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Faits Accomplis in Treaty Controversies†

The recent Vienna Convention on the Law of Treaties does not accord with the view (so fashionable among legal scholars during the thirties) that an international agreement may lawfully be terminated only by a new agreement between the parties or following a declaration authorizing termination by an international tribunal.¹

Nor does the Convention support the opposite view that it is unlawful for a party to enforce, by self-help, treaty obligations whenever the other party claims that some legal grounds of termination or invalidity are applicable to the case. Article 65 of the Convention which prescribes the strategies and procedures to be followed in disputes about termination and invalidity, does not force upon us the traditional either-or concept of termination or invalidity. Such a notion, it will be further explained, is unrealistic. It rests on assumptions that do not accord with modern conditions.

A. Unilateral Termination of a Treaty

Earlier, the International Law Commission which had prepared the Law of Treaties' Convention before it had been deliberated upon, changed and adopted at the Vienna conference, concluded that Article 65 "represents the highest measure of common ground that could be found among governments as well as in the Commission on this question."² The Article in its

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†This article draws on part of a chapter of a treatise currently in preparation: The Strategy of Treaty Termination: Lawful Breaches and Retaliations.

¹Consult, *Harvard Research, The Law of Treaties* (1935), in 29 AM. J. INT'L L. 652, 1108, 1125-26 (1935 supp.); C. Hill, *The Doctrine of "Rebus Sic Stantibus"* in INTERNATIONAL LAW 15 (1934), 1 L. Oppenheim-H. Lauterpacht, INTERNATIONAL LAW 942-43 (1955); Fitzmaurice, *Report on the Law of Treaties*, 1957 Y.B. INT'L L. COMM'N, Vol. 2, 58, 65; but see McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements*, in M. McDUGAL AND ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER, 404, 601 (1960).

²Int'l L. Comm'n., *Draft Report Covering the work of its Eighteenth Session*, U.N. Doc. A/CN.4/L.116/Add. 6, at 4(4) (July 11, 1966).

final form appears to have been a compromise in which unresolved differences were neutralized in ambiguity. Its formulation is in itself symptomatic of many problems. The first four subsections of Article 65 read as follows:

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.³

The specific means of settling disputes indicated in Article 33 of the United Nations Charter are "negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." The parties are bound to seek a solution to the dispute through these means.

This verbal commitment to peaceful resolution of disputes is not accompanied by presentation and analysis of specific policies that ought to guide or govern. Article 65 has sails but no anchor. Which of these methods should be given priority in the solution of conflicts of termination? The ILC Commentary to draft Article 65, and the majority of writers on the subject, seem to prefer adjudication. But according to the International Court itself, adjudication, as currently employed in the international arena, is the least adequate method for settling most disputes of termination.⁴

³8 INTERNATIONAL LEGAL MATERIALS 703 (1969).

⁴There have been only a few explicit judicial cases of termination, and they have held that the termination of international agreements is a "legislative" and not a "judicial" function. The International Court usually did not render a negative decision in these cases, but simply refused to decide on various grounds. The party in possession of the disputed values won the dispute by default of the Court. See *The Case of the Free Zones of Upper Savoy and Gex*, P.C.I.J., A, No. 24, at 38, 42 (1930); the claim was rejected in this case on factual grounds. The International Court in 1966 rejected on procedural grounds, claims for the termination of the South West Africa Mandate Agreement; [1966] I.C.J. Rep. 7. The Court directed the parties to the "international legislator," but did not indicate who that entity was. See Reisman, *Revision of the South West Africa Cases*, 7 VA. J. INT'L L. 3, 76 (1966-7). Other cases of termination which the Court refused to decide are *The Anglo-Iranian Oil Company Case* [1952] I.C.J. Rep. 103; *Northern Cameroons Case* [1963] I.C.J. Rep. 15. For a contextual analysis of decisions refusing to decide, see W. M. REISMAN, NULLITY AND REVISION

Regardless, the failure of Article 65 to provide specific favored methods for settling disputes is unfortunate. Suppose a party claims termination, giving proper notification. The other side objects. The claimant proposes negotiations. The objecting side, believing that adjudication is a more suitable method for preserving treaties, insists on adjudication. What then? To reach a deadlock a party has only to insist on a different method for settling the dispute. Such cases, in which the parties reach a stalemate from the outset, are all too common in disputes of termination. As of this writing, the latest and most dramatic is the Anglo-Spanish conflict over Gibraltar.⁵

Any of the parties to the dispute may, in case of a deadlock after a period of twelve months following the date on which an objection to the claim was raised, set in motion the conciliation procedure provided for in the Annex of the Convention. This procedure is, however, a novelty in international affairs; its future effectiveness in resolving conflicts cannot be taken for granted. The Convention's Annex provides for the establishment in particular disputes of an *ad hoc* "conciliation commission" within which the parties may argue and actually negotiate their differences. The Commission seems to be a semi adjudicative-conciliatory organ. Its structure and functions have many advantages and thus may promote constructive settlements of particular disputes.⁶ But it also suffers from important short-

625-34 (1971). Non-decisions—decisions refusing to decide—are real decisions despite judicial attempts to characterize them differently, and in this context of claims to termination and invalidity they are in effect negative decisions—decisions that reject the claim.

⁵N.Y. Times, June 10, 1967, p. 2, col. 3 (late city ed.). For a discussion of ICJ cases requiring negotiation before submission to adjudication, see Reisman, *id.*, at 359.

⁶Note the marked differences in function and competence between this procedure of the "Conciliation Commission" and the traditional adjudication or conciliation. The general principle dominating arbitral jurisdiction and procedures is one of defined powers limited by the parties' consent. The submitting states renounce no rights whatsoever except so far as may appear from the agreement to arbitrate (the compromise). But the jurisdiction of the Conciliation Commission is compulsory, in the sense that it can effectively be invoked and initiated by any party to a dispute, without any cooperation from the respondent in organizing the body of conciliators which is to pass upon the dispute, in setting the procedures, or defining the questions at issue. The refusal of the respondent duly to designate members of the Commission, or the latter's failure to appoint the chairman, does not bar further proceedings. Furthermore, in examining the claims and objections, the Commission is not bound by formal rules of pleading or evidence, but it decides its own procedures. The Commission has the authority to make proposals to the parties, with the view of reaching an agreed settlement of the dispute. The Commission's functions, however, are not wholly conciliatory but also semi-adjudicative. Its members are "qualified jurists." Its initial jurisdiction is limited by Article 66(b) to disputes concerning the "application or interpretation" of any of the articles in Part V of the Convention, which deals with invalidity and termination (the exception being Articles 53 and 64 whose disputed application and interpretation is subjected to the compulsory jurisdiction of the International Court). Furthermore, the Commission is required to issue a "report" that may include conclusions regarding "the facts and questions of law," and in this sense the report resembles a judicial or arbitral award (see the Convention's Annex, 8 INTERNATIONAL LEGAL MATERIALS 712 (1969)).

comings. The authority of the Commission to regulate the conduct of bargaining not only inside but outside of the conference room is not clear.

In addition, according to Articles 65 and 66, fifteen months should usually pass from the time a claim is put forward until a request for setting in motion the conciliation procedure can be made. The Convention's Annex also allows a period of four to six months to pass before the Commission is duly constituted in each particular case. During this two-year interim period, tacit bargaining may develop and unilateral acts may be effected. *Faits accomplis* may be sought before the constitution of the Commission with the aim of affecting or even "settling" the matter from the outset of its deliberation. Article 65(5), as we shall see, seems to yield assent to such practice. Furthermore, the Commission's final "decision" is not accorded the formal status of a binding decision but only that of a so-called "report" and "recommendation."⁷ This may raise additional problems of enforcement.

Suppose the parties have complied with the procedural requirements, having lawfully stated their initial positions in formal notifications and in due time, and having made impressive efforts to arrive at an agreed settlement of the dispute according to Article 33 of the UN Charter, or even within a Conciliatory Commission, but there are no material results. The parties, either because they refuse to be moved from their initial positions, or because they cannot agree on the kind of compromise, reach a stalemate. What then? May the claimant state take the "measures proposed," and, if not, would the objecting party or parties be justified in enforcing the agreement against the will of the claimant state? In other words, is withdrawal from, or termination of, the treaty not authorized except by the mutual agreement of all parties, or may they also be lawfully made by unilateral acts of the claimant?

Nowhere in the Convention can an answer or a hint to the desired answer be found. If any conclusion may safely be drawn from Article 65, the accompanying commentaries, and the debates in the ILC and the Vienna Conference, it is that while a standard of conduct has not been advanced by them, the major emphasis has been of a delimiting character. There seems to have been a complete agreement on what the "procedural" provision would not do, but not on what it would do.

Article 65 does not authorize unilateral decision in case of disagreement, nor does it require that termination or invalidity be effected only by a new agreement between all parties. At most the Article indicates an intention to impose an indefinitely greater burden on the claimant party than on the

⁷The Convention's Annex (6), *id.*, at 713.

objecting side. The claimant is required to explain the grounds upon which the claim is based, to submit a proposal, and to specify a reasonable time for the reply of the other party or parties. The objecting side is required only to raise an "objection" within the specified time.

Since the Convention does not contain policies relating to self-help enforcement measures and sanctions, a party who has the power to bring about termination can content itself with the proposed Convention. A party who has the power to force compliance with the treaty can also justify the decision by the Convention. Both arguments will be equally well founded. Article 65 furnishes the parties with a convenient verbal justification for any decision, but not with policies to guide a decision.

Obscurity in prescribed provisions is not always an anomaly which results from mixed prescriptive motives or from analytical confusion. Some obscurity must inevitably exist in any legislation since it aims at generalizing policies. Furthermore, ambiguity may on occasion be a tactful and useful technique. What seems to be in our case a violation of the law of identity (an act cannot be both forbidden and authorized at the same time), is not necessarily a violation of the logic of life. A determination of whether "termination" should be authorized cannot be simply an affirmative or negative answer to the question in general. An appropriate response would involve broader considerations.

A balance of the policies at stake should be made and related to a specific context. The context that must be taken into account is, of course, not merely or chiefly "procedural," but should include the whole setting of the problem. This context includes components such as the specific values at stake, the time and crisis factors, and the potentialities for amelioration of the deprivatory effects of the decision. To say that the "termination of agreements" is a variable concept and that answers to the problem depend on a multitude of specific factors, is not to say that an appropriate level of generality in formulating the relevant policies can never be attained.

After all, it is a minimum goal requirement that stability of expectation be maintained through formal authority: general policies, principles, rules and regulations. A rule making behavior solely dependent on the "context" is not a rule at all. Contexts by definition vary. Nor does it provide guidance to decision-makers. At the barest minimum one requires a statement of policy, a reference to the contexts and a way of making those references empirical. What may be required in the articulation of formal authority is not *the* rule or *the* answer to all situations, but answers more or less suitable to certain categories of decisions.

The most important contribution of the Convention to the enforcement and termination of treaties is, therefore, that it does not refer at all to the

traditional concept of "unilateral termination." The Convention is a clear authority for the terminable character of treaties, and for the view that something less than a new agreement between the parties, or a decision of a tribunal, is required for such a termination. Any bargaining is a sequence of reciprocal choices, either made by the parties simultaneously or successively. Each step in the development of a given conflict requires in itself a decision by the parties or by the general community.

In other words, a "decision of termination" is usually partitioned into subsets of decisions, which may be usefully distinguished from one another. The weakness of the Convention is that it stops short of regulating at least some of the various acts that together constitute a conflict about termination (*e.g.*, the duty to negotiate, the topic for discussion, the problem of compensation, the lawfulness of certain unilateral acts, reprisals, retaliations).⁸ It may be suggested that, since the Vienna Convention does not contain a provision pertaining to these matters, such a provision be included in each treaty during negotiation.

Given the previous state of legal doctrines, there can be no doubt that the rejection of "unilateral termination" of a treaty as an operational concept is in itself, an important step forward in the regulation of termination controversies. This indivisible concept has historically been relevant only where the possibility of conflict escalation and reciprocal efforts to set limits and bounds to disputes did not exist. That the authors of the Vienna Convention, who could not agree on any specific measures in connection with termination and invalidity controversies, were intent at least on rejecting the traditional either-or distinction of "unilateral termination" is evident from an examination of Article 65(5). This provision clearly treats "unila-

⁸An analogy can be made between international bargaining on treaty termination and domestic collective bargaining between labor and management on the renewal and revision of labor contracts. Both situations often involve bargaining between organized entities with the aim of value redistribution. In both cases the basic community policies in introducing legislation to regulate the disputes have been to encourage the parties to reach agreed solutions by free bargaining and to check arbitrary or unfair procedures, while not imposing involuntary substantive settlements on the parties, however just or desirable they may seem to be to the larger community. Both situations often involve refusal to negotiate and unilateral acts during bargaining. The *Tart-Hartley Act* 8, 61 Stat. 141 (1947); 29 U.S.C. 158 (1952) provides that it shall be an unfair labor practice for an employer or for a labor union to refuse to bargain collectively on specified issues. The National Labor Relations Board and Courts have interpreted this provision as a duty to desire agreement and "to make some reasonable effort in some direction to compose his differences with the union." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134-35 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953). Activities which were originally regarded as evidence of negotiation in bad faith in a truly subjective test, often have come to be sufficient proof standing alone. Unilateral actions while discussions are taking place have come to be considered *per se* violations of the Act. *Consult Bowman, An Employer's Unilateral Action—An Unfair Labor Action?* 9 VAND. L. REV.487 (1956).

teral termination" as a temporary move, or a sequence of interdependent moves in the larger context of bargaining, and not as a final outcome.

B. A "Notification" After the Fact

It has been suggested during the preceding discussion that the Convention's solution to the problem of unilateral termination has the inevitable effect of equating authority with control. The accuracy of this observation can be tested by an examination of Article 65(5).

That provision seems to provide for an exception to what is supposed to be a general rule, that the claimant party should first notify the other parties, explaining the grounds upon which the claim is based and should then wait at least three months for the other side's reply. Unlike the rest of Article 65, subsection 5 cannot be assailed on the ground that it is too vague to connote any definite idea. The "exception" is relatively clear, though it is at the same time broad enough to override the entire article, and to give a definite, perhaps undesirable, meaning to the solution advanced in the Convention. Subsection 5 is clear evidence that a minimum order, strictly defined, was the sole consideration of the drafting of Article 65. It reads as follows:

Without prejudice to Article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.⁹

This provision does not deal with noncompliance due to a special hardship or inconvenience, since cases of "special urgency" are explicitly dealt with in subsection 2. But to construe the above-quoted provision as applying to all situations and all kinds of agreements is to drain Article 65(1) of all significance. To what situations, then, was the provision intended to apply? The phrases "claim for performance" and a party "alleging a violation," suggest that the primary reference is to *obligatory* treaty provisions rather than *executed* or *territorial* ones. By "executed" treaties is meant treaties that concern for at least one party relatively consummated transactions like the conveyance of a territory, leases and perhaps servitudes, and other treaties that have already been performed in whole or in part.

The distinction between these two categories of treaty provisions is one of degree, not of kind. All international agreements project policies into the future. Even the conveyance of a territory implies a pattern of future conduct on the part of both parties with respect to the territory transferred. Of course, like any distinction of degree, the categorization of treaties into

⁹Note 3 *supra*.

"real" or "executed" and "obligatory" is also hard to maintain in certain cases.¹

"Executed," "earned," "acquired" or "real" rights are species of property, and as usual in concepts of property law, they rigorously draw upon black and white distinctions that would be out of place in most areas of law, including that of ordinary contract. The objection to the application of principles of termination and invalidity such as the doctrine of *rebus sic stantibus*¹⁰ to executed treaty provisions is based on policy consideration; to admit that consummated transactions can be affected by later changes in circumstances, would expose territorial and other possessions to insecurity, and this insecurity would increase in direct proportion to the length of time in possession.

The executed international agreement has, however, an additional quality not shared by contracts and treaties in general. One difference between "real" or "executed" and "obligatory" rights, relates to the manner in which these rights are respected and complied with. Generally, compliance with the former is negative, in the sense that it consists of refraining from action. Once the agreement is performed, it does not require continuous positive action by the grantor state. By the same token, unilateral termination of the agreement or the "real right" can effectively be made only by an act of overt coercion.

Any termination of a treaty, when made against the will of the other party or parties, can be regarded as coercive, since it results in deprivation. But in the given situation, the coercion involved is far more excessive. In treaties that have already been performed, apart from the depriving effects of the termination, the means by which the decision can be carried out unilaterally necessarily involve a direct act of coercion, strictly defined. If the value preponderance is in the hands of one side, and the subject matter of the treaty is a strip of territory or a physical *res*, termination by means of self-help is usually limited to physical seizure.

From the point of view of minimum order, it is of course preferable not to encourage the party claiming termination to resort to unilateral coercive acts, physical or otherwise, and at any rate, not before prior notification of the claim and the making of a "proposal" with the aim of reaching some sort of a mutual understanding.

Article 65(5) seems to acquiesce in a *fait accompli*, provided it is not

¹⁰Many writers exclude from the application of principles of termination, "executed" and "territorial" treaties. See e.g., Hill, note 1 *supra*, at 15; F. VALI, *SERVITUDES OF INTERNATIONAL LAW* 30 (1950). A. McNAIR, *THE LAW OF TREATIES* 256 (1961). Similarly, Article 62 of the Convention on the Law of Treaties (changing conditions) is restricted to "obligations still to be performed under the treaty."

made by an act of overt coercion. The provision does not state that in these "certain" cases a party need not comply with the requirements of making a prior notification justifying the claim, and submitting a proposal, but only that noncompliance with these requirements would not have deprivational consequences on the claimant state. The difference, however, is only verbal, for the results are quite the same.

If a party is allowed, after a *fait accompli*, to invoke the grounds for termination in answer to a demand for performance, or to a complaint alleging a violation, it is in fact allowed to bring about not only unilateral termination, but to do so without the making of a prior notification and the formal forwarding of a claim. While it may be conceded that, formally speaking, to "stop performance" is not exactly to "terminate" the treaty, in practice the effects of the two decisions (except in consummated transactions in which the decision involves a physical seizure or another coercive overt act) may be quite the same.

It is true that after a *fait accompli* the parties would still be bound to "seek a solution" through the pacific means indicated in Article 33 of the Charter, or may try to settle the matter within a conciliation commission, so that the decision could be formally regarded as one of "suspension" of the treaty rather than of "final termination." However, a *fait accompli* of this sort changes the bargaining position of the parties and may decisively determine the final outcome of the dispute. Indeed, the phrase "in answer to another party alleging a violation of the treaty," suggests that a *fait accompli*, made before or during direct negotiation, is lawful, if only the substantial grounds for terminating the treaty are later seriously invoked.

The above conclusion may be disconcerting to many who regard the task of international norms as that of "suppressing" arbitrariness and checking on "bad faith." The authors of the Convention should by no means be criticized for what seems to be the meaning of Article 65(5). It appears clear from a review of international practice, that to prevent a party from invoking the policies for termination and invalidity merely because it has not forwarded a prior notification of its claim, though theoretically workable, is unrealistic.

Each of the "unilateral acts" during the bargaining process is usually only one of the many possible moves. It is by no means "final," and its effect on the continuation of the dispute, or on its outcome, depends to a large extent on the other side's reaction to it. Indeed, as will be further explained, the tendency of governments to debate continually, even after the facts, serves to limit the lateral expansion of conflicts.¹¹ A rule forfeit-

¹¹T. SCHELLING, *ARMS AND INFLUENCE* 148 (1966).

ing the right to invoke the policies and principles of termination in all cases of a *fait accompli* would have abolished just those benefits that the requirement of a prior notification is intended to create.

Literalism of this kind may dissipate those benefits that spring from the invocation of authority in bargaining situations. The form-free and the stuffy literal decision-makers are equally threats to effective bargaining and, thus, to reaching an agreement. Rigid insistence on literal conformity may be a neurotic symptom and may in certain contexts create community discord. People who are always demanding their formal "rights" are no less troublesome to the community than the violator of rights.¹² A party that insists on its procedural "rights" is not likely to proceed much further. Indeed, literalism of this sort may purposely be maintained by negotiators as a useful tactic to avoid or wreck direct negotiations on a certain question.

C. Examples of *Faits Accomplis*

Agreements between states are always under some stress for change. The demand may be for comparatively minor amendments or temporary suspension on through to total abrogation; the demand may be brought by parties to the agreement or by outsiders. In the vast number of cases in the relatively unorganized contemporary world, these claims and readjustments take place in unstructured interactions, in which parties are constantly realigning themselves in matters of reciprocal accommodation, in what often seems to be unilateral action in an atmosphere of conflict. It is in such contexts that the complementary community policies both of establishing and maintaining a creative and productive stability in expectations and of promoting essential change toward an improved public order of human dignity come into clearest confrontation.

The problem of termination of authoritative arrangements necessarily involves examination of larger numbers of interrelated issues. It concerns, among others, the empirical and conceptual analysis of legitimacy and bargaining power, and the interstimulations of normative directives, claims, proposals, promises, warnings, threats and unilateral acts. Evaluation and prescriptive recommendation require detailed analysis of short-term current practices as well as consideration of the long-range inclusive policies of an emerging global structure of authority.

The failure to provide some meaningful policy guidelines will certainly complicate future applications of the relevant provisions of the Con-

¹²See generally, Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV., at 3, 11.

vention. Clearly, the pressing demand is for operational formulae of the community interest in both stability and change, with some way of examining the projected contexts to determine which of alternate choices will actually maximize the inclusive interest. Studies of termination should undertake, *inter alia*, to identify destructive practices for future regulation, so that international agreements can be relied on as effective factors in international behavior and, in the longer run, precipitate fundamental constitutive changes.

The purpose of this section is, therefore, to explore a limited portion of these largely unorganized, controversial aspects of treaty termination as a way of gaining insight into the dynamics of unilateral actions in the global arena. The Convention on the Law of Treaties, it has been pointed out, does not proscribe actual moves during bargaining on termination, even when they are not preceded by formal notification. It is worthwhile, therefore, to examine in this context some such instances of *faits accomplis* and *faits quasiment accomplis*.¹³

There are ample reasons why unilateral acts are common in termination conflicts. Some of these reasons are inherent in the unique features of this particular type of conflict situation. In the familiar type of termination controversies, the objecting side stands to lose those physical issues that the claimant party may win. The point of origin in the conflict is usually the disputed treaty, from which changes in the allocation of values are measured. It is a break-even point which divides for the parties the plus side from the minus side.¹⁴

In conflicts of termination, outcomes ranging from total termination to any sort of revision of the treaty, represent immediate gains to the claimant party and losses to the objecting side. If the objecting side wins the dispute and the value-allocation as represented in the treaty is upheld, it is neither a gain nor a loss to any side, assuming no change in circumstances. The logic of the situation clearly favors the objecting side since the most that it can expect to win is the *status quo*. The best strategy under such circumstances is for the objecting side to invoke the fact that "there is a treaty" while insisting on keeping out of any bargaining.

¹³The Soviet government, for instance, announced in 1918 through a radio proclamation "addressed to everybody" that the Treaties of Brest-Litovsk were denounced. This announcement was regarded in 1925 by a German court as "sufficient expression" that the Soviet government regarded the treaty as abrogated and invalid. *S.E. v. G. & G.* in ORFIELD AND RE, *CASES AND MATERIALS ON INTERNATIONAL LAW* 83, 85 (1965).

¹⁴F. IKLÉ, *HOW NATIONS NEGOTIATE* 164-81 (1964). The term "treaty" refers here to the culminating text and not to the larger process of agreement. When the allocation of values as registered in the treaty does not conform with reality, the actual status quo provides the convenient criteria of evaluation.

The claimant usually tries to undermine the validity of the treaty and to create, by unilateral acts, another point on which the expectations of the parties can converge, and from which gains and losses will be measured. Much of the bargaining on termination consists of maneuvers to determine this initial point of evaluation. It is at this point that the most inclusive community prescriptions—to which, in effect, many of these maneuvers are no more than claims—become relevant.

In the absence of effective regulation or third party decision-making, the conflict will usually continue to be settled by a process of unorganized bargaining. A major problem in termination and invalidity is the division of costs or the compensation for the deprivation that is inherent in such a decision. If the issue of termination or modification is kept separate, it remains—however divisible the physical object of negotiation is—a gain for the claimant, a loss for the objecting side. But if two simultaneous negotiations can be brought into a contingent relationship with each other, a means of compensation is available by way of an exchange. A principal means of compensation is often concessions on some other subject unrelated to the treaty initially in dispute.¹⁵

It is tempting for the claimant side in such situations, therefore, to resort to some unilateral acts, which change the balance of burdens and benefits to its own advantage in the matter that is sought to be connected (*e.g.*, another treaty). By creating an additional dispute, the claimant party usually renders the proposed connection of issues more attractive to the objecting side. The purpose of such acts is often to make direct negotiation or conciliation on the central demand more attractive to the objecting side.¹⁶

¹⁵For a discussion on the expansion of the size of disputes see R. Fisher, *Fractionating Conflict*, in *INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE, The Craigville Papers* 91 (R. Fisher ed., 1964).

¹⁶For a discussion in these terms of the act of building the wall in Berlin see IKLÉ, note 14 *supra*. For many years Britain has firmly rejected a Spanish claim to Gibraltar and rejected demands for negotiations on this claim on the ground that the Treaty of Utrecht of 1714 confers upon it permanent sovereignty over the territory. In 1966 Spain obtained from the UN General Assembly a resolution directing the parties to enter into direct negotiation with the aim of decolonizing the territory (GA Resolution 2231 (XXI), GAOR 21st Sess., Supp. No. 16 (A/6316) at 74 (1966)). By categorizing the dispute as one of “decolonization” the General Assembly’s resolution changed the parties’ criterion of evaluation from the treaty in question to the kind and extent of the desired change. Britain did not totally reject or ignore the resolution but seized upon it to abandon its own treaty obligations. Following the General Assembly’s resolution Britain conducted a referendum in the territory. The tiny colony was presented with the alternatives of annexation by Spain or the continuation of British rule. The decision to conduct the referendum was justified on the ground that colonized “people” are entitled to self-determination. Nearly all the inhabitants voted to remain British subjects. *N.Y. Times*, Sept. 11, 1967, p. 1, col. 1 (late city ed.). In another resolution the General Assembly declared the referendum to be in violation of its previous resolution; GA Resolution 2353 (XXII), GOAR 22nd Sess., Supp. No. 16 (A/6716), at 53 (1967).

But often a process of bargaining that is initiated by unilateral acts is continued to be settled by unilateral acts.

Furthermore, the very fact that previous commitments are demanded to be unilaterally terminated, frequently suggests that reliance on a party's additional promises on the same matter and with regard to the future are equally unreliable. This may also partly explain why a great many conflicts on termination and invalidity are settled mainly by tacit bargaining rather than by direct talks. While in direct negotiations offers and promises play a central role, in tacit bargaining the parties, mainly through unilateral moves seek "solutions" that may leave each side with the immediate possession of their gains. Some additional reasons why, and the methods by which, claimant parties seeking termination wish to bring about a *fait accompli* in partial or whole fulfillment of the central demand will be discussed as we proceed.

Surprising the Opponent

Surprise is the most obvious advantage of a *fait accompli*, particularly when the time is carefully calculated. The opponent may be found unprepared for immediate and decisive reaction. When the other side consists of a number of governments, as is common in treaties of power and security, they will usually need, before sharing a common front, to consult together and to agree on the measures to be taken. This is by no means an easy task, and, at any rate, may take quite some time. "Surprise" and "seizure of any opportunity" are usually (but not only) practiced by parties who are traditional opponents. To submit a prior notification of a demand for a change in the *status quo* in the context of traditionally hostile parties, is clearly an invitation to warnings and threats from an adversary who may wish to stand firm against the demand. The best defense, of course, is to carry out the act before the threat is made, in which case there may be neither incentive nor commitment for retaliation.

Such have been, for instance, the circumstances that led to the famous Declaration of London against the unilateral termination of international agreements. In 1870, Russia, taking advantage of the general pre-occupation with the Franco-Prussian War, had begun building a fleet in the Black Sea, contrary to some multilateral and bilateral obligations. The official "notification" of the claim came only later. Forwarding a claim to termination, prior to, or instead of, the *fait accompli* could have under the circumstances, resulted in direct negotiations and perhaps in a new agreement among the parties.

But an agreed solution, if not also the start of talks, could have been delayed until after the temporary crisis between two of the other signatory

powers had ended. Prussia had no immediate interest in the neutralization of the Black Sea, and France, already engaged in a war in which it was eventually defeated, was not in a position to react militarily. The chances that Britain alone would attempt to enforce the treaty provisions were indeed nil. The time for the denunciation, then, was tactfully chosen. The British and French, not being then in a position to reverse the *fait accompli*, could only accept the decision, and, of course, reaffirm their confidence in the "sanctity of treaties" in regard to the future.¹⁷

Dropping the Initiative

A *fait accompli* usually changes the roles the parties assume in bargaining situations. The purpose of the tactic may be to force the other side to make the initial claim or demand. Typically, there is a difference whether a party has to initiate a claim or to contend with a counter-claim. The difference is in timing, in who has to make an offensive move, and in whose initiative is put to the test. Often, the purpose of unilateral acts is to maneuver into a new *status quo* position, from which one can be dislodged only by an overt act precipitating mutual damage. By a *fait accompli* the party may condition its course of action on what the other side does. It may therefore transfer the actual decision to use violence to the other side, and evade the direct responsibility for escalating the conflict, making the outcome depend mainly on the opponent's decision. The objecting side is left with a narrow alternative decision: to acquiesce in the *fait accompli*, or to try to reverse it by means of some coercive action. It may benefit more by choosing the former.¹⁸

Furthermore, the side that put forward a claim is required, formally, and normally also by third-party pressure, to make an attempt at persuasion before committing a coercive act on the alleged violator of the treaty.

¹⁷*Declaration as to Non-alteration of Treaties Without Consent of Contracting Parties*, London, Jan. 17, 1871, in H. BRIGGS, *THE LAW OF NATIONS* 912-13 (1952). The Declaration of London is commonly considered as the authority against unilateral denunciation or termination. For additional discussion of the circumstances leading to the Declaration see TSENG YU-HAO, *TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW* 75 (1931); Corbett, *Social Basis of the Law of Nations*, 85 *RECUEIL DES COURS* Vo. I, 471, 504 (1954). W. HALL, *A TREATISE ON INTERNATIONAL LAW* 366 (1917) challenges the Declaration on the ground that Russia as a reward for its submission to the Declaration was given what it had affected to have. For the treaty provisions abrogating the demilitarization provisions of the Treaty of Paris by "mutual consent" see BRIGGS, *id.*, at 910. It should be emphasized that the desire to paper over a unilateral breach of a treaty with a seal of "mutual consent" was less an act of hypocrisy and concern with the past, than a concern to communicate a shared intention to police treaties in the future.

¹⁸Consult T. SCHELLING, *THE STRATEGY OF CONFLICT* 138-139 (1961). For the use of this tactic in the Cuban quarantine of 1962 and in connection to the erection of the Berlin Wall in 1961, consult Lipson, *Castro on the Chessboard of the Cold War*, in *CUBA AND THE UNITED STATES* 178, 193 (Plank ed., 1967).

Currently, the only claims for changes in the *status quo* that receive the serious consideration of the international community are those involving threats to the peace. Procedures for effecting changes are generally considered in terms of such threats, rather than in terms of the material needs of the particular states and the validity of their claim.¹⁹

The pressures applied by third-party governments and international organizations to the parties to particular disputes, are usually concerned with the immediate preservation of minimum order. They are, therefore, directed mainly at the party on whose initiative the outburst of violence appears to depend. An example is the Anglo-Egyptian dispute of 1947. Egypt brought its claim for the termination of the British military bases in the Suez Canal zone before the United Nations Security Council (this was the first time a claim based on the principle of *rebus sic stantibus* was put forward there).

The British view was that the case did not involve any threat to international peace and security unless Egypt itself intended to break the peace, instead of accepting the provisions of the treaty which were binding on it. This view was widely accepted among the Council's members and the issue was shelved.²⁰ A similar Tunisian complaint to the Security Council regarding the French military base at Bizerta was shelved in 1952, but in 1961 violence erupted in connection to this base, and a Tunisian complaint brought about a prompt General Assembly resolution favoring the Tunisian claim.²¹

Whether it is intended or otherwise, one gain of a *fait accompli* is to shift the initiative for the resumption of direct talks or the resort to adjudication to the other side. The International Court has been generally reluctant to exercise the termination function expressly. There have been few explicit judicial cases of termination, and in them the Court declined on various procedural grounds to pass judgment on the merits of the substantive issues involved.²² The party in the position of countering a claim can, therefore, win the dispute, or at least the court-centered phase of the match, by the default of the Court.

Besides, delays in answering correspondence before and during negotiations or adjudication, evasions in the form of "negotiations" about the desired procedure for settling the dispute (*e.g.*, whether to call the proce-

¹⁹See F. DUNN, *PEACEFUL CHANGE* 12 (1937).

²⁰See Briggs, *Rebus Sic Stantibus Before the Security Council*, 43 AM. J. INT'L L. 762 (1949). The bases were terminated in 1954, indeed only after violence had erupted against the British forces in the Canal zone.

²¹U.N. Doc. A/PV 1000 at 28 (Aug. 23, 1961). Consult Lester, *Bizerta and the Unequal Treaty Theory*, 11 INT'L & COMP. L. Q. 847 (1962).

²²See note 4 *supra*.

dure "direct negotiations" or merely "discussions," arbitration, Conciliation Commission), and delays due to the conduct of talks about talks (e.g., the "agenda", preconditions) usually operate to the disadvantage of the party who initiates the claim. The longer the lapse of time from the alleged violation, the harder it is for the party demanding the performance of the treaty to justify a coercive act in the enforcement of the treaty.

Furthermore, during the interval, the parties may have to go about their business as usual. Conditions may change and relationships, in general, may develop. Two years later an *ad hoc* Conciliation Commission may perhaps be established to review the violation in the past. After another year, more or less, this Commission may issue a report recommending perhaps that the parties would restore the *status quo ante*. Will the Commission's decision accomplish anything at this late date?

The outcome previously achieved in the course of effective tacit bargaining is likely to be more viable than a legal document of dubious formal validity and addressed to a situation which is three or four years outdated.²³ Besides, at this late date the originally "objecting party" would still face the decision whether to commit resources and try to enforce the Commission's report. The situation favors the party who is confronted with countering a claim, since it may win by default if the other party does not immediately react.

The Tactic of the "Final Decision"

A maneuver into a *fait accompli* may supply a government with a commitment not to concede in negotiation. The aim may be to make an "irreversible" maneuver, the effects of which are the reduction of the government's own freedom of choice and renunciation of its own alternatives. Parties in international negotiations are not unitary decision-makers. Other governments, domestic politics, domestic governmental branches, bureaucratic differences within the executive branch, and other factors alike, influence the parties' objectives and negotiating tactics. Since a government must continuously deal with these influences and obstacles, it must, if it can, arrange to make any retreat in negotiations dramatically visible. In this way the government places its reputation and effectiveness in jeopardy, and thereby becomes visibly incapable of serious concessions.

The conflict in 1966 between the United States and France, concerning the removal of American military bases and installations from French territory, along with NATO's Council and Headquarters, is instructive.

²³For a discussion of a similar situation in domestic collective bargaining see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958).

The French demand was presented in the form of a *fait accompli*,²⁴ but in this particular case, it was impossible for France to create a *fait accompli* in any true sense. France, in the case of the bases, could not unilaterally, and without previously submitting an official notification of the claim, fulfill its demand (*i.e.*, "territorial" or "executed" rights). Such a decision would have required a forceful eviction of the bases, an act which is unthinkable in the case of friendly nations, and which is dangerous in the case of hostile ones.

The only way open to the French government was to forward to the United States a demand for the immediate removal of the bases and a demand to NATO to transfer its headquarters. Nevertheless, the French government managed to achieve the effects of a commitment not to reconsider and compromise, by presenting the demand not in the form of a claim to termination but in the form of a "decision" of termination. To support this appearance of "finality," the French government refused to enter into negotiations on the question of termination. In other words, the French government, though it was the claimant party in the dispute, maneuvered itself into the typical position of the objecting side in termination controversies.

Sometimes negotiation cannot be dispensed with. Negotiation is necessary for any termination in which complicated forms of collaboration between the parties must be established in pursuit of the decision. In the Franco-American dispute, negotiation had still to be conducted on incidental matters such as the transportation of withdrawing troops, the gradual dislocation of installations, and the storage of equipment that would be left behind. But the conduct of negotiation between the parties could undermine the French insistence that the "decision" was "final." The French government, therefore, proposed to talk only on the "practical matters" involved in the decision.

Negotiations on the distinction between "practical" and "political" matters were conducted for quite a long time. The other fourteen members of NATO established a five-power committee and asked the French government to negotiate with this committee. The French government refused to do so. In a conference of all the foreign ministers of the alliance, the French Foreign Minister told his colleagues that France was willing to enter into talks, but that he saw no political issues requiring negotiations on the diplomatic level. France insisted that the "technical arrangements" and other questions following the "decision" could be dealt with on a lower

²⁴See President de Gaulle's letter of March 7, 1966 to President Johnson, printed in N.Y. Times, March 8, 1966, p. 2, col. 1 (city ed.).

level and through ordinary channels, such as between military commanders. This question of how important the issues involved were was so important that the fifteen foreign ministers spent two whole days in unsuccessfully trying to resolve it.

The fact that it is difficult for a government to change a decision that has already been made and implemented may provide a government with an extra incentive to resist the opponent's pressures. The usual noisy reactions to "denunciations," "breaches," and "violations" of international agreements also assure the required publicity and incitement for such a commitment. Governments that, while ceasing to perform a treaty still desire to leave the door open for a change in their initial position, or a reversal of their decision following further bargaining or negotiation, may wish to cloak the repudiation in secrecy. It is not uncommon for parties to termination controversies to fail to forward an official notification of their decision to cease performance of a treaty to the other side. Often, the objecting side too, for similar considerations, does not forward an official demand for performance or an official complaint alleging a violation of the treaty obligations.

Bringing the controversy into the open may commit the contending governments to irreversible positions and invite pressures upon them to expand the dispute by way of overt acts and reprisals. While the French demand for the removal of the bases cannot be said to fall within the exception of Article 65(5), the same dispute involved the unilateral termination of other agreements on which both parties at the time of the termination preferred to remain silent. Only in 1966, the parties respectively revealed to the public, that the other party had resorted to *faits accomplis* in treaty terminations a year or two earlier. Notifications of the claims were dispensed with, "claims for performance"—to use the wording of Article 65(5)—were not officially forwarded, and "complaints on violations" were not formally submitted at the time of *fait accompli*. Both parties respectively stated to the public for the first time the history of outright repudiation of agreements by the other side, only when it became apparent that their conflicting positions in the dispute were already irreversible and incapable of accommodation.²⁵

²⁵In November 1964 the United States, in reaction to French previous withdrawal of naval forces from NATO's integrated-command arrangements, ceased to perform a bilateral agreement, entered into in 1959 (10 U.S. TREATIES AND OTHER INT'L AGREEMENTS, V. 2, at 1279), to provide France with enriched uranium. For the late disclosure of the incident by the French government see N.Y. Times, Apr. 17, 1966, p. 24, col. 1 (city ed.). For a discussion of a similar French termination of a System of Communications Agreement, and other agreements without giving an advance notice see Sulzberger, *Foreign Affairs: Alliance Against Itself*, N.Y. Times, June 8, 1966, p. 46, col. 3 (late city ed.). Other *faits accomplis* in direct

Article 65(5), according to which the parties in ceasing to fulfill an obligation may dispense with a prior notification of their claim, serves precisely this function of helping the parties to preserve the alternatives by not committing themselves in advance to too rigid a position.

relationship to the Franco-American dispute of 1966 were French termination of overflight rights to American military aircraft, and the termination of various tax exemptions to American personnel in France (by "re-interpretation" of some treaty provisions). The U.S. threatened to deny France the benefits of the European alarm system, and the use of some nuclear warheads stored in Germany. In "retaliation" France withdrew from Germany some of its air units. For a comprehensive discussion of this conflict see Stein and Carreau, *Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization*, 62 AM. J. INT'L L. 557 (1968).