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Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur

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LAW OF TREATIES

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GENERAL INTRODUCTION

1. In 1956, the Special Rapporteur presented a first report on the law of Treaties,[1] dealing principally with the subject of the framing and conclusion of treaties; and, in section B of the introductory observations to that report, he indicated briefly the future scope of the work, while drawing attention to possible alternative methods of arrangement. According to the scheme then provisionally adumbrated, there was to be a first, and a second, chapter of a code on treaty law, the first chapter covering the general topic of " Validity " in all its aspects, and the second chapter the topic of " Effects ", within which would be grouped all such matters as interpretation, operation, enforcement, penalties for non-performance, conflicts between different treaties, effects as regards third parties, etc. Whether or not this arrangement was ideal, it offered a *modus operandi;* it could if necessary be altered later; and no final decision need be come to at the present stage.

2. On this basis, the first chapter, on " Validity ", would cover that subject in three main divisions: Part I - Formal validity (framing and conclusion of treaties); Part II - Essential validity (substance of the treaty);[2] and Part III - Temporal validity (duration, termination, revision and modification). Accordingly, having dealt with part I in his first report, the Rapporteur should now, in his second report, be dealing with part II; whereas in fact the present report is concerned with part III (temporal validity), covering, in particular, the subject of termination. It is not the Rapporteur's intention, by proceeding in this way, to suggest that the order of these two parts should be inverted in the final draft of the Code, as it may be approved by the International Law Commission, or even that the Commission should necessarily take them in this inverted order (for, by the time the Commission is ready to deal with the subject of the present report, the Rapporteur will probably have presented a third report covering the missing part II, which the Commission can then take first if it pleases). But the Rapporteur has nevertheless felt it desirable to make the subject of termination his next task, after dealing with that of conclusion, for two main reasons:

[1] Document A/CN.4/101 in *Yearbook of the International Law Commission 1956,* vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), pp. 104-128.

[2] Capacity of the parties, the effect of fraud, error, duress, legality of the object, etc.

(*a*) There are certain affinities between the two topics. Termination is, both in substance and considered as a process, the reverse of a coin of which conclusion is the obverse. Each has a procedural as well as a substantive aspect,[3] and has elements which include matters that are matters of protocol, rather than of strict law—and yet are such as ought to be covered by any comprehensive code on treaties. Some of these matters are very similar in both subjects, and almost common to them.[4] It is therefore, up to a certain point, convenient to consider these subjects either together or successively. At least it may be useful for the Commission to have reports on both, for purposes of reference and comparison, whether they are actually considered in succession or not.

(*b*) More important still is the fact that, contrary to a very general belief, the subject of termination is not at all a simple one. It is indeed full of difficulties and complexities. In addition to involving one or two major questions (such as the vexed question of the doctrine of *rebus sic stantibus*), it presents serious problems of classification and arrangement. Such problems can be ignored with impunity by textbook authorities who are not under any compulsion to establish definite distinctions between the procedural and the substantive aspects of termination—between termination considered as a process (*opération à procédure*) and as a substantive act or event. But a Code cannot ignore such distinctions—on the contrary it is bound to establish them as clearly as is reasonably possible (the words "as is reasonably possible" are used because, in fact, it is not possible—or it is very difficult—to establish all the necessary distinctions in an entirely satisfactory manner, on account of the double element in so much of treaty law, to which attention was drawn in paragraph 5 and elsewhere in the introduction to the 1956 report).[5] For all these and similar reasons, the Rapporteur thought there would be advantage in presenting a report on this part of the subject of treaties well in advance of the time when the Commission would be likely to have to consider it. This would have two advantages: it would give the Commission more time to study a far from easy subject; and it would also enable the Rapporteur to review the matter, and perhaps to revise his ideas on certain points—if necessary presenting a further and amended report.

3. The present report must therefore be regarded as a provisional one, and as not necessarily representing the Rapporteur's final views. His object in this report (and not least for his own benefit) has been, first and foremost, to accomplish a work of analysis—to uncover the anatomy of the subject, so to speak—in a manner which has not, in general, been done or even attempted by previous writers or codifiers.[6] Such an analysis is an essential preliminary to an eventual synthesis—that is to say to any final decision as to the best method of arrangement for a codification of this part of treaty law. The Rapporteur's aim, for the moment, has been to present a *schema* survey of the field. He is already conscious of the many imperfections in the work, which he hopes to remedy or improve in due course. But, if there are imperfections, there are probably not many gaps. The scheme is, in fact, by far the most complete and comprehensive of which the Rapporteur has knowledge. In endeavouring to make it so, he has, as in the case of the topic of the framing and conclusion of treaties, drawn very largely on his own personal experience (see A/CN.4/101, introduction, para. 4), since there are many points that are not dealt with by the authorities, or only touched upon.

4. Such are the principal considerations that have actuated the Rapporteur, and he would stress once more the provisional character of the present report. A number of points of detail remain, to which attention should be drawn:

(*a*) As the present set of draft articles does not follow consecutively the articles presented in 1956, the numbering has been started again from 1 onwards. It may well be convenient to do this for each section of the work as it is prepared, leaving the final order and numbering to be settled at the end, when the whole can be reviewed. Thus the present articles can be known for the time being as "Article—in part III".

(*b*) At a later stage, it will also no doubt be possible to cut down both the total number and the individual length of the articles. However, the Rapporteur draws attention (as he did in paragraph 3 of the introduction to his 1956 report) to the need for a somewhat more detailed treatment than is often given to the subject in standard works. Even

[3] See A/CN.4/101, introduction par. 8. This is even more strikingly the case with termination than conclusion, for if a treaty is regularly drawn up and concluded it will normally possess formal validity; but with termination, the regularity of the process or procedure employed may be quite independent of the question whether any valid grounds exist for terminating the treaty at all, by whatever process.

[4] For example, the mechanics of giving notice of termination has points of contract with those of giving notice of accession; again, a certain number of ratifications or accessions may be necessary to bring a treaty into force, and equally it may terminate if, by successive withdrawals, the number of parties falls below that figure; a party may ratify a multilateral treaty without the treaty thereby being brought into force, and similarly a party may withdraw without the treaty being thereby terminated; the *conclusion* of a new treaty may itself and simultaneously be the *termination* of an existing one, etc.

[5] A treaty is both a text and a legal transaction. Signature of it validates the text, but also completes the transaction in those cases in which it brings the treaty into force. Termination is both a process and a legal act or event. It is effected through, or takes place by means of a process of some kind (expiry, lapse, notice, denunciation), but requires also to be based on valid legal grounds. The two things are juridically distinct, though they may coincide. Thus, to take a simple case, a notice of termination may be regular as to the manner of its communication and the period named in it, but be given in circumstances, or on grounds, which, under the treaty, do not afford a valid basis for termination. But if the parties agree to terminate a treaty then and there, such agreement is both ground and method.

[6] Charles Rousseau. *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944), vol. I, contains an arrangement that is both comprehensive and topical; but Rousseau does not discuss the *subject* of arrangement as such.

Fiore's draft code is fairly full, but it makes no attempt at any scheme of classification or arrangement for the topic of termination. For the relevant parts of the draft code see Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to *The American Journal of International Law*, vol. 29, No. 4 (1935), pp. 1220-1222.

so scholarly a production as the Harvard Research Convention does not devote more than five articles to the topic of termination, of which three relate to the highly specialized questions of war, fundamental breach, and essential change of circumstances (*rebus sic stantibus*), so that only two articles deal with the general aspects of the subject. This may be a sufficient peg on which to hang the extremely full and informative commentary that constitutes such a valuable feature of the Harvard draft. But considered as a constituent element of a code on treaty law, it hardly seems enough.

(*c*) To abbreviate too much would also be to lose some of the advantages of casting the work into the form of a code rather than of a convention. This method not only makes a certain informality and discursiveness in the drafting permissible, but even positively advantageous, since it enables a large proportion of the articles to be made more or less self-explanatory, thus reducing the extent to which comment is required—a reduction the more desirable and acceptable inasmuch as it would be difficult to improve in that respect on the work already done in the Harvard volume and elsewhere.

5. Attention may also be drawn to certain particular difficulties that arise when it is attempted to codify the law as to the termination of treaties, in addition to the difficulties of classification and arrangement already referred to:

(i) The subject is, at a number of points, involved with, or impinges on, other subjects, such as State succession, recognition and capacity of States and Governments,[7] the legal effects of war and hostilities, and the position and rights of third States or parties. Where this occurs, should the matter be referred to the subject in question, to be dealt with as part of that subject if and when codified, or should it be brought into the present Code, but form (or be part of) a different section; or again, should it figure in the present section itself? Different answers are possible, and may vary with the particular matter. The Rapporteur has given some provisional indication of his views at the various points where these questions arise, but will wish to submit further views at a later stage.

(ii) In the introduction to his 1956 report, the Rapporteur drew attention to the inherent difficulty of dealing with all international agreements, whatever their form and character, under the one common appellation of "treaties", and of drafting articles in such a way as to apply indifferently, and with equal appropriateness, to all these kinds of instruments. This difficulty is particularly prominent in the sphere of termination, as regards the position respecting bilateral treaties, on the one hand, and multilateral treaties on the other. In the case of bilateral treaties, the issue is always the termination of the treaty itself; whereas, in the case of multilateral instruments, it is more usually a question of the termination of a particular party's obligation under the treaty, or of the withdrawal of that party from further participation. This gives rise to certain special considerations requiring separate treatment on some points. What makes it still more difficult is the fact that the purely numerical element is not always conclusive in determining the character of the treaty. Thus, a treaty with three or four parties only may be nearer to a bilateral than to a multilateral treaty in its real character. There are even (as can be seen from article 19, paragraph 1, and the comments thereon in paragraphs 124 to 128 of the commentary) some fully multilateral treaties of which it can be said that the withdrawal of even one party would have the same effect—or at any rate would lead to the same result as in the case of a bilateral treaty—namely the termination of the whole treaty.

(iii) An unexpected difficulty arises from the fact that the subject of termination is peculiarly one in commenting on which it is desirable to be able to give illustrations of the various principles, rules, and special cases involved. Yet the nature of the subject is such, that to refer to actual treaties might well give rise to embarrassment if any issue subsequently arose between the parties. For this reason, the Rapporteur has, with a very few exceptions, avoided citing actual and extant treaties. However, the difficulty does not end there; for it is virtually impossible to deal with some parts of the subject without having recourse at least to abstract and imaginary illustrations. Yet here again it may be difficult to avoid some oblique allusion to, or discussion of, an actual case, or one which could arise in concrete form. The Rapporteur has tried to make his illustrations as general and as little pointed as possible, but he cannot guarantee that he will not sometimes have cited facts that might fit a concrete situation. If so, it is by accident and not by design, and because the better the illustrations, the nearer the approach to reality is likely to be.

6. In concluding this introduction, it may be observed that the essence of the subject of termination could be summed up in one sentence: is any right of unilateral denunciation to be presumed to exist in cases where the treaty does not provide for one, and, if so, when, to what extent, and on what grounds? Therefore, the crux of the matter lies in those sections of the work that deal with termination by operation of law. A number of the Members of the International Law Commission may feel that the Rapporteur has gone too far in recognizing grounds on which this may validly occur or be effected. The Rapporteur, on further review, may think so too. But he wanted to test within what limits it would be possible to adopt a liberal attitude on the matter, while not seriously derogating from the principle that is and must remain the basis of all treaty law: *pacta sunt servanda.*

I. TEXT OF ARTICLES OF CODE

First chapter. The validity of treaties

[(*Part I. Formal validity (framing and conclusion of treaties*) was dealt with in the Special Rapporteur's first report on the law of treaties (hereinafter referred to as document A/CN.4/101).

Part II. Essential validity will be dealt with in a subsequent report.]

[7] Thus, what is the position when a Government recognized by some of the parties to a treaty, but not by others, purports to denounce it on behalf of the State concerned?

Part III. Temporal validity (duration, termination, revision and modification of treaties) [8]

A. General conditions of temporal validity or duration

Article 1. Definitions

1. For the purposes of this part of the present Code the following terms have the meaning respectively assigned to them hereunder:

[Left blank for the present for the reasons given in the commentary.]

2. Unless the contrary is stated or necessarily results from the context:

(i) The provisions of the present Code regarding the termination of a treaty, or of any particular obligation under it, relate also to its suspension, or to suspension of performance; and the rules governing the termination of treaties are to be understood as being in general, and *mutatis mutandis*, applicable to the case of suspension of performance;

(ii) References to treaties are to be understood as relating also to parts of treaties, or particular obligations thereunder; and the rules applicable to the termination or suspension of treaties as a whole are, in general, *mutatis mutandis*, applicable to the termination or suspension of parts of treaties, or of particular obligations thereunder;

(iii) References to a party (or to the "other party") to a treaty, are to be regarded as being equally references to the parties (or the "other parties") under plurilateral or multilateral treaties;

(iv) Termination or suspension in the case of plurilateral or multilateral treaties, considered in relation to individual parties to the treaty, is *prima facie* to be regarded as meaning—not the termination or suspension of the treaty itself—but the withdrawal of the party in question from further participation in it, or cessation or suspension of that particular party's obligations under the treaty.

In relation to each of the foregoing cases, the fact that certain provisions of this part of the present Code deal especially with, or make particular mention of, suspension, parts of treaties or particular obligations thereunder, parties to treaties, or the withdrawal of individual parties, as the case may be, is not in itself to be regarded as a ground for reading provisions that refer, as the case may be, only to termination, treaties as a whole, a single party to a treaty, or the termination of a treaty as such, as not also respectively covering the former cases, unless the contrary is clearly required by the context.

Article 2. Legal character of temporal validity or duration

1. In order to be valid (i.e. in the present context, operative) a treaty, in addition to possessing formal validity arising from its regular framing, conclusion and entry into force (see part I, in A/CN.4/101), and essential validity arising from its inherent legality and conformity with the relevant general rules of law (see part II, to be submitted later), must also possess temporral validity, or extension in time—i.e. duration.

2. A treaty possesses extension in time, i.e. duration, so long as it has come into force and still remains in force, i.e. has not expired or lapsed, or been terminated. Expiry or lapse brings the treaty to an end *ipso facto* and for all parties. But termination has a double aspect: the treaty itself may be terminated; or, in the case of plurilateral or multilateral treaties, its operation for a particular party may be terminated.

3. It follows that a treaty retains its validity and operative effect for any party to it so long as it remains in force, both in itself and for the party concerned.

4. A treaty remains in force in itself so long as it has not come to an end in one of the ways specified in section B.2, below.

5. A treaty remains in force for any individual party to it, so long as both (*a*) the treaty in itself remains in force, and (*b*) that party has not ceased to be a party to the treaty in one of the ways specified in section B.2, below.

6. So long as a treaty remains in force, both in itself and for any particular party to it, the obligations specified in the treaty remain incumbent on that party, which is also entitled to receive the corresponding rights and benefits, and to claim the observance of the treaty by the other party or parties.

7. Changes in the text of a treaty brought about by revision, modification or amendment, do not in themselves affect the validity or existence of the treaty, which indeed they only serve to confirm. However, a revision that takes the form of a new treaty intended by the parties to replace, and to operate in substitution of, the old treaty, has the effect of terminating the latter, as provided by article 13 below.

8. Revision, modification and amendment, considered as acts altering but not terminating the treaty, have their own legal effects and modalities which are dealt with in section C.[9]

B. Termination and suspension

Section 1. General principles

Article 3. General legal character of termination and suspension

1. The termination or suspension of a treaty is a juri-

[8] This part is arranged as follows:

A. General conditions of temporal validity or duration;

B. Termination and suspension;

Section 1. General principles;

Section 2. Grounds and methods of termination and suspension;

Sub-section i. Classification;

Sub-section ii. Legal grounds of termination and suspension;

Sub-section iii. The process of termination;

Section 3. Effects of (*a*) valid termination; (*b*) purported termination;

C. Revision and modification.

[9] This section is held over for the present. See paragraph 227 of the commentary.

dical act or event. Whether or not a treaty may in certain circumstances come to an end in fact, it cannot, in the juridical sense, terminate or be terminated or suspended except in accordance with law—that is on grounds, or by methods recognized by international law, as set out in the present Code. An illegal, invalid, or irregular act in purported termination or suspension of a treaty, or a repudiation of the obligation, does not, in the juridical sense, terminate or suspend the treaty.[10]

2. From this, and from the inherent character of a treaty as an instrument binding on the parties during the full period of its validity and duration, it follows that termination or suspension, or withdrawal from participation in it, once the treaty has been duly concluded and come into force, is not an inherent or automatic right of the parties. Unless provided for in the treaty itself, or otherwise by special agreement between the parties, it cannot take place at the sole will of any party, except on grounds and in conditions specifically recognized by international law as justifying unilateral termination, suspension, or withdrawal. Accordingly, a treaty can be denounced by a party, acting unilaterally, or its obligation can be terminated by unilateral notice or other act, only if the treaty or a special agreement between the parties so provides, or all the parties give their assent *ad hoc*, or a rule of general international law so permits.

Article 4. General conditions of validity of termination and suspension

The grounds and methods of termination recognized by the present Code as being in conformity with international law are set out in section 2 below. They fall under three main heads, according to their source: A. provision made by the parties in the treaty itself; B. provision made by the parties outside the treaty; C. grounds arising from general rules of international law (hereinafter referred to as grounds arising by operation of law). With reference to each source, three situations may be envisaged, namely, that termination or suspension, or some particular ground or method of it, is (i) provided for or admitted; (ii) not provided for or covered; (iii) specifically excluded:

A. *The treaty*

(i) *Case of inclusion*: The treaty makes provision for termination or suspension. This case is regulated by the relevant provisions of section 2 below. The inclusion of any particular ground or method necessarily operates to exclude the use of any other ground or method on the basis of the treaty as such, but does not *per se* preclude additional possibilities of termination or suspension arising from subsequent agreement between the parties or by operation of law.

(ii) *Case of non-inclusion*: Absence of any provision for termination or suspension in the treaty. Where this is the case, it is to be assumed, *prima facie*, that, subject to any rule of law operating to terminate it in certain events, the treaty is intended to be of indefinite duration, and only terminable (whether in itself or as regards any individual party) by mutual agreement on the part of all the parties. This assumption may, however, be negatived in any given case (*a*) by necessary inference to be derived from the terms of the treaty generally, indicating its expiry in certain events, or an intention to permit unilateral termination or withdrawal; (*b*) should the treaty belong to a class in respect of which, *ex naturae*, a faculty of unilateral termination or withdrawal must be deemed to exist for the parties if the contrary is not indicated—such as treaties of alliance, or treaties of a commercial character. In these cases, (*a*) or (*b*), termination or withdrawal may be effected by giving such period of notice as is reasonable, having regard to the character of the treaty and the surrounding circumstances.

(iii) *Case of exclusion*: The treaty actually or by necessary implication excludes termination or suspension, either entirely or in certain cases, or as regards certain particular methods of effecting it. Subject to the requirement that the exclusion of any ground or method arising by operation of law must be effected expressly, exclusion under the treaty will operate to prevent termination or suspension, or the particular ground or method concerned (whatever it may be), unless all the parties subsequently agree otherwise.

B. *Special agreement of the parties (outside the treaty)*

(i) *Case of agreement*: There is an agreement providing for termination or suspension, made collaterally with, or subsequent to, the coming into force of the treaty, or by means of another treaty. This case is regulated by the relevant provisions of section 2 below. If there is such an agreement, it may fill any gap in the treaty, or supplement or override any of its provisions, in regard to termination or suspension; but will not of itself preclude additional possibilities arising by operation of law.

(ii) *Case of absence of any agreement*: There is no agreement outside the treaty. In such case the treaty prevails, or, if it makes no provision for termination or suspension, the position will be as in A. (ii) above. Unless expressly excluded by the treaty, there may also be termination or suspension by operation of law.

(iii) *Case of exclusion*: There is a separate agreement, or other treaty, excluding termination or suspension, or some particular instance, ground, or method of it. In this case, the position is the same as in A. (iii) above.

C. *Operation of law*

(i) *Case admitted*: General international law specifically provides for, or permits, termination or suspension in particular circumstances, or on some particular ground. This case is regulated by the relevant provisions of section 2 below. It may operate whenever the ground or method concerned is not actually excluded by the treaty, or by the separate agreement of the parties.

(ii) *Case not covered*: The ground or method concerned is one as to which general international law is silent, and for which it makes no provision either affirmatively or negatively. In that case the ground or method concerned must be regarded as inadmissible, unless provided for by the treaty or by special agreement of the parties.

[10] See also articles 30 and 31 page 41-42.

(iii) *Case excluded*: The ground put forward is one of those which general international law specifically indicates, for reasons of principle, as being invalid and inoperative *per se* to bring a treaty to an end, or to suspend it, or to give a right of unilateral termination, suspension or withdrawal. These grounds are set out in article 5 below. In any such case, unless there is a clear provision in the treaty or special agreement of the parties to the contrary, admitting it, the ground concerned is inadmissible.

Article 5. Grounds of termination or suspension that are excluded by general international law

1. Since the termination or suspension of a treaty, either in itself or with respect to a particular party, can only validly be effected on the grounds and in the conditions set out in this part of the present Code, it follows that any purported termination, suspension, or withdrawal whatsoever, that does not conform to these requirements, or which is contrary to or excluded by the treaty or by any special agreement of the parties, is invalid and inoperative, and does not constitute or give rise to termination or suspension. The character and legal consequences of such acts is set out in articles 30 and 31 below.

2. The following grounds in particular can never *in themselves* (that is, in the absence of other sufficient grounds, or unless the case is expressly provided for in the treaty or by special agreement of the parties) justify a purported termination of or withdrawal from a treaty, or a repudiation of its obligations:

(i) *By reason of the principle of the continuity of the State (but without prejudice to any question of State succession):*

(*a*) That there has been a change (whether occurring constitutionally or not) of sovereign, dynasty, régime, administration, government, or social system, in the State concerned;

(*b*) That a diminution in the assets of a State, or territorial changes affecting the extent of the area of the State by loss or transfer of territory (but not affecting its existence or identity as a State), have occurred; unless the treaty itself specifically relates to the particular assets or territory concerned.[11]

(ii) *By reason of the principle of the primacy of international over national law in the international sphere:*

(*a*) That the treaty has proved inconsistent with the constitution or municipal law of the State concerned, or that it has proved impossible to amend these so as to ensure conformity with the treaty;

(*b*) That subsequently to the conclusion of the treaty, changes have occurred in the constitution or the municipal law of the State concerned, such as to cause a resulting inconsistency with the treaty.

(iii) *By reason of the principle* pacta sunt servanda:

(*a*) That there is a dispute or disagreement between the parties, or a state of strained relations, or that diplomatic relations have been broken off;

(*b*) That the treaty has become difficult or onerous of execution for the party concerned, or that its performance causes inconvenience or embarrassment, or is felt by the party to be, or to have become, inequitable or prejudicial to its interests.

(iv) *By reason of the principle* res inter alios acta:

(*a*) That the treaty is discovered by one of the parties to be incompatible with an already existing treaty to which it is a party, concluded with a third party or parties;

(*b*) That the party concerned has subsequently become bound by another treaty, concluded with a third party or parties, and incompatible with the existing treaty.

SECTION 2. GROUNDS AND METHODS OF TERMINATION AND SUSPENSION

Sub-section i. Classification

Article 6. Analysis

1. The termination of treaties involves two concepts: *provision* for termination, which may be made by the parties themselves in the treaty or other separate agreement, or else by law; and *termination itself* as an act or event. Hence the subject of termination may be subdivided into the *grounds* of termination and the *methods* of termination. The methods (which, in the present article, are formulated first) are the processes by which the termination actually occurs; the grounds are the juridical bases which give validity to those processes, and permit them to operate so as to bring the treaty to an end.

Methods

2. The principal methods of termination are two, namely:

(i) *Automatic*—termination occurring automatically by expiry or lapse; and

(ii) *Specific*—termination brought about by the act either of one party only (notice or denunciation), or of both or all acting jointly (agreed decision to terminate, or replacement by new treaty).

Treaties therefore either come to an end, or are brought to an end; terminate or are terminated (or determined). By whatever method the treaty comes to an end, it can do so on a variety of juridical *grounds*. Thus, automatic expiry may have as its juridical foundation a provision of the treaty itself, according to which it terminates after a certain period of years; or it may result from the operation of a rule of law independently of the treaty. Similarly, a notice given by one of the parties (case of termination by specific act) may be founded on a faculty given by the treaty, or on a faculty given by law independently of the treaty. A notice not given on a recognized ground is invalid and, in itself, ineffective to terminate the treaty, and may amount to a repudiation of the treaty.

3. The methods of termination may also be classified, or redescribed as:

[11] But in that case (see commentary), although the obligation may subsist, it may devolve on another country. This is a question of State succession in the matter of treaties, and will be dealt with separately.

(i) Termination taking place independently of the will of the parties (automaticity);

(ii) Termination at the will of the parties (act).

However, the coincidence is not complete, because (*a*) termination may in some cases be automatic, and yet not take place independently of the will of the parties, but by their will; (*b*) termination may take place by specific act and not automatically, but the act may be that of one of the parties only, not both. It is therefore necessary, if using the criterion of the presence or absence of the will of the parties, to classify the methods of termination as termination taking place at the will (i) of both or all parties, (ii) of one of them only, (iii) of neither party. Case (iii) is always a case of automatic termination, case (ii) never, case (i) sometimes.

4. Additional methods of termination are:

(i) *Ad hoc* assent by a party to a request for termination by the other, or acceptance of an invalid or irregular act in purported termination of the treaty or in repudiation of it—these being, in the last analysis, special cases of agreement under method 2 (ii) above;

(ii) The pronouncement of a competent tribunal in those cases where the termination dates from the pronouncement and not from an anterior date on which the tribunal finds it to have occurred.

Grounds

5. The grounds of termination are various, but may be classified under two heads, namely:

(i) Grounds provided by the parties themselves, by agreement, either (*a*) in the treaty itself, or (*b*) by a separate agreement outside the treaty;

(ii) Grounds not provided by the parties but by the general rules of international law (operation of law).

6. The grounds of termination may also be classified by contrasting sub-paragraph (i) (*a*) in paragraph 5 above, with sub-paragraphs (i) (*b*) and (ii) with the following result:

(i) Grounds provided in the treaty itself;

(ii) Grounds not provided in the treaty, but either (*a*) provided by a separate agreement of the parties, or (*b*) arising by operation of law.

7. It calls for notice in relation to the categories described in paragraphs 2 to 6 above that:

(i) *Agreement* is both a method and a ground or source of grounds: a method if there is a specific agreement to terminate, or an *ad hoc* assent to or acceptance of termination; a ground, or source of grounds, if an agreement between the parties provides for or permits termination in certain events;

(ii) *The will* of the parties means their will (or that of one of them) as manifested in the actual terminating act, deed or event: if the parties agree upon or provide for permissible grounds or methods of termination, they will the *possibility* of it, but not necessarily the actual termination itself, which may occur independently of their will.

8. It follows that in every case of termination there are four main ingredients, drawn in different combinations from the categories specified in paragraphs 2 to 6 above, according to whether:

(i) The termination is automatic or not;

(ii) It is willed by one of the parties, by both, or by neither;

(iii) It is based on grounds provided by the parties themselves (i.e. results from agreement), or on grounds provided by law (i.e. takes place independently of agreement);

(iv) It is based on grounds provided in the treaty itself, or on grounds provided outside the treaty (i.e. by separate agreement of the parties or by operation of law).

9. A *synthesis* of the above categories (see paragraph 10 below) may be arrived at on the basis of the three cases arising out of paragraph 3, namely, termination by the will of both or all the parties, by the will of one party only, or by the will of neither, restated as follows:

(*a*) *Termination by the joint will of the parties* takes place where the will of the parties is manifested not merely in making provision for termination, but also, or alternatively, in the actual process or act of termination itself. It may therefore occur (i) by pre-manifestation of will, resulting from a term of the treaty itself or of any separate agreement between the parties, providing for automatic expiry on a specified date or after a fixed period, or on the occurrence of an event certain to occur; or (ii) *ad hoc*, either by a specific agreed termination of the treaty, or by the conclusion of a new treaty in replacement of the previous one, or by the joint performance of some act, or the bringing about of some event, indicated in the treaty or other specific agreement of the parties as being one the occurrence of which will cause the treaty automatically to expire.

(*b*) *Termination by the will of one of the parties only* takes place where the will of only one party is manifested in the actual process or act of termination, whether or not there has been agreement between the parties envisaging such process or act. It may therefore result (i) from agreement—if the parties include a provision in the treaty, or other separate agreement between them, giving a faculty of unilateral termination or withdrawal, or if they provide for the automatic expiry of the treaty on the performance of some act by, or the occurrence of some event under the control of, one of the parties only—or (ii) from operation of law—in those cases where international law confers a unilateral right of termination or withdrawal on a party, even though no provision to that effect is included in the treaty.

(*c*) *Termination independently of the will of either party* takes place where the will of neither party is manifested in the actual process or act of termination, even though such process or act may have been envisaged in the treaty or other agreement between them. It may therefore result (i) indirectly from the agreement of the parties—in those cases where the treaty, or other separate agreement between the parties, includes a provision for expiry upon some act to be performed by a third party or parties (e.g., the termination or another treaty), or the occurrence of

some event over which the parties have no control—or (ii) from operation of law—in those cases where international law causes a treaty automatically and *ipso facto* to lapse or determine, irrespective of any provision to that effect in the treaty itself.

10. *Resulting synthesis.* The foregoing systems of classification, as given in paragraphs 2 to 6 above, if related to the cases given in paragraph 9, lead to the following results, showing that each case embodies four elements in different combinations, as indicated in paragraph 8.

Case (a) *(i)* consists of termination by automatic expiry willed by both the parties, and resulting from their joint consent, embodied and set out in the treaty or other specific agreement between them;

Case (a) *(ii)* consists of termination by specific act, willed by the parties, and resulting from agreement between them, but not provided for in the treaty or otherwise;

Case (b) *(i)* consists of termination by specific act, willed by one of the parties only, but resulting from the original consent of both, embodied in the treaty or other specific agreement between them;

Case (b) *(ii)* consists of termination by specific act, willed by one of the parties only, and resulting from a faculty given by operation of law, not from agreement or provision in the treaty or otherwise;

Case (c) *(i)* consists of termination by automatic expiry, not specifically willed by the parties, but resulting from their original joint consent, embodied in the treaty or other specific agreement between them;

Case (c) *(ii)* consists of termination by automatic expiry, not willed by the parties, and resulting from operation of law, not agreement or treaty provision.

11. For the purposes of the present Code, the classification adopted is that set out in article 7 below, representing a combination in a modified form of the categories mentioned in paragraphs 2 and 5 above.

Article 7. Classification adopted for the purposes of the present Code by reference to the source of the right

1. Treaties terminate or become suspended by reference to the source of the right of termination or suspension:

(i) In accordance with their own terms, where these (expressly or by necessary implication) provide for termination, and by such methods or in such circumstances as may be therein specified or clearly implied;

(ii) In accordance with the terms of any separate agreement between all the parties, outside the treaty, which may be effected directly by one act, or by successive acts, or by the conclusion of a new treaty; and in each case either (*a*) where the original treaty contains no provision for termination, or (*b*) where, although there is such a provision, the parties are mutually agreed to vary or supplement it;

(iii) By operation of law, either causing the treaty to terminate or become suspended automatically and *ipso facto* in certain events, or giving one or more of the parties the right to terminate or suspend it unilaterally.

2. In each of the above cases, the process of termination may, according to what is provided by the parties, or permitted by law, be either (i) automatic; (ii) the result of a notice given by one of the parties; (iii) brought about by joint or mutual terminating act or acts on the part of the parties. The special considerations affecting the process, as distinct from the grounds of termination, are set out in sub-section iii, articles 24 to 27 below.

Article 8. System of priorities in the exercise of any right of termination

1. Any right of termination arising from the sources mentioned in article 7, paragraph 1, operates on the basis of the following system of priorities:

(i) If the treaty makes provision for termination, this can *prima facie* only take place as so provided, unless the parties subsequently agree otherwise, or assent *ad hoc* to a termination, or unless a case arises causing or justifying termination or suspension by operation of law and not expressly excluded by the treaty.

(ii) In the absence of any treaty provision for termination, then, unless the case is one of those described in article 4 A. (ii), (*a*) or (*b*), above, termination can only take place under or by reason of a subsequent agreement or assent *ad hoc*, or else by operation of law in one of the cases specified in articles 17 to 23 below, and in accordance with their terms.

(iii) In the absence both of any treaty provision and of any subsequent agreement of the parties providing for or effecting termination, and unless the case is one of those described in article 4 A. (ii), (*a*) or (*b*), termination or suspension can only take place if caused or justified by operation of law in one of the cases specified in articles 17 to 23 below, and in accordance with their terms.

(iv) It follows from the three foregoing sub-paragraphs that the unilateral denunciation of, or withdrawal from, a treaty by any party, can only take place in one of three classes of cases, namely, (*a*) if the treaty so provides; (*b*) if all the parties so agree, either generally or *ad hoc*; (*c*) if the circumstances are such that a faculty of unilateral denunciation, withdrawal, or suspension of performance arises by operation of law in one of the cases specified in articles 17 to 23 below, and in accordance with their terms.

2. Even where legitimate in principle, the ground or mode of termination or suspension must, in order to be valid in any given case, be of the character and conform to the conditions and requirements specified in sub-sections ii and iii, and in section 3, below (articles 9-31).

Sub-section ii. Legal grounds of termination and suspension

Article 9. Termination in accordance with the terms of the treaty (types of such provision)

1. Where the treaty itself, expressly or by necessary implication, provides for the circumstances or method of its termination, these matters will depend *prima facie* on the relevant terms of the treaty, the meaning and effect of which will be a matter of interpretation, in the same way as for any other clauses of the treaty.

2. Without prejudice to the rights of the parties to specify in the treaty itself, or thereafter to agree upon, any ground or method of termination that may seem good to them, the following are the principal grounds and methods normally included in treaties:

(i) Expiry automatically and *ipso facto* (*a*) on a specified date, (*b*) after a specified period from the date of the coming into force of the treaty, (*c*) by virtue of a condition subsequent (resolutory condition) i.e. in its widest sense, the occurrence or non-occurrence of a specified event, or cessation or non-cessation of certain circumstances, or the realization or non-realization of specified conditions—any of which may be certain both as to event and date; or certain as to event, but uncertain as to date; or uncertain both as to event and date;

(ii) A fixed initial period of validity and, in the absence of any notice of termination taking effect at the expiry of this period, an indefinite period of duration thereafter, continuing until such time as a notice of termination or withdrawal is given by a party and takes effect;

(iii) A fixed initial period as in (ii), at the end of which notice of termination or withdrawal, if given, takes effect; in the absence of any such notice (or for any party not having given one), this initial period shall be followed by a second fixed period of validity, of the same or some other duration, on the conclusion of which the treaty will definitively expire;

(iv) A fixed initial period of validity and, failing any notice of termination or withdrawal to take effect at the end of this period, automatic renewal or continuance (tacit reconduction) of the treaty itself (or for the remaining parties), for an indefinite number of equal fixed periods, until such time as a notice of termination or withdrawal takes effect at the end of the current period.

3. In cases (ii), (iii) and (iv) the treaty specifies whether notices of termination take effect immediately or only after the expiry of a certain period, and, if so, of what duration. In those cases where a faculty to give notice is provided, but nothing is said as to the period of notice required, it is to be assumed that a notice can only take effect after such period as is reasonable, having regard to the character of the treaty and the surrounding circumstances, unless it can properly be inferred from the character, terms and circumstances of the treaty, that a right of immediate denunciation was intended.

4. Where the system adopted is that of tacit reconduction, i.e. validity for an initial period followed by automatic renewal, or further validity for further successive periods of the same length, or of such other length as may be specified, but no express provision for denunciation or withdrawal upon notice is made, it is to be regarded as an implied term of the treaty that such denunciation or withdrawal can be effected by an appropriate notice taking effect at the end of the initial period, or of any succeeding period of validity. In cases of tacit reconduction, it is equally assumed that the length of the successive periods of renewal or further validity is the same as that of the initial period, unless otherwise provided.

5. The foregoing provisions apply equally to bilateral, plurilateral and multilateral treaties, except that in cases (ii), (iii) and (iv) in paragraph 2, notice of termination will, in principle, only terminate the treaty in respect of the party giving the notice (i.e. it will constitute a withdrawal by that party), and will not terminate the treaty itself unless (*a*) the treaty so provides, or it is a necessary inference from the terms or character of the treaty that its continuance in force depends on the participation of all the original parties; or of the party giving the notice; (*b*) the notice causes the number of parties to the treaty to fall below a specified number (either that which was necessary to bring the treaty into force, or another number, as may be indicated); (*c*) if, although no number is specified, the notice in fact causes the number to fall below two. In connexion with (*b*), the fact that the treaty required the participation of a specified number of parties before it could come into force does not of itself (and in the absence of a specific provision to that effect) entail the consequence that the treaty expires if successive withdrawals cause the number of parties to fall below the number in question.

6. Where a treaty makes no express provision regarding its expiry or termination, the position will be governed by the provisions of article 4 A. (ii) above.

7. Except where it is automatic (on the arrival of a specified date, the lapse of a fixed period, the happening of an event, or the realization of certain conditions), termination under a treaty takes place by a notice of termination or withdrawal given by a party, relating either to the treaty itself or to the participation of that party. Since this method of termination is also applicable in the case of termination provided for by separate agreement of the parties, and in certain cases of termination by operation of law, its modalities are dealt with in sub-section iii, article 26 below.

Article 10. Termination by agreement outside the treaty

A. The agreement considered as an enabling instrument

1. Notwithstanding anything that may be provided in the treaty as regards its termination or non-termination, or the fact that nothing is provided, it is at all times open to the parties, by mutual agreement (either contemporaneously or collaterally with the treaty, or subsequently), to make provision for termination in the same way, and by the same means, as they might have done in the treaty itself, either supplementing or varying its terms.

2. Such an agreement may specify any of the methods of termination described in article 9 above, and the provisions of that article will apply *mutatis mutandis* to the case of provision for termination made by agreement outside the treaty.

Article 11. Termination by agreement outside the treaty

B. The agreement as a terminating act

1. In addition to its enabling function, by which the separate agreement of the parties outside the treaty may make provision for eventual termination, and specify the methods by which this can be brought about, such agreement may itself actually terminate, or cause the termination of the treaty:

(i) By means of clauses having direct and specific terminative effect;

(ii) In the form of a new treaty terminating, replacing, revising, or amending the existing treaty;

(iii) *Ad hoc,* through assent to, or acquiescence in, a request for termination or withdrawal on a voluntary basis, or to a purported unilateral, and invalid or irregular, termination or withdrawal, or repudiation, which would otherwise be inoperative to effect termination or withdrawal;

(iv) In certain special cases described in article 15 below.

2. The above-mentioned possibilities are further considered in articles 12 to 15 below. Subject, however, to anything therein stated, the agreement, consent, assent, or acquiescence of both parties in the case of a bilateral treaty, and of all the parties in the case of a plurilateral or multilateral treaty, is invariably required in order to bring termination about.

Article 12. Agreement as a terminating act (i) Case of direct terminative clauses

1. It is open to the parties to a treaty at any time, in any circumstances, and on any ground, to put an end to it, or any part of it, by express agreement having that intention and effect, even in those cases where the treaty specifically provides that it is to continue indefinitely, or perpetually, or without limit of time, and *a fortiori* in any other case.

2. Unless the contrary is clearly expressed or implied, such an agreement takes effect immediately it comes into force, and brings the treaty (or such part of it as is affected) to an end then and there.

3. Although the parties may, for domestic reasons of a constitutional character, desire that any instrument terminating an existing treaty should take a specific form, and should, for instance, be subject to ratification (and, if so, are at liberty so to provide), there is, on the international plane, no rule of treaty law requiring any particular form for this purpose, so long as the character of the instrument is unmistakable, and it clearly embodies the intention of the parties. Thus, a bilateral agreement in treaty form may appropriately be terminated by a simple exchange of notes between the parties, and a general multilateral convention may be terminated or amended by a protocol.

4. Although it is usual, and *prima facie* desirable, that any agreement terminating, replacing, revising or modifying a treaty, should take the form of a single instrument or a single exchange of notes, duly subscribed to, there is in law nothing to prevent it taking other forms, for example, a series of communications passing between a headquarters government or international organization and the parties to the treaty, or, in appropriate cases, a unanimous vote taken at an assembly of an international organization and recorded in the minutes, provided the delegates are duly authorized to that effect.

Article 13. Agreement as a terminating act. (ii) Case of termination by means of a new treaty

I. *Case of unanimous action*

1. A treaty may be terminated by the conclusion of a new treaty between the same parties on the same subject. In such cases, the new treaty will usually contain an express clause terminating the old one, or declaring that it is replaced by the new treaty. Even in the absence of such a clause, however, the same effect may (depending on the correct interpretation of the two treaties) be produced tacitly or by implication, where it is clear that such was the intention of the parties, or if the second treaty sets up a new system in relation to the same subject matter, in such a way that it would be impossible for the parties simultaneously to apply both treaties in their relations *inter se.*

2. In both the cases mentioned in the preceding paragraph, the old treaty will, unless a different date is indicated in the new treaty, terminate on the date when the latter comes into force; or, in the case of multilateral treaties, it will terminate for each party on the date when the new treaty comes into force for that party, by ratification, accession, or other recognized means.

3. The provisions of the preceding paragraphs apply equally *mutatis mutandis,* to the case where a new treaty or agreement does not replace the old one entirely, but only terminates or replaces some of its clauses, or introduces amendments.

II. *Case of majority action*

4. In general, a treaty, or any part of it, can only be terminated or replaced by a new one if all the parties agree, either by actual participation in the new treaty, or, without such participation, by assenting to the termination when the new treaty comes into force.

5. In some cases, however, a treaty will itself provide for the possibility of its termination, replacement, revision, or modification by a decision of a specified majority of the parties to it. In such case, the whole matter, its processes, conditions and modalities, and also its exact effects on the treaty, and the resulting position and status of the parties of the majority, and those of the minority, and their relations *inter se,* will be governed by the correct interpretation of the relevant provisions of the treaty.

6. Where no provision of the kind contemplated in the preceding paragraph is made, majority action, if taken, can have no direct effect on the previous treaty as such, which will remain intact, subsisting unmodified and binding on the parties. In such a case, the result may be to bring a new régime into being for application between the particular parties subscribing to it, terminating or modifying the existing treaty in the relations between them, but leaving the régime of the existing treaty to continue as between those parties and the parties not subscribing to the new one, as also between the latter parties themselves.[12]

[12] This question belongs to the topic of the effects of treaties, to be considered in the second chapter of the present Code.

Article 14. Agreement as a terminating act. (iii) Case of ad hoc *acquiescence or assent*

1. A treaty, or the participation of a party in it, may, in effect, come to an end by agreement, but without the conclusion between the parties of any terminating instrument or protocol, or the negotiation of any new replacing or revising treaty, in those cases where a simple assent is given to a request by a party for the termination of the treaty, or for its own withdrawal; or where the action of a party in purporting illegally or irregularly to terminate or withdraw from participation in a treaty, or to repudiate it, is acquiesced in by the other party or parties.

2. Where termination or withdrawal takes place by means of an assent given by one or more parties to a request made by another, the case is, though arising differently, analogous to that dealt with in article 12, paragraph 4, above, and is governed by similar considerations.

3. Where there is acceptance of an illegal or irregular act in purported termination or withdrawal, or in repudiation of the treaty obligation, there is agreement *de facto* rather than *de jure*, and the termination or withdrawal springs from and has its legal foundation in the acceptance rather than in any common act of the parties. This case is governed by articles 30 and 31 below.

Article 15. Agreement as a terminating act. (iv) Special cases of renunciation of rights and of mutual desuetude

1. *Renunciation of rights.* While no party to a treaty can, except as permitted by the treaty or by law, renounce its obligations under the treaty, a party may renounce or waive its rights, or the benefits to which the treaty entitles it, or certain of them. However, although the form of the renunciation itself may be unilateral, it cannot of itself bring the treaty, as such, or any particular part of it, to an end, without the consent of the other party or parties, who may have an interest in continuing to implement it, or else in requiring continued performance of the obligations corresponding to the rights renounced, where these are not merely due to the renouncing party.

2. If consent is not given, the renouncing party has the option of withdrawing its renunciation. If it does not exercise this option, it can no longer claim the benefits concerned as a matter of right, but cannot object if the other party or parties continue to carry out the treaty or to claim performance of it so far as they are concerned. The latter parties may, however, at any time decide to discontinue such performance or claim, in which case the treaty will terminate. The same applies *mutatis mutandis* to a renunciation of the benefits of certain particular clauses of a treaty, as regards its effect in bringing those clauses to an end.

2. [*Alternative text.* If consent is not given, the renouncing party has the option of either withdrawing its renunciation or maintaining it. In the latter event, the treaty or particular obligation will terminate, or, in the case of multilateral treaties, the participation of the renouncing party, or its right to claim performance of the obligation, will terminate; but the renouncing party will be liable to pay compensation to the other party or parties for any direct and juridically proximate loss or prejudice suffered by them or their nationals in consequence of such termination.]

3. *Mutual desuetude.* While there is no general legal principle of prescription or obsolescence *longi temporis* for treaties, according to which they may lapse by the mere passage of time as such, failure by both or all the parties over a long period to apply or invoke a treaty, or other conduct evidencing a lack of interest in it, may amount to a *tacit agreement* by the parties to disregard the treaty, or to treat it as terminated. Such an agreement can, however, only be inferred from the conduct of both sides, or of all the parties, sufficiently long continued; and, as a general rule, only if, in addition, the character of the treaty is such that its application after the lapse of time would be anachronistic or inappropriate.

Article 16. Termination or suspension by operation of law (general considerations)

1. In certain special cases, international law operates either to bring a treaty to an end by automatic lapse, where this would not otherwise have occurred (voidance); or to give a party a right to terminate or withdraw from participation in it, by means of a unilateral notice or denunciation, where such a right would not otherwise have existed (voidability). In such cases, international law necessarily operates independently of the terms of the treaty, or of any special agreement between the parties as to termination, in the sense that it provides grounds of termination or withdrawal that may take effect, although not specifically contemplated by the treaty or by the agreement of the parties. Where, however, such grounds are specifically excluded by the treaty or by special agreement, the latter will prevail. The same will apply in the case of any express agreement the parties may reach after, or specifically in view of, the occurrence which would otherwise lead to termination or give rise to a right to bring it about.

2. In certain other cases, to which, however, *mutatis mutandis*, precisely similar considerations apply, international law operates not to terminate the treaty as such, and as an instrument, but, either temporarily or indefinitely, to suspend performance of the obligations arising under the treaty, or to give a party a right to suspend performance.

3. In those cases where the operation of international law is not to terminate the treaty automatically but to give a faculty to a party to terminate or withdraw from it, such right must be exercised within a reasonable time after it is alleged to have arisen. Failure to do this will entitle the other party or parties to assert the continued existence of the treaty and to claim its execution in full.

4. Similarly, where the event, occurrence, or circumstances giving rise to the ground of termination or suspension by operation of law has been directly caused, or contributed to, by the act or omission of the party invoking it (other than in cases of emergency or *force majeure*), either such party will be precluded from invoking the ground in question, or, if the event, occurrence or circumstances nevertheless in their nature entail the ter-

mination or suspension of the treaty, will incur responsibility for any resulting damage or prejudice, as if for a breach of the treaty, and will be liable to make reparation therefor; provided that in any case of termination or suspension by reason of war, the matter will be governed by the special considerations applicable to that case.

5. The cases referred to in paragraphs 1 and 2 above are set out and classified in article 17 below. Their operation is subject to certain limitations and conditions of effectiveness which are also set out in article 17, or, in the more complex cases, in subsequent articles. International law only recognizes the operation of these grounds of termination or suspension subject to these limitations and conditions of effectiveness, and recognizes no other cases in which a treaty can be terminated or suspended, independently of the terms (express or implied) of the treaty or other agreement between the parties, or the will of both or all the parties. It follows that whenever the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement of any dispute concerning the interpretation, application or execution of the treaty, and any party does not admit that circumstances have arisen terminating or suspending or giving a right to terminate or suspend the treaty on grounds of operation of law, reference to arbitration or judicial settlement in accordance with the terms of the treaty or other agreement is necessarily a condition precedent of any termination or suspension.

Article 17. Classification and enumeration of cases of termination or suspension by operation of law

Subject, where applicable, to the provisions of paragraphs 3 and 4 of article 16 above, and to the further limitations and conditions indicated below and in articles 18 to 23, termination or suspension by operation of law may take place as follows:

I. *Cases of termination of the treaty or of a particular party's obligation under it*

A. *Automatically:*

(i) *Total extinction of one of the parties to a bilateral treaty*, as a separate international personality, or loss or complete change of identity, subject however to the rules of State succession in the matter of bilateral treaties where these rules provide for the devolution of treaty obligations.[13]

(ii) *Reduction of the parties to a treaty to a single State or to none* by means of a denunciation or withdrawal effected by the other party in the case of a bilateral treaty, or by successive withdrawals in the case of other treaties, provided in each case that the denunciation or withdrawal is a legally valid one.

(iii) *Total extinction, disappearance, or destruction, or complete metamorphosis, of the physical object to which the treaty obligation relates* (where such is the case); provided:

(*a*) That the extinction, destruction, or metamorphosis is physical, total and permanent, or irremediable, or has every appearance of so being;

(*b*) That the obligation relates wholly to, and requires the continued existence of, the physical object concerned;

(*c*) That the obligation does not comprise an obligation to maintain the object in existence, or to replace or reconstitute it.

In cases where any one of these three conditions is not satisfied, the circumstances may justify suspension of the performance of the obligation, in so far as it relates to the treatment of, or to dealings concerning, or to transactions regarding the object in question; but the treaty itself will not be terminated.

(iv) *Supervening impossibility of performance,* or prevention by *force majeure,* in cases other than those coming under heads (i) to (iii) above; provided:

(*a*) That the impossibility is total, complete and permanent or irremediable, or has every appearance of so being;

(*b*) That it is a literal and actual impossibility, in the sense of imposing an insuperable obstacle or impediment to performance in the nature of prevention by *force majeure,* and not merely of rendering performance difficult, onerous or vexatious.

In cases where either of these conditions is not satisfied, the circumstances may justify suspension of the performance of the obligation; but the treaty itself will not be terminated.

(v) *Supervening literal inapplicability arising from complete disappearance of the field of application of the treaty,* in such a way that there remains nothing to which the treaty can be applied; provided:

(*a*) That the disappearance is total and permanent;

(*b*) That the necessity for the continued existence of the field of application concerned is manifest on the face of the treaty, in such a way that any attempt at further application would involve either a historical anachronism, or amount to a quasi-impossibility;

(*c*) That no reasonable effect can be given to the underlying purposes of the treaty, within its proper scope, by a re-assessment of its obligations in up-to-date terms—in short that the purposes themselves have disappeared, and for both parties.

In cases where any one of these conditions is not satisfied, the circumstances may justify suspension of the performance of the obligation; but the treaty itself will not be terminated.

(vi) *Supervening illegality arising from incompatibility with a new rule or prohibition of international law* which has come into being since the conclusion of the treaty; provided:

(*a*) That the new rule or prohibition is certain, and generally accepted (or accepted by both or all the parties to the treaty);

[13] This matter is not covered by the present report. It is a question whether it should be dealt with as part of the subject of State succession, or whether under the head of "Treaties". On this question the Rapporteur will submit his views at a later stage.

(*b*) That the further application of the treaty would involve a positive violation of the new rule or prohibition, or an inconsistency so radical as to be equivalent to a violation;

(*c*) That there are no other means, within the scope of the treaty, of giving effect to its purposes without entailing such a violation or inconsistency.

In cases where any one of these conditions is not satisfied, the obligations of the treaty will remain unaffected, in the absence of any other arrangement between the parties.

(vii) *The existence of a state of war* may, but only in certain cases and in certain circumstances, cause termination or suspension of treaties between the belligerents, or between them and non-belligerents.[14]

B. *At the instance of the party invoking the ground of termination:*

(viii) *Treaties by their nature inherently finite in character, or not unlimited in duration,* can, even if they contain no provision to that effect, be denounced by a party at any time upon giving a reasonable period of notice of termination or withdrawal, provided that this is not excluded, nor the contrary provided, by the treaty, or necessarily to be inferred from its terms or circumstances. What period of notice will in this case be reasonable must depend on the character of the treaty, the obligations involved, and the surrounding circumstances.

(ix) *Fundamental breach of a treaty by one party* in an essential particular, going to the root of the treaty obligation, may be a ground on which the other party or parties can claim to terminate or suspend it. The circumstances in which, and subject to which, this can be done are separately set out in articles 18 to 20 below.

II. *Cases in which the treaty as such and as an instrument continues to subsist, but the obligations contained in it are terminated or suspended, either temporarily, indefinitely, or permanently*

A. *Automatically:*

(x) *Full and final performance by the parties* of the treaty or of any particular obligation of it will cause the treaty or that obligation to become executed, and the obligation or obligations concerned to become in that sense terminated, because performed; but such performance does not affect the validity of the treaty, which continues to subsist as the basis of the performance, and as the instrument which gave rise to the obligation to carry it out.

(xi) *Satisfaction* aliunde *of the treaty,* or of some particular obligation contained in it (i.e. not performance by the parties, but satisfaction of the objects of the treaty through the occurrence of some outside event, or because of the action of a third party). In such case the treaty or the particular obligation is satisfied, but the treaty as an instrument remains in being, on the same basis as in case (x).

(xii) *The existence of a state of war* may be a cause of suspension, as of termination, of treaty obligations (see case (vii) above).

B. *At the instance of the party invoking the ground of suspension:*

(xiii) *Cases (iii) to (v) in section I. A of the present article,* where the circumstances do not lead to termination, but may justify a suspension of performance.

(xiv) *Essential change of circumstances,* sometimes called the principle of *rebus sic stantibus* (other than such changes as may give rise to grounds of termination or suspension under one of the foregoing heads), but only in the circumstances, and subject to the conditions and limitations, set out in articles 21 to 23 below.

Article 18. Termination or suspension by operation of law. Case of fundamental breach of the treaty (general legal character and effects)

1. A fundamental breach of a treaty (as defined hereafter), or of an essential obligation under it, committed by one party, may, in the case of a bilateral treaty, justify the other party in regarding and declaring the treaty as being at an end; and, in the case of a multilateral treaty, may justify the other parties (*a*) in refusing performance, in their relations with the defaulting party, of any obligations of the treaty which consist of a mutual and reciprocal interchange of benefits or concessions as between the parties; or (*b*) in refraining from the performance of obligations which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance.

2. The case of fundamental breach is to be distinguished from those cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty. In such cases there is no question of the treaty, or of its obligations, as such, being at an end; but merely of particular breaches and counter-breaches, or non-observances, that may or may not be justified according to circumstances, but do not affect the continued existence of the treaty itself.

3. The principle of termination by fundamental breach is limited in three respects as described in article 19 below: (*a*) as to the types of treaties in respect of which it can be invoked; (*b*) as to the character of the breach which will justify it; and (*c*) as to certain particular circumstances the existence of which will preclude a party from invoking it. In addition, the party invoking the right can only do so in the manner and with the consequences indicated in article 20 below.

[14] Further elaboration of this will be required. Unless it is decided to deal with the matter as part of the general topic of "The legal effects of war", it will form the subject of a separate part or chapter of the present Code, to be submitted later, under the head of "The effect of war on treaties".

Article 19. Termination or suspension by operation of law. Case of fundamental breach of the treaty (conditions and limitations of application)

1. *Limitations in respect of the type of treaty.*

(i) Fundamental breach as a ground, giving a right to the other party to declare the termination of the treaty, applies in principle only in the case of bilateral, not multilateral, treaties.

(ii) Subject to the special case mentioned in sub-paragraph (iii) below, a breach, however serious, of a multilateral treaty by one party does not give the other parties a right to terminate the treaty. However, in the case of obligations of the reciprocal, or interdependent, type, a fundamental breach will justify the other parties:

(*a*) In their relations with the defaulting party, in refusing performance for the benefit of that party of any obligations of the treaty which consist in a reciprocal grant or interchange between the parties of rights, benefits concessions or advantages, or of a right to particular treatment in some field with respect to a particular matter;

(*b*) In ceasing to perform any obligations of the treaty which have been the subject of the breach, and which are of such a kind that, by reason of the character of the treaty, their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties.

(iii) If, in respect of a treaty of the type contemplated by sub-paragraph (ii) (*b*) above, a party commits a general breach of the entire treaty in such a way as to constitute a repudiation of it, or a breach in so essential a particular as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation.

(iv) In the case of law-making treaties (*traités-lois*), or of system or régime creating treaties (e.g., for some area, region or locality), or of treaties involving undertakings to conform to certain standards and conditions, or of any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty as in the cases contemplated in heads (*a*) and (*b*) of sub-paragraph (ii) above, so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions—a breach (however serious) by one party:

(*a*) Can never constitute a ground of termination or withdrawal by the other parties;

(*b*) Cannot even (to the extent to which that might otherwise be relevant or practicable) justify non-performance of the obligations of the treaty in respect of the defaulting party or its nationals, vessels etc.

2. *Limitations implied by the character of the breach justifying the plea of termination.*

(i) The breach must be a fundamental breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty.

(ii) It must therefore be tantamount to a denial or repudiation of the treaty obligation, and such as to either (*a*) destroy the value of the treaty for the other party; (*b*) justify the conclusion that no further confidence can be placed in the due execution of the treaty by the party committing the breach; or (*c*) render abortive the purposes of the treaty.

(iii) If the breach is one that the parties foresaw as being possible, and for which they provided in the treaty or in any other relevant agreement, either it must be regarded as not having the character of a fundamental breach in the circumstances, or its consequences will be governed by the treaty itself, or other agreement, according to its correct interpretation, and not by any general rule of law as to termination by fundamental breach.

3. *Limitations imposed by particular circumstances operating to preclude the pleas of fundamental breach being invoked.*

Even where the breach is fundamental according to the foregoing principles it may not be invoked as a ground for terminating the treaty:

(i) If the treaty, according to its own terms, is due to expire in any event within a reasonable period, or can be denounced by the other party within such a period, or upon giving a reasonable period of notice. What period is to be deemed reasonable for these purposes will depend on the character and purposes of the treaty, the nature of the breach, and the surrounding circumstances.

(ii) If the claim that the treaty is terminated by fundamental breach is not made by the other party within a reasonable time after the occurrence of the breach. Failing this, the other party must be deemed tacitly to have accepted the breach, not as justified, but as not constituting a ground for termination, or else to have waived its right to claim termination. What will constitute a reasonable time will depend on the same considerations as set out in sub-paragraph (i) above. Complaint about the breach itself, even if made within a reasonable time, does not *per se* amount to a claim of termination of the treaty, which, if intended, must be made separately and specifically.

(iii) If the other party has in some manner condoned the breach, or otherwise given clear evidence of an intention to regard the treaty as being still in force, despite the breach.

(iv) If the other party itself bears a direct or proximate responsibility for the breach, by having instigated or connived at it, or by having directly caused or contributed to it.

Article 20. Termination or suspension by operation of law. Case of fundamental breach of the treaty (modalities of the claim to terminate)

1. The question whether there has been a fundamental breach, being as a rule controversial and itself in issue between the parties, the party claiming to make it a basis for termination must set out the grounds for such a claim in a reasoned statement to be communicated to the other

party as soon as possible, and must, pending consideration by that party, take no further action.

2. If the party receiving the statement does not reply within a reasonable time, either accepting or contesting the claim of termination, or replies contesting it, the complaining party may then offer to refer the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, to the International Court of Justice); and only if such offer is made, but declined, or not accepted within a reasonable time, can the complaining party declare the treaty definitely at an end. If the offer is accepted, it will be a matter for the tribunal to decide what temporary measures of suspension or otherwise may be taken by the parties, pending its final decision.

3. In those cases where the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement as contemplated by the final sentence of paragraph 5 of article 16 above, the provisions of that paragraph and of the treaty or other agreement will apply, and in the case of any conflict with the preceding paragraphs of the present article, will prevail.

4. Except by the decision of a competent tribunal, neither party will lose any right it might otherwise have to claim damages or other reparation, or to take counter action, whether in respect of breach or non-observance of the treaty, or of its purported termination if the latter is invalid.

Article 21. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(general legal character)*

1. In the case of treaties not subject to any provision, express or implied, as to duration, a fundamental and unforeseen change in essential circumstances which existed when the treaty was entered into, and with reference to which both the parties can be shown to have contracted, may entitle a party to proceed to a suspension of any further performance of the obligations of the treaty pending its revision by agreement between the parties, mutual agreement to terminate it, or an arbitral or judicial decision pronouncing its termination in view of the change of circumstances.

2. Such right of suspension can, however, only be exercised subject to the conditions and limitations specified in article 22 below regarding (*a*) the type of treaty involved; (*b*) the character of the change of circumstances; and (*c*) the circumstances in which a party will be precluded from invoking the change. In addition, the party invoking the change can only do so in the manner and with the consequences indicated in article 23.

3. A fundamental and unforeseen change of circumstances, or the principle of *rebus sic stantibus*, which is in essence a residual ground of termination or suspension, cannot *as such* be invoked in any case where termination or suspension results from, or can be effected under, the terms of the treaty itself or other special agreement between the parties, or on any of the other grounds of termination or suspension by operation of law specified in article 17 above, even where these also involve certain changed circumstances.

4. The principle of *rebus sic stantibus*, which is an objective principle of law, does not involve any " clausula " *rebus sic stantibus* deemed to be implied in all treaties of unlimited duration, and determining them on the occurrence of an essential change of circumstances. If the particular treaty itself, as a matter of its normal and correct legal interpretation, does actually require to be read as containing such an implied provision, the case is not one of termination by operation of law, but of termination provided for by the treaty itself, through an implied resolutory condition.

Article 22. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(conditions and limitations of application)*

The application of the principle *rebus sic stantibus* is subject to conditions and limitations broadly analogous, *mutatis mutandis*, to those set out in article 19 above regarding the case of termination resulting from a fundamental breach of the treaty:

1. *Limitations arising out of the type of treaty involved.*

(i) The principle *rebus* finds its sphere of application mainly in the field of bilateral treaties. As regards multilateral treaties, its application is governed by paragraphs (ii) to (iv) below.

(ii) The principle *rebus* cannot, as such, be invoked in the case of treaties of the kind described in article 19, paragraph 1 (iv) above.

(iii) As regards treaties of the type described in article 19, paragraph 1, sub-paragraph (iii) (*a*) above, the principle " *rebus* " cannot, in the case of an essential change of circumstances affecting one or more parties only, be invoked as a ground for the termination of the treaty itself, but only as a ground for the withdrawal, or for the suspension of the obligations of such particular party or parties.

(iv) In the case of treaties of the type described in sub-paragraph (iii) (*b*) of paragraph 1 of article 19 above, the withdrawal, or the suspension of the obligations of one party, on grounds of *rebus sic stantibus*, may justify the withdrawal of the other parties or a suspension of their obligations.

2. *Limitations as to the character of the change necessary before the principle* rebus *can be invoked.*

A change can only be regarded as being an essential one for the purpose of invoking the principle *rebus* if it has the following character:

(i) The change must be an objective change in the factual circumstances relating to the treaty and its operation, and not merely a subjective change in the attitude towards the treaty of the party invoking the principle.

(ii) The change must relate to a situation of fact, or state of affairs, existing at the time of the conclusion of

the treaty, with reference to which *both* the parties contracted, and the continued existence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the treaty, or into the particular obligation to which the changed circumstances are said to relate.

(iii) The change must have the effect either (*a*) of rendering impossible the realization, or further realization, of the objects and purposes of the treaty itself, or of those to which the particular obligation concerned relates; or (*b*) of destroying or completely altering the foundation of the obligation based on the situation of fact or state of affairs referred to in sub-paragraph (ii) above.

(iv) A change in the motives that led a party to enter into the treaty, or in the inducement to that party to continue performance of it, or of any particular obligation under it, is not in itself either an essential change of circumstances, or a change having one of the effects specified in sub-paragraph (iii) above.

(v) The change must not be one that was foreseen by the parties, or be such as they might, by the exercise of reasonable foresight, have anticipated. It must not, therefore, either expressly or by necessary implication, be a change which is provided for in the treaty, or in any other relevant agreement between the parties, for in that case the treaty or agreement would prevail, and the principle *rebus* would, as such, be inapplicable.

3. *Limitations arising from particular circumstances operating to preclude a party from invoking the principle* rebus

Even where the character of the change of circumstances itself is such as to conform to the foregoing conditions, it may not be invoked:

(i) Unless the treaty is of indefinite duration, and contains no provision, express or implied, for its expiry or termination on giving notice;

(ii) Unless the change is invoked within a reasonable time after the date of its occurrence or completion—failing which it must be presumed not to be fundamental;

(iii) If the change of circumstances has been caused, brought about, or directly or proximately contributed to, by the act or omission of the party invoking it.

Article 23. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(modalities of the claim)*

1. In the absence of agreement between the parties, or of an appropriate pronouncement by an international arbitral or judicial tribunal, an allegation of fundamental change of circumstances on the basis of the principle *rebus sic stantibus* cannot, of itself, cause the termination of the treaty, but only suspension of further performance, and then only in accordance with the following procedure.

2. For the same reasons, *mutatis mutandis*, as those given in paragraph 1 of article 20 above, the party invoking the principle *rebus* must set out the grounds of the claim in a reasoned statement to be furnished to the other party or parties, and must request the concurrence of such party or parties in a revision of the treaty, or in its termination, or in the withdrawal of the party concerned.

3. If the request is not acceded to, the party invoking the change may offer to refer the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, the International Court of Justice). If such offer is made, and the other party or parties do not, within a reasonable time, accept it, the party invoking the change may then suspend performance of the obligation or obligations concerned. If the other party or parties accept reference to a tribunal, it will be for the tribunal to decide what temporary measures in regard to suspension or otherwise may be taken by the parties, pending its final decision. If the party invoking the change does not elect to offer reference to a tribunal, the treaty, and the obligations of the parties under it, will continue in full force and effect.

4. In those cases where the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement as contemplated by the final sentence of paragraph 5 of article 16 above, the provisions of that paragraph and of the treaty or other agreement will apply, and, in case of any conflict with the preceding paragraphs of the present article, will prevail.

Sub-section iii. The process of termination

Article 24. General provisions

1. As described in article 6 above, the processes whereby a treaty terminates or is terminated, or by which withdrawal takes place, are (i) by unilateral notice where valid grounds for it exist as provided in sub-section ii above; (ii) by acceptance of an invalid or irregular notice from another party, or of an act in repudiation of the treaty; (iii) by direct agreement of the parties; (iv) by means of a revising, replacing, or modifying treaty; (v) by pronouncement of a competent tribunal; (vi) by automatic expiry.

2. The process of effecting termination or withdrawal (i) by notice, is the subject of articles 25 to 27 below; (ii) by acceptance of invalid or irregular notice, or of repudiation, of articles 30 and 31 below; (iii) by direct agreement, of articles 11 and 12 above; (iv) by a revising, replacing or amending treaty, of articles 11 and 13 above. The process of termination or withdrawal by the pronouncement of a competent tribunal process (v)) is governed by, and takes place in accordance with, the terms of the pronouncement. Termination by expiry (process (vi)), which takes place automatically, requires no act of the parties; but such an act may be necessary in order to record or establish the precise moment of expiry and to deal with any consequential matters.

3. The processes (methods or modes) of effecting termination or withdrawal, or by which it may come about, are, as described in article 6 above, juridically distinct from the legal grounds validating the process or method, or its use. Termination or withdrawal by a given process or method (especially by notice, or expiry by operation of law) pre-supposes the existence of a valid juridical ground. Termination by the pronouncement of a competent tribunal is a method, not a ground, for the pronouncement

is itself based on a juridical finding that a valid ground exists. Termination by direct terminating agreement is both ground and method, and the same applies to acceptance of an invalid or irregular notice, or of a repudiation, since the act of acceptance is the sole juridical ground of the termination and also the method of it.

Article 25. The exercise of the treaty-terminating power

1. The act and process of terminating or withdrawing from a treaty by any party is an executive one, and, on the international plane, the function of the executive authority of the State. This applies whether the act consists of (i) a notice given under the treaty itself, or under a separate agreement of the parties, or in consequence of a ground of termination or suspension arising by operation of law; (ii) entering into a direct terminating agreement, or a replacing, revising or modifying treaty; or (iii) an acceptance of an invalid or irregular notice of termination, or of a repudiation. Consequently, the provisions of article 9 (The exercise of the treaty-making power) in the introduction to the present Code (A/CN.4/101) apply *mutatis mutandis* to the process of termination and withdrawal in the same way as they do to that of the making and conclusion of treaties.

2. A notice of termination or withdrawal consists, on the international plane, of a formal instrument or notification emanating from the competent executive authority of the State, and communicated through the diplomatic or other accredited channel to the other party or parties to the treaty, or to such "headquarters" government or authority as the treaty may specify, signifying the intention of the party concerned to terminate the treaty, or withdraw from participation in it, on the expiry of the required or appropriate period of notice.

Article 26. The process of termination or withdrawal by notice (modalities)

1. In order to be valid and effective, notice of termination or withdrawal must, whether given under a treaty or other special agreement of the parties, or in consequence of a ground arising by operation of law, comply with the conditions specified in paragraphs 2 to 9 below, it being understood that any reference to a treaty includes any separate agreement of the parties providing for termination in relation to the treaty.

2. Any notice given under a treaty must comply with the conditions specified in the treaty, and must be given in the circumstances and manner therein indicated. Where the notice is not given under the treaty but in the exercise of a faculty conferred by operation of law, it must state the date on which it purports to take effect, and the period of notice specified must be a reasonable one having regard to the character of the treaty and the surrounding circumstances. Except as provided in the remaining paragraphs of the present article, any failure or irregularity in the foregoing respects will render the notice inoperative, unless, either expressly or tacitly (by conduct or non-objection), all the other parties accept it as good.

3. All notices must be formally communicated to the appropriate quarter in accordance with paragraph 2 of article 25 above. It is not sufficient to announce termination or withdrawal or give notice of it publicly, or publish it the press. In the case of bilateral treaties, notice is given to the other party. In the case of plurilateral or multilateral treaties it must be given to each of the other parties individually, unless the treaty enables notice to be given to a "headquarters" government, international organization or other specified authority.

4. Notices take effect on the date of their deposit with the appropriate authority, and any period to which the notice is subject runs from then. In the case of notices given to several governments in respect of the same treaty, a uniform date must be indicated in the notices, and the moment of their communication must, so far as possible, be synchronized.

5. Where the treaty requires a specified period of notice, or only permits of notice to take effect at the end of certain periods, and a notice is given purporting to take effect immediately, or after a shorter period than the one specified, the notice will not be void, but (if it is a notice given under the treaty) will take effect only on the expiry of the correct period as indicated in the treaty. If, however, and whether or not the treaty allows notice to be given under certain conditions, the notice in question does not purport to be given under the treaty, but in the exercise of a faculty conferred by law, the question of the period of notice will be governed by the relevant provisions of paragraph 2 above, and the notice will not take effect before the expiry of a reasonable period.

6. Unless the treaty expressly so permits, notices of termination or withdrawal must be unconditional. Except as so provided, an intimation, public declaration or announcement that a party will terminate or withdraw from a treaty in certain events, or unless certain conditions are fulfilled, does not constitute an actual notice of termination of withdrawal, and will require to be completed by an unconditional notice in due course.

7. Except where the treaty expressly provides for the separate termination or denunciation of, or withdrawal from, some particular part of, or certain individual clauses of the treaty, any notice of termination or withdrawal must relate to the treaty as a whole. In the absence of such express provision, a partial notice is invalid and inoperative.

8. Equally, unless the contrary is both stated in the notice, and permitted by the treaty, a notice of termination or withdrawal applies automatically to all annexes, protocols, notes, letters and declarations attached to the treaty and forming an integral part of it, in the sense that they are without significant meaning or effect apart from, or in the absence of, the treaty.

9. Unless the treaty otherwise provides, any notice of termination or withdrawal may be cancelled or revoked at any time before it takes effect or before the expiry of the period of notice to which it is subject; provided that such cancellation or revocation receives the assent of any other party which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position.

Article 27. Date on which termination or withdrawal takes effect

1. Termination by expiry takes place on the date, or at the end of any period, indicated for that purpose in the treaty or other special agreement of the parties; or, if it occurs upon the happening of certain events, or the cessation of certain conditions (whether by virtue of the treaty, or special agreement, or by operation of law), upon the date or completion of the happening or cessation, as it actually occurs, or as it may be agreed by the parties.

2. Where, in cases coming under paragraph 1 above, expiry takes place automatically in certain circumstances by operation of law, and a notice is sent by one party to another for the purpose of recording or establishing the relevant event or circumstances, the date of termination is nevertheless (unless the parties otherwise agree) that of the event or circumstances producing termination, and not any different date, whether that of the notice or another date indicated therein.

3. Termination by a direct terminating agreement, or by a replacing, revising or modifying treaty, takes place on the date of the entry into force of such agreement or treaty, unless another date is indicated therein.

4. Termination by pronouncement of a competent tribunal takes place on the date of the final award, judgement, or decree, unless another date is specified therein as being the one on which a valid termination is deemed or pronounced to have occurred.

5. Termination or withdrawal by notice takes place on the date (being a date not earlier than the date of the notice itself), or on the expiry of the period, indicated for that purpose in the notice; provided that such indication is correct and regular in accordance with the principles of the present Code. A notice indicating no date or an incorrect date will be deemed to take effect on the date, or at the end of any period of notice, indicated in the treaty itself, or other special agreement of the parties; or, if none is indicated—or if the notice is given in consequence of a faculty arising by operation of law—at the end of such period as is reasonable having regard to the character of the treaty, the ground of termination, and the other circumstances of the case.

6. Termination or withdrawal by acceptance of an invalid or irregular notice, or of an act of repudiation of the treaty, takes place on the date of the acceptance, by which alone a juridical state of termination or withdrawal comes about—unless, in the case of repudiation, the accepting party elects to relate the termination back to the date of the repudiation.

7. In the case of a notice of termination or suspension given in consequence of a fundamental breach of the treaty, or in the application of the principle *rebus sic stantibus*, the date of termination is governed by the provisions of paragraph 5 above, and cannot relate back to the breach or change of circumstances.

SECTION 3. EFFECTS OF TERMINATION AND OF PURPORTED TERMINATION

Article 28. Valid termination (general legal effects)

1. The termination of a treaty (provided such termination is valid and legally effective) puts an end to all executory (continuing) obligations, liabilities or disabilities arising or existing under it, and equally to all corresponding rights, faculties and benefits. The same applies *mutatis mutandis* as regards termination in respect of a particular party, or termination in respect of a particular obligation.

2. In no case, however, can termination, merely as such, affect the validity or continued existence of any right acquired in consequence of, or any status or position, or disability, created by or resulting from, the terms of the treaty, or from the past performance of any obligations or exercise of rights under it. If any reversal or alteration of the situation created by the treaty under its executed clauses comes about, this can only be by reason of some further and separate act or agreement of the parties, on or following upon the termination, and not from the termination itself, as such.

3. Hence, termination cannot cancel, rescind, undo, reopen or jeopardize any executed clause of a treaty or any act performed thereunder, or revive or reinstate a previous condition of affairs, situation or status determined by the treaty, or restore a *status quo ante* to which the treaty put an end. Nor can it affect any rights of property or other acquired rights existing at the date of termination.

4. The foregoing paragraph applies equally to the case where the whole treaty, and not merely some clause in it, is executed. The inherent force and validity of the treaty as an instrument is not thereby affected; and if, for formal reasons, or on grounds of convenience, the parties declare such a treaty terminated, this operates merely as an agreed record of the fact that its obligations have been fully performed, and that the acts performed in satisfaction of them are valid.

5. The foregoing provisions apply whatever the cause of termination.

6. The termination of a treaty, or of any particular obligation under it, or of the participation of a particular party, may give rise to a number of consequential issues. These will, despite the termination, be governed by the treaty itself if it provides for them, and if not, must be the subject of a separate agreement between the parties.

Article 29. Effects of valid termination (special consideration affecting multilateral treaties)

1. In the case of bilateral treaties, termination is necessarily of the treaty itself and for both parties, but where the participation of a party in a multilateral treaty ceases, the effect will vary with the type of treaty:

(i) In the case of multilateral treaties of the type described in article 19, paragraph 1 (iv) above (self-existent type obligations), the treaty itself will not thereby be terminated (nor will the participation of any other party). In consequence of that (i.e. by reason of the treaty's character), although the party concerned will cease to be bound by the obligations of the treaty as such, the remaining parties will continue to be fully bound in all respects to carry it out, even though, in the result, the party whose participation has ceased, its nationals, companies or vessels, continue to receive the benefits of the treaty.

(ii) In the case of multilateral treaties of the type described in article 19, paragraph 1 (ii) (*a*) (reciprocal and concessionary type obligations), the treaty itself will not thereby be terminated (nor will the participation of any other party), but the remaining parties will be entitled to decline to carry out its obligations as respects the party ceasing to participate, and to stop according that party any of the rights or benefits of the treaty.

(iii) In the case of multilateral treaties of the type described in article 19, paragraph 1 (ii) (*b*) (fully interdependent type obligations), where the participation of all the parties is a condition of the obligatory force of the treaty, the remaining parties will, by reason of the character of the treaty, be released from their own obligations, and the treaty will accordingly come to an end.

In each of the foregoing cases, the question of termination, its extent and effect, must in the last analysis depend on the interpretation of the treaty, according to its character and terms.

2. The foregoing provisions are without prejudice to the possibility that the termination of a multilateral treaty may ensue upon a party ceasing to participate, if the effect is to cause the number of remaining parties to fall below that prescribed by the treaty, or by any other agreement between the parties, as being necessary for maintaining the treaty in force, or if it otherwise gives rise to termination on one of the grounds specified in article 9, paragraph 5 (*a*) to (*c*).

Article 29 A. Effects of termination on the rights of third States

[Held over. See paragraph 211 of the commentary.]

Article 30. Purported or invalid termination (character and methods)

1. A party to a treaty may purport to effect a termination of it or to withdraw from it, invalidly:

(i) By declaring termination or withdrawal, (usually by unilateral denunciation) on grounds or for reasons which do not constitute valid grounds or reason under the terms of the treaty, or otherwise under the provisions of the present Code;

(ii) By an act of termination or withdrawal valid in principle, i.e. based on sufficient juridical grounds, but irregular as to method, or involving a defect or irregularity of process;

(iii) By repudiation, as defined in paragraph 2 below. In case (i) above, the party concerned purports to have valid grounds, but does not in fact possess any, either because the grounds put forward are not legally recognized, or because they are insufficient (i.e. the facts alleged are not adequate to support the claim); in case (ii) there is a valid ground but an irregularity of method; in case (iii), repudiation, the obligations of the treaty are rejected without pretence as to grounds.

2. Repudiation is an act of outright rejection, whereby a party to a treaty declares or evidences an intention no longer to be bound by it or some particular obligation under it, and repudiates the treaty or the obligation. Repudiation may be effected expressly or take place by conduct, but, in the latter case, can only legitimately be inferred if the conduct is so much at variance, or so incompatible with the nature of the treaty obligation, as to amount to a rejection of it, or not to be consistent with an intention any longer to be bound. It is of the essence of repudiation that, although it may be effected by means of a unilateral denunciation or notice, the party concerned does not claim the existence of any valid juridical ground on which the treaty or particular obligation is at an end, or on which a right to terminate or withdraw from it has arisen. In general, therefore, if a party simply denounces a treaty in the absence of any right to do so under the treaty itself or other applicable agreement, and without putting forward any ground on which a right of denunciation is claimed, or if the grounds put forward are predominantly non-juridical in character, there is a *prima facie* inference of repudiation.

3. In none of the cases mentioned in paragraphs 1 and 2 above does the act in question terminate the treaty or the obligation, or effect a withdrawal, in the juridical sense; but such results may, without prejudice to the rights of the parties as to damages or other reparation, ensue in the circumstances described in article 31 below.

4. A party to a treaty incurs international responsibility for any invalid or irregular act by way of purported termination or withdrawal which it may carry out, or for a repudiation, and such act of repudiation, if accompanied or followed by non-performance or a cessation of performance, will, in principle, give rise to a liability to pay damages or make other suitable reparation.

Article 31. Effects of purported termination by invalid or irregular act or by repudiation

1. Where a party to a treaty (herein called the denouncing or repudiating party) purports to terminate or withdraw from it, or any part of it, or to repudiate it or any obligations under it, in one of the ways described in the preceding article:

(i) Such action has of itself no effect on the treaty, its duration, validity, the obligations of the denouncing or repudiating party, or the rights of the other party or parties;

(ii) The other party or parties will have an option in such circumstances to accept termination or withdrawal, and to regard the treaty or the denouncing or repudiating party's obligations under it, or the particular obligation concerned, as being at an end; and in that event the treaty or the obligations concerned will terminate as from the date of the acceptance, but without affecting the responsibility of the denouncing or repudiating party, or any right the other party or parties may have to claim compensation or other reparation in respect of any loss or damage or prejudice involved;

(iii) If termination or withdrawal is not accepted as described in sub-paragraph (ii) above, the treaty will continue in full force with all its obligations, including those of the denouncing or repudiating party, but subject to the right of the other parties to treat any non-performance

by that party as a breach of the treaty giving rise to a right to claim damages or other reparation, or to effect a corresponding or counter non-performance.

2. Acceptance, under paragraph 1 above, of an invalid or irregular act of termination or withdrawal, or of a repudiation, may be express or may be inferred from conduct, but, in the latter case, only from conduct clearly evidencing an intention to accept, or inconsistent with any intention not to.

3. Where, however, the act of purported termination or withdrawal is validly based, and merely irregular as to method, or involving some procedural defect or fault, acceptance may always be inferred *sub silentio.*

4. Where a purported termination or withdrawal professes to be based on valid legal grounds, but these are not accepted by the other party or parties, a dispute will ensue. Even if, however, this leads to a non-performance or suspension of the treaty obligations, it will not, pending eventual acceptance, agreement between the parties, or the pronouncement of a competent tribunal, cause termination or withdrawal as such, and in the juridical sense, to take place. If eventually termination or withdrawal does take place, it will be by virtue of such acceptance, agreement or pronouncement of a competent tribunal.

C. Revision and modification

[Held over. See paragraph 227 of the commentary page.]

II. COMMENTARY ON THE ARTICLES

[*Note.* The texts of the articles are not repeated in the commentary. Their page numbers are given in the table of contents at the beginning of the report.[15]]

General observation. For the purposes of the commentary familiarity with the basic principles of treaty law is assumed, and only those points calling for special remark are commented on. In addition, in order not to overload an already full report, authority has not been cited for principles that are familiar, or where this can be found in any standard textbook; but only on controversial points, or where otherwise specially called for.

First chapter. The validity of treaties

Part III. Temporal validity (duration, termination, revision and modification of treaties)

A. General conditions of temporal validity or duration

Article 1. Definitions

1. *Paragraph 1.* Numerous technical terms are employed in connexion with the subject of the termination of treaties and related matters.[16] At the eighth session of the International Law Commission in 1956, some members expressed doubts, in connexion with article 13 in part I (Formal Validity) (A/CN.4/101), as to the utility of defining such terms. Although the Rapporteur feels that some definitions may be useful, and perhaps even necessary, he suggests that the matter might be left in suspense until the Commission has been able to consider the draft, and to come to some provisional conclusion as to the precise terms to be employed. A number of synonyms or near synonyms exists in connexion with the subject of termination, but the Rapporteur has endeavoured to use as few terms as possible, in the interests of simplification and uniformity.

2. It may, however, be useful at this point to recall that, as provided by articles 1 and 2 and in part I of the Code (A/CN.4/101), the term "treaty", as used in the present Code, includes every kind of written international agreement, whatever its type, form, or designation, and regardless of whether it is expressed in one or more instruments.

3. *Paragraph 2.* The object of this paragraph is largely drafting convenience. Much of the law relating to termination applies equally to the case of the suspension of a treaty, or to suspension of performance; and what is applicable in respect of the treaty as a whole, may be equally applicable in respect of part of it, or of some particular obligation under it. Again, what is applicable to the case of two parties under a bilateral treaty may be equally applicable to that of several parties under a multilateral treaty. Finally, termination itself has two aspects: there is the termination of the treaty as such, but (in the case of multilateral instruments) there is also the possibility of termination not of the treaty as a whole but of the participation of one or more of the parties, by withdrawal or by cessation of its obligation. In such case, there is termination for the party or parties concerned, but nothing more. This paragraph is accordingly intended to make these points clear, and to avoid constant repetition and reiteration in later articles.

4. No particular comment is called for on *sub-paragraphs (i) to (iv),* but the object of the final part of the whole paragraph is to prevent any misunderstanding arising from the fact that, in certain articles, suspension (for example) is expressly mentioned, as well as termination, whereas in others it is not, although intended to be covered unless the contrary is clearly required by the context. The fact is that in certain articles it is necessary or desirable to make express mention of suspension (for example) as well as termination, whereas in others it is sufficient to leave its inclusion to be understood.

Article 2. Legal character of temporal validity or duration

5. This article is largely self-explanatory. *Paragraph 1* links up with articles 10 to 12 of the Code (A/CN.4/101).

6. *Paragraphs 2 to 5* deal with the distinction between the termination of the treaty itself, and its termination for any particular party, where there are more than two. Where there are only two, the withdrawal of one of them necessarily puts an end to the treaty as such (provided, of

[15] For the arrangement of the articles, see footnote 8.

[16] Here are a few: duration, termination, determination, abrogation, cancellation, rescission, dissolution, expiration, supersession, substitution, denunciation, repudiation, renunciation, withdrawal, voidance, desuetude, obsolescence, executed, executory, performed, spent, satisfied, suspension, revision, modification, amendment, etc.

course, that the withdrawal is a valid one); see under articles 30 and 31.

7. *Paragraph 6* states the perhaps obvious consequences of the fact that a treaty is still in force and has not terminated, whether in itself or for any particular party. But it is desirable to state it, in order to deduce the consequence set out in article 3, paragraph 1, which lies at the foundation of the treaty obligation.

8. *Paragraph 7.* As indicated, the case of the termination of a treaty taking place by means of the conclusion of a new revised treaty is dealt with in later articles, and therefore this paragraph may not be essential here, but could be retained for the present.

9. *Paragraph 8.* This paragraph must be regarded as provisional, because certain aspects of revision, modification and amendment are, in fact, or can be, dealt with under the head of termination, and a separate section C on these subjects may eventually prove unnecessary, or should perhaps figure in another part of the work; see paragraph 227 of the commentary.

B. Termination and suspension

10. This section, which contains the kernel of the subject, is divided as follows: 1. General principles; 2. Grounds and methods of termination and suspension; and 3. Effects of termination and of purported termination.

Section 1. General principles

Article 3. General legal character of termination and suspension

11. The purpose of this article is to state at once the fundamental position of principle regarding treaty termination or suspension, and, as an immediate deduction to be drawn from this principle, the general conditions of its validity. *Paragraph 1* stresses the essentially juridical character of termination and suspension. An illegal, invalid, or irregular act in purported termination or suspension of a treaty, or a repudiation of the obligation, whatever the eventual consequences, is, in itself, juridically a nullity and has no effect on the validity of the treaty. This matter is considered further in connexion with articles 30 and 31. It will be seen that while invalid acts may, in certain circumstances, tend to lead to a juridical termination of the treaty, they do not themselves constitute one.

12. *Paragraph 2.* The principle in question, which is here stated, cannot, it is believed, be questioned without involving a destruction of the whole value and essential character of the treaty obligation. It needs no justification, because, without it, treaty obligations, even after being duly assumed, would have no certain foundation, and would only continue for any party so long as that party remained willing to be bound. Since it is always open to the parties to make express provision for termination or suspension by unilateral act if they wish to, or to agree about it separately, it must be assumed, in the absence of such provision or agreement, that they did not intend to allow it. This principle has, of course, certain exceptions, and these are indicated later.

Article 4. General conditions of validity of termination and suspension

13. This article is not intended to state or elaborate in detail the various grounds, methods and modalities of termination and suspension. That is done in section 2. Its object is (*a*) to state the three main sources from which provisions or rules for the termination or suspension of a treaty, or conferring a right to effect either, are derived: the treaty itself, any other agreement between the parties outside the treaty, and the general rules of international law; and (*b*) to state the position according to whether, in the given case, the source (i) makes provision for termination or suspension; (ii) makes no provision, or is silent as to any particular ground or method; (iii) expressly *excludes* termination or suspension, or some particular ground or method of it. Each case is theoretically possible under each head, although some are rather unlikely to occur, while others are usual.

14. *Case A (i).* The fact that the treaty contains certain provisions on the matter does not prevent the parties subsequently making some other special agreement. Nor does it *per se* prevent the possibility that circumstances may supervene in which, under some general rule of international law, termination or suspension may occur, or a right to effect it may arise, by operation of law (as it will hereafter be called).

15. *Case A (ii).* This raises a cardinal issue: are treaties to be deemed terminable by notice if, although not containing any provision for termination, they do not forbid it; or is the correct position that in the absence of provision for termination, this can, *in general*, only take place by mutual consent? There seems to be no doubt that the latter is the correct position, both as a matter of principle and historically.[17] There is, of course, now an increasing tendency to make some express provision about termination in the treaty itself, so that silence is, generally speaking, evidence either of an intention that the treaty (whether or not meant to continue indefinitely) should only be terminable by general consent, or else, at the least, of an absence of any intention to confer on the parties a specific right of unilateral termination or withdrawal. In older treaties, it was more usual to make no provision for termination. But it was precisely because the legal consequences of this were regarded as being those just stated,[18] that the practice of inserting express provisions for termination or suspension (where this was intended) arose.

16. The general rule is therefore clear: silence means, in principle, no termination except by general consent. But to this there may be exceptions: (*a*) some general inference as to duration may be drawn from the treaty as a whole, by considering, for instance, the nature of the obligation; e.g. the parties agree to take certain action " during the following year ", or so long as certain conditions continue, or so long as one of them is in a certain situation, etc.; (*b*) again, it is generally thought that there are certain

[17] See, for the elements both of principle and of history, the text of the Declaration of London of 1871 (which is cited by practically every authority as declaratory of the law on the subject) quoted in paragraph 156 below.

[18] See the Declaration of London quoted in paragraph 156 below.

sorts of treaties which, unless entered into for a fixed and stated period or expressed to be in perpetuity, are by their nature such, that any of the parties to them must have an implied right to bring them to an end or to withdraw from them. Thus, a treaty of alliance may be expressed to be for a fixed term of years, or to continue for specified periods by tacit reconduction, unless and until denounced at the end of any such period. If so, it cannot in principle come to an end, or be denounced, earlier. Even if, however, the treaty contained no such provision, there would probably still be a presumption, arising from the character of the relationship of alliance, that either party may wish to bring it to an end, so that in the absence of any other provision on the matter, this could be done, by giving a reasonable [19] period of notice to that effect. A similar implication may arise from the nature of certain other kinds of agreements, e.g., commercial or trading agreements. For this very reason, such agreements now usually contain express provisions about their intended duration. If they do not, they are depending, of course, in the final analysis, on their terms and correct interpretation governed by an implication of terminability on giving reasonable notice.[20] But this position only exists in relation to treaties. Whose very *nature* imposes such an implication as a necessary characteristic of the type of obligation involved. In all other cases (apart, of course, from that considered under (*a*) of the present paragraph) the principle prevails that silence means termination by consent only.

17. *Case A (iii).* This case is clear where the treaty expressly, or by necessary implication,[21] excludes termination altogether, or for some specified period, or as to a particular ground for, or method of effecting it (e.g. if a treaty is expressed to be for a fixed term of years, this, by implication, excludes denunciation or withdrawal by any party within that period, except by general consent). [22] In all such cases termination (whether in itself, or on the particular ground or by the method concerned) can only take place if permitted under a subsequent agreement of the parties, or by consent given *ad hoc*.

18. There is no reason of principle why, as regards particular grounds of termination, the parties should not (under the treaty, or by subsequent special agreement—see case *B (iii)*), exclude grounds that might otherwise become available to them by operation of law. It is clear that certain grounds of termination must operate independently of the will of the parties. But these are cases in regard to which, by their very nature, the possibility of an exclusion under the treaty or by other agreement will not arise—for instance, the case of the extinction as an international person of one of the parties to a bilateral treaty; or the reduction of the parties to a multilateral treaty to one, in consequence of successive withdrawals; or actual physical impossibility of execution, e.g., by the disappearance or destruction of a material object (such as an island) which forms the subject matter of the treaty. But in other cases in which international law may afford grounds of termination, but which are not cases in which the continuance of the treaty would be an actual impossibility, it seems clear that, if the parties wish to exclude any such case of termination, by the treaty itself or by separate mutual agreement, they are free to do so; and the treaty or separate agreement will in that case govern.

19. *Case B.* The three cases here considered involve elements of the same order as under case A, and are sufficiently covered by the commentary in paragraphs 14 to 18 above.

20. *Case C.* The points involved in *sub-paragraphs (i) and (iii)* will receive comment in connexion with later articles. As regards *sub-paragraph (ii)*, it is an inescapable conclusion that, except on grounds positively provided or permitted by law, termination can only take place as and if provided for in the treaty or other specific agreement of the parties.

Article 5. Grounds of termination or suspension that are excluded by general international law

21. *Paragraph 1* is intended to emphasize that, since any purported termination or suspension effected on grounds that are not positively recognized by general international law, or else specifically provided for in the treaty, or by special agreement of the parties, is invalid and void, it is not strictly necessary to state in terms what are the grounds which general international law excludes—for it really excludes all those it does not expressly admit, or which are not admitted by the parties. However, experience shows that there are certain particular grounds which have frequently been put forward by Governments in purported justification of claims to terminate, or to cease or suspend performance of a treaty. Although, in some of these cases, the other party or parties may have been obliged to accept termination in fact, or may eventually have been willing to agree to it, or to negotiate a new treaty, the grounds themselves have seldom, if ever, been accepted by another party as valid, and there is not believed to be any case on record in which an international tribunal has pronounced termination to be valid on any of these grounds *as such;* [23] while, on the other hand, such tribunals have

[19] What notice is reasonable must depend on the character of the treaty and the general circumstances. It might sometimes be very short, *in principle*, there must be adequate notice, and, of course, all this assumes that no term is provided by the treaty.

[20] It should be stressed that these cases are not, properly speaking, cases of the application of the doctrine of *rebus sic stantibus*. It is true that, if notice of termination is given, it will often be because of a change of circumstances. But this is merely the motive for exercising the right, not the ground of the right itself. The latter is based on the character of the treaty, not on any objective principle of *rebus sic stantibus* applicable (so far as it is applicable at all—see articles 21-23 below) to all treaties except law-making treaties, whatever their character. The right now under discussion, *per contra*, is to be regarded as deriving either from a term implied in the treaty itself in view of its inherent character, or as an implication of law arising from that same character.

[21] This is necessarily a matter of the interpretation of the particular treaty. For instance, a provision, such as occurs not infrequently, that the parties will meet after so many years "in order to introduce into it [the treaty] such modifications as experience may have shown to be necessary", certainly contains such an implication, at least in considerable measure.

[22] Unless, of course, some ground arises by operation of law.

[23] Claims of this kind have sometimes been advanced, though not admitted, on the basis of the doctrine of *rebus sic stantibus* (see below in connexion with articles 21-23).

often endorsed those fundamental principles of international law in the light of which such grounds must be pronounced inadequate and inadmissible.

22. *Paragraph 2* sets out these pleas, together with the fundamental principles of law that render them invalid, taken by themselves. This is in no way to deny that considerations of the kind involved in these cases may play a legitimate part in leading to the termination or revision of a treaty. For instance, they may afford perfectly reasonable grounds on which the party concerned may ask to be *released* (by agreement), or may ask the other party or parties to agree to a revision or modification of the treaty, or to its replacement by a new treaty, or to accept some form of international review. Again, if the treaty itself, or other special agreement of the parties, permits unilateral denunciation after the lapse of a certain period, or at certain stated intervals, or on giving a certain period of notice, the considerations in question may provide an entirely adequate motive for exercising this right. But these are different matters.

23. Finally, as recognized in the phrase "... in the absence of other sufficient grounds ..." (*paragraph 2*), it may well be that if a case arises involving considerations of this sort, it may also involve additional considerations (or may itself, by reason of certain special circumstances, constitute a case) of such a kind, that a right of termination or suspension will arise on other grounds, duly recognized by the present Code. But, if so, it is on those other grounds, not on the occurrence *per se* of the circumstances envisaged by article 5, that the right will be based.

24. The cases envisaged by article 5 (considered, that is, as claims to terminate, or cease or suspend performance of a treaty at will, and as of *right*) all involve a conflict with one or other of three or four great principles of international law, universally accepted, and of wide application over the whole field of international (not merely treaty) law—which might indeed be said to be of a fundamental character for international law, since without them international law could not function—namely, the principle of the continuity of the State as an international entity; the principle of the primacy of international law over national law in the international sphere; the principle *pacta sunt servanda*, which is not merely a principle of the law of contractual obligations, but one of the foundations of the binding force of all law; and the principle *res inter alios acta*, which equally extends beyond the purely contractual field. It is not therefore necessary to justify these principles, which are essential to the stability of international law and obligations, but only to make a few remarks as to their application in the present connexion.

25. "By reason of the principle of the continuity of the State ..." (*sub-paragraph (i)*). Without prejudice to the philosophical questions centring around the personality of the State, it can be affirmed that as *between* the State and such other juridical constructs as governments, régimes, administrations, etc., it is the State (i.e., if preferred, the national community as a whole) which is the subject of international law, and the subject of international rights and obligations (including treaty ones), and it is the State—i.e. the community or aggregation of the citizens of the State, conveniently personified, or at any rate designated, as the State—which is the party to a treaty.[24] This position is not affected by the fact (*a*) that it is heads of State or governments who actually negotiate and conclude treaties, and (*b*) that the treaty is often expressed to be between heads of State, governments, departments of government, ministries, etc.—for it is in the name and on behalf of the State (community, nation, populace, aggregation, society or whatever it may be called) that the head of State, government, etc. acts. It is only in this capacity that the head of State, government, ministry, etc., has any *raison d'être*, i.e. as representing, or as an organ or agent of the State (community, aggregation, etc.). It is only in that capacity that such entities are recognized as being entitled to act and to produce valid juridical effects in the international field.[25] It follows that, in so acting, heads of State, governments, etc., bind the State. If they did not, their acts would have no meaning. From this it follows that while the acts of heads of State, governments etc. can (provided these acts are juridically valid) correspondingly *unbind* the State, they cannot do so merely because the head of State or government is a different one, nor can that be made a ground *per se* for such action. When a government etc. undertakes an obligation, it is the State which becomes bound, not merely the particular government (except as agent of the State responsible for implementing the obligation). Therefore a change of government (agent) has no effect on the international position and responsibilities of the State. At any given moment, a State is subject to a complex of international obligations. A new government simply inherits this position. It can, according to its own views as to what is desirable for the State, take such steps as are legally open to it under the treaty or otherwise, or by agreement with the other parties, to change this position. But it cannot claim a right to change it *at will* merely because it is a new government: for the government can have no right better than, or superior to, that of the State which it represents; and the State itself would have no such right.

26. Put in another way, it may be said that just as a State is continuously bound by its *general* international obligations, irrespective of any change of government, etc., so equally (subject to any *valid* steps open to it by way of termination or suspension) is it continuously bound by its *special* (i.e. treaty) obligations, irrespective of any change of government etc.—for if the new government did not itself personally assume these obligations on behalf of the State, equally it did not personally assume the State's general international law obligations. Yet it is, and remains bound by them. Given the frequency with which changes of government, régime, administration etc. occur, any other view would be fatal to the stability of the treaty obligation, and States would not be willing to enter into the treaty relationship on so precarious a basis. This is not to say

[24] All this is quite without prejudice to any question of the position of individuals in international law. In any event, individuals cannot be parties to treaties—unless indeed as representing the State (e.g. sovereigns, heads of State, etc.).

[25] These remarks are not intended to affect the question of what limited, partial, or temporary recognition, or recognition for special purposes, may, in certain circumstances, be accorded to entities such as insurgents, parties in a civil war, etc.

that the considerations set out in paragraph 22 above are not fully applicable to this case. But it means that a new régime or administration, seeking to free itself from a treaty obligation, can only do so if (and in the manner) provided for by the treaty, and, if neither the treaty itself nor any recognized rule of law avails, must request release at the hands of the other parties. If this is refused, the government concerned must carry out the treaty or accept responsibility for a breach, or for an illegal repudiation of it.

27. "... without prejudice to any question of State succession ..." (*sub-paragraph (i)*). Where the new government, régime, etc. is the consequence not of a mere change of administration within the same State, but of a break in the continuity of the State involving a change in international status or personality, the case is a different one. Common examples are the disappearance of a State by absorption in another; the splitting up of a State into a component state or part of a Federal Union; the emergency of a new State by succession or separation from an existing one (but in that case the international continuity of the latter State is not affected). In such cases, the treaty position will to a greater or lesser extent be affected. But if, in consequence, the new government or régime is entitled to claim that certain treaties are not applicable, it will not be because the government itself is new but, precisely, because there is not merely a new government but a new State, or the disappearance of a former State: the government does not represent the same international entity but a different one, or an entity which is no longer a separate international entity; the State is not the same State that entered into and was bound by the treaty, or the State is no longer there to be bound by it. Except in so far as the total extinction or absorption of a party to a bilateral treaty necessarily brings that treaty, as such, to an end (a case dealt with in article 17), these matters are matters of State succession in regard to treaties, and are probably best dealt with as part of the general topic of State succession. In any event, if dealt with as part of the topic of treaties, they would require to be made the subject of a separate report.

28. The point just discussed is, however, one that fully safeguards the position of colonial or analogous territories that emerge into full independent statehood; for these are new international entities, and the extent, if any, to which, in the absence of any special arrangements relating to their change of status, they will continue to be bound by treaties formerly applicable to their territory as part of a larger international entity, will be a matter of the law of State succession.

29. *Sub-paragraph (i)* (b). The principle of State continuity applies equally to prevent any cessation of the treaty obligation occurring merely because, owing to a diminution in its assets, or a loss of territory, the State may be less well placed to carry it out than previously—just as the curtailment of a private individual's income does not *per se*, or in law, absolve him from payment of his debts.[26]. Such changes may affect the position of the State, but not its personality or continuity. Where, however, the treaty obligation specifically relates to the particular assets or territory affected, the case may be different, and the obligation, if it persists, may devolve on another State. This is partly a matter of the interpretation of the relevant treaty and partly a matter of State succession.

30. *Sub-paragraph (ii)*. The principle that a State cannot plead its internal law or constitution as a ground for non-performance of its international obligations, of which this sub-paragraph is only a particular application, is well established generally, and was affirmed by the Permanent Court of International Justice more than once, and particularly (as regards the present point) in the case of the *Exchange of Greek and Turkish Populations*, when the Court said that it was "... a principle which is self-evident ..." that "... a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[27] It is accepted law that a State entering into a treaty must take the necessary steps to assure or bring about the requisite conformity on the part of its law and constitution, so as to be, or place itself, in a position to implement the treaty. If this is impracticable, the State must refrain from entering into the treaty. If it nevertheless does so, it must, unless it can obtain lawful release, accept responsibility for any resulting breach.[28] Therefore, if it should, for constitutional or other reasons, prove impossible to take the required steps or effect the necessary changes, the State must exercise any right of denunciation afforded by the treaty, or, if none is provided for, must request release at the hands of the other party or parties. If release is not afforded,[29] and it still proves impossible to do what is required, the State must accept responsibility for a breach. It cannot simply declare its own release. Exactly similar considerations apply (see sub-paragraph (ii) (*b*)) to the case of

[26] International law does not recognize anything that is the direct equivalent of the private law principle of bankruptcy But some of the rules given in articles 16 to 23 of the present draft may operate to afford the same kind of relief.

[27] Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 10, p. 20.

[28] In some cases, a treaty may expressly provide that the parties shall take the necessary legislative steps to enable themselves to carry it out. Strictly, this is unnecessary. Such an obligation arises *ipso facto* by the very fact of entering into the treaty, which implies and guarantees that the parties can or will be able to carry it out.

Where a treaty provides that it shall be ratified by the parties in accordance with their constitutional requirements, this operates precisely as a warning that domestic considerations may prevent ratification. But that is another matter, for if the treaty is not ratified because of internal difficulties, the country concerned does not become a party to the treaty at all.

The case of a government which ratifies a treaty without having conformed to the State's constitutional requirements is again a different one. This is a matter of the essential validity of the treaty, which comes under part II of this chapter and is to be considered in a separate report.

[29] It is unlikely, in any *bona fide* case, that it would not be afforded. What is inadmissible is that a government should declare its own release because of difficulties arising from a failure of the State as a whole; or alternatively, should refuse to accept responsibility for a failure to carry out the treaty which is equally ascribable to a deficiency of the State as a whole.

supervening changes in the State's internal law of constitution, leading to inconsistency with (or preventing performance of) a treaty obligation. It is the duty of the State, through its government and legislature, to avoid such a result during the currency of the treaty, unless it can lawfully terminate or obtain release from it. Failing this, and if the changes occur and cannot be undone, the State must accept responsibility for any resulting breach.

31. In all these cases, the kind of difficulty or even the "impossibility" involved is not the kind of impossibility in respect of which international law may, in certain circumstances, recognize a termination of the treaty obligation (see article 17 and the commentary thereon below). The latter kind consists of the impossibility arising from circumstances external to the State, over which it has no control, and does not include obstacles arising from defects or failures in the State's own internal arrangements or actions. A State, as an international person, incurs responsibility for the failure or refusal of its legislative or other particular organs to implement its international obligations; or for the action of its government in entering into the treaty in these circumstances; and in the last resort for possessing a constitution that does not permit the State to carry out its treaty obligations [30], for constitutions can be changed. What may be difficult, or constitutionally impossible, for a particular organ of the State, can never be impossible for the State as a whole, unless it is not a fully sovereign State. Sovereignty implies, and indeed denotes, the unfettered ability and capacity of the State internally in such matters.[31]

32. "... the primacy of international over national law in the international sphere ..." (*sub-paragraph (ii)*). The words "in the international sphere" are not intended to raise or prejudge any philosophical question as to the respective positions, and the interrelationships, of national and international law—concerning which various views are, or have been, current. These words are indeed intended to avoid controversy, because, whichever of the different views is taken, the result is in each case (if through different processes of reasoning) the primacy of international law in the international sphere.[32] Without this, international law would have no obligatory force, and would depend on the continuing willingness of States to carry it out voluntarily.[33] On such a basis it could not function, and the common-sense reason for the rule contained in article 5, paragraph 2, sub-paragraph (ii), is that, without it, means would never be wanting for the legal, and quasi-unchallengable, avoidance of treaty obligations.

33. *Sub-paragraph (iii).* The principle *pacta sunt servanda* is not open to question. But it embodies *inter alia* an implied recognition of the need for obligatory force in respect of legal as opposed to "voluntary" obligations. When situations are normal, and relations good, and neither party experiences any difficulty in implementing the treaty, there could be said to be no need for legally binding obligations at all. The matter could be left to the mutual, but voluntary, action of the parties. The introduction of the legal factor involves a recognition precisely of the fact that situations are not always normal, nor relations always good, nor the parties always or equally free from all sense of burden in carrying out the obligation. Indeed, it is not too much to say that, underlying every contractual and treaty relationship, there is an implied anticipation of the possibility that in one form or another, at some time or another, in greater or lesser degree, and for both or one of the parties, such an element may exist or arise. The whole *raison d'être* of the obligatory force of the contract or treaty is to cater for such a situation, and it is therefore virtually a term implied by law that such factors are not *per se* [34] grounds of dissolution.

34. "... or that diplomatic relations have been broken off ..." (*sub-paragraph (iii) (a)*). Cessation or suspension of diplomatic relations between States does not of itself affect treaty relationships between them. If these are affected, it will be *aliunde*, through circumstances with which the breaking of diplomatic relations may be connected, but which are independent of it. Any practical difficulties of implementation can be met by invoking the

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[30] The Rapporteur does not overlook the very real difficulties that may exist for States with non-unitary constitutions, such as federal Unions, where matters which are the actual or potential subject of treaty obligations may be entirely within the purview of the component division of the Union, and not subject to direct control by the federal government. In practice, there are usually a number of domestic devices for overcoming these difficulties, or the matter may be the subject of a special clause in the treaty, or of arrangement with the other party or parties. However, it is believed that the rule enunciated in article 5, paragraph 2, sub-paragraph (ii), and in the text of the commentary above, must be valid unless the whole treaty obligation is to suffer a *reductio ad absurdum*; and that it must, in principle, obtain equally for federal States, unless it is to be admitted that certain kinds of treaty obligations are, for them, purely voluntary in character, not only as regards their initial assumption, but also as regards their actual implementation when assumed—although for the non-federal parties they would be obligatory—a position of discrimination that could not be accepted.

[31] See the luminous analysis of what constitutes fully sovereign independent statehood given by the distinguished Danish jurist Alf Ross in *A Textbook of International Law* (London, Longmans, Green and Co., 1947), chapter I, section 3, pp. 33-46.

[32] This is so whether the position adopted be the dualist view, or the monist view that subordinates international to national law, or the monist view that subordinates national to international law. Even according to the second of these (by which it is each State's national law that applies international law in the State's external sphere, and subjects the State to international law in that sphere) it is (though by the operation of the national law) international law that prevails in the international sphere, in case of any conflict.

[33] States may *enter* into obligations voluntarily, but once entered into they are binding, and their implementation is not a voluntary act. Consent is only a method (if, in the treaty sphere at any rate, an indispensable one) by which obligations arise or come into force; but it is not the foundation of the binding force of the obligation once it has come into force. It is not consent that makes consent binding, for if it depended on that it would be necessary to provide yet another principle in order to give juridical force to the consent that made consent binding. See the present Rapporteur's article on "The Foundations of the Authority of International Law and the Problem of Enforcement" *The Modern Law Review*, vol. 19, No. 1, January 1956, pp. 8-13.

[34] In connexion with other circumstances or factors, they may have an effect indirectly. See paragraph 22 above.

good offices of another State, or by appointing a protecting State.[35]

35. *War*, on the other hand, introduces a radical change in all the relations between the parties, and may constitute an objective ground causing the termination or suspension of treaties between them, other than such as specifically contemplate a state of war [36].

36. *Sub-paragraph (iii)* (b). The considerations set out in paragraph 33 above apply peculiarly to the type of case contemplated by this sub-paragraph. On the other hand, so also do those discussed in paragraphs 22 and 23. But it must be emphasized that if there are elements involved that may give rise to a right of termination or suspension, it will be on the existence of these elements that the right must be based, not on the mere onerousness, difficulty, embarrassment, etc., *per se*.

37. *Sub-paragraph (iv)*. The principle *res inter alios acta*—that a party's rights cannot be affected by transactions entered into by the other party with a third party or parties—is fundamental to treaty law. Without it there would be a complete instability and uncertainty of the treaty obligation, and, frequently, a ready means of avoidance. If, of course, it is not a case of *res inter alios acta* and the other treaty is with the same party or parties, the case is an entirely different one, and this is considered in connexion with article 13. It makes no difference whether the other treaty is previous or subsequent. The party concerned will have entered into two mutually inconsistent sets of obligations. In principle, he will be bound by both, and it is for him to resolve the difficulty. For any breach of either treaty he will incur responsibility.

Section 2. Grounds and methods of termination and suspension

Sub-section 1. Classification

Article 6. Analysis

38. This article is purely analytical in character, but has been included for the present because one of the major difficulties confronting the codifier of the topic of termination is that of classification. Several different systems are possible, and no two authorities deal with the matter in quite the same way. Equally, the various extant codifications adopt different methods.[37] Some authorities make no attempt at classification at all, but simply give an *ad hoc* list of a number of grounds and methods, without reference to the different juridical bases of the methods given.[38] In other cases there is a mixture, one system being employed for part of the subject and another for the rest, because no clear distinction is drawn between *grounds* on the one hand, and *methods* on the other. Again, the authorities differ as to which ground or method they put under which head.[39] Therefore a scientific analysis of the categories involved is, if not essential, very desirable.[40]

39. The main source of confusion lies in the failure to distinguish clearly between the legal grounds causing, justifying, or giving a right of termination, and the methods or processes by which the termination itself results or is carried out. Thus, automatic expiry is a method by which a treaty terminates, but expiry may result from a variety of legal causes (for example, provision in the treaty, operation of law). Again, a notice of termination or withdrawal given by a party is a method of bringing a treaty, or that party's participation in it, to an end; but the categories of legal grounds on which such a notice may be justifiable are several. Another method of termination is by the joint act of the parties in drawing up a specific agreement terminating the treaty, or in replacing it by a new treaty. Here the agreement (or the new treaty) is both ground and method. But an agreement also may be ground without being method, in those cases where the parties supplement or vary the terms of a treaty by making *provision* for termination in a separate agreement, without, however, actually terminating the treaty.

40. There are in fact several ambiguities about the concept of agreement in the present connexion. There is the one just noticed, that an agreement may be an agreement *providing* for termination, or else an agreement actually *terminating*; and an agreement "terminating" may itself be *direct*, or *indirect*, as when it takes the form of assent to or acceptance by one party of what the other wants or does. Secondly, an agreement "providing" may be an agreement by means of, and embodied in, the treaty itself, or else it may be an agreement arrived at outside it; whereas an agreement "terminating" always takes place outside the treaty. Finally, an agreement "terminating", and taking place outside the treaty, may take the form of an agreement expressly for that purpose and having no other effect, or it may take the form of a new treaty replacing or revising the previous one.

41. Further ambiguities are latent in the concept of the *will* of the parties. Termination may take place by the will of both or all parties, of one only, or of neither or none (operation of law). Again, the will of the parties may be manifested either in making provision for termination, or in actually bringing it about, or both. The two are not the same, and frequently do not coincide. Thus, the parties

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[35] *A fortiori* will the treaty position not be affected by a mere withdrawal of heads of mission, leaving the mission functioning *in situ* under a *chargé d'affaires*.

[36] See under commentary on article 17. It is proposed in due course to submit a separate report on the subject of the effect of war on treaties, since, although very closely connected with the subject of termination and suspension, it is not wholly part of it, and is of sufficient importance to warrant a separate report. It is, however, possible that it might be better dealt with as part of the general topic of the legal effects of war, because it must involve certain questions that are not peculiar to the treaty aspect, such as what constitutes "war"; in what does it differ from "hostilities"; are the same rules applicable to the case of hostilities?—and so on.

[37] See, for instance, Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to *The American Journal of International Law*, vol. 29, No. 4 (1935), and the various codes and codifying treaties given in the appendices to that volume.

[38] Paul Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau et Cie, 1926), vol. I, part III, paras. 845-860.

[39] However, that strictly lies outside this article, which is concerned with *systems* of classification rather than classification itself.

[40] This particular analysis is certainly neither flawless nor exhaustive but does constitute an attempt at a classification of the modes of termination on a scientific basis.

may provide that the treaty shall terminate in a certain event, but it may lie outside their control whether that event occurs or when, and it may occur contrary to their wishes. They will the end, but not the occasion of it. Or the treaty may provide for termination by unilateral notice, but only one party gives the notice. Here the parties have both or all willed a *faculty* of termination, but only one party has willed termination itself. Thus, the fact that the parties have agreed on, or made provision for, termination does not mean that they have willed it—or that both or all have.

42. From the foregoing considerations it will be clear that the question of classification is not a straightforward one. For instrance, there is an obvious distinction between the class of case in which a treaty terminates automatically by expiry or lapse, and without specific act of the parties, and the case of termination brought about by the act of the parties themselves, or one of them. Yet automatic termination can itself be (indirectly) the act of the parties—for instance if they embody in the treaty a provision for its automatic expiry on a certain date. Therefore, a different method of classification arises out of the contrast between, on the one hand, the cases where the parties have *provided* for termination (automatic or not) and, on the other, the cases where they have made no such provision; but termination (again, whether automatic or not) can take place by other means, e.g. operation of law. Further distinctions can be drawn according to whether, if the parties have made provision for termination, they have done so in the treaty itself or by means of another separate or subsequent agreement.

43. In consequence, there emerge several possible methods of classification turning on different criteria, such as presence or absence of the will of the parties (or one of them) in the act of termination; presence or absence of agreement of the parties as to termination (contrast with termination by operation of law); termination by expiry or other automatic means, or by the act of the parties; and to these must be added termination provided for or not provided for by the treaty itself. These criteria might be summed up as the criterion of will, the criterion of automaticity, the criterion of agreement, and the criterion of treaty provision. Any concrete case of termination will be made up of a combination of factors, either negative or positive, taken from each category. It has been attempted to render the foregoing points clear in article 6 itself, which requires little further comment, but the following remarks on the separate paragraphs may be made.

44. *Paragraph 1* poses the fundamental distinction between *provision* for termination and termination itself, and between methods or processes of effecting termination and the legal grounds for it.

45. *Paragraphs 2 and 3* deal with *methods* or processes, of which there are only two *classes*, the automatic and the specific, but the latter is divisible according to whether the act is the act of both or all the parties, or of one only. There are, however, two different ways of describing these classes, turning respectively on the criterion of automaticity or not, and on that of the presence or absence of the will of the parties. There are also the complications arising from the different ways in which the agreement of the parties can manifest itself (see also below in connexion with paragraph 4).

46. "... may in some cases be automatic, and yet not take place independently of the will of the parties, but by their will ..." (*paragraph 3*). This occurs if, for example, they agree that it shall take place on the expiry of a specific period or on the happening of an event *certain* to occur. *Per contra,* if the treaty is to expire on the occurrence of an event uncertain of occurrence or under the control of a third State, it is a true case both of automaticity and non-dependence on the will of the parties, because expiry only takes not place automatically on the happening of the event, but because also the parties have not willed the event to occur.

47. *Paragraph 4.* These two cases are described as additional or subsidiary, because the first is really a special case of agreement, though of indirect agreement (see also the commentary to articles 30 and 31 concerning the acceptance of an invalid or irregular act of termination); and the second is rare, because the pronouncement of a tribunal is usually to the effect that the treaty did in fact lapse on a certain date, or that a party validly exercised a faculty of termination. These two cases are not further directly considered in this analysis.

48. *Paragraphs 5 and 6* deal with *categories* or sources of *grounds* (but not with actual grounds, which are considered in later articles according to their source, for example, the treaty, or operation of law). Two criteria are possible, based respectively on whether the parties have or have not themselves provided for termination, and whether the treaty itself does or does not make such provision (the parties may have done so, but not in the treaty).

49. *Paragraphs 7 and 8* make the points explained in paragraphs 40, 41 and 43 above; and *paragraphs 9 and 10* attempt a synthesis based on the three central cases of termination at the will of both or all parties, of one only, or of neither or none. All these paragraphs are self-explanatory and call for no further special comment except as regards two phrases in paragraph 7:

(*a*) "... if an agreement between the parties provides for or permits termination in certain events ..." (*sub-paragraph (i)*). For instance, if the parties sit round a table and draw up and sign a protocol terminating a treaty, the agreement of the parties so embodied is both the legal ground or foundation of the validity of the termination and the terminating act itself; whereas if a party gives a notice of termination in consequence of a faculty provided in the treaty, such act constitutes the termination, but the agreement of the parties embodied in the treaty constitutes the legal ground or foundation of the validity of the act.

(*b*) "... but not necessarily the actual termination itself, which may occur independently of their will." (*sub-paragraph (ii)*). For instance, if they have provided for termination on the happening of an event (*a*) which is not certain to happen, (*b*) over the occurrence of which they have no control.

50. *Paragraph 11.* Because of the complications involved, it seems best to proceed on a largely pragmatic basis. The simplest, and, from the purely legal point of

view, the most fundamental contrast, seems to be that between the case where there is some agreement between the parties about termination (or they consent to it *ad hoc*), and the case where there is not, but termination or suspension can nevertheless, in certain circumstances, take place by operation of law.[41] The first of these, however, itself offers two different cases (though both are cases of agreement), namely, the case where provision is made in the treaty, and the case where the agreement takes place outside the treaty.[42] Thus, the classification adopted for the purposes of the draft Code is the simple and practical one set out in article 7, which is really that of classification according to the *source of the right*. On this basis, if a trifle logically, three main classes may be envisaged: termination deriving from the terms of the treaty; termination deriving from any separate agreement between the parties; and termination by operation of law. In connexion with each, the possible or appropriate method or methods has to be considered as well as the grounds, but this cannot be fully completed until sub-section iii (The process of termination) of the present section is reached—articles 24 to 27.

Article 7. Classification adopted for the purposes of the present Code by reference to the source of the right

51. *Paragraph 1.* See the remarks just made in paragraph 50 above. The classification here suggested has the great advantage of presenting the matter in the same way as it presents itself in practice, namely, according to the source of the right of termination invoked; for the first inquiry that must always be made when any question of termination arises is what does the treaty itself provide, or does it make no provision? If the treaty is silent, the next question will be whether there is any relevant agreement of the parties outside the treaty or, in certain cases, whether they have consented or assented to, or accepted a termination. Finally, there is the possibility that, in addition to either or even both the above, or although there is no treaty provision and no separate agreement, the circumstances may be such as to bring about, or to warrant, termination under some rule of law.

52. "... by one act, or by successive acts ..." (*sub-paragraph (ii)*. This covers the case where the parties designedly agree to terminate, and the case where agreement results from a series of acts, e.g., a request by one party and an assent by the other, or an invalid purported termination by one, which however is accepted by the other (see also the commentary on articles 30 and 31).

53. *Paragraph 2* is self-explanatory and calls for no comment.

Article 8. System of priorities in the exercise of any right of termination

54. *Paragraph 1.* Although this to some extent goes over ground covered in another form by article 4, it seems desirable to state explicitly in what order of priority the basic criteria specified in article 7 for determining the possibility or validity of any termination are applicable, and with what effect in principle.

55. *Paragraph 2.* This is intended to reserve such questions as, for instance, *what* particular circumstances will support a claim of termination or of a right of termination in any given case where operation of law is invoked; or what modalities have to be followed in effecting termination by notice under a treaty clause etc. It is not enough to show the existence of a treaty clause, or an agreement of the parties, or a rule of law: it is also necessary to show that the concrete case is within that clause, agreement or rule, and that any necessary steps have been taken in the manner provided or required.

Sub-section ii. Legal grounds of termination and suspension

Article 9. Termination in accordance with the terms of the treaty (types of such provision)

56. This article is, as a matter of fact, equally applicable to the case where methods of termination are provided for under a separate agreement, and this is made clear by paragraph 3 of article 11. However, as provision in the treaty itself is by far the most frequent case, it is convenient to deal with the substance of the matter under that head.

57. *Paragraph 1.* Everything naturally depends on the correct interpretation of the treaty or special agreement, and this is the primary principle.

58. *Paragraph 2.* There is no limit to what the parties may provide for if they wish. But, subject to that, certain types of provision are very common. They are set out in sub-paragraphs (i) to (iv), which do not call for special comment.

59. *Paragraph 3.* See paragraph 57 above, which applies equally here. It will be rare that notice with immediate effect is permissible, and then usually only under emergency circumstances.

60. *Paragraph 4.* It is not uncommon to find a treaty clause in some such terms as "The present treaty shall remain in force for a period of five years, and thereafter for successive five yearly periods." Such a provision would fail in its proper intention unless its effect was as specified in this paragraph.

61. *Paragraph 5.* See the commentary to article 2 above. In the case of a plurilateral or multilateral treaty, notice by one of the parties will, in general, only affect that party, and will not bring the whole treaty to an end, unless the case is one of the three specified in this paragraph. Clearly, if, by the effect of successive withdrawals, only two parties remain, notice by one of them will bring the treaty to an end. It will do the same if the successive withdrawals have caused the number of parties to fall below a number specified in the treaty as being necessary to keep it in force, or below which it will terminate.[43]

[41] However these two cases are not mutually exclusive, for the fact that there is an agreement between the parties does not of itself preclude termination taking place by operation of law. See paragraphs 14 and 19 above.

[42] Again, the two cases are not mutally exclusive, for provision in the treaty may be supplemented or varied by an agreement outside it.

[43] It will be a matter of the interpretation of the relevant provisions what the position is if new participation by accessions or ratification is still possible at the time.

Such number may, but need not, be the same as that of the number (if any) of ratifications, accessions, etc., specified as necessary to bring the treaty into force. On the other hand, the mere fact that such a number was specified for the purpose of entry into force does not mean that the same, or any, number (other than two) will equally operate for purposes of termination. Finally (although this case is put first in the text), there may be cases where either the treaty provides, or it is a necessary inference from its terms and circumstances, that withdrawal by any party or by a particular party will cause the treaty to terminate.

62. *Paragraphs 6 and 7* are self-explanatory.

Article 10. Termination by agreement outside the treaty.

A. The agreement considered as an enabling instrument

63. The title of this article is based on the distinction between an agreement which simply provides for termination and one which actually effects it. The one is enabling, the other operative.

64. *Paragraph 1.* This provision is based on the principle that the parties can do anything by agreement. Thus, they can provide separately for termination, even though it is not provided for in the treaty, or can vary the provisions of the treaty as to termination.

65. "... (either contemporaneously or collaterally with the treaty, or subsequently) ..." (*paragraph 1*). As a general rule any such agreement will be entered into perhaps a considerable time after the treaty has come into force, with a view to supplementing or varying its provisions in respect of termination, in the light of events that have occurred subsequently. However, there may be cases in which it will suit the parties to embody provisions about termination in a separate or collateral instrument or protocol, drawn up contemporaneously with or immediately after the treaty itself.

66. *Paragraph 2* is self-explanatory.

Article 11. Termination by agreement outside the treaty.

B. The agreement as a terminating act

67. As to the title of the article, see paragraph 63 above.

68. *Paragraph 1.* Four classes of cases are contemplated: (i) the agreement directly terminates the treaty; (ii) it takes the form of a new treaty; (iii) it takes the form of assent to or acquiescence in a simple request for, or in a unilateral act of, purported termination; (iv) it operates in two special cases of renunciation of rights and mutual desuetude.

69. *Paragraph 2* enunciates the general principle that, in order that the agreement of the parties (in whatever form) may operate to terminate a treaty, it must be the agreement of both or all of them, as the case may be. Only if the treaty itself or any separate agreement of the parties otherwise provides (see below in connexion with article 13, paragraphs 4 and 5), will this not be so, and in that case the parties will have agreed in advance that a limited measure of agreement will suffice.

Article 12. Agreement as a terminating act. (i) Case of direct terminative clauses

70. *Paragraph 1.* Although not strictly necessary, it seems desirable to state explicitly that even a treaty expressed to be perpetual or without limit of duration can be terminated by the act of all the parties.

71. *Paragraph 2.* In the type of case contemplated by this article, termination will be the primary, if not the sole object of the agreement, and will take place at once on the coming into force of the agreement (which will itself usually be immediately, unless ratification is provided for). In some cases, however, the parties may terminate the treaty, but provide that this shall only occur after the lapse of a specified period—when it will take place automatically.

72. *Paragraph 3.* It has been maintained (largely, it would seem, with a view to internal constitutional requirements) that in such a case the terminating, replacing, revising or modifying instrument must be of "equal weight" with the one terminated, replaced, revised or modified.[44] On this basis a full treaty could only be terminated or replaced by another full treaty, and so on. However, there appears to be no rule or necessity of law for any such requirement. Nor would the doctrine accord with practice. No doubt where replacement in involved, a treaty will normally be replaced by another treaty. On the other hand, where treaties are terminated by special agreement this will often, indeed usually, take the form of a simple exchange of notes or protocol. The same is true of many revising or modifying instruments. The correct view is that, since the agreement of all the parties is required, they can adopt (or any one of them can insist on) such form as may be appropriate for constitutional or other reasons. In law, however, all that is required is agreement, and the form in which it is embodied is immaterial, provided it is adequate to make clear the character and intention of the transaction.

73. *Paragraph 4.* See the previous paragraph. Where there are a large number of parties which have, at different times, ratified or acceded to the treaty, it may be impracticable to obtain all their signatures to a single terminating instrument, and they may be requested to communicate their assent individually to a central authority. Nor, in the case of treaties concluded under the aegis of an international organization, would there seem to be any reason of principle why termination should not be effected by means of a vote of the assembly of the organization, recorded in the minutes, provided the delegates are duly authorized.

Article 13. Agreement as a terminating act. (ii) Case of termination by means of a new treaty

74. There are two possible cases: all the parties agree, either by participating in the new treaty, or by giving their assent to the termination of the old one on the coming

[44] See a statement by the United States representative at the forty-ninth meeting of the Social Committee of the Economic and Social Council held on 28 July 1948, E/AC.7/SR. 49, p. 8.

into force of the new; or the treaty (or other agreement of the parties) provides for termination on a majority basis, if a specified majority of the parties agree to supersede the treaty by another one, replacing or revising it.[45] Where some only of the parties agree on a different régime for application *inter se* (which may or may not be compatible with the continued application of the existing treaty in their relations with the other parties); or where all the parties to a treaty become parties to a new one without intending to terminate or replace the other treaty, but an incompatibility between the two subsequently reveals itself —difficult questions of interpretation and application may arise. However, since they are fundamentally questions not of termination, but of the operation and effect of treaties, they are dealt with elsewhere in the present Code.

75. *Paragraph 1.* Quite often the new treaty does not explicitly terminate the old one, but either it uses equivalent language (for example, it states that it " replaces " or is in substitution of or supersedes the old), or else it is clear from the tenor of the new treaty that such must be the result. If this is not the case, there is no termination—at least not then and there.

76. *Paragraphs 2 and 3* are self-explanatory.

77. *Paragraphs 4 and 5* deal with the only case where a termination by means of a replacing or revising treaty can take place by majority action (i.e. otherwise than unanimously). See paragraphs 69 and 74 above.

78. "... revision or modification ..." (*paragraph 5*). It is very often the object of this procedure not to terminate or replace the treaty, but to facilitate its revision of the introduction of amendments.

79. *Paragraph 6.* See comments in paragraph 74 above.

Article 14. Agreement as a terminating act. (iii) Case of ad hoc *acquiescence or assent*

80. *Paragraph 1* is self-explanatory and calls for no special comment.

81. *Paragraphs 2 and 3.* There is however an important difference—of a theoretical character at any rate—between assent to another party's request for termination or withdrawal, and acceptance of an illegal or irregular act of purported termination or withdrawal, or of a repudiation of the treaty obligation. The first is a genuine case or agreement; and although it is evidenced by a request or proposal, and a reply thereto (and therefore is analogous, though arising differently, to the case contemplated by article 12, paragraph 4—see paragraph 73 above), there is a genuine common act of the parties, or at any rate a common mind. In the second case, it is only in a somewhat elliptical sense that this can be said to be true. There is no common act and no real common mind. There are two individual and separate acts which, taken together, lead to termination, but the latter (whether termination of the treaty itself or of the participation of the party concerned) springs from, and has its legal foundation solely in the acceptance. For this reason, the incidents of the matter are dealt with under articles 30 and 31.

Article 15. Agreement as a terminating act. (iv) Special cases of renunciation of rights and mutual desuetude

82. The cases covered by this article are both cases which either have been treated by some authorities as cases of termination by operation of law, or which might be so regarded, but which seem to the Rapporteur to fall more properly within the category of termination by agreement, or needing agreement.

83. *Renunciation of rights. Paragraph 1.* This is a controversial case, some authorities (Rousseau and Fauchille, for example) treating it as a case of automatic termination, on the ground that if a party renounces its rights under a treaty the latter *pro tanto* loses its *raison d'être* and therefore must come to an end, either as a whole or as regards that part of it which relates to the obligations corresponding to the rights renounced. Other authorities, on the other hand, consider that a renunciation of rights cannot in itself bring the treaty or relevant part of it to an end, and that the consent of the other party or parties is required, presumably because the latter may have an interest in continuing to perform the relevant obligations, either (where there are reciprocal rights and obligations) to ensure the corresponding performance of the same obligations by the party renouncing its rights (it cannot renounce the obligations), or because such party or parties anticipate some indirect or long-term advantage or interest from performing these obligations, even though obtaining no immediate return, benefit or reciprocity.[46] On the whole, this seems to the Rapporteur to be the better view. Apart from the fact that a renunciation of rights under a treaty and the termination of the treaty are theoretically distinct things, there is also the practical reason that, generally speaking, States do not undertake obligations out of pure altruism; and even where a treaty may, so far as its actual terms go, appear to do no more than confer a benefit on one party and an obligation on the other to furnish that benefit, an indirect or long-term interest may exist for the latter, even if only of a negative kind (e.g. the performance of the obligation has created work in its territory, the cessation or disturbance of which will cause difficulties). Moreover, merely by reason of the fact that it has furnished such benefits it ought to have a say in any question of terminating them—since this may well affect private interests in its territory.[47]

[45] It is, above all, for the purpose of being able to introduce desirable modifications without encountering a "veto" that this majority procedure is employed. Although it would be theoretically possible to do so, it seems that treaties do not normally provide for simple termination by a decision of the majority of the parties, *unless* by way of revision or modification. Provision for termination by unilateral notice is a right which, where given, is given to the parties individually.

[46] See in particular Harvard Law School, *op cit.*, pp. 1161-1162. Alphonse Rivier also admits it only "... lorsque cette renonciation est acceptée par l'Etat obligé ..." (*Principes du droit des gens* (Paris, Arthur Rousseau, 1896), vol. 2, rubric 158.)

[47] For instance, State A is by treaty furnishing State B with certain supplies free of charge. In order to do this, the government of A purchases the materials from manufacturers in its territory and pays them out of revenue. If, owing to a renunciation by B, this suddenly comes to an end, the manufacturers in A will be affected, precisely because the government of A no longer has to furnish the supplies.

84. "... or ... in requiring continued performance of the obligations corresponding to the rights renounced where these are not merely due to the renouncing party." (*paragraph 1*). This contemplates the case of a plurilateral or multilateral treaty of the type where one or more parties own obligations to the others, the latter being beneficiaries. A renunciation or waiver of its rights by one of the beneficiaries cannot of itself (whatever the practical effect) impair the rights of the others as a matter of law, or absolve the party subject to the obligations concerned from continuing to perform them in relation to, or as regards, any non-renouncing party. This may be of importance in the type of case where a number of parties have a common interest in the performance of certain obligations by one or more of them, and a waiver of its rights by one of the beneficiaries may tend to weaken the force of the obligation.[48]

85. *Paragraph 2* makes two alternative proposals for dealing with the case where consent is refused. The second of these is the more favourable to the renouncing State as regards bringing the treaty, or its own participation in it, to an end, but may entail the payment of damages to the other party—by no means an unreal possibility.[49] However, the words " direct and juridically proximate " have been inserted in order to exclude (*a*) damages of a remote character, (*b*) the sort of damage that may be said to arise where the force of an obligation, owed by one or more parties to the other parties in common, may be impaired if one of the latter elects no longer to insist, for its part, on performance of the obligation. Any non-performance in relation to the other parties would however remain contrary to the treaty, and any damage resulting therefrom would have as its juridical cause such (illegal) non-performance. It could not, *juridically*, be attributed to the renouncing party.

86. *Mutual desuetude. Paragraph 3.* Obsolescence is sometimes ranked as a ground terminative of treaties by lapse. But although such cases may involve circumstances rendering it possible to invoke some other principle of law conducing to termination, such as physical impossibility of further performance, the Rapporteur does not believe that there is any objective principle of law terminative of treaties on the mere ground of age, obsolescence, or desuetude as such.[50] Indeed it would be possible to point to a number of treaties centuries old, framed in archaic language, and seldom invoked *in terms* or referred to by the parties, which the latter nevertheless regard as being still in force and effective.[51] On the other hand, where the parties themselves, without denouncing or purporting actually to terminate the treaty, have, over a long period, conducted themselves in relation to it more or less as though it did not exist, by failing to apply or invoke it,[52] or by other conduct evincing lack of interest in or reliance on it, it may be said that there exists what amounts to a tacit agreement of the parties, by conduct, to disregard the treaty and to consider it as being at an end. In such event, however, the basis of the termination would be the presumption of a tacit agreement of the parties—or, alternatively, of an assent to or acceptance by each party of the non-application of the treaty by the other—and not age or desuetude as such, although the latter would be relevant factors in estimating the real attitude and intentions of the parties.

87. "... the conduct of both sides, or of all the parties ... " (*paragraph 3*). It is of course of the essence of this basis of termination that the attitude and conduct of the parties should have been *mutual*. If one of them has taken a different line, there could not be any termination on this particular ground. It is in order that the attitude of the parties may be established beyond doubt that the requirement of long continued disregard exists.

88. "... only if ... its application after the lapse of time would be anachronistic and inappropriate." (*paragraph 3*). While, as stated, mere age and desuetude *per se* do not terminate, it would often be difficult to read into the conduct of the parties to a treaty a positive, if tact, agreement to consider it as terminated, without some assistance from the character of the treaty itself, as being or not being one which the parties would be inherently likely to regard in that light. If, of course, the parties are agreed as to their attitude, no difficulty arises; but if there is a dispute, it will be precisely because one of them differs in the construction it places on the past conduct of the parties. In these circumstances, the inherent character of the treaty becomes an important element in arriving objectively at a correct appreciation of the attitude of the parties towards it.

Article 16. Termination or suspension by operation of law (general considerations)

89. *Paragraph 1.* Although termination is a matter primarily governed by the terms of the treaty, or by any other special agreement of the parties, international law has always recognized the existence of certain factors which will cause a treaty to terminate independently of the will of the parties, or of any provision in the treaty itself or other agreement (unless indeed the parties have expressly excluded the case). There are, similarly, factors which, by law, may confer on a party a right of unilateral termination or withdrawal (again unless the case is excluded by the parties). Practically all writers and publicists list such cases,

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[48] See the case propounded in the preceding footnote. The government of A may have placed long-term contracts with its manufacturers in respect of which it will be liable for any cancellation.

[49] For this reason Fauchille (*op. cit.* para. 850), does not admit a right to renounce certain obligations of the treaty only, unless the obligations are divisible and the case is not one where the treaty obligations are interdependent and make an indivisible whole. However, the distinction is a very difficult one to draw in practice.

[50] Thus, even where the doctrine of *rebus sic stantibus* is invoked, it is the alleged change of circumstances that forms the ground of the claim, not age or desuetude *per se*. Of course the two often go together in practice.

[51] See, for instance, the British Seventeenth century treaties with Denmark, Spain and Sweden, the texts of which appear in the *Handbook of Commercial Treaties,* (London, H. M. Stationery Office, 1931).

[52] In a sense therefore, through non-invocation, it is a special case of (tacit and mutual) renunciation of rights, but by both or all, not merely one party.

though they do not all list the same ones, and are not always agreed as to the basis of the right. The general policy of the Rapporteur has been to accord a rather full recognition in principle to these cases, but to subject them to a somewhat stringent process of definition, and of conditions and limitation of application.

90. *Paragraph 2.* In some cases international law does not go so far as to cause or permit termination outright, but only provides for suspension, or a right to effect it. Even where suspension is of indefinite duration, it does not in law amount to a termination of the treaty. What occurs, strictly, is a suspension of the obligation, or of performance, not of the treaty itself as such, which, *qua* instrument, remains intact and alive.[53]

91. *Paragraphs 3 and 4.* The two points here stated are more fully considered later in connexion with the cases of fundamental breach (articles 18 to 20), and essential change of circumstances (articles 21 to 23) with reference to which they chiefly arise. To some cases they are clearly inapplicable, but in principle it is right that a party invoking a faculty of termination or suspension should do so within a reasonable time; and also that the grounds for it which have arisen should not be due to that party's own act or omission. The case of termination or suspension because of *war* is, however, traditionally governed by separate and independant considerations. The words "... (other than in cases of emergency or *force majeure*) ..." have been inserted to meet the type of situation that arose in the *Portendic* case, where the action of the local authorities in blockading one of their own ports, in the course of quelling a revolt, prevented the exercise of trading rights by foreign nationals under treaty.[54]

92. *Paragraph 5.* There is clearly a danger that the force of the treaty obligation may be impaired if too many grounds are recognized on which, by law, a treaty may be terminated or suspended, or if these operate too easily in practice. Most authorities therefore approach the matter with some caution, and admit only certain grounds, and then subject to various limitations and restrictions. On the other hand, there are clearly circumstances in which it would be undesirable, and often even impossible, to hold States to treaty obligations in respect of which a release imposes itself through the facts. It is, however, important to stress that, outside the grounds that international law does recognize (and subject to their proper limitations or restrictions), there are no others, except such as the parties may themselves jointly specify in the treaty or other separate agreement between them. There is, as stated in paragraphs 11, 12, 15 and 16 above, no general or inherent right of unilateral denunciation or termination at the will of a party. The final sentence of this paragraph (paragraph 5), needs no comment, though it embodies an important point.

93. A case not included in the present draft is that of a treaty void *ab initio* either because of some fundamental defect in the method of its conclusion (see part I of this chapter of the Code), or because it is lacking in essential validity (see, eventually, part II). Such cases often have the appearance of being cases of termination or suspension, because the defect or flaw may only be discovered or put forward after the treaty has ostensibly come into force, and been put into operation *in fact*. Nevertheless, the case cannot be one of termination or suspension in the juridical sense, since the treaty will either be valid, or, if it is found not to be, will never have had any legal validity at all, or been binding on the parties. These are not cases of *voidance* or *voidability* by the subsequent operation of a rule of law, but of the treaty being *void* from the start. Such a situation may have its legal incidents and consequences, but they do not lie in the field of termination.

Article 17. Classification and enumeration of cases of termination or suspension by operation of law

94. Cases of termination or suspension by operation of law may be classified according to either of two systems: first, according to whether they operate *automatically* (either to cause termination or to cause suspension), or operate merely to give a *faculty* to a party to terminate or suspend; secondly, according to whether the result is *termination*, or merely *suspension* (whether occurring automatically or by the exercise of a faculty given to a party). There is little practical difference in the results given by these two systems, but the second is adopted here as being the more radical in practice though not perhaps in theory. Even where the case is one of automatic termination or suspension, it will usually be necessary for one of the parties to invoke the ground concerned, and it may be disputed by the other. Therefore the difference between this and the case where operation of law gives a *faculty* of termination or suspension (a faculty very likely to be utilized) is not in practice so radical as that between the case where the treaty terminates entirely and as such, and that where it continues to subsist, though performance of the obligation may be in suspense. The categories here adopted for purposes of classification are thus:

I. *Cases of termination* occurring either:
   - A. Automatically; or
   - B. At the instance of the party invoking the particular ground of termination;

II. *Cases of suspension* occurring either:
   - A. Automatically; or
   - B. At the instance of the party invoking the particular ground of suspension.

For convenience, the individual cases are consecutively numbered throughout.

95. *Case (i)* (class I.A). *Extinction of party* to a *bilateral* treaty. A bilateral treaty must terminate if only one party remains, since the very notion of treaty implies at least two parties. Any difficulties that may arise will be in the field of State succession, and this case is stated to be subject to the rules governing that topic.

96. *Case (ii)* (class I.A). *Reduction of the parties to a single State or to none by means of denunciations.* The

[53] The subsistence of the treaty as an instrument, even though its performance is indefinitely in suspense, may produce a number of effects which, if indirect, can be substantial.

[54] See Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), vol. III, p. 444.

result is the same, but from a different cause. On the subject of successive withdrawals from a multilateral treaty, causing the treaty to terminate because the number of parties falls below a number specified in the treaty, see the commentary on article 4 above. That would be a different case, because the treaty would then terminate by reason of its own provisions, not operation of law. The proviso regarding the legal validity of the denunciations or withdrawals concerned is necessary in order to prevent an invalid act of denunciation or withdrawal having precisely the effect of bringing the treaty to an end. In such a case the denunciation or withdrawal has *per se* legal effect, and the number of parties remains the same. If any juridical termination or withdrawal eventually results, it will be from the act of the other party or parties in accepting what has occurred. This is considered later in connexion with articles 30 and 31. A special case is dealt with in article 29, paragraph 1, sub-paragraph (iii), where, in the case of a certain type of multilateral treaty, withdrawal by one party will lead to or justify a corresponding withdrawal or non-performance by the others. The treaty will end through the effect of multiple withdrawals (see paragraph 209 below).

97. *Case (iii)* (class I.A). *Extinction of the physical object to which the treaty relates* for instance, the disappearance of an island owing to a subsidence in the seabed; the drying up of the bed of a river permanently, the destruction of a railway by an earthquake; the destruction of plant, installations, a canal, a lighthouse, etc. The case is theoretically a clear one, but may give rise to difficulties in practice which the provisos (*a*), (*b*) and (*c*) are designed to meet. Unless the obligation relates wholly to the object concerned, and the destruction of the latter is irremediable and permanent, and the treaty cannot be interpreted as involving an obligation to reconstitute it (where that is possible), there may be no more than a case for suspension for a period more or less prolonged, according to circumstances, until performance can be resumed, or the impossibility of doing so is made clear beyond all doubt. In some cases, the obligation may precisely be to maintain the object concerned in existence (e.g., a light, buoy, or beacon). This is also an obvious case for the application of paragraph 4 of article 16, if what has occurred is due to the act or omission of one of the parties. The result may nevertheless necessarily be termination or suspension, but there will then, in principle, be an obligation to make reparation as if for a breach of the treaty; for, even if the act or omission was in the exercise of what would normally have been a legal right, this cannot, in the absence of an emergency or *force majeure,* justify a course inconsistent with an existing treaty obligation. But admittedly, difficult questions of interpretation may arise as to how far the grant of rights in respect of an object involves a guarantee to maintain the object itself, or to abstain from all action liable to interfere with it. Does a grant of fishery rights in a river imply an obligation not to divert the water or (e.g., by use for industrial purposes) impair the fisheries? Such questions must depend on the interpretation of the treaty.

98. *Case (iv)* (class I.A). *Supervening impossibility of performance.* Certain cases separately listed in this article (such as the previous one, which is a special instance of it) may involve impossibility, but nevertheless have another juridical basis. The present case deals with impossibility in general. The obvious difficulty in the case of alleged impossibility is to decide whether it really exists in the literal and actual sense; but this is a matter that must depend on the particular circumstances. The theory is clear: if there really is impossibility, and it is permanent, the treaty must come to an end. It must be emphasized, however, that impossibility in the present context does not mean mere difficulty, or metaphorical impossibility of the kind denoted by such phrases as " an impossible situation " or " this is an impossible state of affairs ". Such a situation or state of affairs may in fact be all too possible and actual. " Impossibility " is sometimes alleged precisely because there is no literal impossibility in carrying out the treaty, but only what is felt by the party concerned to be a political or moral impossibility. Whether or not in such a case there may be other grounds for claiming termination or suspension, the case is not one of *impossibility.*

99. Some authorities divide cases of impossibility into two: physical impossibility and juridical impossibility. Fauchille, instances as examples of the latter the case of a country having alliances with two other countries which proceed to go to war with each other; and the case of a country having certain military obligations, which then becomes a neutralized State.[55] It seems clear, however, that the case of juridical impossibility, *as such,* cannot be admitted, at least on this ground,[56] for the result would be that a country could always obtain release from its treaty obligation by entering into other incompatible obligations. In such cases there is not impossibility in the sense that the treaty *cannot* be executed, but merely in the sense that it cannot be executed without involving a breach of another treaty. That is not the same thing, and is not impossibility for the purposes of the rule now under discussion. It is moreover governed by the principle *res inter alios acta* discussed above in connexion with article 5. Such a case as that of a country which has entered into conflicting alliances, instanced by Fauchille, can reasonably be regarded as a case of literal impossibility, since the same country cannot fight on opposite sides in a war. Incidentally, even in this case it would not seem that the treaties concerned would be terminated, but merely that they would be rendered impossible of performance on the particular occasion, and to that extent suspended. As for the case of the country that becomes neutralized, though having military obligations, this would raise a preliminary point of principle, applicable in many other types of cases, namely, whether a country in such a position can permit itself to enter into inconsistent obligations, or assume an inherently incompatible status, without first taking steps to obtain release from the existing (incompatible) obligations—either by giving notice of termination where that is permissible, or by requesting the other party or parties to consent to it. In the event of release, any questions of impossibility would automatically disappear. If release is not procurable, it cannot be maintained that performance is thereby rendered impossible, and the assumption of an

[55] Fauchille, *op. cit.,* para. 849.

[56] For a different type of case see in connexion with case (vi), paras. 104 and 105.

inconsistent set of obligations or status cannot, in the juridical sense, afford ground for non-performance (see under article 5).

100. In those cases where the impossibility attaches not to actual and literal performance, but to any further performance of such a kind as to achieve or realize the purposes of the treaty, the case may be one of " frustration ", to which the doctrine of *rebus sic stantibus* applies. This is considered later in connexion with articles 21 to 23. But supervening impossibility, if literal—even though it involves changed circumstances—is an independent ground of termination.

101. *Case (v)* (class I.A). *Supervening literal inapplicability owing to disappearance of the treaty field of action.* Examples that might be given are treaties regulating incidents of the feudal system, after the disappearance of that system; treaties regulating certain matters relating to a system of capitulatory rights, after the disappearance of the system; treaties relating to certain matters arising out of a customs union, after the termination of the union; treaties relative to a *condominium,* the latter having come to an end, etc.[57] Usually these cases are classed sometimes as cases of *rebus sic stantibus* (essential change of circumstances), sometimes as cases of impossibility of performances. As regards the latter, it is not so much that performance has become impossible (probably it has, but it might be that literal performance could in some cases take place): it is rather that performance would, even if possible, be absurd, inappropriate and meaningless, and that it is really no longer a question of performance, because there is no longer any sphere or field of action to which the treaty relates, or in which performance can take place. It seems preferable therefore to treat this as a case that may involve impossibility of performance, but which is juridically distinct from it.

102. As regards the relationship of this case with *rebus sic stantibus.* It is evident that the case is one involving change of circumstances, and essential change at that. Nevertheless, as will be seen later, the principle of *rebus sic stantibus* (within its proper limitations) has a wider scope than would be implied by sheer and literal inapplicability as such, and involves certain considerations of a somewhat different character. As in the case of supervening impossibility therefore (which also involves essential change), it seems better to regard cases of inapplicability arising from a complete disappearance of the treaty's field of action on having an independent juridical basis. Though very close to the case of essential change of circumstances, the present case is not so much one of a *change* in, as of a total *disappearance* of the only circumstances to which the treaty could have any application.

103. *Sub-paragraph* (c) of this case introduces what seems to be a desirable safeguard in order to meet that type of case in which, despite the general situation, it is still possible to give some reasonable effect to the treaty.

104. *Case (vi)* (class I.A). *Supervening illegality arising from incompatibility with a new rule of international law or a new legal situation.* It has already been seen that incompatibility with new treaty obligations is not a ground of termination, unless the parties are the same and have intended to replace the old treaty, or have entered into a new and wholly incompatible treaty on the same subject matter, so that the latter treaty must be regarded as replacing the former one (see above in connexion with article 13). In all other cases, there is simply a conflict between two mutually inconsistent, but equally valid, sets of obligations, which must be resolved in accordance with ordinary legal principles.[58] The case of incompatibility with a new supervening general rule of international law, or a new legal situation, may be different. It is not the same case as incompatibility with an *existing* rule of international law, which might mean that the treaty had an illegal object and lacked essential validity (as to which see, eventually, part II of this chapter). In the case now under discussion, the treaty is valid when made, but, by reason of the emergence of a new general rule of law or legal situation, it cannot later be carried out without involving action in breach of, or incompatible with, the State's obligations under general international law. An example sometimes given is a treaty about privateering in the light of the later abolition of that practice.[59]

105. There must, however, be an actual and definite conflict with the new rule of law or legal situation. For instance, a new rule or legal situation may simply confer on States certain rights they did not previously possess, but without obliging them to exercise those rights. In that case, there would be no conflict with, or ground for overriding, a previous treaty by which the parties had bound themselves not to claim or attempt to exercise such rights, or had regulated certain questions on the footing that neither possessed any exclusive right in the matter. The same must apply *a fortiori* if there is any doubt as to the status of the new rule or legal situation itself. The provisos (*a*), (*b*) and (*c*) to this case are intended to make these points clear. If they are not satisfied, it would seem that, pending any arrangement between the parties, the treaty must be regarded as unaffected.

106. *Case (vii)* (class I.A.). *War.* The existence of a state of war between the parties has various effects in respect of treaties. It may terminate some, suspend others (or suspend performance) and bring yet others into operation.[60] The subject is therefore in a sense more properly part of the general topic of the " Effect of war on treaties ". It must be dealt with in any Code on treaties,

[57] It was, in effect, on this ground that, in 1921, Great Britain notified a number of countries with whom she had treaties for combatting the slave trade, that she regarded these as terminated, there being no longer any slave trade to combat. (If subsequent events have shown the danger of over-optimism in such matters, and the need for safeguards such as those embodied in sub-paragraphs (a)—(c) of case (v), there is no doubt that, in 1921, these treaties appeared to lack any field of application.

[58] This is a question not of the law of termination, but of the *effect* of treaties, and will be the subject of another report. In the case of conflicts with the Charter of the United Nations, the question is resolved in favour of the latter by Article 103 of the Charter. But this does not of course in itself *terminate* the other treaty.

[59] See L. Oppenheim, *International Law: A Treatise,* vol. I, *Peace,* 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), p. 946, para. 546.

[60] For example, The Hague and Geneva Conventions.

even though the effect of war on treaties is itself part of the still more general topic of the "Legal effects of war". But in any case it will require a separate report, and beyond receiving mention here, it is not for the present further considered.

107. *Case (viii)* (class I.B.). *Treaties finite by nature.* With this rubric, the class is entered of those cases in which termination is not automatic, but the party concerned has a faculty of bringing it about. For comment on this particular case see paragraph 16 above. Although considered under article 4, it is strictly a case where a general rule operates to give a right or faculty of termination to any party to the treaty. But it is essential that the treaty should belong to a class generally recognized as having a finite character, and (unless the contrary is provided or implied, or to be inferred from the circumstances) not a treaty intended to set up a permanent or indefinite régime.[61]

108. *Case (ix)* (class I.B.). *Fundamental breach.* As to this, see the commentary to articles 18 to 20 below.

109. *Case (x)* (class II.A). *Performance* by the parties. With this rubric the field of termination or suspension of the obligation, rather than termination of the treaty itself, is entered. Some authorities (Anzilotti and Fauchille, for example) regard the case of full and final performance of the treaty as one of termination, and in a sense it is, for nothing remains to be done. Yet the better view would seem to be that the treaty, though executed, still subsists, at any rate as an instrument, and does not formally and technically determine.[62] The practical result may be much the same, but the latter position ensures that the executed (and therefore acquired or irreversible) character of the acts done in performance of the treaty is not thrown open to doubt or question, on the basis of a contention that the treaty is no longer valid because no longer in force or extant. This matter is further considered in connexion with article 28, under the head of the effects of termination.

110. *Case (xi)* (class II.A). *Performance* aliunde. This will not be a very frequent case, but it is a possible one.[63] For instance, provisions for the placing of beacons or marks in certain waters might, in fact, be satisfied by the action of a third State interested in the navigation of those waters.[64] Again, provisions for the construction of certain works, or a road, railway etc., in, or through, certain territory, might in fact be carried out *aliunde* during a military occupation, etc. The same type of consideration applies in these cases as in the cases coming under case (x), but even more strongly, since there is an obvious element of fortuitousness and possible impermanence about the case, which would in any event preclude the treaty being regarded as terminated.

111. *Case (xii)* (class II.B). This refers to cases previously considered under (iii), (iv) and (v), but where the circumstances only justify suspension, not termination. Clearly, in such cases there is the reverse of any automatic or terminative effect on the treaty, and it is for the party contending that the circumstances justify a suspension to make a claim to that effect.

112. *Case (xiv)* (class II.B). *Essential change of circumstances* (rebus sic stantibus). For comment, see below in connexion with articles 21 to 23.

Article 18. Termination or suspension by operation of law. Case of fundamental breach of the treaty (general legal character and effects)

113. *General remarks.* The principle of fundamental breach as a ground entitling the other party to put an end to a contract is admitted by most authorities on international law; but, presumably because it is basically a common law doctrine, it seems to have been received on the international plane more readily by common law jurists than by those of the civil law. It obviously could not be admitted as a ground *per se* terminating the treaty; for, if it were, then, as Fauchille says:

> "... chaque Etat signataire aurait un moyen trop commode de se dégager à sa guise d'une convention qui le gêne: il lui suffirait, en effet, pour la faire disparaître, de refuser d'exécuter telle ou telle de ses dispositions."[65]

But, even if fundamental breach is not regarded as having any automatic effect, but as merely giving a faculty of termination to the other party, it remains a principle not without danger in the international field, where it is all too easy to allege fundamental breaches of a treaty as a ground for claiming to terminate it. Frequently, moreover, there is no means by which the merits of the allegation

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[61] The classic statement of this doctrine, together with some indication as to its proper field of application, is given by Oppenheim:

> "But there are other treaties which, although they do not expressly provide for the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever, or are apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty, or a treaty of alliance not concluded for a fixed period only, can always be dissolved after notice, though such notice be not expressly provided for." (Oppenheim, *op. cit.*, p. 938, para. 538).

However, the Rapporteur considers that this statement goes somewhat too far, and does not correspond with present practice. Taken literally, it might seem to indicate that any treaty "not expressly concluded for ever" can be denounced at will. This is certainly not the case, either as a matter of principle, or historically (see discussion in paragraphs 15 and 16 above in connexion with article 4). The correct rule is that absence of provision for termination means termination only by agreement or by operation of law (which latter includes the case where the treaty belongs to an inherently finite *class*).

[62] Thus Oppenheim states: "A treaty whose obligation has been performed is as valid as before, although it is then of historical interest only" (Oppenheim, *op. cit.*, p. 937, para. 534.) Supporting this view, Harvard Research states: "A treaty is not terminated by the execution of its stipulations; there may be no further obligations to perform under the treaty, but the treaty continues to exist nevertheless". (Harvard Law School, *op. cit.*, p. 1162.)

[63] Cited in Oppenheim, *op. cit.*, p. 945, paras. 540-544, sub-section (3).

[64] This assumes, of course, that the waters, though near the coast, are not national or territorial.

[65] Fauchille, *op. cit.*, para. 854. Although Fauchille is here speaking of the possibility that fundamental breach might be regarded as an automatic ground of termination, he appears to have little greater liking for it as a ground entitling the other party to declare termination.

can be tested before any tribunal, although, as a rule, it will be this very point which is in issue between the parties. In the domestic field, the principle of fundamental breach operates partly as a sanction, tending to ensure respect for contracts, partly as a relief to the injured party should such a breach occur. But in the international field it may well operate in precisely the reverse sense, under both heads.

114. Not surprisingly, therefore, some international law authorities have only admitted the principle, if at all, with hesitation, and subject to a number of limitations and restrictions. Thus, Rousseau, although giving the matter very full consideration, does not finally appear to admit the principle as a definitely received one.[66] Fauchille seems more or less to reject it,[67] and in the Harvard Research volume it is admitted only as a ground justifying provisional suspension of performance pending the pronouncement of a competent international tribunal or authority.[68]

115. The principle would in any event seem to be confined, mainly if not entirely, to the field of *bilateral* treaties. Indeed it is clear that in the case of a multilateral treaty, a breach by one party, however fundamental, could not *per se* give any right to bring the whole treaty to an end, though it might affect the position of that party, and the obligations of the other parties in their relations with the defaulting party, and might, in the case of treaties of a certain class to be noticed presently, lead to eventual termination of the treaty. On the other hand, there are other classes of multilateral treaties, of the law, system or régime creating, or "social", categories, which have to be applied integrally, where a fundamental breach would not only not give any right of termination, but not even give a right to refuse its application in respect of the defaulting party. This matter is further considered below.

116. Reverting to the field of bilateral treaties, the main difficulty is to define what constitutes a fundamental breach. In the case of ordinary breaches, the other party may have various remedies (such as rights of counter-action); but, in order to justify putting an end to the whole treaty, the breach must itself be of a kind that does practically that. It must be something so inconsistent with the treaty relationship as to amount virtually to a repudiation of the treaty.

117. Despite these difficulties, the Rapporteur considers that the doctrine, in some form, must be given a place in any body of treaty law. In principle, it is difficult to contest that there may be breaches of a treaty so serious as to constitute a denial of it, in the face of which the treaty relationship can hardly continue to exist. Such cases can and do occur, and it is hard to deny that they must confer on the other party some more far-reaching right than a mere faculty of taking counter-action, which may be quite inadequate to meet the situation. But it is necessary to define carefully (*a*) the type of case in which such a right arises, (*b*) the conditions which must limit its exercise, and (*c*) the steps which must be taken before it can be claimed.

118. *Article 18. Paragraph 1.* This poses the fundamental distinction between the operation of the principle of fundamental breach in the case of bilateral treaties, and its operation in the case of multilateral treaties—a distinction rendered necessary by the character of the latter.

119. "... may ... justify the other party in regarding and declaring the treaty as being at an end ..." (*paragraph 1*). All the authorities are unanimous in considering that whatever else it does, a breach of a treaty by one party, however serious and fundamental, cannot operate automatically and of itself to put an end to the treaty. It can only give to the other party a faculty (which it may or may not exercise) of declaring the treaty to be terminated, or of claiming to do so.[69]

120. "... (*a*) ... obligations ... which consist of a mutual and reciprocal interchange of benefits and concessions as between the parties; or (*b*) ... obligations which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance." (*paragraph 1*). It is also necessary, in the case of multilateral treaties (see paragraph 115 above) to distinguish between types of obligations—on the one hand those based on contractual reciprocity consisting of a reciprocal interchange between the parties, each giving certain treatment to, and receiving it from, each of the others; or again, obligations of such a character that their performance by one party is necessarily dependent on performance by all the parties; and on the other hand, those which must be applied integrally or not at all (for instance an obligation to maintain a certain condition of affairs in a certain locality). This matter is further considered below in connexion with article 19, paragraph 1.

121. *Paragraph 2.* The concept of fundamental breach is defined in article 19, paragraph 2, and this is commented on below. It is distinguished from "ordinary" breaches not only by its character, but by its potential consequences, ordinary breaches having no effect on the continued existence of the treaty, and merely justifying counter-action in the way of corresponding or other non-observances of a more or less significant kind, as the case may be. This matter does not enter into the present subject, since it concerns the general question of remedies for breach of treaty and not that of termination.

122. *Paragraph 3.* Because of the dangers inherent in the doctrine of fundamental breach (see paragraphs 113

[66] Rousseau, *op. cit.*, paras. 344-347.

[67] Fauchille, *op. cit.*, paras. 854 and 854[1].

[68] Harvard Law School, *op. cit.*, article 27 and comment, pp. 1077-1096. This is the more striking coming from a common law source.

[69] Jean Spiropoulos in *Traité théorique et pratique de droit international public* (Paris, Librairie Générale de Droit et de Jurisprudence, 1933), p. 257, puts the point well when he states: "... d'après la généralité de la conviction juridique, le simple fait de l'inaccomplissement n'affecte pas la force obligatoire du traité ... la non observation n'entraîne pas par elle-même l'extinction du traité ..." Then, after referring to the right of the injured party to put an end to the treaty in such circumstances, he continues: "Mais la possibilité de la dénonciation n'est point une obligation; c'est une simple faculté accordée par le droit international à celui à l'égard duquel le traité a été violé, en sorte qu'au cas où celui-ci ne fait pas usage de ce droit, le traité subsiste, ainsi que le droit de la partie intéressée à en réclamer l'exécution."

and 114 above), it is necessary to condition both the occasion and the manner of its application and exercise. This is considered below in relation to articles 19 and 20.

Article 19. Termination or suspension by operation of law. Case of fundamental breach of the treaty (conditions and limitations of application)

123. *Paragraph 1, sub-paragraph (i).* For general comment on this matter, see paragraph 115 above.

124. *Sub-paragraph (ii).* The view that a breach, even fundamental, of a *multilateral* treaty cannot give the other parties a right to declare its termination, or individually to withdraw from it, is generally supported by the authorities and is summed up in the following passage from the Harvard Research volume:

> "... the State seeking the declaration is not in any way to be freed of its obligations under the treaty toward all the parties thereto other than the offending State. The treaty is not destroyed; it continues in full force and effect, and must be carried out in accordance with the rule *pacta sunt servanda* ...".[70]

In this passage the Harvard volume clearly has in mind the type of treaty specified in rubric (*a*) of sub-paragraph (ii). In connexion with this type of treaty, it is arguable that it must be open to *all* the other parties acting jointly to declare the treaty to be at an end. This, however, seems doubtful. If the treaty is of the reciprocal benefits and concessions type, such a right might indeed theoretically exist, but it would be quite unnecessary and inappropriate to exercise it, since it would suffice to withhold the benefits and execution of the treaty from the offending party only. If, on the other hand, the treaty is not of this kind, but requires absolute or integral performance, its character would be inconsistent with the existence of any faculty of general termination for such a cause, even if exercised by the joint body of the other parties (see paragraph 125 below). There remains the type of treaty mentioned in rubric (*b*) of sub-paragraph (ii), concerning which see paragraph 126 below.

125. *Paragraph 1. Sub-paragraphs (iii) and (iv).* For general comment, see paragraphs 115 and 120 above. It will be convenient to start with the case given in sub-paragraph (iv), and with some examples of the type of treaty in respect of which a fundamental breach by one party, in addition to giving no right of termination to the other parties, would not even justify a refusal to apply the treaty vis-à-vis the offending party (and where it would perhaps not in any case be practicable to operate such a refusal). Thus, a fundamental breach by one party of a treaty on human rights could neither justify termination of the treaty, nor corresponding breaches of the treaty *even in respect of nationals of the offending party*. The same would apply as regards the obligation of any country to maintain certain standards of working conditions or to prohibit certain practices in consequence of the conventions of the International Labour Organisation; or again under maritime conventions as regards standards of safety at sea. The same principle is now enshrined in express terms in the Geneva Conventions of 12 August 1949 on prisoners of war and other matters.[71] Another type of case is where there exists an international obligation to maintain a certain régime or system in a given area.[72]

126. The key to the cases just mentioned is that the character of the treaty is such that, neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others. The obligation has an absolute rather than a reciprocal character—it is, so to speak, an obligation towards all the world rather than towards particular parties. Such obligations may be called self-existent, as opposed to concessionary, reciprocal or interdependent obligations of the types mentioned in rubrics (*a*) and (*b*) of sub-paragraph (ii). The difference between the self-existent type, and the rubric (*b*) type—which is further considered in sub-paragraph (iii) of paragraph 1 of article 19—can easily be seen by comparing the cases mentioned in paragraph 125 above with that of a treaty on disarmament. In the latter case, and unless the contrary is expressly provided by the treaty, the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others. Particular breaches by individual parties would therefore justify corresponding particular non-observances by the others; and a general, or really fundamental breach by one party, amounting to a repudiation, would ensure for all practical purposes an end of the treaty, but this would come to pass from force of circumstances rather than from any juridical act of the parties formally declaring the end of the treaty.[73] Therefore, the case would in some ways be more akin to that of the tacit acceptance by the parties of an illegal repudiation of the treaty on the part of one of them, considered later in connexion with articles 30 and 31.

127. This suggests, as a speculation, the question whether fundamental breach as a ground of termination (particularly as it applies in its proper sphere of bilateral treaties) would not, in general, be better described or considered as a case where one party in effect repudiates the treaty (by conduct), and the other expressly or tacitly accepts this repudiation—subject of course to any resulting right to damages or other reparation. The practical result

[70] Harvard Law School, *op. cit.*, p. 1093.

The "declaration" referred to is that envisaged by the relevant article (article 27) of the Harvard draft convention, according to which an alleged fundamental breach only gives a right of provisional suspension of performance while a declaration is being sought from an international tribunal or authority.

[71] See, in particular, article 2 and other opening articles of each of the four Conventions.

[72] For example the régime of the sounds and belts at the entrance to the Baltic Sea. See the Treaty of Copenhagen of 14 March 1857, and the Convention of Washington of 11 April 1857.

[73] Other cases involving a similar interdependence of the obligations would be treaties not to make use of certain weapons or methods or war, not to commit hostilities in certain areas, to abstain from fishing in certain waters or at certain seasons, etc.

would be the same, but the responsibility for bringing about actual termination would be placed somewhat differently,[74] and perhaps more appropriately. This way of looking at the matter would also have the great advantage of emphasizing the true character of the concept of fundamental breach as a cause or termination, by automatically ruling out as insufficient any breach not of so major a kind as to amount to a denial, or repudiation, of the treaty obligation. However, attractive as is this method of presentation, it must be rejected, for reasons to be stated later.

128. To revert to the sub-paragraphs under discussion, the phrase "... (to the extent to which that might otherwise be relevant or practicable) ..." (*sub-paragraph (iv)* (b)) is inserted in order not to lose sight of the fact that, in the case of the type of obligation here in question (and illustrated in paragraph 125 above), there is, as a rule, no choice, or very little. These obligations do not lend themselves to differential application, but must be applied integrally. In many cases anything else would either be totally impracticable or very difficult, or would entail a general failure to carry out the obligation in question.

129. *Paragraph 2, sub-paragraphs (i) and (ii).* These are self-explanatory, in the light of what has already been said. "... tantamount to a denial or repudiation of the treaty obligation ..." (*sub-paragraph (ii)*). See the remarks in paragraph 119 above.

130. *Sub-paragraph (iii).* It would seem that if the parties foresaw the possibility of a breach in some respect,[75] and provided for the consequences, its occurrence cannot be regarded as destructive of the treaty relationship. Alternatively, the consequences are necessarily governed by the treaty itself, according to its correct interpretation, and not by any general principle of law.

131. *Paragraph 3.* A breach may in fact be fundamental, and such as would normally enable the other party to declare its termination, but there may be factors which must operate to preclude that party from exercising the right.

132. *Sub-paragraph (i).* Although this point is not dealt with by the authorities, it seems to constitute a reasonable safeguard against abuse. One of the reasons why treaties often provide for their own expiry after a relatively short period is the possibility that they will not be satisfactorily executed by the parties; and, similarly, one of the reasons why treaties often give the parties a right of denunciation is to afford the possibility of bringing the treaty to an end to any party dissatisfied with the way in which it is being carried out by the other. In such circumstances, it is unnecessary to envisage a right of immediate termination: either the treaty is due shortly to expire or it can shortly be denounced. Only if the periods involved are such that, in view of the nature of the breach, it would not be reasonable to expect the aggrieved party to wait until termination was brought about by expiry or denunciation, should there be a right to declare immediate termination.

133. *Sub-paragraph (ii).* This has already been mentioned as a factor governing all cases of termination or suspension by operation of law, where this does not occur automatically but by the exercise of a faculty given by law to a party to invoke the ground in question (see paragraph 91 above). It seems reasonable that a party who only invokes the right after an undue lapse of time should forfeit it. The implication will, of course, be that the breach cannot really have been a fundamental one, but even if it is, undue delay in invoking the right must operate as a waiver of it, or as an acceptance of the breach as falling short of being fundamental. This does not mean that the party concerned will forfeit any other right it may possess in respect of the breach—e.g., to damages or reparation, or to take counter-action. On the other hand, a complaint about the breach *made for these latter purposes,* or simply to prevent a recurrence, is not in itself a claim that the breach warrants total termination of the treaty—still less does it operate as an actual declaration of termination on the ground of fundamental breach. Any claim or action of this kind must be made and taken expressly and specifically.

134. *Sub-paragraph (iii).* This is the general principle, of which sub-paragraph (ii)—unreasonable delay—is a special case. If the claim to terminate is not made within a reasonable period, this is evidence of condonation or acceptance of the breach, if not *qua* breach, then as not having any terminative effect. But there may be other ways in which such evidence is afforded—for instance, if, despite the breach, the party concerned takes some action under the treaty which it could not, or would not normally have taken, had it regarded the breach as terminative, or had it intended to claim termination.

135. *Sub-paragraph (iv).* This is simply an application of the ordinary and universal principle of law *nemo ex sua culpa tenet jus.*

Article 20. Termination or suspension by operation of law. Case of fundamental breach of the treaty (modalities of the claim to terminate)

136. *Paragraph 1.* Because of the dangers of abuse, and because it is precisely the character of the breach (or whether there has been a breach at all) that is usually in issue between the parties, it seems desirable to impose a brake on the process of bringing about termination, in such a way that the exercise of the right is neither automatic nor absolute. Therefore, the complaining party should not be able simply to *declare* termination, but should begin by presenting the other party with a reasoned statement of its view, pending consideration of which no further action would be taken.

137. *Paragraph 2.* This imposes a second brake, namely, that if the other party does not reply, or contests the claim of termination, the complaining party cannot proceed to terminate without first offering a reference of the matter to an appropriate tribunal to be agreed between the parties. Without this, termination cannot be declared, and only if the offer is not accepted within a reasonable time can ter-

[74] It would rest somewhat more directly on the party repudiating by breach.

[75] As occurs in some cases, the treaty stating what course is to be followed in that event.

mination be proceeded to. If it is accepted, it will be for the tribunal to decide whether there is a case for an interim suspension of the obligations of the treaty.

138. *Paragraph 3.* This is a logical consequence of the rule stated in the final sentence of paragraph 5 of article 16, and needs no special comment.

139. *Paragraph 4.* This is intended to preserve the general rights of the parties. It is, of course, clear that if the alleged breach has not been a fundamental one, justifying termination, or if the case is one to which one of the limitations specified in article 19 above applies, any purported termination of the treaty will be illegal and invalid; it will leave the treaty juridically in being, giving rise to a claim to damages, or other reparation in respect of any resulting non-performance. Even if the claim of termination is accepted, so that the treaty itself comes to an end, a claim to damages or reparation may remain (see the commentary on articles 30 and 31 below).

140. It was suggested in paragraph 127 above, that the case of termination on the ground of fundamental breach could perhaps more appropriately be regarded as a case of constructive repudiation of the treaty, accepted by the other party subject to its claim to reparation. Despite its attractions, particularly as regards making clear the kind of thing involved in the concept of a fundamental breach, the Rapporteur has not felt able to adopt this theory. It would render impossible the application of the safeguards provided by articles 19 and 20. Basically, the allegation of fundamental breach as a ground of termination is a right claimed by the aggrieved party, and should be claimed and justified as such.

Article 21. Termination or suspension by operation of law. Case of essential change of circumstances, or principle of rebus sic stantibus *(general legal character)*

[*Note.* This part of the report (and the corresponding articles) should be regarded as especially provisional (see paragraph 3 of the general introduction to the report). The Rapporteur has not yet been able to come to final conclusions on all points. In all probability therefore a supplementary or amended report on this part of the subject will be presented later.]

141. *General remarks.* There are few questions of treaty law more controversial, and more controverted, than that of the place to be given to essential (or vital) change of circumstances as a ground of termination, on the basis of the principle of *rebus sic stantibus* (*conventio omnis intellegitur rebus sic stantibus*). Within certain limits, analogous principles find a place in many systems of private law,[76] but in the international field, although much discussed in the literature of treaty law, the doctrine is accorded a mixed reception, compounded of attraction in theory and fear as to the practical consequences of admitting it. As Monsieur Paul-Boncour said in 1929, in presenting the French argument before the Permanent Court of International Justice in the *Free Zones* case:

> " Lorsque j'ai invoqué la clause *sic rebus stantibus,* je ne l'ai pas fait . . . pour transformer cette règle de droit international public en je ne sais quel automatisme qui jouerait par la volonté unilatérale d'une Puissance quelconque et par le fait qu'elle estimerait que les circonstances ne sont plus les mêmes que celles qui avaient présidé à l'élaboration du traité dont elle demande l'abrogation . . . je me permets d'ajouter que les besoins mêmes de mon argumentation, le gain du procès si grave que nous avons engagé devant vous, n'auraient pas pu me faire oublier l'imprudence qu'il y aurait pour l'Europe et pour le monde à donner à la clause *sic rebus stantibus* l'interprétation extensive que mon confrère m'a prêtée."[77]

This attitude has shown itself in a marked reluctance of courts, both national and international, actually to apply the principle, while not rejecting it in theory and even professing to view it with some sympathy.[78] As regards State practice, there were, up to 1939 at any rate, only a very few cases in which States had expressly put forward the doctrine as such, as a ground for claiming that a treaty had *ipso facto* terminated, although there were quite a number in which, without actually invoking the doctrine, States had referred to changed circumstances as a factor justifying non-performance, or calling for the termination or revision of the treaty.[79] Post-war experience on the other hand, would seem to suggest an increasing tendency for States to found themselves on such a principle—in fact, if not in so many words. At the same time, there are virtually no cases in which the other parties to a treaty thus called in question have been willing to admit that the doctrine of *rebus sic stantibus,* as such, was applicable, although they have often been quite ready to agree in practice to revise the treaty in question or to accept its termination.

142. The reasons for this attitude are not far to seek, and are similar to those which have sometimes caused fundamental breach as a ground of termination to be accepted with reserve. The doctrine is attractive in theory, and may, in practice, and within limits, be necessary; but it is dangerous. There are few which could so easily reduce the main principle of treaty law, *pacta sunt servanda,* to a mere form of words; and moreover, its operation on the international plane can frequently, even generally, not be controlled by the action of any tribunal, as it can on the domestic plane. It is all too easy to find grounds for alleging a change of circumstances, since in fact, in international life, circumstances *are* constantly changing. But

[76] It seems to have had its origin in certain provisions of Roman Law. See Chesney Hill, " The Doctrine of *'Rebus sic stantibus'* in International Law ", *The University of Missouri Studies,* vol. IX, No. 3 (July 1, 1934), p. 18. See also the details as to the private law application of the principle given in H. Lauterpacht, *The Function of Law in the International Community* (Oxford, The Clarendon Press, 1933), pp. 272-276 and the footnotes thereto.

[77] Publications of the Permanent Court of International Justice, *Acts and Documents relating to Judgments and Advisory Opinions given by the Court,* series C, No. 17-1 (Case of the Free Zones of Upper Savoy and the District of Gex), vol. I, pp. 283-284.

[78] For a convenient account of these cases with citations see Hill, *op. cit.,* pp. 19-25, 30-31 and 37-41.

[79] See the exhaustive account given in Hill, *op. cit.,* pp. 27-74.

these changes are not, generally speaking, of a kind that can or should affect the continued operation of treaties. As a rule, they do not render the execution of the treaty either impossible or materially very difficult, or its objects impossible of further realization, or destroy its value or *raison d'être*. What they may tend to influence is the willingness of one or other of the parties, on ideological or political grounds—often of an internal character—to continue to carry it out. Such cases, and others which it would take up too much space to go into, no doubt present their difficulties, but these lie in the political field and must be solved by political means. They cannot and ought not to be made a basis for importing into treaty law a juridical doctrine of release that is wholly at variance with its spirit and fundamental purpose.

143. It is therefore tempting—having made provision for a number of specific grounds on which treaties may terminate, or on which a party may acquire a right to terminate or suspend them, by operation of law [80]—to reject *rebus sic stantibus* altogether as a ground for termination, unless it operates in some specific form, independently recognized as a ground of termination, such as a supervening and literal impossibility of performance, due to changed circumstances. Especially is this so having regard to the fact (*a*) that, as will be seen presently, the principle in any case only operates in regard to treaties that are ostensibly of unlimited duration, or do not contain any provision for termination, and that according to modern practice most treaties are drafted so as to include such provision; (*b*) that certain classes of treaties, of frequent occurrence, are in any event recognized as being inherently not intended to be of unlimited duration, and to be subject to an implied right of termination on giving reasonable notice;[81] (*c*) that even in the case of other treaties it is often possible, as a matter of their correct interpretation, to draw from their terms and special character a legitimate inference to the same effect, or alternatively to imply in them a positive intention that the treaty should terminate in certain eventualities.[82]

144. At the least, these various factors should operate severely to limit the scope of any principle of *rebus sic stantibus*—that is to say, to reduce the number of cases in which it will be necessary to have recourse to the principle *as such*, and because the case cannot be covered in any other way. Nevertheless, there will remain a residue of cases that are not covered by any other recognized rule or principle, and with respect to which the question will arise whether termination on a basis of *rebus sic stantibus* is legitimate. The Rapporteur has come to the conclusion (provisionally at all events) that some place must be given to the principle *rebus* in any code of treaty law, though within carefully stated limits, and subject to as clear a definition as possible of what constitutes an essential (or vital) change of circumstances, and what the effect of the change must be in order to bring the principle into play. The main reasons for taking this view are as follows:

(1) Although some authorities reject altogether the doctrine of *rebus sic stantibus* [83] the great majority admit it, in one form or another, although there are great diversities of view as to its legal foundation and the exact extent and manner of its application.

(2) While no international tribunal has not applied the doctrine, there have been several indications that such tribunals would, or might, do so if the circumstances justified it. Referring to the remarks of the Permanent Court of International Justice in the *Free Zones* case, Sir Hersch Lauterpacht has written: "It is clear that the Court was prepared to recognize the principle (although it refused to say to what extent) that a change of conditions may have an effect on the continuation of treaty obligations" [84]

(3) Analogous principles—or principles leading to very similar results—have received a wide degree of recognition in private law.[85] While this is not conclusive (see for instance the different treatment given by private, as compared with international law, to the question of duress as a ground voiding contracts), it suggests that there is a case for some degree of recognition of the principle under international law.

(4) It is impossible to close the mind to certain ways in which the international field differs from the domestic. The absence of any certainty of being able to have recourse to a tribunal; the lack of any legislature able to give relief from unduly burdensome contracts such as exists in the domestic field;[86] the fact that in the domestic field most contracts have a natural term, because individuals die, companies are wound up etc., or the contract soon becomes wholly executed and performed; whereas in general, States do not die, and they often enter into treaties involving continuing obligations without natural term, which may and do last for centuries—all these things and others necessitate a certain measure of acceptance of a principle according to which, if the phrase may be permitted, change calls for change. But, in this, there need be no "negation of international law",[87] if the character and scope of the principle are properly understood and defined—as they must be, for it would be unrealistic not to recognize that the very elements in the international field that call for the doctrine are also those that render it dangerous.

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[80] See articles 16-20 hereof, and paragraphs 89-140 above.

[81] See article 4 A (ii), and paragraphs 15 and 16 of the commentary above.

[82] See article 4 A (ii), (*a*), and paragraph 16 of the commentary above.

[83] For example, Bynkershoek, Wildman, Strupp, Lammasch, and, to a large extent, Grotius, Vattel and Klüber.

[84] H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (London, Longmans, Green and Co., 1934), p. 43.

[85] For a convenient and detailed summary, see Lauterpacht, *The Function of Law in the International Community* (footnote 76 page 56).

[86] Compare, for instance, the French *loi Failliot* of 21 January 1918, passed in order to give relief to cases of undue hardship in the performance of contracts resulting from the 1914-1918 war. As Lauterpacht points out, it is significant that the French Civil Courts refused to apply in the sphere of private contracts the theory of "*imprévision*" applied by the Conseil d'Etat to public contracts. (*The Function of Law in the International Community*, p. 279).

[87] This is the phrase used by Lauterpacht to characterize the principle in its wider and illegitimate senses (*The Function of Law in the International Community*, p. 270). See also the discusion in Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, Green and Co., 1927), pp. 167 ff.

145. *Juridical basis of the principle* " rebus ". The difficulties of discussing this matter are increased by the fact that many writers do not clearly distinguish cases of *rebus sic stantibus,* as such, from certain other cases of termination by operation of law that have features in common with it, although actually possessing an independent juridical basis—such as, for instance, supervening impossibility of performance. True, in such cases, there has been a change of circumstances; but it is the impossibility, not the change as such, that constitutes the juridical ground of termination. The present Rapporteur, for his part, considers it essential that no ground of termination should be regarded as a case of *rebus* that has, or can reasonably be considered to have, an independent juridical basis. It will therefore, in due course, be essential to specify those cases in which termination can occur, if at all, only on a basis of *rebus,* and to define what the proper sphere of application of the principle is for this purpose. Whether the Rapporteur has been successful in this, remains to be seen. As stated, his aim has been to isolate the true cases of *rebus,* by distinguishing from them those cases which involve the common feature of change but seem, in fact, to have an independent juridical basis. The attempt at least cannot fail to prove useful.

146. In any event, whatever the precise scope and application of the principle *rebus,* international jurists have differed widely as to its juridical basis. In the principal monograph on the subject in English, Chesney Hill's study, " The Doctrine of ' Rebus sic stantibus ' in International Law " [88] (to which, together with the relevant parts of Rousseau [89] and the Harvard Research volume,[90] the Rapporteur wishes to acknowledge his deep and particular indebtedness), no fewer than seven different theories are mentioned.[91] It is not necessary for present purposes to state all these, because they can, broadly speaking, be reduced to three, or variants of these. The first bases the principle *rebus* on a supposed implied term of the treaty, arising from the presumed intention of the parties that the treaty should terminate in certain eventualities, or that its duration should be dependent on the continuance of certain circumstances, etc. According to the second theory, the principle is an objective rule of law, a consequence (to use the language of the civil law) following *naturaliter* [92] from certain events, not dependent on any presumed or implied term of the treaty, but imposed *ab extra,* and having the effect that certain changes of circumstances will give a party a right to require the termination of any treaty not already subject by its terms to a limit of duration. A third theory must be noticed which partakes of both the first two. According to this theory, the principle *rebus* is an objective principle of law, but it operates by, so to speak, forcibly importing into the treaty itself (if not already subject by its terms to a limit of duration) a clause (the " *clausula* " *rebus sic stantibus*) to the effect that the treaty will terminate if there is an essential change of circumstances.[93] The first and third theories resemble each other in being based on an implied clause in the treaty; but according to the first, it is there because of the presumed intention of the parties, whereas according to the second it is there because the law decrees it to be there, or places it there. Thus, according to the first theory, the presence of the clause in the treaty is a matter of the interpretation of the treaty itself—(and on the true interpretation of the treaty such a term may or may not be there); whereas according to the third theory it is *always* and necessarily there, unless the parties have expressly excluded it. As regards the relationship between the second and third theories, it may be stated that they resemble each other in operating (basically) *ab extra,* but differ in the mode of their operation, the one operating directly, the other via the treaty.

147. Subject to one important—indeed crucial—point, the difference between the second and third theories seems to be one of form rather than of substance. It matters very little in practice whether the law operates to bring about the termination of a treaty by postulating an objective rule of termination *rebus,* or whether it does so by postulating the automatic and invariable existence of a " *clausula* " *rebus* in all treaties not of limited duration, subject to which they are to be read. In either case, it is the law that operates objectively, either *ab extra* or via the treaty, to terminate it, rather than any inference drawn from the presumed intention of the parties. In one pre-eminent respect however there is a difference. If a *clausula* is presumed to exist in the treaty, then, if the essential change of circumstances occurs, termination takes place by reason of a term contained in the treaty itself, even if it is the law rather than the parties that placed it there. This must, therefore, involve an automatic termination of the treaty *ipso facto,* as soon as the circumstances that call the clause into play arise, for in that event it is a term of the treaty (even if implied by law) that says that the treaty is at an

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[88] Hill, *op. cit.*

[89] Rousseau, *op. cit.,* paras 368-385.

[90] Harvard Law School, *op. cit.,* commentary to article 28, pp. 1096-1126.

[91] See also Rousseau, *op. cit.,* paras 370 and 371, especially the list in para. 371.

[92] For the common-law jurist, who usually prefers the theory of the implied term, Sir John Fischer Williams in an article in *The American Journal of International Law,* vol. 22, 1928, entitled " The Permanence of Treaties ", gives the following explanation: " On the other theory, upon the change in essential conditions, the dissolution of the contract follows *naturaliter,* as a natural consequence. This is not to make the dissolution depend on the intention of the parties, but to invoke a conception of a general or natural order with which the maintenance of the obligation is inconsistent ... we are appealing to a general legal conception independent of the intention of the parties, to whose rule we conceive that they are ready, or bound, to submit their relationships ... arguments of this kind are of permanent value for a development of international law, in that they involve a reference to a standard set, not by the will or intention of the parties themselves, but by an external authority ". The present Rapporteur would qualify this only by saying that what actually occurs *naturaliter* is not the automatic dissolution of the treaty, but the bringing into existence of a faculty for the party affected to take certain steps looking to termination or revision (see below, in connexion with article 23).

[93] For a particularly forthright statement of this theory, see Fauchille, *op. cit.,* para. 853[1].

end, and termination on that basis cannot take place otherwise than automatically.[94]

148. But if there is one point on which there is a very large measure of agreement amongst the authorities, it is that this is *not* the way the principle *rebus* operates—that termination is not automatic, and that what the principle does is simply to give a party a right to invoke it by (in the first place at any rate) addressing a request to the other for termination or revision in view of the changed circumstances. It follows that the third theory, that of the *clausula,* must be rejected, as leading to the wrong results. The second theory does not give rise to this difficulty, for according to it, the principle *rebus* operates *ab extra* not *ab intra.* It does not determine the treaty from within, and of its own force so to speak, but imposes a rule from without, namely that in certain circumstances the parties are invested with a certain faculty which they (or either of them) may exercise if they wish.

149. There remains the choice between the second theory and the first. The first might be said to represent the classical and hitherto dominant view, the second to accord more with modern tendencies. This is so not only on the plane of international law but also in the field of the analogous theories of private law.[95] The view provisionally taken by the Rapporteur is in favour of this second theory, for the following reasons:

(1) The notion of the intention of the parties in a matter of this kind is very much of a fiction. It will generally mean imputing to them ideas they never had, because in most cases the governments concerned will neither have foreseen the actual changes that have occurred, or even, as a rule, envisaged the general idea that changes in essential circumstances might come about—indeed, as will be seen later, if the parties did foresee the possibility of changes, but included no provision regarding them, this is, if anything, a fact that would tend to cause the principle *rebus* not to apply.[96]

(2) If, on the other hand, the parties really did have some intention in the matter, and this intention is expressed in the treaty, or, as a matter of its correct interpretation, is clearly to be inferred from it, then there is no need to have recourse to any abstract *principle* of *rebus sic stantibus* at all. In the contemplated circumstances, the treaty will come to an end as a matter of its own interpretation and effect. It will be a case coming under article 9, paragraph 1, of the present part of the Code, as one in which the parties have themselves made provision for termination in the treaty. There is very little point in saying, as a number of authorities do, that if the parties have themselves expressed or implied a clause *rebus sic stantibus* in the treaty, then the principle *rebus* will operate—for in that case it is not any *principle* of *rebus* that operates, but simply the treaty itself, according to its correct interpretation. The first theory, therefore, as a supposed juridical basis for the doctrine or principle of *rebus,* is really a denial of that principle as having any independent existence. It simply brings the matter back to the interpretation of the treaty, and adds nothing to what would in any event be the case—namely that if the parties have themselves, expressly or by implication, provided for termination if certain circumstances change, then, if that occurs, the treaty will, by its own terms, come to an end. (On the other hand—as will be seen—the fact that the intention of the parties is not the primary reason why the principle *rebus* as such operates, does not mean that such intention can be ignored for the purpose of deciding whether an essential change of circumstances has occurred, or whether the change is in fact an essential one.)

(3) Thirdly, as Rousseau justly points out, there are greater dangers in the *ab intra* basis than in the *ab extra*: "... l'appel à la pseudo-clause tacite est très dangereux pour la force obligatoire des traités, car, sous couvert d'interprétation, il ouvre la voie à d'innombrables et incessantes modifications. Il mène nécessairement, dès lors, à la révision permanente des situations existantes, donc à l'insécurité juridique, en introduisant dans les rapports interétatiques un principe destructeur du droit conventionnel."[97] It is a case of the Trojan horse, the enemy within the gates. On this view of *rebus sic stantibus,* and having regard to the ease with which given interpretations can be put forward and plausibly defended, every treaty would contain the seeds of its own dissolution.

(4) Therefore, and finally, it seems preferable to regard *rebus sic stantibus* as an objective principle of law and (to use the language of an eminent judge in speaking of the analogous English doctrine of "frustration") as being "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."[98]

150. *Operation of the principle* "rebus". *What changes of circumstances bring it into play?* Although the intention of the parties is not, according to the theory here adopted, the juridical basis of the principle *rebus,* as an abstract principle of law (and as opposed to being a principle of interpretation, which will of course always be applicable when in fact a treaty is, on its terms, definitely open to that interpretation), such intention must nevertheless play a major part in determining whether the change which has occurred is one that calls for the application *ab extra* of the rule *rebus.* The rule *rebus,* in short, considered as a rule which, irrespective of anything expressed or implied in the treaty, may give the parties a faculty to take steps directed to the revision or termination of the treaty, operates independently of the will of the parties except at

[94] Naturally, in practice, a party will *invoke* the "clause"; but only in the sense that the conditions that cause it to operate have, in that party's view, come into existence. The party would not be invoking any faculty given him by the clause, but the clause itself, as having operated.

[95] See the French doctrine of "*imprévision*" applied by the Conseil d'Etat to public contracts. The tendency is also noticeable in the trend of recent English decisions. See Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd., Law Reports* [1926] Appeal Cases, at p. 510, and Lord Wright in *Denny, Mott and Dickson Ltd.,* v. *Fraser (James B.) and Co., Ltd., Law Reports* [1944] Appeal Cases, at p. 274-276.

[96] It would in effect be evidence that they did not regard the change as vital, or as affecting the force of the treaty obligation.

[97] *Op. cit.,* p. 584.

[98] Lord Sumner in the *Hirji Mulji* case (see footnote 95 above). Reference may also be made to the quotation from Sir John Fischer Williams' article on "The Permanence of Treaties" given in footnote 92 above.

the point where a party invokes it. But, in determining whether a case has arisen to which the principle properly applies, it is necessary to have regard to the original purposes of the treaty and the circumstances in which it was concluded. As has already been mentioned, the difficulty of discussing the question of the circumstances that give rise to *rebus sic stantibus* is added to by the tendency of many writers not to distinguish it clearly from other cases of termination presenting certain features in common but possessing in fact an independent juridical basis—such as impossibility of performance. Clearly, where a supervening impossibility does arise, a change of circumstances, and an essential one, must have occurred. But although the case of impossibility might therefore be represented as being one of *rebus sic stantibus,* it is clear that the latter principle is not limited to cases of actual impossibility. This can be seen from a consideration of the somewhat similar English doctrine of " frustration ", as it has been applied in, for instance, what is known as the " Coronation " type of case. A room is rented for a certain day, overlooking the route of a procession; before the day arrives the procession is cancelled or postponed.[99] This does not render the contract impossible to execute: the room can still be occupied on the specified day and paid for at the agreed (though of course abnormal) price;[100] but there would be no purpose in it. The contract has lost its *raison d'être*. What has become impossible is not the literal execution of the contract, but its execution in accordance with the intentions of the parties, or rather *of the objects of the transaction.* These have become " frustrated " by a change of circumstances.[101]

151. The question then arises, is the international law doctrine of *rebus sic stantibus* to be regarded as more or less equivalent—and therefore as being confined to—the case of " frustration ", i.e. of a change of circumstances totally preventing the realization of the purposes of the treaty? It would seem that, if the doctrine were to be accepted on the basis on which it has been invoked by various governments at various times,[102] this would not be so. Frequently, the suggestion is not that the change of circumstances has rendered realization by performance impossible, but that it has so altered the *conditions* of performance for the party concerned (either by increasing their onerousness or diminishing the value to be gained by further performance) that such party can no longer carry out, or can no longer be expected to continue performing, the treaty. That this is liable to be the plea is readily seen from the fact that the great majority of treaties involve *continuing* obligations. In this they differ from the " Coronation " type of case, where there is one particular act which has to be performed. Where however there are continuing obligations, it will generally be the case that they have in fact been in the course of performance for some time. The objects of the treaty are therefore, or have been, in principle realizable, and are being realized, so that, short of some event creating an actual and literal impossibility of further performance, or rendering further performance pointless for both or all parties, there is actually nothing to prevent the continued execution of the treaty. The plea put forward in such cases usually is that performance has become vexatious or unduly burdensome for one of the parties, or that events have occurred such that, for one of the parties, the treaty has lost a large part of its value, or is no longer worth while.

152. It would seem that, whatever political merits such a plea may have in a given case, the principle *rebus,* considered as a *juridical* ground for termination, cannot be extended to cover them, without becoming destructive of the whole force of the treaty obligation. On the other hand, the Rapporteur does not think that the principle can be entirely confined to cases of the " frustration " type, i.e. where the changed circumstances have rendered impossible the further realization of the objects of the treaty. There are changes which, without producing quite that result, may destroy the foundation of the obligation, if the latter was essentially based on assumptions or states of fact that have ceased to exist (even although not in such a way as to destroy the whole field of action of the treaty in the manner contemplated by case (v) in article 17).

153. It seems therefore to the Rapporteur that there are two but, in general, only two cases in which, on grounds genuinely of a specifically juridical character, it can be said that a change of circumstances affects the force of the treaty obligation (apart from the cases of impossibility and literal inapplicability separately specified as independent grounds of termination in article 17), and in which therefore the principle *rebus* can apply as such. These are (1) " frustration ", i.e. impossibility of realization, or of further realization, of the objects of the treaty; (2) destruction or alteration of a situation of fact, or state of affairs, fundamental to the treaty obligation, and on the basis of the existence of which *both* the parties contracted.

154. The second of these is further considered below in connexion with paragraph 1 of article 22. The first calls for certain further general remarks here, as regards the words " the objects of the treaty ". It is essential in this respect to distinguish clearly between what was the *object* of the treaty itself, and what may have been the *motives* of one or other of the parties in entering into it. The distinction is fully recognized in private law. For instance, a distinguished recent authority on English contract law states:

" The doctrine [of frustration] is certainly applicable

[99] This actually happened in the case of the Coronation procession of King Edward VII in 1902. Owing to the King's sudden illness, the Coronation was postponed for several months. Hence the appellation given to this type of case.

[100] See Arnold Duncan McNair, *Legal Effects of War,* 3rd ed. (Cambridge University Press, 1948), p. 151.

[101] The original " Coronation " case was *Krell* v. *Henry* [1903] 2 K.B. 740. But the process involved had been applied some time earlier in decisions such as that of *Taylor* v. *Caldwell* (1863), 3 B. and S.826. In that case, a hall hired for a concert was destroyed by fire six days before the date of the concert. This of course was a case of impossibility resulting from destruction of the physical object of the contract. Still, it was in this case that the English Courts began to resile from their former doctrine, deriving from the 17th century case of *Paradine* v. *Jane* (1647), Aleyn, 26, according to which an unconditional undertaking must be regarded as absolute, since the party concerned could have insisted on the inclusion of a clause safeguarding him from occurrences rendering performance impossible. However, as McNair shows (*op. cit.,* pp. 139-142), the process of softening the rigour of this rule had, in maritime cases, started well before *Taylor* v. *Caldwell.*

[102] See Hill, *op. cit.,* pp. 27-74.

if the object which is the foundation of the contract becomes unobtainable, but the judges are equally insistent that the motive of the parties is not a proper subject of enquiry." [103]

A man may contribute to a charity for the blind because of his affection for a blind daughter. But his object is to benefit the charity, and his affection for the daughter is simply his motive in wanting to do so. If, as he well may, he enters into some sort of covenant with the charity to subscribe to its funds,[104] he will not be absolved from carrying it out because, after a time, his daughter recovers her sight. Motives, and objects or purposes may sometimes be difficult to disentangle, but they are always juridically distinct. Possible examples may be imagined in the treaty field. For instance, a number of countries may, in relation to some specific area, enter into a treaty having as its object the regulation and equitable division amongst them of certain resources and activities, e.g., sealing, whaling, guano-collecting, oyster-taking, or whatever it may be. For this purpose they agree, *inter alia,* to divide up the area, each assuming exclusive rights in respect of a prescribed part of it. After a certain period, however, owing to a change in the habits of the animals, fish, birds, etc., these abandon certain parts of the area, and are only to be found in others. In such a case it may well be contended that the object of the treaty was, *inter alia,* an equitable division of the available resources of the region as a whole; that this was effected on the footing of a certain distribution of those resources over the region as a whole, and that, if this materially alters, the object (or this particular object) of the treaty is frustrated or can no longer be realized. Suppose, however, a different case. Two countries grant each other trading rights, and various facilities and exemptions in each other's ports or territory. The object of the agreement is that the ships and nationals of each country shall enjoy these rights and facilities, etc., in the ports and territory of the other. After a lapse of time however, one of the parties finds that, owing to a change in the pattern of its trade, it is no longer interested in the exercise of these rights, and it thereupon finds the obligation to grant them to the other party burdensome and vexatious. But all that has really happened here is that the party concerned has lost the motive it originally had for entering into the treaty. The object of the treaty itself is not in the least affected, and remains fully realizable—namely that the ships and nationals of each country should have certain rights and facilities etc., in the ports and territory of the other. The fact that one of the parties no longer wants to exercise its rights under the treaty, and perhaps would not have entered into the treaty at all if the pattern of its trade had not then lain in that direction, is quite irrelevant, and affords no ground for any denial of the treaty rights to the other party on the basis of a supposed application of the principle *rebus sic stantibus.*

155. *Method of invoking the principle* "rebus". In addition to the limitations arising out of its inherent character, there are a number of further limitations that operate as regards the exercise of the rule, of the same order as in the case of fundamental breach, i.e. in respect of the type of treaty involved, and of certain particular circumstances that may debar a party from invoking it in a particular case. These are discussed below in connexion with article 22. The remaining, much controverted question, is as to the exact extent of the right given by the rule "*rebus*" in those cases where it is applicable, and in what manner it must be invoked. The great majority of the authorities are agreed that it neither operates automatically of itself to terminate the treaty, nor even to give a party a right immediately to declare termination. The main weight of opinion undoubtedly is that a party which considers that, by reason of an essential change of circumstances, a treaty should be revised or terminated, should begin by addressing a request (or at least a reasoned statement) to that effect to the other party or parties, and that there is no automatic or immediate right of unilateral denunciation. Moreover, State practice is in accordance with this view, as is shown by the numerous cases cited by Chesney Hill.[105] But there is disagreement as to what happens next, if the request is refused or ignored. Some authorities consider that in such case the State concerned can thereupon denounce the treaty; others think or imply that it cannot do so. A third school considers that the matter must then be referred to a tribunal. A fourth suggests no solution, and merely discusses the problem.

156. None of these courses is satisfactory, and perhaps there is no practicable course that could be wholly so. The third involves the difficulty that, in existing circumstances, the parties themselves would have to consent to the reference, unless they happened both to be parties to the compulsory jurisdiction of the International Court of Justice, and the case was also not covered by any reservation.[106] The second course would be tantamount to denying any effective sphere of operation at all to the principle *rebus,* except in those cases where the other party or parties happened to be willing to agree to termination or revision; while the first course, on the other hand, given the ease with which essential change can plausibly be alleged, would, in effect, amount to giving an absolute, if delayed, right of unilateral denunciation, and would be quite inconsistent with the often cited Declaration of London of 17 January 1871,[107] which still forms part of the corpus of written international public law, according to which:

"[Les Puissances] reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale." [108]

[103] G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract,* 4th ed. (London, Butterworth and Co. (Publishers) Ltd., 1956), p. 467.

[104] Legally binding covenants of this kind are frequently entered into in England because of certain (perfectly lawful) tax advantages to be gained thereby.

[105] *Op. cit.,* pp. 27-74.

[106] Nevertheless, as will be seen, it would be possible to make the exercise of the right dependent on an *offer* of adjudication being made by the party claiming it, followed by *non-acceptance* on the part of the other.

[107] Annex to Protocol 1 of the London Conference, *British and Foreign State Papers, 1870-1871,* vol. LXI, pp. 1198-9.

[108] To this would now have to be added the recognized cases where, by operation of law, a party is given a right of unilateral termination.

157. Where the other party or parties agree to revision or termination, *cadit quaestio*. The case is then one of agreement (either express, or else tacit—by mutual desuetude—see above in connexion with article 15, paragraph 3). If therefore the principle *rebus* is to have any separate field of application, it must be in those cases where the parties do *not* agree. Yet the dangers of this are manifest. The solution offered by the Rapporteur is that contained in article 23. Actual termination would only result (apart from agreement) from the pronouncement of a competent tribunal. The party invoking the change of circumstances would, basically, only have a right of *suspension,* though (if necessary) of suspension for an indefinite period. Even this could only be effected if the party concerned was willing to offer recourse to some form of international adjudication, and if this offer was not accepted. The practical result of indefinite suspension may not differ greatly from termination, although the indirect and secondary differences are considerable. In any case, the other party could always avoid an unjustified suspension by accepting the offer of adjudication.

158. *Comments on the particular paragraphs of article 21. Paragraph 1.* This states the principle, for general comment on which see paragraphs 141 *et seq.*, above.

159. " In the case of treaties not subject to any provision, express or implied, as to duration . . . " (*paragraph 1*). There is a general consensus of opinion [109] that the principle *rebus* is only relevant to the case of what are sometimes called " perpetual " treaties—indeed it can be said that the principle has no *raison d'être* in the case of other treaties, for it is precisely to remedy the hardship that might result from perpetuation, if an essential change of the order contemplated by the *rebus* principle occurs, that the principle exists. If the treaty is not of this kind, either the question does not arise, for the treaty can be terminated by other means (if a change has in fact occurred, it may *motivate* such termination but will not be the juridical ground of it), or else the treaty will expire in due course under its own terms; and this event can reasonably be awaited, for, short of supervening literal impossibility of performance (which would terminate the treaty in any case), a change of circumstances can hardly be of such a character that termination cannot await the natural advent of the treaty term. Indeed, it is a legitimate inference, as a matter of interpretation, that, if the parties provided a term, they meant to *exclude* earlier termination on any basis other than further special agreement, fundamental breach,[110] or literal impossibility of performance.

160. ". . . a fundamental . . .change in essential circumstances . . ." (*paragraph 1*). The requirement of essentiality attaches both to the original circumstances—which must have been basic to the contract—and to the change itself—which must affect it in an essential way (see article 22, paragraph 1, and the comments thereto).

161. ". . . and unforeseen change . . ." (*paragraph 1*). If the change was foreseen by the parties, whether actually or as a possibility, and even if they did not provide for it in terms in the treaty, they must be taken to have contracted with reference to it or the possibility of it. Either they must be taken impliedly to have excluded it as a ground of termination, or the change itself must be held not to be an essential one giving rise to such a ground.[111]

162. *Paragraph 2.* The remaining phrases of paragraph 1 have either been sufficiently explained in the general commentary on this article above, or will be further considered in connexion with articles 22 and 23, to which paragraph 2 refers. The definitions and limitations thereby introduced form of course an integral part of the concept of *rebus.*

163. *Paragraph 3.* The reasons for this have been fully explained in paragraphs 145 and 150 above. *Rebus* is, within its limitations, essentially a residual right. It is not to be invoked, and is not applicable, in any case where an independent right or ground of termination or suspension exists.

Article 22. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(conditions and limitations of application)*

164. The conditions and limitations on the application of the principle *rebus* are, *mutatis mutandis,* of the same order as those relevant to the case of fundamental breach, and some of the commentary to article 19 is accordingly applicable.

165. *Paragraph 1. Limitations in respect of the type of treaty involved. Sub-paragraph (i).* This statement is *broadly* true, and is not intended to be more. *Rebus* has seldom been invoked, and is unlikely to be, in the case of general multilateral conventions; but it has not infrequently (in one form or another) been put forward in connexion with plurilateral treaties having special and restricted objects, and a limited number of parties.[112] This sort of case may well come under sub-paragraph (iv) of the paragraph now under discussion.

166. *Sub-paragraph (ii).* For comment and illustration of this type of treaty, see paragraphs 125 and 126 above. It is believed that the principle *rebus* cannot, or should not, ever be invoked with regard to this type of treaty. If a case should arise, it must be a matter for agreement with the other parties.

167. *Sub-paragraph (iii).* For comment on this type of treaty, see paragraphs 124 and 126 above. The case of essential changes of circumstances affecting all, or the great

[109] See the standard authorities *passim*. Even the most ardent advocates of the doctrine of *rebus* base themselves precisely on the presumed impossibility for a State to bind itself for ever. If therefore it had *not* bound itself for ever, there is no need for *rebus*.

[110] Even here, there may be doubt. See paragraph 132 above.

[111] If they both foresaw *and* provided for it in the treaty, then of course no question arises, but, for reasons already considered (para. 149 above), it is not a case of *rebus*.

[112] A typical case that might be cited is the well known one that resulted in the Declaration of London referred to in paragraph 156 above, namely the Russian request for a revision of the Black Sea clauses of the Treaty of Paris of 1856.

majority of, the parties need hardly be dealt with, since there would inevitably ensue an agreed revision or termination. If only one or some parties are involved, this may lead to their withdrawal, or to a suspension of their obligation, but it cannot affect the remaining parties or the treaty itself (unless of course it led to termination *aliter*, as for instance if the number of parties became reduced to below a prescribed number).[113]

168. On the other hand—*sub-paragraph (iv)*—in the case of the type of treaty involved in this sub-paragraph, the interdependence of the obligations might lead to termination by general withdrawals or suspensions, if one or more parties, on a basis *rebus* (or indeed on any other basis or ground), themselves withdraw or suspend.

169. *Paragraph 2. Limitations as to the character of the change necessary before the principle* rebus *can be invoked.* It is not every change, nor even every important change, that can constitute an "essential" change for purposes of the application of the *rebus* rule. For general comment see paragraphs 151 to 154 above.

170. *Sub-paragraph (i).* Many pleas of essential change are motivated by a change in the attitude of the party concerned towards the treaty. This, however, is the very case that the rule *pacta sunt servanda* is intended to apply to. The change must therefore be an objective one, taking place in the external circumstances. Of course, if that duly exists, the fact that there has also been a subjective change of attitude by one of the parties will not matter. This is the reason for the phrase "and not merely".

171. *Sub-paragraph (ii).* The situation of fact or state of affairs in which the change has taken place must have been in existence at the time when the treaty was entered into. This is of the essence of the whole doctrine. A change in a subsequent situation or state of affairs would be juridically quite irrelevant. But further, it must be a change in a situation or state of affairs that was itself fundamental to the contract, as a factor moving the parties to enter into it. A change in circumstances which, though they existed at the time of the treaty, were not of that nature would be irrelevant, and not a ground of *rebus*. For the formula employed in this sub-paragraph, the Rapporteur is indebted to Hill, and the Harvard Research volume whose respective formulae [114] (which considerably resemble each other) he has merged and adapted. He has not however made use of the words in Hill's formula "... and whose continuance ... formed a condition of the obligatory force of the treaty according to the intention of the parties". The reasons for this are given in paragraphs 146 to 149 above. According to the view taken by the Rapporteur, the principle *rebus* (*as such*) does not operate as a *condition of the contract,* to bring about termination. If the latter occurs, this will not (if the basis *rebus* is in question) be attributable to any original intention of the parties, but to an independent and objective principle of law that essential changes having certain specific effects should (unless the parties agree otherwise) be grounds for termination.[115] The intention of the parties remains relevant —as implied in the actual wording of sub-paragraph (ii)— in order to determine *what* facts or circumstances existing at the time of the conclusion of the treaty were fundamental as constituting a determining factor jointly moving them to contract. Such intention is not however material (according to the theory provisionally adopted in the present report) when it comes to considering whether or not the parties may invoke the *principle* of essential change, as a principle that, if the facts warrant it, may give grounds for termination (subject always to the reservation that, if the parties have indeed expressed or clearly implied a *term* in the treaty providing for termination in certain eventualities, it will operate accordingly—but, in that case, by reason of the treaty, not of the principle *rebus* as such). In short, the question of intention (actual or presumed) is not material for the purpose of determining the legitimacy of the principle itself, but only for the purpose of determining whether it can legitimately be invoked in the particular case. To put the matter from another point of view, what is necessary for the purposes of sub-paragraph (ii) is not so much to show that the parties intended the treaty to terminate if there was a change in certain then existing circumstances, but that *in the absence of those circumstances they would not (that is, neither of them would) have entered into the treaty at all, or that they would have drafted it differently.* It is only on that basis that the circumstances can be regarded as being such that a fundamental change in them should give a faculty of termination or suspension of the treaty obligation.

172. "... with reference to which *both* the parties contracted, and ... envisaged by both of them as a determining factor moving them jointly ..." (*sub-paragraph (ii)*). The governing terms are "both" and "jointly". Here the heart of the problem of *rebus sic stantibus* is reached. This is the question of the distinction between objects or purposes on the one hand, and motives or inducements on the other, discussed in paragraph 154 above. Neither of these terms figures in the Hill or in the Harvard drafts, though they are probably implied by both. It is the failure to deal clearly with this point that has tended to render so many attempts to deal with the topic of *rebus sic stantibus* unsatisfactory. Does it suffice to bring the principle *rebus* as *such* into play, that there has been a change (even an essential change) in circumstances that moved *one* of the parties only, and not both to enter into the treaty? If so, what are the juridical grounds, if any, on which it can be asserted that (the change having occurred) the interests of the party affected must *ipso facto* prevail, not only over those of the other or others, but over the treaty obligation itself? If it is once settled that the change must be in something that was a determining factor moving *both* parties jointly to enter the treaty, a decided step forward will have been taken in the direction of placing the doctrine of *rebus* on a firm foundation and removing it from the realm of the arbitrary and the unilateral.

173. In a matter of this kind, it is of great assistance

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[113] See paragraph 96 above concerning this case.

[114] Hill, *op. cit.*, p. 83, and Harvard Law School, *op. cit.*, article 28, pp. 662-663 and 1096.

[115] If the parties had intentions about termination if certain changes occurred, and these intentions are clearly expressed in, or to be inferred from the treaty, then it is a case of termination by virtue of the treaty itself.

to look away from the *ignis fatuus* of the intentions of the parties and to consider the treaty itself. According to the most up-to-date theories of treaty interpretation,[116] and even if the extreme teleological position is avoided,[117] the treaty itself has to be regarded as possessing objects and purposes that may to some extent be, or have developed in a manner, independent of the original intentions of the parties. What these objects and purposes are, may be a matter of the interpretation of the treaty, on which the parties may differ, and if the text is not clear, recourse may be had to non-textual means of interpretation[118] but, by whatever means they are arrived at, the treaty does have such objects and purposes. The parties, on the other hand, may have had various, and widely different *motives* for entering into the treaty. They may have had a common objective, but different reasons for pursuing it. If, later on, something occurs radically to affect this objective as such, that will be one thing; but if it merely affects the interest or motives of one party, so that a situation arises in which that party wishes to end the treaty, but the other party wishes to preserve it, there may, purely *in the abstract*, be no reason why the views of either should prevail over the other's, if it is simply a question of the views or wishes of one party against the other's. *Juridically* however, what occurs at this point is that the rule *pacta sunt servanda* enters in, not in favour of either party as such, but in support of the *treaty*.[119]

174. For the rule *rebus* to operate *as such* therefore, it is necessary to have an essential change of circumstances which either vitiates the objects and purposes of the treaty itself, or relates to fundamental considerations that were basic to the treaty for *both* parties and moved them jointly to conclude the treaty. This is not to deny that there may be cases (though they would normally be rare) where the particular or special interests of a particular party in entering into a treaty are so obvious and paramount that their continuance could be said to be an actual condition of the treaty. But, if so, it would be by reason of such an implied condition in the treaty itself that any termination on that ground would take place, and not in the application of any independent principle of *rebus* in the proper sense. Much of the confusion that surrounds the subject has sprung from the failure to distinguish clearly between the case when a party claims termination by virtue of a definite (even if implied) condition of the treaty, and the case where termination is claimed on the basis of some general and independent principle of change as a ground of termination. The former is a matter of interpretation of the treaty; the latter of deciding whether the objective requirements of any such principle are met in the given case. The articles and paragraphs now under discussion are intended to state what those objective requirements are, and to do so in such a way as to rule out the subjective and individual attitudes of the parties, by relating the matter exclusively to a change of the kind described in the first sentence of the present paragraph, and more closely defined in paragraph 2 of article 22.

175. *Sub-paragraphs (iii) and (iv).* In view of what has just been said, these need no further elucidation.

176. *Sub-paragraph (v).* This has already been adequately discussed in paragraph 171 above.

177. *Paragraph 3. Limitations arising from particular circumstances operating to preclude a party from invoking the principle* rebus. *Sub-paragraph (i).* This has already been fully discussed in paragraph 159 above.

178. *Sub-paragraph (ii).* Reference may be made to the comment on the same point in connexion with fundamental breach, which, *mutatis mutandis*, is applicable here (see paragraph 133 above).

179. *Sub-paragraph (iii).* It may be argued that this principle, correct when it is a case of *culpa* on the part of a party complaining of a fundamental breach which it has caused or contributed to, should have no place here, where no direct *culpa* is necessarily involved. It is believed however that the limitation should none the less apply. The point links up to some extent with that of a party's personal attitude and motives. Where the party concerned has itself caused the change invoked, the chances that this change will not be of the character required by paragraph 2 of article 22 will be considerable. Even where this is not so, it would seem that a State taking (or contributing to) action bringing about a fundamental change in essential circumstances affecting a treaty to which it is a party must be presumed to be aware of the possible effects on the treaty. It therefore has a choice. It can elect to take the action, but cannot then plead it as a ground for claiming to terminate the treaty. By action inherently detrimental to the treaty, the party concerned incurs—if not direct *culpa*—at any rate responsibility. It may be that the *other party* can invoke the principle *rebus*, but not the party responsible. If A gives rights to B in territory belonging to A, in return for receiving rights in certain territory belonging to B, and A afterwards acquires this very territory by annexation from B, it admittedly no longer receives any *quid pro quo* under the treaty, since it will not need the rights in question—the territory concerned now belonging

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[116] See G .G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points", *The British Year Book of International Law*, 1951, pp. 1-28, especially pp. 1-6; and the proceedings of the Bath, Siena and Granada sessions of the Institute of International Law in *Annuaire de l'Institut de droit international* for 1950, 1952 and 1956 (vols 43, 44 and 46) *passim*.

[117] See Fitzmaurice, *loc. cit.*, p. 4.

[118] At its 1956 session (Granada) the Institute of International Law adopted a resolution which in these circumstances looked principally to sources of non-textual interpretation, such as the subsequent practice of the parties in relation to the treaty, but without any direct reference at all to their presumed intentions at the time of its conclusions. See *Annuaire de l'Institut de droit international* (1956), vol. 46, pp. 364 and 365.

[119] Suppose, to take an example, that a number of countries enter into an arrangement by treaty to pool their information on a certain subject. They may have a number of different motives, and the interest of some may be much greater than that of others. But the *object* of the *treaty* is that each should have any information possessed by or becoming available to any of the others. A discovery by one party that, owing to a change of circumstances affecting it, it was no longer interested in receiving the information would not justify it, on a basis *rebus*, in refusing it to the others.

to it.[120] But this, it is conceived, could not, in the circumstances, be made a ground for invoking the principle of *rebus sic stantibus* to refuse B the agreed rights in the territory of A.

Article 23. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(modalities of the claim)*

180. The reasons for the procedure (and, resulting from that, the limitations) proposed in this article have already been explained in paragraphs 155 to 157 above. Reference may also be made to the comments on the somewhat similar article proposed in respect of fundamental breach (article 20). In the present case it will be noticed that, as in the case of fundamental breach, the claiming party is not obliged, initially, to offer reference to a tribunal. But unless it eventually does so if necessary, it cannot either permanently suspend the obligation (if the offer is not accepted) or proceed to termination (if the offer is accepted, and the tribunal finds in a manner justifying that step). If it does not make this offer of adjudication, the party invoking the change must continue performance of the treaty in full, pending any eventual termination or revision by agreement with the other party.

Sub-section iii. The process of termination

Article 24. General provisions

181. *Paragraph 1.* Reference may be made to paragraphs 38 to 43 of the present commentary for an explanation of the important distinction between grounds and methods (or processes) of termination, which is essential to a proper understanding of the subject. It will be realized that in this section of the work (the process of termination) it is questions of mechanics rather than of substance that are under discussion.

182. *Paragraph 2.* A purely logical order of arrangement would have required that all the articles on methods as opposed to grounds should be placed together in a separate self-contained section. On that basis, the articles would have figured in the present section. As regards articles 10 to 14 however, the difficulty is that termination by special agreement, or by a replacing treaty, is both method and ground, and is more conveniently dealt with under the section on grounds; while, as regards articles 30 and 31, it is more appropriate to deal with the case of termination eventually brought about by the acceptance of an invalid or irregular termination, or repudiation as part of the topic of " Effects ".

183. "... in order to record or establish the precise moment of expiry and to deal with any consequential matters " *(paragraph 2).* For instance, literal impossibility of performance is a ground *ipso facto* of termination. The event, not either of the parties, terminates the treaty. But it may not be certain or clear, or may be a matter of dispute, at exactly what moment the impossibility supervened and the treaty could no longer be carried out. Something may turn on when that moment was, and it may be that a Code on the law of treaties should contain more detailed and specific provisions on the matter. For the present the Rapporteur contents himself with the phrase quoted above.

184. *Paragraph 3.* See comments in paragraphs 181 and 182 above. The pronouncement of a tribunal is never the ground of termination, because what a tribunal is called upon to do is to determine whether legal grounds already exist according to which a treaty must be regarded as terminated, or as having come to an end at a certain time, or on the happening of a certain event, or on the basis of which one of the parties possesses a right of denunciation, or has properly exercised such a right. Such a pronouncement may however be a *method* of actual termination in those cases where the tribunal declares the treaty to be at an end on some (pre-existent) legal ground, but with effect from the date of the pronouncement.

Article 25. The exercise of the treaty-terminating power

185. This article and the succeeding one are applicable to *all* notices of termination or withdrawal, whether given by virtue of the treaty itself (as will usually be the case), or of a special agreement about termination, or in the exercise of a faculty given by law. It must therefore logically figure in the present section, as a method or process, not a ground of termination, although, purely as a matter of convenience, it might have been grouped with articles 9 *et seq.*

186. *Paragraph 1.* See generally the commentary to article 9 (The exercise of the treaty-making power) in the introduction to the Code (A/CN.4/101), which is equally applicable here. Treaty-termination carried out by any party on the inter-governmental plane is procedurally the obverse of treaty-conclusion.

187. *Paragraph 2.* The considerations here involved are of the same order as in the case of the deposit of other instruments in connexion with a treaty (such as ratifications or accession), and it will be sufficient to refer to the relevant parts of the 1956 report, for instance, paragraph 2 of article 31 and the commentary thereto (A/CN.4/101).

Article 26. The process of termination or withdrawal by notice (modalities)

188. *Paragraph 1.* The remarks made in paragraph 185 above are equally applicable to the present article.

189. *Paragraph 2* lays down the basic requirement of strict conformity with any conditions specified in the treaty itself, or in any separate agreement of the parties. Defects can of course be cured if the other party or parties all accept the notice as good, but, failing that, a notice given irregularly is void and inoperative. Where the notice is not given under the treaty or a separate agreement, but in

[120] Something of this kind, although the facts are not quite parallel, occurred in the case of what was known as the " French shore ". By the Treaty of Utrecht, 1713, Great Britain granted France certain fishing rights in Newfoundland (ceded under that Treaty to Great Britain), France being then also in possession of settlements in Canada. Later, in consequence of the Seven Years War, French Canada also was ceded to Great Britain; but French fishermen continued to enjoy rights in Newfoundland for nearly two hundred years after the original grant, until they were determined by agreement under the Anglo-French Convention of 1904.

the exercise of a faculty conferred by operation of law, there will of course be no specified period of notice. But a reasonable period must be given. What this will be will depend on the factors mentioned in the article. In all other respects, the requirements of the article will be applicable to the case of such notices.

190. *Paragraph 3.* It not infrequently happens that the first intimation of the denunciation of a treaty received by the other party or parties is an announcement in the press of the country effecting, or purporting to effect, termination or withdrawal. This is not only discourteous, but also inoperative as an actual notice, even in those cases where the treaty permits of withdrawal by notice. Equally, where there are several parties and no "headquarters" government, organ or authority is provided, any notice must be given to *all* the other parties separately. Notice given to one does not count as notice to another, and is not in itself sufficient.

191. *Paragraph 4.* The date of the notice will normally be inserted by the diplomatic representative or other competent authority of the notifying country, and will be that of the day on which the notice is actually deposited by such representative or authority, either at the ministry of foreign affairs of the other country or of the "headquarters" government, or at the seat of an international organization where appropriate, or at the diplomatic mission of that country or government, or the local office of the organization in the capital of the notifying country. Where notice has to be given to several parties, the notifying government must insert a uniform date in the notices, and must so far as possible synchronize the moment of their communication to the various recipients.

192. *Paragraph 5.* This is self-explanatory, except as regards the latter part. This relates to the case of the exercise of a faculty of giving notice of termination arising by operation of law. Although the treaty might provide such a faculty, it might do so, for example, only in the form that the treaty remain in force for successive periods of five years, subject to a right to denounce it by a notice to take effect at the end of any five-yearly period. In the meantime, however, it is possible that circumstances may arise in which a party might, by virtue of one of the rules set out in articles 16 and 17 above, acquire a right of termination or suspension by operation of law, exercisable immediately or by giving "reasonable" notice, and in any case earlier than the end of the current quinquennial period. Or there may be no provision at all in the treaty, but such a right may arise by operation of law. In all such cases, if the notice states no date or period, or states an inadequate period, it will not be void but will not take effect until the expiry of a period that is reasonable, having regard to all the circumstances.

193. *Paragraph 6.* This is self-explanatory, though see the remarks made in paragraph 190 above, in connexion with paragraph 3 of this article.

194. *Paragraph 7.* This provision is the necessary counterpart, so to speak, of those in part I of the first chapter (A/CN.4/101). These do not permit of ratification, accession etc., to *part* of a treaty only, unless the treaty itself so permits.[121] The object of that rule is to avoid a position in which intending parties can exclude portions of the treaty they do not wish to carry out, while obtaining the benefit of participation in the rest. This object would however be defeated if a State, having become a party to the treaty as a whole, could then proceed to terminate or withdraw from performance of part of it, while continuing to be a party in respect of the remainder. Such a process would, in fact, amount to effecting a disguised unilateral reservation, and would be particularly objectionable, since the process would permit of reservations not merely made once and for all on signature, ratification etc.,[122] but made at any time during the currency of the treaty, the operation of which would accordingly always be uncertain and precarious.

195. *Paragraph 8.* This is required partly as a corollary to paragraph 7, and partly to avoid situations likely to create doubt and uncertainty.

196. *Paragraph 9.* Whereas ratifications, accessions etc., once made, cannot be withdrawn,[123] there seems to be no reason why a notice of termination should not be withdrawn, provided it has not yet taken effect. Ratifications and accessions or acceptances are acts that take effect immediately. The State concerned is thereupon bound, either immediately by the treaty, or so soon as the latter comes into force, and is in any case immediately operative in order to bring or assist in bringing the treaty into force.[124] In a sense, therefore, any withdrawal of the ratification or accession would be tantamount to a termination of or withdrawal from the treaty, and could only be effected on such grounds and in such circumstances as are recognized by the provisions of the present part of the Code.[125] But a notice of termination or withdrawal, the period of which is still unexpired, has not yet taken effect and has not the same finality. From the point of view of the other parties and of the treaty itself there can, in principle, only be advantage in permitting its cancellation or revocation if the party concerned changes its mind. It would seem, however, that a right of objection must be reserved to the other party or parties if, in the meantime, they have been led by the original notice to enter similar notices, or otherwise to change their position.

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[121] See, for instance, article 31, paragraph 4; article 34, paragraph 8; and article 36, paragraph 1 (A/CN.4/101).

[122] These remarks are not intended to imply that there is an unlimited freedom of reservation, provided only that it is effected initially. On this subject, see generally articles 37-40 on reservations, and the commentary thereon, in document A/CN.4/101.

[123] See article 31, paragraph 5; article 34, paragraph 8; and article 36, paragraph 1; and the commentary thereon (A/CN.4/101).

[124] This is always true of accessions and acceptances, and also of ratifications of a bilateral treaty. In the case of multilateral treaties there may be an interval between the deposit of the ratification of any particular party and the actual entry into force of the treaty, if the latter is not already in force and requires a stated number of ratifications to bring it into force. Nevertheless, the ratification is final as respects the party effecting it, will count towards making up the required number of ratifications, and in other ways has an immediate operative effect. See article 33, paragraph 1, and the commentary thereon (A/CN.4/101).

[125] See the commentary to article 31, paragraph 5, in part I (A/CN.4/101).

Article 27. Date on which termination or withdrawal takes effect

197. *Paragraph 1.* This is self-explanatory. "... or as it may be agreed by the parties"—see paragraph 183 above.

198. *Paragraph 2.* See equally paragraph 183 above.

199. *Paragraphs 3 and 4* are self-explanatory.

200. *Paragraph 5.* "... (being a date not earlier than the date of notice itself) ...". Notices of termination cannot be antedated or "relate back". The parties can of course agree on some special date, and where *repudiation* is *accepted* by a party, thus terminating the treaty, or the repudiating party's participation in it, there is an option to relate the termination or withdrawal back (see paragraph 201 below)—but these are different matters. Where "reasonable" notice is required, it may in fact be quite short, almost immediate if the circumstances justify this; but not otherwise.

201. *Paragraph 6.* "... unless, in the case of repudiation, the accepting party elects to relate the termination back to the date of the repudiation". In general, termination must date from the moment at which it legally occurs: previous to that there is no termination. Thus, in the ordinary way, where a purported termination is invalid or irregular, it can only be validated (in the sense of producing legal termination, not of validating the act) by an acceptance of termination by the other part, so that termination takes place and dates from then. However, *repudiation* (which is defined in article 30, paragraph 2) seems to involve somewhat different considerations. In the other cases, the party claiming to terminate at least professes valid grounds for doing so, or has merely committed some procedural irregularity. In the case of repudiation, there is an open and deliberate rejection of the obligation. In these circumstances, it seems right that the other party, if it is prepared to accept the repudiation as a basis of termination, should have a faculty of election as to the date on which termination will be deemed to have taken place. In most cases such party will probably have no interest in "relating back", but in some cases it may. It is of course well understood that any acceptances of the kind here referred to cannot affect the *consequences* of any repudiation or other illegal act of purported termination, as regards the right of the aggrieved party to damages or other appropriate reparation.

202. *Paragraph 7.* This paragraph is included largely for the avoidance of doubts. However fundamental a breach may be, it has no automatic terminative effect. The treaty goes on. The other party has a right (subject to the provisions of articles 18 to 20) to declare termination. It may or may not exercise this faculty. If it does, termination only takes place and dates from then.

SECTION 3. EFFECTS OF TERMINATION AND OF PURPORTED TERMINATION

Article 28. Valid termination (general legal effects)

203. *Paragraphs 1 to 3.* The term "valid" termination is strictly inapt, since an "invalid" termination is not a termination at all, and therefore termination, if it is such, is necessarily valid. But the term is none the less convenient in order to mark a difference, the full significance of which appears in connexion with articles 30 and 31.

204. The principle embodied in these paragraphs, based on the accepted and inherent distinction between "executory" and "executed" clauses, is common form in private law. It is no less so in international law. Yet the point surprisingly often gives rise to misunderstanding. In particular, the idea that the termination of a treaty may somehow revive an antecedent state of affairs is quite often entertained, although, as the Harvard Research volume points out, it is really inherent in the very fact of termination that this cannot be so:

> "In other words, after a treaty has been terminated, *and because of that fact,* [italics added] there can be no undoing of what was already done in carrying out the provisions of the treaty while it was in force, and no disturbing of rights vested as a result of such performance." [126]

Familiar examples would be transfers of territory effected under a treaty, boundary agreements or delimitations, and territorial settlements of all kinds; payments of any kind effected under a treaty; renunciations of sovereignty or of any other rights (these would not revive); recognitions of any kind (no position of non-recognition or contestation would revive). As stated in paragraph 1, a continuing disability will cease, but not a permanent disability created by the treaty. Thus an obligation to refrain from doing certain things will not persist when the treaty terminates;[127] but a renunciation of certain claims or pretensions will, and so also will an acceptance of any legal situation or state of fact.

205. Any notions to the contrary spring from a confusion of ideas as to what termination really involves. The treaty may be terminated, but not the legal force of the situation it has created. Executed clauses of the type described above are spent only in the sense of being fully performed; but, by this very fact, the rights, status or situations resulting therefrom are complete, in the sense of being acquired, established or stabilized. Their juridical validity and force is not affected by the termination of the treaty in which they are contained, or from which they resulted. They persist, although the treaty which gave them life may not. As stated in paragraph 2, any reversal or alteration of the situation created by the treaty under its executed clauses could only be brought about by a distinct and separate act or agreement of the parties, on or after termination. Thus, territory ceded under the treaty could be retroceded, rights renounced could be reconferred, etc.[128] But none of this could result from the termination itself, as such.

206. *Paragraph 4.* For the sake of "tidyness", or for the removal of doubts, States sometimes prefer to "ter-

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[126] Harvard Law School, *op. cit.*, p. 1172.

[127] For instance, in the case of an obligation not to levy certain dues and charges, the party concerned may resume doing so when the treaty terminates, but could not purport to collect dues etc. retroactively for the period of the treaty.

[128] However, "de-recognition" would not, in general, appear to be possible at all, by any method.

minate " a fully executed treaty, performance of which is complete and under which nothing remains to be done. As has been seen in connexion with article 17, cases (x) and (xi) (see paragraphs 109 and 110 above), even where the whole of a treaty is executed and carried out, it does not strictly determine as an instrument—it remains, so to speak, on the statute book. If, for reasons of convenience, the parties agree to " terminate " it, this is really no more than a record (*constatation*) of the fact that its obligations have indeed been fully performed, and that nothing remains to be done under it.

207. *Paragraph 5.* The cause of termination is of course immaterial. It is the fact that counts. " Cause " naturally means juridical cause. A treaty illegally " terminated " is not terminated. The provisions of this article, therefore, apply no less in cases of termination by operation of law than in cases of termination provided for by the treaty itself, or by other special agreement of the parties. Hence, it follows that such grounds as changed circumstances, breach by the other party, etc., even where valid, can only affect executory treaties or clauses, and cannot affect executed treaties or clauses, or reopen past situations or facts.

208. *Paragraph 6.* This is self-explanatory.

Article 29. Effects of valid termination (special considerations affecting multilateral treaties)

209. *Paragraph 1.* When a multilateral treaty does wholly terminate, the results are, in general, the same as in the case of a bilateral treaty. But whereas termination by one of the parties to a bilateral treaty necessarily terminates the treaty itself, this is not usually the case with multilateral treaties. The treaty itself is not affected, unless it is of the type in which the participation of each of the parties is a *sine qua non* of the obligation, and hence of the continued participation of all the others. Except in that type of case, the withdrawal from, or termination of, the treaty in respect of one particular party will do no more than allow the other parties to cease performance of their obligations in respect of that party—and may not in certain cases have even that effect. For more detailed comment it will be sufficient to refer to paragraphs 124 to 126 above.

210. *Paragraph 2.* This is self-explanatory, but see the comment to article 17, case (ii), in paragraph 96 above.

Article 29 A. Effects of termination on the rights of third States

211. This is held over for the time being. It may more properly belong to the general topic of the effect of treaties upon third States, which will be dealt with elsewhere in the Code. Provisionally, and without prejudice to the question whether, and if so when and to what extent, third States may have rights under any treaty, the Rapporteur suggests that where such rights do exist, or have arisen out of the situation created by the treaty, or where third States are in fact benefiting, 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 that it will not necessarily follow from their doing so that the position or rights of third States will thereby *ipso facto* be affected. However, this is a matter requiring separate treatment.

Article 30. Purported or invalid termination (character and methods)

212. *General remarks on articles 30 and 31.* The subject of " invalid " termination is not free from the possibility of confusion. The term is one of convenience, and characterizes an act or process rather than the result. The invalidity lies in the act or pretension, and therefore no termination in the juridical sense ensues. Hence the adjective " purported " is preferable.

213. It is necessary to insist that an invalid act cannot *of itself* bring a treaty to an end, juridically, because so often all the appearance of termination is, in practice, produced, and there is actually termination in fact, in the sense that no further performance takes place. But this does not terminate the treaty in law. If it did, then for all practical purposes treaties would be terminable at will, subject only to paying damages or making other suitable reparation for the prejudice caused. No doubt in actual fact this is what may sometimes occur. But it cannot be the legal position, or a treaty would, juridically, be reduced to the level of that type of quasi-obligation, found in private law, according to which the person concerned is not actually obliged to do a certain thing (in the sense that he commits an illegality if he does not), but suffers a penalty or forfeiture if (or to the extent to which) he elects to withhold performance. (See also articles 3 and 5 and the commentary thereto.)

214. It follows that a purported, invalid or irregular " termination ", in one of the ways described in this article, can, in itself, have no effect on the legal existence of the treaty, or on the legal force of the obligation. It may of course be accepted by the other party, who may elect to regard the treaty as at an end (subject to any claim of reparation); but if so, it is by this acceptance, and from the date of it, that the treaty terminates. There are in fact only three ways in which an illegal termination can be validated and —subject to any claim of reparation—become actual termination, namely, unilateral acceptance by the other party or parties, subsequent agreement of both or all parties, and the pronouncement of a competent tribunal that the act of termination was in fact valid. Only in the latter case will the act itself rank as the source of termination, or termination date from it—and this will be precisely because it has been found to be valid.

215. The Rapporteur considered whether, as a matter of convenience, it might not be desirable to have a separate section entitled " invalid or irregular termination " in which the two articles now under discussion and also an earlier article (article 5) and much of what appears in article 3 could be grouped. To do so, however, would tend to lend support to the fallacy that such things as repudiations or unilateral denunciations, without basis of right, and although illegal, and although giving rise to claims for damages or other reparation, nevertheless do, in fact, terminate the treaty as a legal instrument. But this is not the case. There-

fore, the present arrangement was adopted whereby, on the one hand, the section on " general principles " contains articles stating the general principles of termination as a *legal* act, and excluding *au préalable* certain grounds of purported termination as being at variance with accepted principles of international law; and, on the other hand, irregular and invalid " termination " are relegated to the section on " effects " of termination, for there is no doubt that these acts, although they have in themselves no effect on the legal existence of the treaty, do have consequences, some of which may be of a juridical order.

216. There was the further, if somewhat technical difficulty, that *repudiation* (see article 30, paragraph 2) is not really even an act that purports to *terminate* the treaty. It is a rejection of it. The attitude of the *terminator*, whether justified or not, is to claim to have grounds on which there is a right to terminate the treaty. But the *repudiator* says in effect that the treaty has no existence for him, and he refuses to be bound by it any longer. The terminator recognizes the obligation, though purporting to be entitled to put an end to it. The repudiator rejects it altogether.

217. *Article 30. Paragraph 1.* See the foregoing. "... (usually by unilateral denunciation) ..." (*sub-paragraph (i)*). Strictly, a declaration of termination which is not officially communicated to the other party has no effect even as a purported termination (still less as an actual one—see article 26, paragraph 3, and paragraph 190 above). If relations are bad, governments sometimes decline to communicate with each other even through a third party, and simply make a public announcement. This partakes more of the nature of repudiation than of purported termination.

218. *Sub-paragraph (ii).* The usual case would be a failure to give a notice when the treaty requires one, or a notice purporting to take effect immediately when the treaty prescribes a *period* of notice, or a notice given at the wrong time, for example, if the treaty provides for tacit reconduction, terminable by notice only at the end of specified successive periods. In all these cases there is *in principle* a right of unilateral denunciation provided by the treaty, but it is irregularly exercised.

219. *Paragraph 2.* See the remarks in paragraph 216 above. "... may be effected expressly or take place by conduct ... ". The words immediately following this passage are intended to make it clear that repudiation is not lightly or easily to be inferred. It is too grave a step to be imputed to a government except on the clearest evidence. Moreover, the dangers attendant upon a faculty to declare that the other party to the treaty has by its conduct repudiated its obligations, are not unlike those noticed in paragraphs 113 and 114 above, in the case of alleged fundamental breach. It would in some cases not be difficult for a government seeking a pretext to put an end to an unwanted treaty, to allege that the other party had by its conduct repudiated the treaty, and that the first party was prepared to accept this act and regard the treaty as being at an end. Nevertheless, although for these reasons a repudiation should normally be evidenced by an express declaration, there undoubtedly are cases where it takes place by conduct—a crude and obvious case would be if a country having a treaty of alliance with another were to invade the latter. The inference of repudiation would not only be irresistible, but the act would actually constitute a repudiation *per se.*

220. " It is of the essence of repudiation that, although it may be effected by means of a unilateral denunciation or notice, the party concerned does not claim the existence of any valid juridical ground on which the treaty ... is at an end, or on which a right to terminate or withdraw from it has arisen " (*paragraph 2*). This and the concluding sentence of the paragraph lead to the consideration that it may not always be easy to say whether a denunciation by notice is in the nature of repudiation or not. If no right of termination by giving notice is provided for in the treaty, and the latter is also not of a type in respect of which the existence of such a right can be inferred, and if the notice is silent as to the ground on which it purports to be based, or gives reasons which are clearly of a purely political, ideological, economic, or otherwise of an extra-legal character, the inference is one of repudiation. A denunciation which is only thinly veiled by a pretension of legal right may give rise to the same inference. But, if any serious legal grounds are put forward, the case must be regarded as one of purported termination, even if the grounds given appear *prima facie* to be bad or insufficient.

221. The distinction between repudiation and invalid termination is undoubtedly important, but its importance lies mainly in the political and psychological field. Legally the consequences, or lack of consequences, of repudiation and invalid termination are the same, except (*a*) as regards the question of possible date of termination if this ensues by virtue of an acceptance by the other party—see above in connexion with article 27, paragraph 6; (*b*) in so far as a competent tribunal may eventually pronounce an apparently invalid termination to have been lawful, whereas a repudiation *as such* can never be lawful; (*c*) because the grave character of a repudiation may affect the question of reparation and the *quantum* of damages.[129]

222. *Paragraph 3.* No further comment is required.

Article 31. Effect of purported termination by invalid or irregular act or by repudiation

223. *Paragraph 1.* No further explanation seems required, except as regards sub-paragraph (iii). Some difficult questions may arise when the other party refuses to accept the repudiation or " termination ", and elects to regard the treaty as remaining in full force. Such party must then *in principle* be prepared to continue performance of its own obligations. But in these circumstances the non-performance of its obligations by the repudiating or " terminating " party will simply constitute a breach of the treaty which will, *inter alia,* give a right of corresponding non-performance to the other party. The latter cannot, of course, be deprived of this right merely because it has refused to accept termination, and regards the treaty as continuing in force. This may lead therefore to a total

[129] This is probably the case, despite the limited extent to which international law recognizes the principle of moral or exemplary damages. Even within the scope of ordinary damages, a tribunal can take a restrictive view, or the reverse.

cessation of performance *de facto* on both sides, though without affecting *per se* the existence or validity of the treaty.

224. There are however cases of a different kind. There is, for instance, a fairly common class of treaties where the essence of the obligation on the one side is not the performance of any specific acts, but the allowing or licensing (perhaps in return for a payment) of certain acts by the other party, which that other party would not otherwise be free to carry out. Examples might be if one country were, by treaty, to allow another to maintain and operate a meteorological station in its territory, or to afford it certain special traffic or transit rights. If the party affording the rights denounces the treaty, it may nevertheless content itself for the time being simply with doing so, and with maintaining that, thenceforth, the exercise of the rights in question is illegal and a violation of its sovereignty. Since, under the treaty, only passive not active conduct is required of such a party, no question of any specific non-performance arises. Can the aggrieved party then maintain that, in such circumstances, the denunciation must itself be regarded as a breach and specific non-performance, entitling it—while continuing to exercise its rights, for example, to maintain the meteorological station—to refuse performance of any accompanying obligations, for example, the payment of rent?[130] Or must the aggrieved party under these conditions, if it continues to exercise its rights, also continue to perform the related obligations? On ordinary private law principles, the latter would appear to be the correct view; and this is also what would result from this provision of article 31 as drafted, if it were applied to a case of this kind. However, given the international law principle of retaliatory rights—a principle which, generally speaking, does not obtain in private law—it may well be that, although no case for non-performance would exist on a basis of *counter* non-performance (there being no original non-performance to counter), such a right might exist on a general retaliatory basis.

225. *Paragraphs 2 and 3.* This point may be of importance. Where a party is said to have accepted, for example, a repudiation in such a way that, apart from consequential questions of damages etc., the treaty is at an end as an instrument, and as a source of legal obligation, it is necessary that this should be established beyond doubt. Normally, this can only be done if the party makes an express acceptance. It can only be *inferred* from conduct that permits of no other interpretation. Generally speaking, silence is not enough, or at any rate would not produce any effect until after the lapse of a considerable period of time. Where, however, only irregularity of method, rather than a repudiation or illegal termination is in question—particularly in the case of a defective notice—acceptance *sub silentio*, i.e. failure to reject the notice, or to query its regularity, would normally operate as an acceptance of termination.

226. *Paragraph 4.* This has already been sufficiently commented on in paragraph 214 above.

C. Revision and modification

227. This is held over for the time being. The essentials of the matter as they affect the specific question of termination are covered by article 13 and the commentary thereon in paragraphs 74 to 79 above. It may be that the rest would be better placed in a general section on "Conflicting treaties".

[130] A nice point arises if the local government accepts the rent. Can it thereby be held to have admitted the invalidity of the denunciation and to have re-instated the treaty, so to speak? Or can it maintain that it now allows the station to be operated on a basis of sufferance only, and not by right, and accepts rent on that footing alone?