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Revolutions and Treaty Termination

Philip Noonan*

It is a widely accepted principle of international law that ordinary changes in government do not affect treaty obligations. During the course of the twentieth century, however, certain states and some writers have asserted that revolutionary changes in government do affect treaty obligations. Nevertheless, many states continue to adhere to the rigid rule that treaty obligations should not be affected even by radical changes in government. This rule can create anomalous and unreasonable results. Accordingly, it may be better to replace the present blanket rule with a flexible test that encompasses all relevant factors and provides a result in accordance with reasonable expectations. Such a test will be more likely to earn the sort of respect and support among nations upon which effective international law depends.

I. Introduction

Treaties are agreements made between defined parties which are meant to prescribe action in certain situations for certain periods of time. If the world were static, parties would always be identifiable, situations would always be predictable, and it would always be reasonable to expect that agreements would be kept. But the world is not static. Claims inevitably arise involving unanticipated changes serious enough to terminate a treaty. A large part of international law is concerned with regulating such claims. This Article will examine one type of such claims—the one that is often made following a popular revolution within a party to the treaty.

What is the law of treaty termination applying to revolutions? The answer to this question must begin with an analysis of the traditional view of succession law.

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II. The Traditional Theory of Succession Law

A. *The General Rule*

There is little doubt that the weight of authority in international law suggests that revolutions do not affect treaty obligations. Authorities differ on the precise paths taken to this conclusion, but their common basis is asserted by Lord McNair:

It is necessary to remind ourselves from time to time that when we say that a State is a subject of international law . . . we mean the State itself, not its Government. Governments are the agents or representatives of States. . . . The Statement that, in the eye of the law, the parties to treaties are States so that treaties remain in force in spite of changes in the form of Governments, is supported by ample textbook authority and is indeed obvious.¹

This argument has received consistent endorsement for centuries from all sources of international law. Some of the most famous jurists of the twentieth century have advocated similar arguments.² There have been many cases, before both international³ and domestic⁴ tribunals, which have relied on this reasoning. The argument has been both embodied in treaties⁵ and employed in state practice.⁶ For

1. A. MCNAIR, *LAW OF TREATIES* 668 (1961).

2. *Id.*; see also KUNZ, *The Meaning and Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180, 187 (1945) [hereinafter cited as KUNZ]; J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW*, 333 (7th ed. 1972) [hereinafter cited as STARKE]; J. VERZIJL, VII INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 16 (1974) [hereinafter cited as VERZIJL]; K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 24 (1954) [hereinafter cited as MAREK]; O. UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* 112 (1972) [hereinafter cited as UDOKANG]; H. LAUTERPACHT, I OPPENHEIMS INTERNATIONAL LAW 925 (8th ed. 1955) [hereinafter cited as OPPENHEIMS]; H. WILKINSON, *THE AMERICAN DOCTRINE OF STATE SUCCESSION* 17 (1934) [hereinafter cited as WILKINSON]; H. SMITH, I GREAT BRITAIN AND THE LAW OF NATIONS 105 (1932) [hereinafter cited as SMITH]; C. FENWICK, *INTERNATIONAL LAW* 172 (4th ed. 1965) [hereinafter cited as FENWICK]; W. TUNG, *INTERNATIONAL LAW IN AN ORGANIZING WORLD* 59 (1968) [hereinafter cited as TUNG].

3. Case of Beales, Nobles and Garrison, cited in 4 HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 3548, 3552 (J. Moore ed. 1898) (United States-Venezuelan Claims Commission).

4. The Russian Roubles, summarized in J. WILLIAMS & H. LAUTERPACHT, I ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES case no. 15 (1919-22) (Sup. Ct. Japan 1919) (attempted counterfeiting case); Lazard Bros. & Co. v. Midland Bank Ltd., AC 289, 307 (HL(E)) (1933); The Sapphire, 78 U.S. (11 Wall) 164 (1870); King of Two Sicilies v. Peninsula 8 Oriental Steam Packet Co., 19 L.J. Eq. N. S. 202 (1850); Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396 (2d Cir. 1927).

5. The Pan-American Convention on Treaties (1928) (art. II), in 4 INTERNATIONAL LEGISLATION 2378 (M. Hudson ed. 1971) [hereinafter cited as Hudson]; Kunz, *Identity of States Under International Law*, 49 AM. J. INT'L L. 68, 73 (1955) (citing London Protocol of February 19, 1831).

6. WILKINSON, *supra* note 2, at 97-98 (citing the United States decision of February 22, 1817, that a treaty with the Netherlands remained in force despite the various changes of sovereignty in that country). Thomas Jefferson, then United States Secretary of State, came to a similar conclusion about treaties with post revolutionary France. Queen's Advocate Dodson gave a similar opinion in 1847 about Mexico's purported repudiation of certain prerevolution-

example, when the infant Soviet Union renounced treaty obligations incurred by the Imperial and Provisional Russian Governments, the other Great Powers roundly condemned the action.⁷

Despite such widespread support, the argument's validity has occasionally been questioned. Such doubts are usually based upon the realization that a change of government may take many different forms. The extent to which such a change affects the state may range from the negligible to the traumatic. The argument advanced by McNair, however, tends to treat all changes of government as though they have the same effect.

It is surprising to encounter such an apparently general and inflexible rule in international law. The initial task of this Article is to examine why and how international lawyers have come to insist upon such generality and inflexibility.

B. The Reasons for the General Rule

Many authorities offer no particular justification for the rule beyond the fact of its general acceptance.⁸ Among those authorities that provide some additional reason, six arguments can be distinguished.

1. The Preservation of International Order.—Some authorities insist on the continuity of treaties despite revolutions, on the basis of the need to preserve international order and the sanctity of international agreements. Such insistence is commonly supported by a floodgate principle; if every revolutionary government were allowed to escape treaty obligations, the entire lattice of treaties would come crashing down. Thus Marek writes:

The identity and continuity of the State are not affected by changes of government which it may undergo.⁹ Here again, the starting point for the development of the rule was provided not by theoretical considerations, but by practical concern for the maintenance of international rights and obligations,—in other words, for the stability and security of international legal relations. For such stability would be non-existent, if treaties were to become void with every internal change within a State and

ary contracts. See SMITH, *supra* note 2, at 406.

7. See *Harvard Research Draft*, 29 AM. J. INT'L L. 655, 1048 (Supp. 1935) (*Law of Treaties*, pt. III) [hereinafter cited as *Harvard Research Draft*]; I INTERNATIONAL LAW OPINIONS 9 (McNair ed. 1956) [hereinafter cited as OPINIONS] (quoting a letter dated October 1921 from the British Government to the then agent of the Soviet Union in Britain, M. Kasson); see also 37 Op. Att'y Gen. 505, 513-515 (1932-34).

8. See *supra* notes 2 & 3; STARKE, *supra* note 2, at 333; UDOKANG, *supra* note 2, at 112; SMITH, *supra* note 2, at 405; OPPENHEIMS, *supra* note 2, at 925. Kunz might also fit into this class.

9. MAREK, *supra* note 2, goes on later to say that as the identity of a state is unaltered by revolution, its treaty obligations are not affected by revolution. *Id.* at 63.

moreover, if a State could at will repudiate its international obligations by the simple device of changing its form of government.¹⁰

This line of reasoning is open to two specific criticisms. The first stems from the frequency of revolution. If true revolutions are quite rare, a repudiation of all treaty obligations by every revolutionary government would hardly obliterate treaties on a world-wide basis.¹¹

The second criticism can be made of any floodgate argument. A floodgate rationale imposes a situation upon a legal actor, not because the situation is juridically correct, but on the theory that if every actor evaded similar situations, a grave problem might arise. Such hypothetical reasoning may be particularly dangerous in international law, where the entire legal system requires continued acceptance and promotion if it is to have any efficacy at all.

2. *The Sanctity of Treaties.*—A second reason for not allowing revolutions to affect treaties derives from the moral inviolability of inter-state agreements. This argument strongly emphasizes the norm *pacta sunt servanda*, which requires that treaties be rigorously observed. On occasion this doctrine has been said to be the very cornerstone of international law.¹² Gormley has even suggested that its origins are divine.¹³

Most modern authorities would view such claims as exaggerated. They would say that the norm represents merely one of several complementary principles in treaty law. Indeed, this position is reflected in the 1969 Vienna Convention of the Law of Treaties.¹⁴

It could be that the floodgate fear lies behind the rigid insistence upon *pacta sunt servanda* by some authorities: "If there is no higher will which compels the state to keep its word, then there is no sufficient basis given to the contract which obligates the state to observe it."¹⁵

10. *Id.* at 24-25; See also D. O'CONNELL, I STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 24 (1967) [hereinafter cited as O'CONNELL]; *Harvard Research Draft, supra* note 7.

11. Note, *Revolutions, Treaties and State Succession*, 76 YALE L.J. 1669, 1675 (1967).

12. Kunz, *supra* note 2, at 180.

13. Gormley, *The Codification of Pacta Sunt Servada by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS U.L.J. 367 (1970) states: "[P]acta sunt servanda . . . can be held, in the light of the Greco-Roman-Christian tradition, to arise from the Law of God . . ." *Id.* at 371. Further, Gormley notes that, "[i]n fact, the moral face of the pacta sunt servanda is roughly analogous to the Ten Commandments given by God to Moses." *Id.* at 374.

14. Article 26 of the Vienna Convention embodies the principle of *pacta sunt servanda*. Article 42 allows treaty termination only in accordance with the treaty's own provisions. Articles 54-65 provide for several grounds of treaty termination.

15. Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 781 (1959).

3. *Continuity of Personality*.—Some authors look to the key elements of statehood, especially population and territory, in arguing that a revolution does not terminate treaties. A revolution, unlike other situations in which treaties may be affected, will usually involve no substantial changes in population or territory. For example, an annexation, a dismemberment, or a secession may each involve substantial changes in population, territory, or both.

Some lawyers believe that the continuity of these key features of legal personality which characterizes a revolution is an indication that the treaty obligations of the state should be unaffected by the revolution. Thus, Lauterpacht writes,

As treaties are binding upon the contracting *States*, changes in the Government, or even in the form of Government, of one of the parties can, as a rule, have no influence whatever upon the binding force of treaties. . . . For all such changes, important as they may be, do not alter the person of the State which concluded the treaty.¹⁶

There may be an element of over simplification in this formulation, since it seems to imply that changes must “alter the person . . . which concluded the treaty” in order to affect the treaty. This is not so.¹⁷

4. *Defining ‘Revolution’*.—In the modern world, the majority of nonconstitutional changes in government take the form of a coup, an exchange of personnel at the very top of the political pyramid. Such an event is rarely accompanied by significant alterations in the social or economic structure of the state. It seems impossible that such a trivial change should affect treaty obligations.¹⁸

Revolution is often defined as a legal equivalent to a coup. For instance, Marek writes,

a revolution does not depend upon the extent of the material changes involved but solely upon the change being brought about in violation of the prescribed procedure of revision. . . . This purely formal criterion of a revolution is the only one which is both reliable and legally correct. Any attempt to substitute for this stable and formal criterion a necessarily unstable and material one is bound to undermine all legal certainly [sic] and to lead to all kinds of intellectual vagaries in the field of law.¹⁹

16. OPPENHEIMS, *supra* note 2, at 925; see also OPINIONS, *supra* note 7, at 172; Kunz, *supra* note 2, at 69; STARKE, *supra* note 2, at 333, UDOKANG, *supra* note 2, at 113; Kunz, *supra* note 2, at 187.

17. See *infra* p. 315.

18. At the time of this writing, Bolivia had its 193rd President in its 158 years of independence. Many of these Presidents have come to power through coups.

19. MAREK, *supra* note 2, at 26; see also SMITH, *supra* note 2, at 405; Kunz, *Revolu-*

Such a definition excludes from consideration the question of whether there is a class of nonconstitutional changes of government that are so much more profound than mere coups that they may affect treaty obligations.

5. *Defining 'Succession'*.—Another popular line of reasoning in international law, while not in itself denying that a revolution may affect some treaties, limits the number of treaties that can be affected. Hopefully, it is a forgivable generalization of traditional international law to say that although specific treaties may be terminated under other doctrines,²⁰ general termination of a state's treaties can occur only if the state has undergone one of the categories of state succession.

Some sources define 'state succession' as extending only to cases where there is a change of sovereignty over territory.²¹ Revolutions do not generally involve alterations in a state's geographic boundaries. Hence the effect of defining succession in such terms is to say that revolutions cannot affect a state's treaties generally.²² The jurist who adopts this argument often confines all discussion of revolution to treaty law.²³ He considers the concept only in relation to doctrines, such as *rebus sic stantibus*,²⁴ that relate only to individual treaties.

6. *The Underlying Reason*.—In evaluating the reasons offered for the proposition that revolutions cannot affect treaty obligations, the traditional dominance of Western legal theory in international law should not be forgotten. Western nations, also dominant in world trade and international investment, have often suffered severe economic loss as a result of the turmoil associated with revolution.

At times the vehemence of Western reaction has prevented an objective assessment of the law. The English case of *Luther v. Sagor*²⁵ is evidence that domestic judicial consideration of a revolutionary state's rights and responsibilities can be obstructed by an intransigent municipal stand on recognition.²⁶ Treaties may similarly

tionary Creation of Norms of International Law, 41 AM. J. INT'L L. 119 (1947).

20. See *infra* p. 315.

21. See, e.g., 1978 Vienna Convention on Succession of States in Respect of Treaties (1978); WILKINSON, *supra* note 2, at 16; Jones, *State Succession in the Matter of Treaties*, 24 BRIT. Y.B. INT'L L. 360 (1947); VERZIJL, *supra* note 2, at 8; FENWICK, *supra* note 2, at 172.

22. WILKINSON, *supra* note 2, at 16.

23. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 665 (3d ed. 1979) [hereinafter cited as BROWNLIE]; VERZIJL, *supra* note 2, at 16.

24. See *infra* p. 319.

25. [1926] 1 K.B. 456, 3 K.B. 456 (C.A.)

26. [1921] 1 K.B. 456, 474 (Roche, J., stated: "If a foreign government, or its sovereignty, is not recognized by the Government of this country, the Courts of this country either cannot or at least need not, or ought not, to take notice of, or recognize such foreign government or its sovereignty"). The Court of Appeals did not disagree with this point.

reflect domestic dislike for the act of revolution. For example, the Central American Conventions of 1907 and 1923²⁷ pronounced as anathema revolutionary governments and imposed a duty of their nonrecognition on the contracting parties.²⁸

An author may well be affected by the fact that his nation has consistently refused to deal with revolutionary governments, or that it has actually gone to war against such governments.

C. *Arguments Against the General Rule*

The previous section has questioned the validity of the arguments advanced in support of the inflexible approach to revolutions and treaty termination. Three further arguments against that approach can be advanced.

1. *Dissenting Jurists.*—While it is true that the weight of authority in international law takes a strict view of the treaty-terminating power of revolutions, there are some authors who adopt a more flexible approach. Typically, these authors believe that certain characteristics of a revolution set it apart from other governmental changes; that such characteristics may warrant an approach more sophisticated than the bald application of a general rule of treaty continuation. Thus, Starke writes that, “[T]here may be such fundamental revolutionary changes with the advent of the new Government, politically, economically or socially, that it is impossible in fact to hold the Government to certain serious or burdensome obligations.”²⁹

Graham, having distinguished changes of government by civil war from those by revolution,³⁰ proposes a number of factors which seem to him relevant in determining the legal effect of revolutions. He then asks whether there should not exist a single general theory that could be applied to achieve a correct balance between these various factors.³¹ Perhaps it is just such a general, flexible theory that

27. The 1923 Treaty appears in Hudson, *supra* note 5, at 901.

28. See art. II of the 1923 Treaty in Hudson, *supra* note 5, at 901. Spain's refusal over many years to recognize the independence of its former colonies in South America should also be considered.

29. STARKE, *supra* note 2, at 334; see also Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931, 944 (1978); Fairman, *Implied Resolutive Conditions in Treaties*, 29 AM. J. INT'L L. 219 (1935); see also *Harvard Research Draft*, *supra* note 7, at 1052. For pertinent case law, see generally 22 Ct.Cl. 408 (1887); *In re Lepeschkin* (1923), cited in WILLIAMS & H. LAUTERPACHT, 2 ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 323, case no. 189 (1923) (Swiss Fed Ct) [hereinafter cited as WILLIAMS & LAUTERPACHT]. For the views of revolutionary authorities, see *infra* pp. 309-15.

30. Graham, *The Effects of Domestic Hostilities on Public and Private International Agreements: A Tentative Approach*, 3 W. ONTARIO L. REV. 128, 133 (1964) [hereinafter cited as Graham].

31. *Id.* at 135. It should be noted that Graham, *supra* note 30, was considering the

McNair is thinking of when he surmises that state succession is a question of "changed conditions affecting the political status of a contracting party."³² This question is addressed in a later section.³³

2. *Inconsistencies with Other Doctrines.*—Certain similarities exist between revolutions and unconstitutional secessions. Both involve the people overthrowing a political and social system that they feel is imposed upon them; both often involve violence; both often lead to the establishment of a completely new government; both represent a clean break from the old legal order.³⁴ Indeed, a revolution that was a partial success geographically³⁵ might be virtually indistinguishable from an unconstitutional secession.

In the narrow context of a revolution that was a partial success geographically, one might expect the legal rules governing revolution to closely approximate those governing secession. Far from such a legal coincidence, however, the general rules in fact contrast.³⁶ International law insists that although secessions may affect treaty obligations, revolutions do not.

Similar points could be raised with respect to self-determination. Comparing revolutions with exercises of self-determination, one might find in some cases that the only significant difference is the nationality of the former rulers. Although the authorities hold that revolutions cannot affect treaties, most concede that newly independent states are very often free of their predecessors' treaties.³⁷

The point of this digression into the law of secession and self-determination is not to equate these two types of situations with revolutions. Rather, it is meant to merely raise the question of whether the rules relating to revolutions are really adequate when opposite rules prevail in closely related areas of succession law.

3. *Practical Shortcomings of the General Rule.*—The extent to which it is observed in practice is perhaps the most powerful reason for questioning the correctness of the rule that insists upon virtually total treaty continuation. Revolutionary states in fact refuse to be bound by treaties that they regard as against the best interests of

effect of revolutions *during* the revolution. Perhaps the same flexibility he advocates should be extended to the legal effects of revolution *after* the revolution.

32. Quoted in Jones, 24 BRIT. Y.B. INT'L L. 360, 373. See also O'CONNELL, *supra* note 10.

33. See *infra* p. 327.

34. I look here only at unconstitutional successions. A peaceful succession, perhaps accompanied by a devolution agreement, is not nearly as analogous to a revolution.

35. Guinea-Bissau is one example.

36. Generally, a succeeding state is not bound by the treaty obligations of the original state. See BROWNLIE, *supra* note 23, at 616-18; O'CONNELL, *supra* note 10, at 88.

37. See REPORT OF THE FIFTY-SECOND CONFERENCE HELD AT HELSINKI 557 (1966) for an overview of state practice.

the state.³⁸ In other words, the rule "is a paradigm of the over-ambitious norm."³⁹

Graham reminds us that, "[A]ll law that is effective must be respected by the citizens to which it applies. To be respected, it must be related to the realities of the social context in which it operates."⁴⁰ Such respect is vital in international law, a system of law more dependent on acceptance by its "citizens" than perhaps any other. Such respect is best obtained by a proper reconciliation of the competing forces for stability and change. As Brierly has stated, "Every system of law has to steer a course between the two dangers of impairing the obligations of good faith by interfering with contractual engagements, and of enforcing oppressive or obsolete contracts."⁴¹ Perhaps to insist on the preservation of aspects of the status quo when a revolutionary nation has sacrificed all for change is to risk insisting on law at the expense of peace.

III. Revolutionary Theories of Succession Law

In analyzing the effect of revolutions upon treaties, the practice and theory contributed by governments and jurists in revolutionary states are of obvious importance. This section examines three twentieth century revolutions: the 1917 revolution creating the Soviet Union; the 1949 revolution creating the People's Republic of China; and the 1979 revolution in Iran.

A. *The Soviets*

In the period immediately following the 1917 revolution, the Soviet theory of treaty-termination by revolution was an argument that appeared as a novel idea in international law. The Soviet contention was that

'[t]he revolution of 1917, which completely destroyed all the old economic, social and political relations and replaced the old society with a new one, transferring the state government power in Russia to a new social class on the strength of the sovereignty of the people . . . which had revolted, thereby severed the succession of civil obligations which were a component part of the economic relations of the society which had disappeared, and which passed away along with it.'⁴²

38. Note, *supra* note 11, at 1680; *see also* discussion of views of revolutionary states, *infra* pp. 309-15.

39. *See* Esgain, *The Spectrum of Responses to Treaty Violations*, 26 OHIO ST. L.J. 1 (1965).

40. Graham, *supra* note 30, at 128.

41. J. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 332 (6th ed. 1963) [hereinafter cited as BRIERLY].

42. Statement of Delegation of the RSFSR and Union Republics to the Genoa Confer-

The argument appears to be that the revolution substituted a new state for the old.⁴³ Thus interpreted, it has been the subject of extensive criticism from Western nations⁴⁴ and jurists,⁴⁵ and even on occasion from Soviet writers.⁴⁶ Such criticism usually proceeds on the ground that a change in government could not involve a change in state and, therefore, that a state's obligations are not affected by revolution.

Apart from these theoretical objections, it is also true that the precise legal position of the Soviet Union in this area, as in other areas of international law,⁴⁷ has tended to oscillate according to the political interests of the Soviet Government.⁴⁸ For instance, while the infant Soviet Union used the grounds of inequality to renounce some treaties that were to its advantage, it has rarely, if ever, renounced the rights of the Imperial Government on the grounds of the changes brought about by the revolution. Indeed, when the Government of Iran, pursuant to its 1979 revolution, proposed to terminate a friendship treaty with the Soviet Union, the Soviets maintained that there could be no such unilateral termination.⁴⁹ Despite the Soviet's inconsistent use of the argument, the legal validity of the argument still requires examination. It must be understood that there are some grounds to believe that the Soviets never argued that the Soviet Union was actually a different state from Imperial Russia. Grzybowski writes:

Soviet constitutional theory distinguishes between the form and the type of a state. The form of state and government is a concept known to general constitutional theory. Soviet theoreticians have introduced a new criterion for the systematization of various political forms of states and have coined a new term for it. The 'type' of a state is determined not so much by its institu-

ence of 1922, Apr. 20, 1922, *quoted in* Slusser and Triska, *Professor Krylor and Soviet Treaties*, 51 AM. J. INT'L L. 766, 769 (1957) [hereinafter cited as Slusser and Triska]; *see also* Statement by Krylor, *translated in* K. GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE* 99 (1970) [hereinafter cited as GRZYBOWSKI].

43. *See* Note, *supra* note 11, at 1672; O. UDOKANG, *supra* note 2, at 130-31.

44. *E.g.*, Declaration of Britain and France of March 28, 1918, *cited in Harvard Research Draft*, *supra* note 7, at 1048; *see also* 1921 note from the British Government to the Soviet Union's London agent, *quoted in* McNAIR, *supra* note 1, at 670.

45. Note, *supra* note 11, at 1672-73. *See also* R. ERICKSON, *INTERNATIONAL LAW AND THE REVOLUTIONARY STATE* (1972) [hereinafter cited as ERICKSON].

46. Korovin, writing in July, 1917, admittedly before the November revolution, wrote in terms broad enough to exclude the argument. *See* Slusser and Triska, *supra* note 42, at 769-70; *see also* Bobrov, *translated in* GRZYBOWSKI, *supra* note 42, at 98; Kozhevnikov, *translated in* GRZYBOWSKI, at 99.

47. Some examples in the area of treaty termination are *noted in* GRZYBOWSKI, *supra* note 42, at 436, who relates the amazing Soviet arguments behind repudiation of treaties with Germany in 1918 and with Poland in 1941 and 1945.

48. *See* GRZYBOWSKI, *supra* note 42, at 94; ERIKSON, *supra* note 45, at 83; Triska and Slusser, *supra* note 42, at 131, 138.

49. *See infra* p. 315.

tions as by the economic forms of its society and the domination of a determined social class.⁵⁰

In the Soviet view, therefore, mere changes in the form of a government cannot affect treaty obligations, but changes affecting the historical type of the state might. Although this argument may rely on artificial and semantic distinctions, which the Soviets have used to avoid their obligations while preserving their rights,⁵¹ the argument may actually be based on something more substantial than a distinction between the 'type' and the 'form' of a state. It may follow from the argument that a fundamental change in the form of government affects the historical type of the state, and, because the change has been fundamental, the treaties of the state have been affected and, perhaps, invalidated.

The analogies to the doctrine of *rebus sic stantibus*⁵² are too obvious to be ignored. In fact many Western scholars have not hesitated to characterize the Russian argument for treaty-termination by revolution as being based entirely upon *rebus sic stantibus*.⁵³

On occasion, even the Soviets have been unable or unwilling to distinguish the 'historical type' argument from the related but more conventional doctrines of changed circumstances, such as *rebus sic stantibus* and *force majeure*. This is not to say that the Soviets have wholeheartedly embraced the doctrines of changed circumstances. In fact, it is a recurrent theme of Soviet treaty law to insist on the general inviolability of treaties, and to cite the alleged over use of doctrines such as *rebus sic stantibus* by the West.⁵⁴ Such criticism has been interspersed, however, with invocations of changed circumstances doctrines on behalf of the Soviet Union itself. For example, in a 1924 Communication to the Director of the International Intermediary Institute, the Soviet Government said:

A general abrogation of all treaties concluded by Russia under the former regime and under the Provisional Government never

50. GRZYBOWSKI, *supra* note 42, at 98. Other authorities have hinted at the point that Grzybowski makes with clarity. See Toth, *The Doctrine of Rebus Sic Stantibus in International Law*, 19 JURID. REV. 56, 74-75 (1974) [hereinafter cited as Toth]; ERICKSON, *supra* note 45, at 80-81 (citing an official Russian author to the same effect); see also the official syllabus for international law in the USSR in 1938, cited in Butler, *Soviet International Legal Education and 'Stability of Laws': The Syllabus of 1938*, 12 N.Y.U.J. INT'L L. & POL. 31, 46 (1979). In addition, G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 29 (1974) translates a statement made by Lenin on November 8, 1917: "We reject all provisions regarding plunder and coercion but all provisions where good-neighborly terms and economic agreements have been concluded we heartily welcome, we cannot reject these." (emphasis added).

51. See GRZYBOWSKI, *supra* note 42, at 98.

52. See *infra* pp. 315-18.

53. Toth, *supra* note 50, at 74-75; GRZYBOWSKI, *supra* note 42, at 436, 441; Note, *supra* note 11, at 1670; T. TARACOUZIO, *THE SOVIET UNION AND INTERNATIONAL LAW* 249 (1935); MAREK, *supra* note 2, at 38, 44-45.

54. For a commentary on Kozhevnikov on this point, see Kulski, *Soviet Comments on International Law and Relations*, 48 AM. J. INT'L L. 640 (1954).

took place. However, it hardly follows that all these treaties are susceptible of being reconfirmed. It will be in place to examine this question from the point of view of the clause '*rebus sic stantibus*' for each State and each treaty separately.⁵⁵

Is the real basis for Soviet claims that they were entitled to terminate Czarist treaties the "new type" argument or the "changed circumstances" argument? Writing in 1954, Marek was in no doubt:

[I]t is generally believed that the Soviet doctrine of international law adopted the conception of a revolution breaking the legal continuity of the State. It is submitted that this view is just as erroneous as the one concerning the alleged denial of State continuity by the Soviet State. The truth is that following Soviet practice, Soviet writers have insisted upon far-reaching modifications in the rights and obligations of a post-revolutionary State under the heading of the *Clausula rebus sic stantibus*.⁵⁶

B. *The Chinese*

Chinese State representatives and scholars have contended that the revolution of 1949 affected their treaty obligations. The basis for this claim is usually the doctrine of *rebus sic stantibus*, with the revolution itself being characterized as a fundamental change of circumstances.⁵⁷

In applying that principle, the Chinese have said that it is important to look at the subject matter of each treaty. The question to be asked is whether the change of circumstances represented by the revolution affected that particular treaty. Thus, article 55 of the *Common Program* of the Chinese People's Political Consultative Conference provides, "The Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall, in accordance with their contents, recognize, abrogate, revise, or reconclude them respectively."⁵⁸

The Chinese Government's application of this article is illustrated in the following example. On August 1, 1952, Chou En-lai,

55. See *Harvard Research Draft*, *supra* note 7, at 1119 (commentary on definition of *rebus sic stantibus*). See also Statement of the Soviet Delegation to the Genoa Conference of 1922, quoted in ERICKSON, *supra* note 45, at 81; Korovin, *Soviet Treaties and International Law*, 22 AM. J. INT'L LAW 753, 763 (1928).

56. MAREK, *supra* note 2, at 44-45.

57. See Chou-En-Lai's Statement of July 9, 1957 to the First National People's Congress on the Issue of the Sino-Burmese Boundary Question, quoted in J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 431 (1974) [hereinafter cited as COHEN & CHIU]. Apparently, a counter-revolution would *not* be a treaty-terminating event. See H. CHIU, *THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES* 101 (1972) [hereinafter cited as CHIU].

58. See COHEN & CHIU, *supra* note 57, at 1122.

then Foreign Minister of the People's Republic, stated that the new Government would "recognize" the 1925 Protocol Prohibiting Chemical and Bacteriological Warfare and the 1949 Geneva Conventions. This would be done even though the nationalist Government had signed those treaties on behalf of China, since the agreements were conducive to international peace, and in conformity with humanitarian principles.⁵⁹

Very few Western scholars would dispute the existence of the principle of *rebus sic stantibus*.⁶⁰ However, the majority of them would question the manner in which the principle has been applied by the People's Republic. In the preceding statement by Chou En-lai, the indefinite nature of the factors used to justify application of the rule would cause considerable controversy in the West.

Apart from this indefiniteness, the Chinese theory of treaty termination accords quite closely with the traditional Western view. For example, the Chinese Government has never purported to lead a new state separate from the state ruled by the Kuomintang;⁶¹ it has regarded boundary treaties concluded by prior governments as binding;⁶² and it has treated multilateral treaties relating to the establishment of international organizations as continuing in force, regardless of revolutionary changes in government.⁶³ All of these positions are fully consistent with traditional Western legal theory.⁶⁴

C. *The Iranians*

The view of the new government of the Islamic Republic of Iran concerning the effect of its revolution on Iran's treaty obligations is not yet clear. The arguments that it conveyed indirectly to the International Court of Justice at the time of the *Tehran Hostages Case*⁶⁵ did not rely on a right of repudiation of the relevant treaties. Al-

59. *Id.* at 1122-23.

60. See *infra* note 74 and accompanying text.

61. CHIU, *supra* note 57, at 92 n.18.

62. Although not unequal boundary treaties. *Id.* For an example of a boundary treaty regarded by the Chinese as being unequal, see COHEN & CHIU, *supra* note 57, at 431. Contrast the Chinese position with Cuba's 1946 Constitution which "rejects and considers null and void" all treaties which diminish its sovereignty over any part of the national territory. The principle of *rebus sic stantibus* is one of the reasons commonly advanced in support of this position. See D'Zurilla, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional Theory*, 55 TUL. L. REV. 1223, 1246 (1980-81).

63. CHIU, *supra* note 57, at 93.

64. Perhaps the relative insignificance of the difference between the Chinese and Western positions is reflected in the way in which each regards the other's performance in international law. While Western scholars have accused the Chinese of excessive use of *rebus sic stantibus*, at least one Chinese author has indicted Western nations for the same reason. See COHEN & CHIU, *supra* note 57, at 1257 (translating relevant passage from WANG YAO-T'EN, INTERNATIONAL TRADE TREATIES AND AGREEMENT (1958) [hereinafter cited as WANG YAO-T'EN]).

65. Case Concerning United States Diplomatic and Consular Staff in Tehran, 19 INT'L LEGAL MATS. 553 (1980) (Final Judgment).

though one might detect from the arguments⁶⁶ an underlying belief that the revolution represented such a profound change that to insist on aspects of the old order was unreasonable, the arguments, as they were presented to the Court, displayed a confused mixture of reasoning which the Court disposed of with speed.⁶⁷

The Court does not seem to have considered the possibility that the revolution affected Iran's treaty obligations.⁶⁸ At paragraph 45 of the Final Judgement, the majority says (perhaps rather hastily) that the Court has jurisdiction because, inter alia: "The United Nations publication 'Multilateral Treaties in Respect of which the Secretary-General Performs Depository Functions' lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963"⁶⁹

Other activity by the revolutionary Iranian Government concerning the area of treaty continuity is unfortunately sparse. Iran did, in a legally curious incident, "re-denounce" the 1921 Friendship Treaty with the Soviet Union,⁷⁰ which the government of the Shah had denounced as early as 1959.⁷¹ In addition, the new government unilaterally terminated certain gas supply compacts with the Soviet Union when the latter refused to negotiate a price increase of several hundred percent.⁷² Finally, it is interesting to note that Iran did seek to rely on the continuation of at least some contractual agreements with private individuals following the revolution.⁷³

D. *The Revolutionary Rule in Review*

It can be seen that with respect to three important revolutions in this century, the post-revolutionary government has claimed the

66. The arguments were set out in two letters to the court, one of December 9, 1979 (reproduced in para. 8 of the Interim Judgment at 19 INT'L LEGAL MATS. 139, 141 (1980)), and the other of March 16, 1980 (reproduced in para. 10 of the Final Judgment at 19 INT'L LEGAL MATS. 553, 558 (1980)).

67. Case Concerning United States Diplomatic and Consular Staff in Tehran, *supra* note 65, at 561-62, 571, paras. 34-38, 82-83. As to the Iranians' point that the revolution was wholly within the domestic jurisdiction, see G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 68 (6th ed. 1976) (offering a similar point as an argument for why treaty obligations *continue* after a revolution).

68. Of course, even had it done so, the nature of the particular treaties involved would probably have led the Court to conclude that the revolution should not affect the operation of the treaties.

69. See Case Concerning United States Diplomatic and Consular Staff in Tehran, *supra*, note 65, at 564.

70. Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic, Feb. 26, 1921, Persia-Russia, 9L.N.T.S. 383.

71. The incident seems to imply a power in the revolutionary government to withdraw the previous government's revocation of the treaty.

72. Smolangky, *Soviet Policy in Iran and Afghanistan*, 80 CURRENT HIST. 321, 322 (1981).

73. *E.g.*, American Bell Int'l Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979).

right to be free of at least some of its predecessor's treaty obligations. The People's Republic of China has based this squarely on the principle of *rebus sic stantibus*, the revolution being the *rebus*. The Soviet argument is less obvious, but seems to represent a similar plea that the changed circumstances associated with the revolution have rendered certain treaties invalid. While Iranian theory is as yet unclear, the importance of changes in circumstances may be relevant there too.

It is necessary, therefore, to examine the various doctrines that deal with changed circumstances, and to ask whether they really stand for as much as the revolutionaries claim.

IV. Treaty Law—Changed Circumstances

A. *Rebus Sic Stantibus*

We now move from principles that may affect a state's treaty obligations in general to those that are said to affect only individual treaties. Many authorities would say that this involves a shift from "succession law" to "treaty law." The most important, and perhaps the most controversial, of the treaty law doctrines is *rebus sic stantibus*. Broadly speaking, this doctrine allows a state to withdraw from a treaty upon the occurrence of certain types of changes in the circumstances surrounding the treaty.

Although much controversy surrounds the precise ambit of *rebus sic stantibus* as well as the procedures for its application, the majority of authority confirms the doctrine's existence as part of international law.⁷⁴ This support is chiefly based on the idea that any

74. Examples from state practice include: the Iranian repudiation of the 1921 Friendship Treaty between Persia and Russia; the United States' 1941 suspension of the Load Line Convention; French termination of certain NATO agreements; and the Egyptian attempt to persuade the Security Council to declare the 1936 Anglo-Egyptian Treaty at an end.

For extensive analyses of state practice in this area, see Toth, *supra* note 50, at 150-54; J. VERZIIL, VI INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 351-57 (1973) [hereinafter cited as VERZIIL (VI)]; *Harvard Research Draft*, *supra* note 7, at 1113-23; T. TARACOUZIO, THE SOVIET UNION AND INTERNATIONAL LAW 249 (1935).

For judicial decisions, see Free Zones Case 1932 P.C.I.J., ser. A/B, No. 46; Fisheries Jurisdiction Case (U.K. v. Ice.) 1973 I.C.J. 3, 18-22; *Hooper v. United States* 326 F.2d 982 (Ct.Cl. 1964) *cert. denied* 377 U.S. 977 (1964); *Francis v. The Queen* 1956 S.C.R. 618; *Bremen v. Prussia*, 112 Entscheidungen des Reichsgerichts in Zivilsachen, Anhang 21, 426 (1926), translated and summarized in A. McNAIR & H. LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES case no. 352 (1925-26) [hereinafter cited as McNAIR & LAUTERPACHT]. See also VERZIIL, *supra* note 2, at 351-58.

On the other hand, J. CASTEL, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY CANADA 1051 (3d ed. 1976) [hereinafter cited as CASTEL] quotes from *Commentary, International Law Commission*, 58 AM. J. INT'L L. 284 (1964), to the effect that the International Court of Justice has never committed itself to the existence of the doctrine.

Regarding treaties, see art. 19 of the Covenant of the League of Nations. Article 19 is sometimes said to be, however, an ineffective version of the changed circumstances rule. Toth, *supra* note 50, at 160; U.N. Charter art. 14 is a similarly concerned advisory provision.

Regarding jurists, see CASTEL, *supra*, at 1051; Toth, *supra* note 50, at 155; Crittenden (then U.S. Attorney General), *Power of the Secretary of the Treasury Respecting Certain*

complete legal system must accommodate and reconcile the competing interests of stability and peaceful change.⁷⁵ Despite strong support for the doctrine, however, there is universal recognition of the dangers of its excessive use, and the consequent need to carefully define its operation.⁷⁶

The test for the doctrine's application is enunciated in a variety of ways. A common element is that the change in circumstances must be fundamental. This means that the change must not only relate to circumstances that are relevant to the performance of the treaty, but it must also make the treaty greatly more burdensome as a result of its occurrence.⁷⁷

It is clear that not every change of circumstances will do. In the words of Rhyne, "Since international agreements are usually entered into in order to deal with a future state of affairs, it is apparent that an agreement should not be interpreted as inapplicable simply because future events do not correspond fully with the expectations of one or more of the parties."⁷⁸ Inherent in the very act of contracting for the future is an allowance for the uncertainties of that future. The question posed by the doctrine of *rebus sic stantibus* is which changes fall outside such an allowance.

There are two theoretical bases for the doctrine. One basis looks at the shared intentions of the parties.⁷⁹ The other basis views the doctrine as an objective rule of law, the operation of which does not

Florida (Claims), 5 Op. Att'y Gen. 333, 346-47 (1851).

However, some writers regard *rebus sic stantibus* as involving basically political issues. See BRIERLY, *supra* note 41, at 339; Gormley, *The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS U. L.J. 367, 384 (1980); Sastry, *Clausula Rebus Sic Stantibus in International Law*, 13 CAN. B. REV. 227, 229 (1935); Comment, *supra* note 29; Kulski, *Soviet Comments on International Law and Relations*, 48 AM. J. INT'L L. 640, 642 (1954) (citing Kozhevnikov, *supra* as rejecting the doctrine on the grounds of abuses by "aggressive" countries).

75. O'CONNELL, *supra* note 10, at 34; see also BRIERLY, *supra* note 41, at 332 (the relationship between Brierly's comment here, and the one at note 74 *supra* is one I do not understand); Esgain, *The Spectrum of Responses to Treaty Violations*, 26 OHIO ST. L.J. 1, 6 (1956); A. LEVONTIN, *THE MYTH OF INTERNATIONAL SECURITY* (1957) [hereinafter cited as LEVONTIN]; see also BIN CHENG, *GENERAL PRINCIPLES OF LAW: AS APPLIED TO INTERNATIONAL COURTS AND TRIBUNALS* 118 (1953); T. ELIAS, *THE MODERN LAW OF TREATIES* 128 (1974) [hereinafter cited as ELIAS]; M. MCDUGAL and W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1257 (1981); B. SINHA, *UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY* 78 (1966).

76. ELIAS, *supra* note 75, at 120. For examples of nineteenth century abuses, see generally O'CONNELL, *INTERNATIONAL LAW* 279 (1965) and Toth, *supra* note 50, at 70. For examples of twentieth century abuses, see generally K. VON SCHUSCHNIGG, *INTERNATIONAL LAW: AN INTRODUCTION TO THE LAW OF PEACE* 274 (1959) [hereinafter cited as VON SCHUSCHNIGG].

77. See, e.g., *Fisheries Jurisdiction Case*, 12 I.L.M. 290, 298, para. 38, & 299, para. 43 (1973).

78. C. RHYNE, *INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE* 98 (1971).

79. Toth, *supra* note 50, at 56.

necessarily depend upon the intention of the parties.⁸⁰ Although a detailed comparison of these two bases is beyond the scope of this Article, it is suggested that the distinction between them may not be as important as is sometimes thought.⁸¹

Applying *rebus sic stantibus* to revolutions using the shared-intentions basis of the rule, one asks whether the changes brought about by the revolution altered the outlook and policies of the revolutionary state in a manner and to an extent that could not have been envisioned by any of the contracting parties.⁸² Using the rule-of-law basis, the question is whether the changes brought about by the revolution altered the nature of the obligations agreed to by the parties, and made those obligations greatly more onerous.

Although these questions are still very general and nebulous, already one thing is clear—a revolutionary government should not be able to escape every treaty obligation on the grounds of *rebus sic stantibus*. For example, it would be difficult to argue that the nations who are parties to the United Nations Charter could regard the emergence of any new form of government in one of their number as having defeated their contractual intentions.

In less obvious cases, there will be questions of degree and value judgments that will be difficult to answer and to make. Nevertheless, one can draw on the experience of past revolutions to compile a list of factors that will be relevant in deciding when and to what extent the changes brought about by the revolution affect the treaty obligations of the state. This is undertaken in a later section.⁸³ It might be more useful here to briefly consider other doctrines of international law that are related to *rebus sic stantibus* by both the importance of fundamental change to their application and by their capacity to af-

80. *Id.* at 265 speaks of a "fundamental," "substantial," "essential" or "radical" change in circumstances existing at the time of the treaty and related to the objects and purposes of the treaty. VERZIJL (VI), *supra* note 74, at 363, surveys the field of these and other related expressions.

81. Some commentators have stated that a complete test must refer both to the parties' intentions and to the extent of the change. See C. HYDE, 2 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 82 (1922); *Accord Toth*, *supra* note 50, at 265; see also art. 62 of the 1969 Vienna Treaties Convention, and the United Nations' Secretariat's report concerning the continuing validity after the Second World War of the Minorities Treaties.

Other scholars allege, however, that there are important procedural differences between the two bases. See MCNAIR, *supra* note 1, at 688, 493; Toth, *supra* note 50, at 271; see also *Harvard Research Draft*, *supra* note 7, at 1102, 1126; Note, *supra* note 11, at 1687; OPPENHEIMS, *supra* note 2, at 942; VON SCHUSCHNIGG, *supra* note 76, at 271; LEVONTIN, *supra* note 75, at 152; WANG YAO-T'EN, *supra* note 64. The relevant passage is translated in COHEN & CHIU, *supra* note 57, at 1257. See also *In re Lepeschkin*, translated and summarized in WILLIAMS & LAUTERPACHT, *supra* note 29, at 323.

82. Comment, *supra* note 29, at 945; see also D. O'CONNELL, THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY 14 (W. O'Brien ed. 1965), noted in UDOKANG, *supra* note 2, n.17.

83. See *infra* notes 121-127 and accompanying text.

fect treaty obligations. These doctrines might also be relevant to revolutions.

B. *Impossibility of Performance*

It is an accepted principle of international law that if a treaty obligation becomes physically impossible through no fault of a particular party,⁸⁴ that party will be relieved of its obligation. This principle is clearly applicable in the case of a commercial treaty on the sale and delivery of goods. Some authorities, however, have suggested that it has an even wider application. For instance, Nahlik has referred to a subjective impossibility in addition to an objective one.⁸⁵

For present purposes, a concept such as subjective impossibility might be relevant to treaties that depend upon the form of government in the participating states. Indeed, Marek seems to offer a concept much like subjective impossibility as a general explanation of cases in which a new government might avoid the obligations of the old.⁸⁶

C. *Force Majeure*

A state may escape treaty obligations on the grounds of a supervening incident, such as a natural catastrophe or a foreign invasion.⁸⁷ It would appear, however, that this doctrine is restricted to cases in which the observance of the obligation would imperil the very existence of the state.⁸⁸ Even with this restriction, a revolutionary government might argue that the revolution was so traumatic that it overwhelmed the state's treaty obligations. No direct appeal to *force majeure* by a revolutionary state is known to the author, but the Soviet delegation to the 1922 Genoa Conference did characterize the Russian revolution as "akin to" *force majeure*.⁸⁹

D. *Other Doctrines*

Other doctrines related to those above but clearly not of any

84. An exception to both this doctrine and *rebus sic stantibus* arises when the terminating party has caused the event or events upon which it seeks to rely. Whether a revolution is "caused" by the state in which it occurs cannot be discussed within the scope of this analysis.

For a consideration of the doctrine, see TUNG, *supra* note 2, at 363; see also Vienna Treaties Convention art. 61.

85. Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 AM. J. INT'L L. 736 (1971); see also TUNG, *supra* note 2, at 363.

86. See MAREK, *supra* note 2, at 60.

87. I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 419 (3d ed. 1979); Serbian Loans Case, summarized in MCNAIR & LAUTERPACHT, *supra* note 74, at 466.

88. Russia v. Turkey (arbitration), translated in 7 AM. J. INT'L L. 178, 195-96 (1913).

89. Quoted in ERICKSON, *supra* note 45, at 81.

particular relevance to revolutions may be briefly noted. Treaties that were lawful at the time of contracting but which later transgress a principle which has become a part of *jus cogens* are deemed terminated by that development.⁹⁰ An outbreak of war will cause the termination of at least those treaties whose continuation would be incompatible with the circumstances of the war.⁹¹ Treaties can also be terminated by way of reprisal or because of desuetude.

E. Several Doctrines or One?

It might be asked whether these various doctrines are really separate and distinct, or whether they are simply different aspects of the single concept of changed circumstances. The basic idea behind each of the doctrines is that changes in circumstances have made treaty obligations unfair and invalid. One must examine the subject matter of the treaty and ask whether in the light of the new circumstances the treaty should be insisted upon. Such questioning will require a detailed and cumulative examination of each of the changes relied upon by the defaulting party. It clearly will be very difficult to formulate rules of general application.

Some authorities would argue against any theoretical amalgamation of these several concepts.⁹² Other authorities, however, are less concerned with distinguishing between the various doctrines.⁹³ One commentator refers to a number of treaty-termination doctrines that rely on fairness (without, however, actually naming those doctrines) saying:

Taken together, these policies outline a general doctrine of treaty termination which unifies many of the treaty-terminating changes hitherto treated as conceptually discrete. . . .⁹⁴ [and in the footnote] . . . This doctrine would not inappropriately be called *rebus sic stantibus*, It seems better to use the doctrine as a general principle, of which all the well-established treaty-terminating changes are instances.⁹⁵

The formal division of the area of changed circumstances into several rules may not be constructive; it only makes the already diffi-

90. OPPENHEIMS, *supra* note 2, at 946; VON SCHUSCHNIGG, *supra* note 76, at 271; Kunz, *supra* note 2, at 180.

91. BRIERLY, *supra* note 41, at 328. The exact rule is very complex and quite unclear. The Chinese position, for example, seems very different from the Western position. See CHIU, *supra* note 57.

92. Toth, *supra* note 50, at 273-74; ELIAS, *supra* note 75, at 128; CASTEL, *supra* note 74, at 1051; VERZIJL (VI), *supra* note 74, at 349; The Serbian Loans Case, *cited in* MCNAIR & LAUTERPACHT *supra* note 74, at 466.

93. OPPENHEIMS, *supra* note 2, at 939; *see also* Frances v. The Queen, 1956 S.C.R. 618.

94. Note, *supra* note 11, at 1670.

95. *Id.* at 1670-71 n.9.

cult and confusing task of formulating dispute-solving guidelines more difficult and more confusing. If the rules were considered as particular variations upon a common theme of changed circumstances, perhaps they would be more useful tools in the quest for peace.

A later section will attempt to enunciate that common theme. However, it will be useful to first briefly review the performance of treaty-termination law in general. The same common theme which seems to underly the doctrines of changed circumstances has a surprising relevance to the whole body of treaty-termination law.

V. An Alternative Test

A. *The Nature of Treaty Termination Law*

Perhaps the most obvious characteristic of treaty-termination law is its tendency toward categorization. There is a rule for each type of succession event. There is in a sense a discrete body of law dealing with annexation, real union, federation, secession, self-determination, and a host of other succession events.⁹⁶

The effect of each particular rule may depend upon the type of treaty involved. The classification of treaties according to type is a division that is neither always superior nor always subordinate to the division created by the classification of succession events. For example, if we consider a mere change of government personnel to be a succession event, then the authorities hold that all treaties, irrespective of their type, continue in force.⁹⁷ In such an instance, the classification of the succession event is the superior criterion. On the other hand, although a self-determination event may generally terminate treaties, it appears that it will terminate neither dispositive or localised treaties nor those of a law-making nature. In such a situation, the classification of treaty type is the superior criterion.

All of these rules represent doctrines of succession law that may affect entire classes of treaties. There are also doctrines of treaty law that may terminate only individual treaties. The doctrines of treaty law are almost as complex as those of succession law. One treaty law doctrine, *rebus sic stantibus*, has been examined above, and a few others have been mentioned.

A sophisticated application of the entire body of treaty-termination law to any given factual situation is a process requiring many steps. Furthermore, it is one in which each step may involve choosing between alternatives of great complexity.

96. See VERZIJL, *supra* note 2.

97. Treaties of alliance and other similar treaties are exceptions.

B. *General Problems with Treaty Termination Law*

Earlier in this Article the manner in which treaty-termination theory has been applied to revolutions was called into question. It could be, however, that the inconsistencies noted therein are not merely the result of the misguided application of a basically sound theory, but are instead an almost inevitable consequence of an inadequate theory. Symptomatic of the difficulties inherent in treaty-termination theory are both the contradictions found in the detailed rules as well as the awkward features of their application, especially in novel factual situations. Without attempting an exhaustive analysis, these symptoms can be briefly reviewed.

The contradictions in the rules of treaty-termination law appear when the facts do not fit neatly within the ambit of one rule alone, but seem to warrant the consideration of two or more rules. Very often the results prescribed by the rules, far from complementing one another, are contradictory. The following points outline these contradictions:

It was suggested earlier that the distinction between revolutions and secessions may, in certain cases, be a very fine one. The same was said of the distinction between revolutions and exercises of self-determination. Although the authorities say that revolution does not affect treaty obligations, secession and self-determination may well lead to the termination of treaty obligations.

Similarly, the difference between the formation of a 'loose federation' and a 'true union' may be a very narrow one,⁹⁸ yet treaties continue in the former case and may be terminated in the latter.

Many authorities view the formation of Yugoslavia after World War I as an enlargement of Serbia, whose treaties therefore continued to bind Yugoslavia.⁹⁹ However, some say that the latter was a completely new state, and was therefore born without treaty obligations.¹⁰⁰

Was the State of Germany annexed or perhaps extinguished *de bellatio* upon its defeat and occupation at the end of World War II, being replaced in the 1950s by two new states?¹⁰¹ Or, was it merely suspended and preserved in limbo, later being revived?¹⁰² Both views seem reasonable, but their

98. The narrowness of the test is noted in Note, *supra* note 11, at 1676.

99. This was the view not only of the United States, but also of Yugoslavia. See O'CONNELL, *supra* note 10, at 378.

100. See, e.g., *Artukovic v. Boyle*, 107 F. Supp. 11, 30 (S.D. Cal. 1952).

101. This view is apparently espoused by Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945).

102. 1 M. WHITEMAN, DIGEST OF INT'L LAW 332-34 (1963) (quoting U.S. DEP'T OF STATE, FILE NO. 762.00/7-1350 which elaborates the 'suspension' approach).

consequential effects on the treaty obligations of the two new Germanies differ radically.

If a state loses a significant but not overwhelming portion of its territory, it is not clear whether one should apply the rule that mere territorial changes do not affect treaties, or the rule that a disintegration of a state into several smaller ones eliminates existing treaties.¹⁰³ Similarly, the distinction between secession and revolutionary dismemberment may be a very fine one, but it has been said to have vital consequences for treaty obligations.¹⁰⁴

Any artificial division of a state raises issues that are very difficult to deal with if one possesses only the tools of the conventional theory. Consider for example the divisions of Korea and Vietnam.

In addition to the above, there have been numerous other situations, particularly since World War II, where the existing regime of treaty-termination rules has been ill-equipped to provide any real solution.¹⁰⁵

When two rules conflict, it is not uncommon to see authors attribute superiority to one rule or another for reasons that are somewhat unconvincing. For example, Elias says that the continuity of boundary treaties forms a general exception to the principle of self-determination in order to avoid "a source of constant friction."¹⁰⁶ In fact, even the sanctity of the rule of boundary treaty continuity may be subordinated to other rules.¹⁰⁷ Furthermore, even rules alleged to be absolutely basic can be subject to numerous qualifications and exceptions.¹⁰⁸ Thus, as Verzijl writes of treaty-termination law, "[E]very possible system [of classification] has its advantages and disadvantages, and . . . moreover, a number of the varying developments overlap each other in whatever system one chooses to apply in the exposition. The realities of political events are by nature too dissimilar to lend themselves to rigid systematization."¹⁰⁹

When discussing treaty termination, however, international law-

103. See K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 15-24 (1954). One example is the breakup of the Austro-Hungarian Empire in 1919, with Austria becoming one of several resulting pieces.

104. *Id.* at 62.

105. Consider the formation of Italy from the Kingdom of Sardinia in the nineteenth century; the revival of the Austrian Republic after World War Two; the revival of the Syrian Arab Republic in 1961; the status of Ethiopia after Italian occupation; the devolution of treaties formerly relating to India upon both India and Pakistan.

106. ELIAS, *supra* note 75, at 126.

107. See the argument of the Syrian and Afghan delegations to the 1969 Vienna Treaties Convention Conference, in ELIAS, *supra* note 75, at 126; see also discussion, *supra* note 62, in regard to the People's Republic of China's views about unequal boundary treaties.

108. Gormley, *supra* note 74, at 371, explaining that "pacta sunt servanda arises . . . from the law of God." But at 389 he offers *thirteen* exceptions to the doctrine.

109. VERZIJL, *supra* note 2, at 12.

yers seem very dependent upon systems of classification. When a new factual situation arises, the prevailing practice is to ask which rule covers the situation, rather than to address the primary issue of whether treaties ought to terminate, for which the detailed rules are mere guides.

Such a practice is not necessarily fatal. The existence of a comprehensive general principle or theme underlying the law might eventually cure the illness and eradicate the symptoms, since a constant reference to the same axiom would tend to correct individual errors in its application. In this sense, a system of law underlaid by general principles is a stable legal regime, even though deviations are not impossible, because the constant *tendency* is toward rules that are consistent with the general themes. However, in treaty-termination law, far from finding the constant influence of a single guiding principle, it is more common to encounter a specific denial that the law has *any* underlying philosophy, suggesting that the rules exist in a vacuum, isolated from one another with no common history and no contemporary relevance to one another.¹¹⁰

Some authors have made attempts to define a common theme underlying treaty-termination law. Most of these writers have seized upon one particular factor, which they cite as common to all cases of treaty termination. Hence, it is said by some that personality, or transfer of sovereignty, or continuity is the key.¹¹¹ It is also said that personal treaties terminate but dispositive treaties continue.¹¹²

One observation can be made about these general theories. While they can be, and are, used to explain many of the rules of succession law, they are not intended to, nor do they, explain doctrines of treaty law such as *rebus sic stantibus* and impossibility of performance. Therefore, even such general theories do not explain all treaty-termination law. The question immediately arises whether there is another theory of even greater generality that is the root of all treaty-termination law.

110. Jones, *State Succession in the Matter of Treaties*, 24 BRIT Y.B. INT'L L. 360, 372 (1947).

111. See *supra* p. 305. Note that the concepts of "personality" and "continuity" have not been fully explored in this Article. They can become sources of complexity, and perhaps inflexibility. See generally BRIERLY, *supra* note 41, at 54-55. He reminds us that the concept of state personality is a legal fiction. For example, consider the revival of pre-Anschluss Austria in 1945, and pre-Arab Union Syria in 1961.

112. E.g., OPPENHEIMS, *supra* note 2, 158-67, where the rule that multilateral treaties of a "law-making" nature always continue is also noted. In the sense discussed, continuing treaties are referred to as "executed," "dispositive," "local," "territorial." The mere variety of terms is an indication of the uncertainty associated with the precise width of the rule.

See O'Connell, *The Present State of the Law on State Succession*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 331 (1973); O'CONNELL, *supra* note 10, at 2. He expresses dissatisfaction with the distinction between "personal" and "dispositive" treaties. See also FENWICK, *supra* note 2, at 175-76.

VI. Reasonable Expectations

Some writers have searched for such a paramount rationale. They have proceeded from the basis that this area of international law, as with many others, ought to be oriented primarily toward a peaceful balancing of the ever-competing forces for stability and change. O'Connell states, "The problem is to give expression in normative form to a reconciliation of two competitive pressures, that of stability in the international and internal orders, and that of adjustment of legal relationships to the social and economic effects of change."¹¹³

The best way to achieve such a balance is by giving effect to the reasonable expectations of the parties. Thus Lissitzyn writes, "The basis of much of the law of treaties, as that of the law of contracts in municipal legal systems, is the community policy of protecting and giving effect to reasonable expectations, and in particular to those stemming from agreements."¹¹⁴ Lissitzyn also states:

The normal function of treaties, like that of contracts, is to express and secure the shared intentions, expectations and objectives of the parties. Related to this function is the basic community policy of promoting stability by giving effect to reasonable expectations, and in particular, by protecting and giving effect to the reasonable expectations arising out of contracts and treaties.¹¹⁵

In evaluating the reasonableness of expectations, principles of contract law might be thought appropriate, but they do not cover the field. For example, whether a party foresaw or ought to have foreseen a particular change at the time of entering the treaty, whether both parties or only one foresaw the change, or whether the expectation arose at the time or after the making of the treaty are all factors that may be vital if the treaty is a common-law contract, but there is no reason for them to be decisive in international treaty termination law. Writers point to the wisdom of approaching each new factual situation with a desire to absorb all potentially relevant factors before choosing the best legal position. O'Connell states:

International law, it may be said, does not have a special rule respecting either the inheritance or lapse of treaties in the event of State succession; it utilizes the ordinary rules for the termination of treaties, and leaves it to judicial, or judicious, appreciation in each instance whether a treaty, upon interpretation, is

113. O'CONNELL, *supra* note 10, at 34-35.

114. Lissitzyn, *Treaties and Changed Circumstances: (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895, 896 (1967).

115. See O'CONNELL, *supra* note 10, at 368.

applicable in the new context . . . This interpretative approach gains in flexibility what it loses in dogma.¹¹⁶

This is a single test that looks at all relevant factors, and it might be called the reasonable expectations test.¹¹⁷

VII. The Operation of the Reasonable Expectations Test

To suggest that there is a single test for all issues in treaty-termination law is hardly to abandon the existing rules of law, or to pretend that they are no longer useful. Such rules are obviously excellent guidelines, reflecting the importance of key individual factors. The presence of such factors will lead to the strongest presumptions concerning treaty termination. Hence, if the treaty is an economic one and the succession event is an exercise of self-determination, the treaty will almost certainly be terminated. An expectation of termination would be highly reasonable under such circumstances.

Such factors, however, are not magical formulae, and they must not be blindly applied to new situations in which their importance may, for various reasons, not be as great. The reasonable expectations test, properly applied, creates a balance between established precedent and novel ideas. It does this both by focusing attention on the question of why treaties ought to terminate (or be observed) and by compelling answers that are reasoned beyond the level of a mere assertion of the application of some particular rule.

A reasonable expectations approach would presumably reflect the more basic of the treaty-termination rules quite clearly. For example, only in the most extreme circumstances would it be reasonable to allow a treaty that had settled a longstanding, and perhaps violent, border dispute to be overturned. On this point, the result obtained by examining reasonable expectations accords quite closely with the result predicted by the traditional theories.

Where the traditional rules do not give a very good indication, the reasonable expectations test might help fill the gap. For instance, the effect of the so called devolution agreements on third parties is almost nil, from a strictly legal point of view. From what may be reasonably expected, however, such an agreement would be a strong indication of treaty continuity. It is the latter view that more closely resembles state practice. In fact, devolution agreements have proved

116. *Id.* at 6; UDOKANG, *supra* note 2, at 166.

117. O'CONNELL, *supra*, note 10, at 6, criticizes the notion of a "universal touchstone" of succession to treaties, but I do not believe he would criticize a single test which aims to take all relevant facts into account; rather, he is probably attacking the sort of test that decides what facts are relevant, something that could be said of the personality related tests. *See also* O'CONNELL, *supra* note 10, at 335; Graham, *supra* note 30, at 128. A flexible approach already exists with respect to the effect of war upon treaties. *See* *Karnuth v. United States*, 279 U.S. 231 (1929); *Techt v. Hughes*, 229 N.Y. 222, 128 NE 185 (1920).

very effective in causing a continuation of treaties.

It is hoped that the recognition of a superior criterion, such as reasonable expectations, in treaty-termination law, might imbue the present legal regime with a new flexibility and resilience. Such recognition might make the various rules interrelate in a more satisfactory manner; allow new political and social concepts to be approached with fresh ideas rather than with weary concepts; and render adherence to the established principles more willing and necessary departures from them less traumatic.¹¹⁸

Recognition of the reasonable expectations criterion additionally might facilitate dispute settlement. This can be illustrated by examining the process of dispute settlement that currently prevails. The Falklands-Malvinas conflict, although not related to treaty termination law, is a recent case in point. Both the Argentine and British peoples firmly believed that international law was on their side. They interpreted international law according to their disparate political opinions. The Argentine claim to the Islands was based on both succession to Spain's right of title by discovery and on contiguity. The British claim amounted to title by conquest, and probably title by long use, and they undertook the recent war under the principle of self-determination of peoples.¹¹⁹ Each of these claims has at least some basis in international law.

Having found vaguely relevant rules to suit their respective causes, the parties were not compelled by the structure of international law to see whether other factors might be involved as well. Perhaps if there had existed a higher principle, encompassing all the individual rules, the reconciliation of the competing interests might have been prosecuted more efficiently and more peacefully. As it was, as each side marshalled the moral authority of international law for itself, it excluded the legal claims of the other. The result was that the only real pressure to negotiate came from a vague desire not to be seen as the initiator of war. Perhaps the recognition of a test of reasonable expectations in treaty-termination law might in some way ameliorate such situations.

The method of applying the test deserves a much fuller treatment than can be offered within the scope of this Article. The following, therefore is a brief overview of how the reasonable expecta-

118. A few thought-provoking passages on this point are: Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193, 194-96 (1980); BRIERLY, *supra* note 41, at 339; LEVONTIN, *supra* note 74, at 154.

119. For the British view, see MccGwire, *Battle for the Falklands: The Stakes*, THE NEW REPUBLIC, May 12, 1982, at 11. MccGwire adds "peaceful settlement of disputes" to the list of principles at stake. On the issue of self-determination, it could be questioned whether 1,600 scattered farmers constitute a "people." See Advisory Opinion on the Western Sahara, I.C.J. 4, para. 59 (1975).

tions test might be applied. The starting point would be an article in a treaty which might resemble in form the proposal in the Appendix to this Article. The breadth of the test and its rejection of dry legalism must become widely known. Upon the emergence of a dispute, the test must be put before the parties in such a fashion that the arguments available to both are inescapable and irrefutable. In a difficult case, such as one in which this process of forced conciliation has proved ineffective, a restructured International Court of Justice, one equipped with a more efficient process than currently exists, might be consulted. The object of the exercise is not to offer politicians the choice of conflict or reconciliation, since political gains can often be wrung out of conflict (and even war). Rather, the object is to influence the population of each state, making peace the only alternative open to the governments. Precisely how this is to be done is beyond the scope of this Article.

VIII. Reasonable Expectations and Revolutions

What then are the particular factors to be considered when a government changes? The authorities are of some assistance. Few of them, however, make specific proposals concerning revolutionary changes of government. One commentator offers the following:

The reasons developed here for granting revolutions treaty-terminating force have stressed two characteristics: a radical change in national policies and identity, and the lack of 'legal continuity' between the old and the revolutionary regimes usually accompanying such policy upheavals¹²⁰

For treaty purposes, changes in international alignment will be particularly important in identifying true revolutions.¹²¹ Internally, changes in form of government, redistribution of wealth (including land reform), and obvious shifts in power between social classes—particularly when carried out through formal legislation, and when made in the name of the revolution—will be objective indicia of revolution.¹²²

[For close cases] a presumption should run in favor of a regime's characterization of itself.¹²³

Writing about the status of treaties during a revolution, Graham identifies five factors:

- (1) conditions at the time of making the agreement,
- (2) the nature of the agreement,
- (3) the type of revolution; its purpose, duration and factual

120. Note, *supra* note 11, at 1682.

121. The author apparently means treaty terminating revolutions.

122. Note, *supra* note 11, at 1683-84.

123. *Id.* at 1684.

effect,

(4) the nature and extent of the changed conditions associated with the revolution,

(5) the factual effect of these changed conditions on the agreement.¹²⁴

In addition to these direct considerations of revolutions, some authors, in discussing other aspects of treaty termination law, offer factors that would be incidentally relevant to revolutions. For example, one might look at the extent to which a new regime adopts the treaties of the former government, which could involve implementing them for some time after the revolution.¹²⁵

When assessing the extent of change in a state, it is necessary to remember that a revolution is not an instantaneous event. Even when the old government has been decisively defeated, the character of the changes promoted by the new government may depend upon which of the various factions, perhaps united in warfare but rivals in victory, gains full power.¹²⁶ Hasty decisions, based upon insufficient information, may well yield inadequate results.

Apart from factors relating to the extent of societal change brought about by the revolution, the specific contents of the treaties involved are also important. The subject matter of a particular treaty may be a very good indicator of the reasonableness of expectations for termination. The draft article in the Appendix to this Article lists a number of particular points to consider when analyzing the subject matter of the treaty.¹²⁷

Clearly, the factors relevant to the reasonable expectations test are of great diversity and exhausting complexity. It is not a test for the fainthearted. Perhaps, however, it is a test for the peacemaker. It is appropriate to conclude with a word from O'Connell on state succession. Criticizing the alleged distinction between changes in government and changes in state, O'Connell makes a statement of perhaps wider application:

There might, therefore, be a spectrum of solutions rather than a unique solution. If this is to introduce relativity into the law it is by no means to divorce it from philosophical considerations or from the need for theoretical elaboration, for, one's approach to any problem of State succession will depend upon one's ap-

124. Graham, *supra* note 30, at 28.

125. Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. INT'L L. 521, 542 (1967).

126. A recent example of this problem is provided by the Nicaraguan revolution. See Grande, *The Revolution in Nicaragua: Another Cuba?* 58 FOREIGN AFFAIRS 28 (1979). Consider also the factionalization of rebels in El Salvador. See Nissen, *Life in the Rebel Zone*, in Newsweek, Mar. 1, 1982, at 22. Consider also Angola during the 1970s.

127. See Appendix *supra* p. 329; see also Keith, *supra* note 125, at 542.

proach to the philosophy and methodology of international law as a whole.¹²⁸

The author respectfully agrees.

IX. Appendix

The following is assumed to be one article in a full treaty. Although the form in which it is presented might be appropriate for insertion into the Statute of the International Court of Justice, other conventions might be equally appropriate as 'host treaties.'

DRAFT ARTICLE ON CHANGES OF GOVERNMENT AND TREATY TERMINATION

- (1) The Court shall determine an application under this Part by declaring whether the treaty has ceased to bind a State party to it.
- (2) In determining an application pursuant to subclause (1), the Court shall have regard to the following factors;
 - (a) the subject matter of the treaty and in particular;
 - (i) whether the treaty was intended by the parties at the time of its negotiation to embody a final resolution of a dispute, and if so, the extent to which such a dispute was or is a violent or potentially violent dispute; and
 - (ii) whether the treaty was intended by the parties at the time of its negotiation to codify then existing international law, and the extent to which the treaty represented a codification of international law existing at the time of the application;
 - (b) the purposes of the treaty as interpreted by each party at the time of that party's ratification of the treaty, and in particular, in relation to any such purpose;
 - (i) the extent to which the purpose is reflected by the words of the treaty; and
 - (ii) the number of parties who ratified the treaty with that purpose;
 - (c) any changes of national government within any State and in particular, in relation to each such change;
 - (i) whether the change was constitutional;
 - (ii) whether the new government has alleged that the treaty no longer binds the State and if so when, in relation to the change of government, the new government made such an allegation;
 - (iii) the extent to which the new government

128. O'CONNELL, *supra* note 10.

adopted the treaty before alleging that it no longer bound the State;

(iv) the extent to which the governing personnel of the State have changed;

(v) the extent to which the State has lost population or territory directly or indirectly because of the change of government;

(vi) the extent of foreign influence over the former government;

(vii) the support of the people of the State for the new government and for its policies;

(viii) the extent to which the change of government is accompanied by changes in the relative power or wealth of social classes within the State;

(ix) whether, and if so the extent to which, the new government has rejected the policies of the former government, and in particular policies relating to education, morality, economic structure, religion and intrasocietal political relationships;

(x) the extent to which the treaty reflects those policies of the former government which the new government has rejected;

(xi) whether, and if so the extent to which, the new government has altered the alignment of the State with other States or organizations; and

(xii) whether the various parties to the treaty represent such a large spectrum of the international community that the appearance of a new form of government in one of them would or should be a matter of irrelevance to the treaty in the minds of the other parties; and

(d) any other factor which in the opinion of the Court is relevant.

(3) In making a declaration pursuant to subclause (1), the Court may declare that a treaty continues to bind some only of several parties to it.

(4) The provisions of this clause may apply to any part of a treaty in so far as the Court determines that that part is severable.