauses

36. It is appropriate to make a distinction according to whether the object of the dispute is the application of the treaty or its extinction itself. The second case can certainly also relate to the application of the treaty when the latter includes a denunciation clause and terminates through the application of this clause. Nevertheless, such problems can be assimilated with the case where the treaty terminates in conformity with the general rules of the law of treaties.

Disputes relating to the application of a treaty

37. For disputes relating to the way in which a convention provision has been applied, the principle appears to be the following: the jurisdiction of the court established on the basis of an extinct treaty persists, on condition that the seizure of jurisdiction takes place before the date of the termination. Beyond this date, the matter cannot be validly referred to the court in question even if the contention relates to past events. Here again, (p. 1605) the *Northern Cameroons* judgment can be invoked as a precedent.[100] One way to justify such an effect, independently of any specific convention stipulation, consists in relying once again on Article 70(1)(b) and considering regular seizure of jurisdiction as a 'legal situation', constituted at a time when the treaty was in force and ongoing. The relevant date would therefore be that at which the matter was referred to the court and not that at which it gave its verdict. Dispute-settlement clauses therefore benefit from an extension of their effects on a transitory basis, in such a way as to settle litigations already underway. Certain conventions, establishing an independent dispute-settlement procedure, have incorporated this principle in their denunciation clause. Article 12(2) of the Optional Protocol to the International Covenant on Civil and Political Rights thus specifies that '[d]enunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Article 2 before the effective date of denunciation'. Similarly, Article 31(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 provides that denunciation shall not 'prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective'. Article 127 of the Statute of the International Criminal Courts deals more broadly with all procedures underway, as withdrawal shall not affect 'any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective' nor 'the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective'.

38. As for the invocation of a dispute-settlement clause following the date when the treaty containing it has terminated, this issue was discussed in the *Ambatielos* case. Greece wished *directly* to use the Treaty of Commerce and Navigation of 10 November 1886 concluded with the United Kingdom, which a treaty of 16 July 1926 concluded between the same parties and having the same object had terminated. It relied on the fact that the contention related to a legal situation constituted under the influence of the 1886 Treaty. Moreover, a declaration joined to the 1926 Treaty provided that the dispute-settlement clause of the 1886 treaty would remain applicable to 'claims on behalf of private persons based on the provisions of the…Treaty of 1886'. The Court considered that:

> But for the Declaration, Article 32 of the Treaty of 1926, which brought that Treaty into force upon ratification, might, in the absence of any saving clause, have been regarded as putting the Treaty into full operation so as completely to wipe out the

> Treaty of 1886 and all its provisions, including its remedial provisions, and any claims based thereon.[101]

(p. 1606) This passage certainly includes a double ambiguity. On the one hand, the wording is too general as the 1886 treaty is not ‘wiped out’ for those of its clauses that were executed before 16 July 1926; on the other hand, it is inaccurate as far as ‘claims’ are concerned, for, as seen *supra*, these do not disappear with the treaty.[102] However, the termination of clauses on ‘remedial provisions’ seems pertinent in this particular situation, given that Mr Ambatielos only made a claim from 1933 onwards. Hence, the Court very rightly considered that in the case of a dispute between parties on this matter, it was only *mediately* that the procedure of the Treaty of 1886 could be set in motion, by reason of the reference made by the declaration attached to the Treaty of 1926.[103] The survival of the procedure for dispute settlement established by the Treaty of 1886, for claims following the treaty's extinction and relating to anterior facts, is therefore due to the inclusion of a special convention provision.

39. A prolonged effect can result from certain provisions relating to denunciation, which aim at going beyond the ‘classic’ transitory effect of procedural clauses, linked to the date at which a matter is referred to an adjudicatory body. This is the case of Article 72 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965. The provisions of the Convention continue to apply if the State has consented to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) prior to the denunciation. In this regard, it is appropriate to recall that the State's consent can not only be given in a contract or an arbitration agreement concluded with the investor, a national from another State that is a party to the Convention, but also in a separate and abstract manner, in a national law or a treaty dealing with the protection of investments, in which case the investor's consent intervenes in a second stage, during the request for conciliation or arbitration.[104] As Article 72 mentions the consent ‘of one of them’, the dispute-settlement mechanism established by the Convention can be activated as long as the legal deed containing the consent of the denouncing State or an investor who is a national of this State is itself in force, and as long as the other conditions relating to the jurisdiction of the ICSID are fulfilled. As for dispute-settlement clauses appearing in bilateral investment treaties themselves, these can be invoked in the same way as the treaties' other clauses, insofar as the treaty termination clause provides for a carry-over effect that protects investments made before the date of the end of the treaty.[105]

40. Cases of prolonged effect also exist in international human rights law. Thus, denunciation of the European Convention on Human Rights (Art. 58(2)) or the American Convention on Human Rights (Art. 78(2)) can not unbind a State from the obligations set out in these conventions with respect to ‘any act’ accomplished previously and constituting a violation of these obligations. Reference to ‘obligations contained in [/under]’ the Convention seems to include procedural obligations, which would allow matters to be (p. 1607) referred to organs established by these treaties when contentions arise regarding acts preceding the denunciation, that is on the body of continuous obligations concerning the respect of human rights that have been—or should have been—executed. However, until now, practice has remained limited. The claim made against Greece by three other States parties on 10 April 1970 does not constitute a conclusive illustration because the Greek withdrawal, notified on 12 December 1969, only took effect on 13 June 1970. This was therefore once again a situation where referral of the matter to the organ in question preceded the date when the treaty terminated for this State. As a result, the *ratione temporis* jurisdiction of the European Commission of Human Rights raised no difficulties,[106] which moreover confirms the principle previously outlined *supra* in paragraph 37. It is more interesting to note that the European Court subsequently exercised its jurisdiction in a case where a violation of the Convention was ongoing and had commenced before the

withdrawal in question.[107] The fact that Greece had re-adhered to the Convention in the meantime is no doubt essential, all the more because it did not raise any preliminary objection in this regard, thus allowing the Court to keep to the declaration that the grievances dealt with ‘a continuing situation, which still obtains at the present time’.[108] However, the Commission was more precise in its report by ruling out the period between 13 June 1970 and 28 July 1974, the date of Greece's re-adherence.[109] Only the effect of the denunciation clause allows explaination of the Commission's jurisdiction over acts preceding 1970.

41. Legal theorists have sometimes seemed sceptical as to the practical scope of a prolonged effect of dispute-settlement clauses, whether regarding court proceedings underway or the implementation of even more ambitious convention clauses. Indeed, the precedent of the Greek withdrawal from the Council of Europe is hardly encouraging, as the European Commission essentially rejected examination of the case due to the attitude of the Greek government in refusing to participate in the procedure.[110] As for the non-compliance by Trinidad and Tobago with conservatory measures issued by the Inter-American Court in death-sentence cases examined subsequent to that State's denunciation of the American Convention on Human Rights, it is all the more worrying that the OAS General Assembly did not deem it useful to react.[111] However, these clauses target a fundamental objective, namely that of dissuading a State from denouncing a treaty in order to escape a condemnation it deems to be inevitable. All possible efforts are thus welcome to encourage the institutions in question to entirely fulfil their functions. In this regard, it is fitting to add that the ICJ has frequently been confronted with fairly similar situations, following withdrawals by States of the acceptance of its compulsory jurisdiction. If one admits that the mechanism in Article 36(2) of the (p. 1608) Statute of the Court deals with a convention relationship, this relationship will terminate upon the unilateral denunciation of the declaration of acceptance.[112] In these instances, continuation of the procedure has never raised difficulties for cases referred to the Court before the denunciation.[113] The Court itself has pointed out the existence of a principle supporting this approach in the case of the *Right of Passage Over Indian Territory (Preliminary Objections).* [114] The fact that some of these States may have decided no longer to participate in the procedure was not considered as being of a nature to interrupt the legal proceedings either.

Disputes relating to treaty termination

42. Disputes relating to the validity of the termination of a treaty constitute a highly specific category. The legal problem raised, particularly complex, is that of a contested termination, or that of the effects of a unilateral denunciation that raises the objection of one or several other parties. According to Sir Gerald Fitzmaurice, ‘a purported, invalid or irregular “termination”…can, in itself, have no effect on the legal existence of the treaty, or on the legal force of the obligation’.[115] Following this logic, the treaty therefore does not terminate and questioning on the fate of procedural clauses is useless. However, this opinion does not seem so simple to put into practice, as the whole difficulty resides in determining who can validly pronounce on the regular or irregular nature of the termination. In the absence of the intervention of an impartial third party, doctrine preceding the Vienna Convention appeared to accept the idea that a contested termination may have immediate effects. Conversely, Article 65 of the Vienna Convention supports the maintenance of the treaty in force in this situation.[116] However, this is an innovative clause the customary character of which is, to say the least, far from established.[117] When the parties to the dispute are not parties to the Vienna Convention, or when the dispute precedes the entry into force of the Vienna Convention, the problem therefore remains intact.

(p. 1609) **43.** To resolve the problem, case law tends to state the existence of a widened transitory effect, even a form of permanence for compromissory clauses.[118] In the case of the *Appeal Relating to the Jurisdiction of the ICAO Council*, India declared that due to violations attributable to Pakistan, the Chicago Convention and the Transit Agreement were no longer in force between the two States. The possible suspension or termination of these treaties with respect to India thus threatened also to paralyse the clause attributing jurisdiction to the ICJ to examine the case. The Court nevertheless declared itself to have jurisdiction, for:

> If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—i.e., whether it has been validly terminated or suspended.[119]

The Court also underlined that accepting the idea of the inoperative character of dispute-settlement clauses would amount to systematically depriving them of any utility, whenever the object of the dispute relates to the validity of the termination—or suspension—of the treaty containing them.[120] The same reasoning was followed in the cases of *Fisheries Jurisdiction* and *United States Diplomatic and Consular Staff in Tehran*.[121] One can note in passing that such a justification would have been useless if the Court had considered that, in the context of customary law, unilateral denunciation had no effect on the whole treaty as long as it remained contested.

44. This solution, while appearing fairly spontaneously as a result of the tight interweaving of procedural and substantive clauses, is a little delicate to justify. A first interpretation would come to including in the 'legal situation' constituted by the dispute, the procedure allowing it to be resolved, as it is impossible to make a clear-cut decision on the issue of jurisdiction without analysing the content of the dispute. A second interpretation would consist of identifying here one of the rare cases of treaty separability: in this case, when doubt hangs over the fate of the whole convention, dispute-settlement clauses are maintained in force. This is possible insofar as continuing to apply these clauses appears as a 'just' solution—to paraphrase Article 44(3)(c) of the Vienna Convention. It is understandable that an institution representing justice and wishing effectively to exercise its judicial role may be led to conclude in this way. It is also a reasonable interpretation of the law of treaties.

HERVÉ ASCENSIO *

Footnotes:

1 It can also be said that termination by virtue of the clauses of the treaty is foreseen by the Vienna Convention itself (Art. 54(a)), which makes the clause partially redundant.

2 Title of Art. 53 in *YILC*, 1963, vol. II, p 216. Paragraph 2 provided the following:

> If a treaty terminates on account of its having become void under Article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3 *Contra*, F. Capotorti, 'L'extinction et la suspension des traités', *RCADI*, 1971-III, vol. 134, pp 458–9. The author admits that the expression 'becomes void and terminates' contained

in Art. 64—and therefore Art. 71(2)—is ‘ambiguë’ and that this language is ‘critiquable’. He nevertheless concludes that:

> De toute façon, on reste en dehors du domaine de la nullité, puisque la conséquence normale de l'hypothèse prévue à l'article 64 est celle de la cessation des effets du traité *ex nunc*, et non pas *ab initio*, et le cas où la nouvelle norme impérative a une répercussion sur les situations acquises reste exceptionnel.

4 The rule appeared in relation to termination alone in para. 4 of draft Art. 53 (the future Art. 70) in *YILC*, 1963, vol. II, p 216.

5 eg Art. 317(3) of the United Nations Convention on the Law of the Sea (‘The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention’), or Art. 63/62/142/158 of the 1949 Geneva Conventions (denunciation ‘shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience’).

6 See *infra* Section C.

7 F. Capotorti, *supra* n 3, p 460.

8 See *infra* para. 18.

9 These issues had been raised by Sir Gerald Fitzmaurice in his Second Report, A/CN. 4/107, *YILC*, 1957, vol. II, p 20.

10 See the Report of the ILC in *YILC*, 1963, p 3, and 1966, p 9, as well as the analysis by F. Capotorti, *supra* n 3, pp 437–8.

11 Ibid, pp 439–50.

12 See the comment of the delegate of Poland during the Conference, 23rd meeting of the 2nd session, A/CONF.39/11/Add.1, p 136.

13 This view is supported by F. Capotorti, *supra* n 3, p 447, relying on the last paragraph of the preamble (‘the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention’) to limit the effect of Art. 42(2), an interpretation that in our opinion seems difficult to sustain.

14 For more details on exclusions, notably regarding the evolution of international law governing the latter, we refer to the corresponding commentaries on Articles in this present work.

15 Sir Humphrey Waldock, Second Report on the Law of Treaties, A/CN.4/156 and Add.1–3, *YILC*, 1963, vol. II, p 94. See also the commentary on draft Art. 53 (current Art. 70) by the ILC in *YILC*, 1963, vol. II, p 216, subsequently taken up in the commentary on draft Art. 66 (current Art. 70) in *YILC*, 1966, vol. II, p 265.

16 eg Art. 25(3) of the United Nations Framework Convention on Climate Change: ‘Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party’.

17 eg Art. 15(1) of the Agreement Establishing the World Trade Organization: ‘Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements’.

18 F. Capotorti, *supra* n 3, p 456; G. E. do Nascimento e Silva, ‘Le facteur temps et les traités’, *RCADI*, 1977-I, vol. 154, pp 279–83.

19 F. Capotorti, *supra* n 3, p 457.

20 Sir Humphrey Waldock, Second Report, *supra* n 15, p 94.

21 *YILC*, 1963, vol. II, p 216 (commentary on draft Art. 53).

22 See also A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), p 303, for whom the rules in question were put forward ‘somewhat obviously’.

23 Second Report of Sir Gerald Fitzmaurice, A/CN.4/107, *YILC*, 1957, vol. II, esp. p 67.

24 See Sir Humphrey Waldock, Second Report, *supra* n 15, pp 93–4; draft Art. 53 in the 1963 ILC Report, *YILC*, 1963, vol. II, pp 216–17; Sir Humphrey Waldock, Sixth Report on the Law of Treaties, A/CN.4/186 and Add.1–7, *YILC*, 1966, vol. II, pp 55–7; draft Art. 66 in the 1966 Report of the ILC, *YILC*, 1966, vol. II, pp 265–6.

25 Sub-paragraph (a) from para. 1 of the French version, originally ‘libère dès lors les parties de l'obligation d'exécuter le traité’, became ‘libère les Parties de l'obligation de continuer d'exécuter le traité’—a preferred rendering of ‘any obligation further to perform the treaty’. On this point, see the comments from the Greek delegation, Official Records, 1st session, 75th meeting, p 487, para. 4.

26 This was an amendment submitted by France, relating to *restricted* multilateral treaties (on this topic, see *infra* Section C). See Official Records, Reports of the Plenary Commission, p 212, paras 611–17, and pp 269–70, paras 121–8.

27 Criticisms were expressed by France, Greece, the United States, and Spain, Official Records, 1st session, 75th meeting, pp 486–7, paras 1–8.

28 Adoption by 101 votes versus 0 (Official Records, 2nd session, 23rd meeting, p 135).

29 The rare examples on this topic, cited by Lord McNair in ‘La terminaison et la dissolution des traités’, *RCADI*, 1928-II, vol. 22, pp 463–537, deal with the consequences of termination due to war, a domain excluded from codification. As for the *travaux* of the ILC, they exclusively mention denunciation clauses in certain treaties, whereas Art. 70 is suppletory. Problems in practice all seem essentially to relate to the legality of motives invoked for the termination of a treaty, ie the legality of causes of termination.

30 *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX, p 251, para. 75.

31 See *supra* para. 4.

32 Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), vol. I, pp 403–4. This work is a compilation of commentaries published in the *BYBIL* between 1950 and 1963.

33 Lord McNair, *supra* n 29, pp 496–7, on the effects of war on treaties. Original French text:

> Lorsqu'un traité tendant à créer ou à transférer des droits relatifs aux biens ou se rapportant au statut personnel a été appliqué ou lorsqu'un traité tendant à la reconnaissance de l'existence de tels droits est dûment entré en vigueur, il est considéré comme ‘exécuté’; c'est-à-dire qu'il a établi ou reconnu un état de fait permanent; son objet est réalisé et aucune rupture ultérieure des relations entre les parties contractantes ne peut avoir pour conséquence de défaire ce qu'il a fait.

34 Ibid, p 498. Original French text: ‘ceux qui créent une obligation de faire ou de ne pas faire, de nature continue et permanente’.

35 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 35, paras 1–3.

36 On the general importance of the distinction between instantaneous phenomenons and continuous phenomenons in inter-temporal law, see M. Sørensen, ‘Le problème dit du droit intertemporel dans l'ordre international’, *Ann IDI*, 1973, vol. 55, pp 35–6, para. 38. We reason in terms of obligations per commodity, following the Special Rapporteur.

37 Sir Gerald Fitzmaurice, *supra* n 32, p 403.

38 See esp. F. Capotorti, *supra* n 3, p 457:

> un traité éteint n'équivaut pas à un traité rayé du monde des phénomènes juridiques: ce qui est arrivé historiquement reste, même juridiquement, un fait accompli, si la validité du traité n'est pas mise ne cause'. To designate this phenomenon, the author uses the expression 'extinction partielle du traité. (ibid, p 460)

39 See esp. P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public* (Paris: LGDJ, 1970), pp 231 and 278 ff. The author deals mainly with inter-temporal problems encountered at the time a treaty enters into force, but it seems that the analysis can be transposed to the end of a treaty.

40 Sir Gerald Fitzmaurice, *supra* n 32, pp 403–4.

41 See the interesting observation by G. Scelle in *Précis de droit des gens*, Part II (Paris: Sirey, 1934), p 420, regarding territorial treaties:

> on les prend généralement pour des traités contrats, sous prétexte qu'ils s'exécutent par une sorte de *prestation* matérielle que l'on veut considérer comme définitive.…Ils n'aboutissent nullement à des prestations, car les Etats ne sont pas propriétaires du territoire…

The author goes on to describe them instead as treaty laws, the effects of which can therefore cease upon the end of the treaty.

42 See however the case—in our opinion, of little relevance in the context of the law of treaties—of the Franco-British position regarding Romania as recalled by the French representative at the 100th session of the Council of the League of Nations in 1938: as Transylvania and Bessarabia had been associated with Romania in the same treaty as that granting rights to minorities on Romanian territory, attacks carried out against Jewish minorities by the Romanian government could lead to the termination of the treaty and therefore the corresponding territorial titles. The legal notion implicitly present was visibly that of servitude, little accepted in international law. This precedent is nevertheless interesting from the point of view of the creation of customary rules protecting minorities.

43 *ICJ Reports 1994*, p 37, para. 72, and p 40, para. 76.

44 *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX, p 266, para. 105.

45 Ibid, para. 105: ‘If the breach was a continuous one…, that means that the violated obligation also had to be running continuously and without interruption’.

46 eg Art. 127(2) of the Statute of the International Criminal Court: ‘A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued’.

47 CTS, vol. 1878, p 340.

48 On this topic, see A.-C. Kiss, 'L'extinction des traités dans la pratique française', *AFDI*, 1959, pp 784–5.

49 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 35, para. 6: in the absence of a clause in the treaty on the subject, questions raised by termination '*must* be the subject of a separate agreement between the parties' (emphasis added).

50 eg Art. 53 of the 11 October 1985 Convention Establishing the Multilateral Investment Guarantee Agency, dedicated to the 'rights and duties of States ceasing to be members': 'the Agency shall enter into an arrangement with such State for the settlement of their respective claims and obligations. Any such arrangement shall be approved by the Board'. Here, the organ established by the treaty acts in the name of all the States that remain parties.

51 See *supra* para. 3.

52 *YILC*, 1963, vol. II, p 216.

53 Ibid.

54 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 20.

55 *YILC*, 1966, vol. II, p 265.

56 See generally, P. Tavernier, *supra* n 39, pp 233–53.

57 D. Bindschedler, 'De la rétroactivité en droit international public', *Mélanges Guggenheim* (Geneva: Faculty of Law of the University of Geneva/IUHEI, 1968), p 190.

58 PCIJ, Series A, no. 7, *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, 25 May 1926, p 42. See also PCIJ, Series B, no. 6, *German Settlers in Poland*, Advisory Opinion, 10 September 1923, p 36.

59 M. Sørensen, *supra* n 36, p 46.

60 *Chirac v Lessee of Chirac* 2 Wheat 259, 277 (1871), reproduced in J. B. Moore, *A Digest of International Law* (Washington DC: Government Printing Office, 1906), vol. V, para. 780, pp 386–7.

61 *Society for the Propagation of the Gospel v New Haven* 8 Wheat. 464, 493 (1823), reproduced in J. B. Moore, ibid, para. 779, pp 372–3, and para. 780, p 387.

62 *ICJ Reports 1963*, p 34.

63 On the doctrine of *jus in rem* in international law, see especially Lord McNair, *supra* n 29, p 530, regarding conveyancing and, more generally, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp 259 ff, regarding treaties establishing objective regimes.

64 According to P. Tavernier, *supra* n 39, p 249: 'Le principe des droits acquis a souvent une portée plus politique que juridique. La stabilité assurée à certains droits ne sera donc pas absolue et sera fonction des circonstances'.

65 More broadly, regarding any modification, see M. Sørensen, *supra* n 36, p 46:

> Si, par exemple, un traité d'établissement est modifié en sens restrictif en ce qui concerne les conditions d'établissement sur le territoire de l'autre Etat contractant, cette modification ne devrait pas affecter les personnes physiques ou morales qui se sont établies en vertu des dispositions antérieures.

66 Treaty between the Government of the United States of America and the Government of…concerning the encouragement and reciprocal protection of investment, Art. 22, para. 3 (2004 model BIT) (available at: ⟨http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf⟩).

67 English translation of term 'effet de rémanence' used by Nguyen Huu-Tru, 'Le réseau suisse d'accords bilatéraux d'encouragement et de protection des investissements', *RGDIP*, 1988, vol. 3, p 592. The objective is to 'assurer à un investissement le bénéfice du traitement convenu pendant le temps nécessaire à son amortissement' (ibid).

68 I/ACtHR, Judgments of 24 September 1999, Series C, nos 54 and 55.

69 *General Comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights*, 1631st Meeting of the Human Rights Committee (61st session), 29 October 1997, CCPR/C/21/Rev.1/Add.8, para. 4.

70 See eg the Advisory Opinion of 24 September 1982 of the I/ACtHR on *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75)*, OC-2/82, Series A, no. 2, and, amongst legal theorists, C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993), p 14.

71 Notification was given respectively on 23 October 1997, 26 August 1998, and 5 January 1999. However, the re-adhesion of Trinidad and Tobago and Guyana raised protests in relation to a reservation limiting the jurisdiction of the Human Rights Committee. The second denunciation from Trindad and Tobago, notified on 27 March 2000 and taking effect on 27 June 2000, was not contested. See the Report of the Secretary-General, *Status of Withdrawals and reservations with respect to the International Covenants on Human Rights*, E/CN.4/Sub.2/2000/7.

72 For a global discussion, see O. de Frouville, *L'Intangibilité des droits de l'homme en droit international public—Régime conventionnel des droits de l'homme et droit des traités* (Paris: Pedone, 2004), pp 441–9.

73 This idea is developed by M. M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (The Hague: Martinus Nijhoff, 1966), p 134.

74 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 68, para. 21: when third States benefit from the rights of a treaty:

> this can nevertheless not prevent the actual parties to the treaty from exercising any rights of termination *inter se* that they may possess under the treaty or otherwise; but…it will not necessarily follow from their doing so that the position or rights of third States will thereby *ipso facto* be affected.

The author concluded on the necessity for a subsequent separate analysis, which never took place.

75 Therefore, the termination of an agreement that has established a regime of free circulation via internationalized canals or straits would have no effect on a third party insofar as the State entrusted with the management of the said regime remains bound with respect to them (eg Panama, for the Panama Canal).

76 Sir Humphrey Waldock, First Report on the Law of Treaties, *YILC*, 1962, vol. II, pp 34–5.

77 See *supra* n 26.

78 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 35: 'In the case of bilateral treaties, termination is necessarily of the treaty itself and for both parties'. Following the same reasoning: G.-C. Venturini, 'La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats', *RCADI*, 1964-III, vol. 112, p 419; M. M. Gomaa, *supra* n 73, p 133.

79 Draft Convention Prepared by the Research in International Law of the Harvard Law School, *AJIL*, Suppl. 1935, vol. 29, pp 1176 ff.

80 C. Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris: Sirey, 1970), p 56.

81 Ibid, p 212.

82 See *infra* paras 30–2.

83 F. Capotorti, *supra* n 3, p 465.

84 For a transposition to treaties between federated States (German *Länder*), see the Federal Administrative Court of Germany, *Case of the Treaty relating to Norddeutscher Rundfunk*, 28 May 1980, reproduced and translated into English in *ILR*, 1992, vol. 90, pp 365–86. The judgment mentions international law as being opposed in theory to the termination of the whole multilateral treaty in case of denunciation by one of the parties (ibid, p 380).

85 These definitions appear in Sir Gerald Fitzmaurice's Third Report, *YILC*, 1958, vol. II, respectively p 44 (para. 91, commentary on Art. 19) and pp 27–8. See also the study by F. Coulée, 'Droit des traités et non-réciprocité: recherches sur l'obligation intégrale en droit international public', PhD thesis, Université Paris II, 1999, vol. I, pp 9 ff.

86 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 36.

87 J. Dehaussy, 'Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies', *Mélanges Guggenheim* (Geneva: Faculty of Law of the University of Geneva/IUHEI, 1968), p 108.

88 An example of this type of clause, prior to the Vienna Convention, appears in the Washington Naval Arms Limitation Treaty of 5 February 1922 (Art. 23) (*International Legislation*, vol. II), the denunciation of which by Japan on 29 December 1934 led to the end of the whole treaty on 31 December 1936.

89 In this way, the Locarno Treaty of Mutual Guarantee of 16 October 1925 (ibid, vol. III, p 1689), which contained no specific clause, remained in force despite its being denounced by Germany on 7 March 1936.

90 F. Coulée, *supra* n 85, vol. II, p 485.

91 Separate Opinion of Judge Hersch Lauterpacht, *ICJ Reports 1955*, p 105: 'The determination of rights validly acquired under treaties or statutes which have lapsed is a frequent occurrence in judicial practice'.

92 *ICJ Reports 1963*, pp 34–5. See also the comments by Sir Humphrey Waldock in *YILC*, 1964, vol. I, 730th meeting, para. 3.

93 For this view, see the Opinion of Lord McNair in *Ambatielos (Preliminary Objection)*, of 1 July 1952, Judgment, *ICJ Reports 1952*, p 63, and the commentary of Sir Gerald Fitzmaurice in *The Law and Procedure, supra* n 32, pp 403–4.

94 *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX, p 266, para. 106.

95 *ICJ Reports 1963*, p 34.

96 Ibid, p 37:

> in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render.

97 Sir Humphrey Waldock, in his commentary *supra* n 92, speaks of the 'special circumstances' of the case.

98 *Northern Cameroons* case, Judgment of 2 December 1963, *ICJ Reports 1963*, p 34: 'The claim of the Republic of Cameroon is solely for a finding of a breach of the law'.

99 *Case between New Zealand and France, RIAA*, 30 April 1990, vol. XX, esp. para. 122:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State…

100 *ICJ Reports 1963*, p 35:

> Nevertheless, it may be contended that if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust. Of course Article 19 of the Agreement which provided for the jurisdiction of the Court in the cases which it covered, was terminated with all other Articles of the Agreement, so that after 1 June 1961 it could not be invoked as a basis for the Court's jurisdiction. The Application in the instant case was filed before 1 June 1961 but it does not include…any claim for reparation.

101 *Ambatielos* case, Judgment of 1 July 1952, *ICJ Reports 1952*, p 43.

102 See notably the Opinion of Lord McNair, *supra* para. 34, subsequently taken up in doctrine and in the ILC *travaux*.

103 *ICJ Reports 1952*, pp 44–5.

104 ICSID Arbitral Tribunal, *Southern Pacific Properties (Middle East) Ltd (SPP) v Arab Republic of Egypt*, no. ARB/84/3, Decision on Jurisdiction of 27 November 1985; ICSID Arbitral Tribunal, *Asian Agricultural Products Limited (AAPL) v Democratic Socialist Republic of Sri Lanka*, no. ARB/87/3, Award of 27 June 1990.

105 See *supra* para. 22. The Stockholm Chamber of Commerce (SCC) no. 088/2004 Partial Award, *Eastern Sugar BV v Czech Republic*, of 27 March 2007, uses as an additional argument the carry-over effect of a settlement clause for mixed disputes, presented as containing an anticipated consent to arbitration by the State and a correlate right of the investor to take advantage of this (paras 173–5).

106 Application no. 4448/70; decision on admissibility of the European Commission of Human Rights of 26 May 1970, *YBECHR*, vol. 13, p 108.

107 European Court of Human Rights, *Papamichalopoulos and others v Greece*, 24 June 1993, Series A, no. 260-B.

108 Ibid, para. 40.

109 Paragraph 39 of the report. Strictly speaking, one may wonder whether this period should not have extended until 20 November 1985, the date on which Greece recognized the jurisdiction of the Commission for dealing with individual applications and only for posterior acts, decisions, facts, or events.

110 See A.-C. Kiss and P. Vegleris, 'L'affaire grecque devant le Conseil de l'Europe et la Commission européenne des droits de l'homme', *AFDI*, 1971, pp 927–31.

111 P. Frumer, 'Dénonciation des traités et remise en cause de la compétence des organes de contrôle. A propos de quelques entraves étatiques récentes aux mécanismes internationaux de protection des droits de l'homme', *RGDIP*, 2000, vol. 4, p 945 and, for a more general evaluation also dealing with the European Convention, p 947.

112 In favour of conventional interpretation: ICJ, *Right of Passage Over Indian Territory (Jurisdiction), ICJ Reports 1957*, p 146; *Military and Paramilitary Activities In and Against Nicaragua (Jurisdiction and Admissibility), ICJ Reports*, 1984, p 418, para. 60. See however the reservations of S. Rosenne in *The Law and Practice of the International Court (1920–1996)* (3rd edn, The Hague: Martinus Nijhoff, 1997), vol. II, pp 824–31. The author notably points out that the mechanism of Art. 36(2), which had been included in the context of the ILC draft on the law of treaties, was no longer mentioned from 1962 onwards.

113 This was the case of Iran in 1951 (after the indication of interim measures in the *Anglo-Iranian Oil Company* case), India in 1956 (shortly after the matter was referred to the Court in the *Right of Passage Over Indian Territory* case), France in 1973 (after the indication of interim measures in the *Nuclear Tests* case), the United States in 1985 (after the judgment of the Court establishing its jurisdiction in the case of *Military and Paramilitary Activities In and Against Nicaragua*). See, generally, S. Rosenne, *supra* n 112, vol. II, pp 817–22.

114 *ICJ Reports 1957*, p 144.

115 Second Report of Sir Gerald Fitzmaurice, *supra* n 23, p 68, para. 214.

116 On these two aspects, see F. Capotorti, *supra* n 3, p 576:

> actuellement, s'il est vrai que chacun des Etats intéressés maintient son point de vue juridique, la partie qui invoque une cause d'extinction ou de suspension peut cependant légitimement cesser de respecter le traité là où les conditions de fond de l'extinction ou de la suspension existent, tandis qu'à la lumière de l'article 65 de la Convention ladite partie devrait en tout cas continuer à appliquer le traité, tant que les conditions de procédure préalables à l'instrument prévu par l'article 67, paragraphe 2 ne sont pas remplies (c'est-à-dire tant que le différend n'a pas été réglé).

See also H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Four)', *BYBIL*, 1992, pp 85–90, analysing subsequent case law.

117 See the commentary on Art. 65 in this present work.

118 H. Thirlway, *supra* n 116, p 90. We have, in this paragraph, resumed the essentials of the author's analysis. See also M. M. Gomaa, *supra* n 73, p 131.

119 *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment of 18 August 1972, *ICJ Reports 1972*, p 54, para. 16(b).

120 Ibid and pp 64–5, para. 32.

121 *Fisheries Jurisdiction*, Judgment of 2 February 1973, *ICJ Reports 1973*, p 31, para. 12; *United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1990, *ICJ Reports 1980*, p 28, para. 54.

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