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NICOLAE PLOEŞTEANU

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CUPRINS

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KEYWORDS

law of treaties, 1969 Vienna Convention, termination and ending of treaty effects, treaty performance, expiry of the period when the treaty is in force, abrogation of the treaty, denunciation of and withdrawal from a treaty, breach of obligations, impossibility of performance, war, extinction of the international legal personality of a party, state succession, rebus sic stantibus, invalidity

SUMMARY

The title of the thesis is "The termination and ending of treaty effects" and, as such, the theme of this thesis is drawn from within the field of the law of treaties – a branch of public international law.

The approach is twofold but the results are presented in a single material structure. Due to the fact that this is a Romanian research, treaties where Romania is a party are often used when analyzing the grounds for termination of treaties. However foreign research data is widely used, although the relation with Romanian elements is limited or insufficient. It includes texts of bilateral and multilateral treaties, decisions of international courts and tribunals or arbitrations and foreign literature. The fact that the two approaches unite in a single structure is a consequence of the relationship between public international law and domestic law where both are grounds for complex social relations that often come together or are quite identical.

The PhD thesis is composed of six chapters and a concluding chapter. The first chapter, called "General aspects on treaties" deals briefly with notions, rules and other theoretical problems that are not only general but also fundamental in this field. Therefore characteristics of the law of treaties are discussed, its role and functions, the means of concluding treaties (including the capacity to conclude treaties, the mechanisms for expressing the consent to be bound by a treaty) and the scope of legal obligations. This part is an introduction in the thesis' field of research providing evidence to the means and techniques for studying the grounds of termination. For instance, while presenting the means of concluding treaties the principle of

the liberty of decision is naturally asserted. The usefulness of this principle in analyzing the grounds for treaty termination and the ways this termination takes place is unquestionable. The introduction also underlines the reality that, in the field of treaty law, the study of the grounds for termination should start form identifying the formal sources in this domain. This is why the system of the 1969 Vienna Convention on the Law of Treaties, the 1986 Vienna Convention between States and International Organizations or Between Organizations and the 1978 Vienna Convention on Succession of States in Respect of Treaties is highlighted. On the same level the international customary law is situated. The two categories of legal instruments (the conventions and the customary law) are essential when analyzing the grounds for termination of treaties and their effects and also in writing this PhD thesis. First of all the reason for dealing with them in the introduction is to define the field of research different from other fields, some very similar, as the field of international responsibility or the one of state succession. For instance the suspension of the operation of a treaty may result from one party's position towards another's unlawful act. The situation that here arises entails international responsibility but the suspension following a breach of treaty obligations is dealt with by the law of the treaties. Second of all, the Vienna Conventions and the international customary law in this field look into the mechanisms for treaty termination and, above all, today, the 1969 and 1986 Vienna Conventions form a systematic and unitary ensemble although not an absolute and exclusive one.

This introduction also underlines the merits of international judgments and literature, both true guidelines for the study of any ground for termination of a treaty. Actually, article 38 of the International Court of Justice Statute mentions them together with the conventions and the customary law used by the Court in deciding, in accordance with international law, disputes as are submitted to it.

The second part of the PhD thesis consists of the following main parts: the meaning of "termination and ending of treaty effects", the coordinates of termination, the actual grounds for termination, treaty law and international responsibility. This part is organized into 5 chapters.

The second chapter argues the reasons for including among the grounds for termination both grounds referred to by the 1969 Vienna Convention and grounds resulting from international customary law and also grounds for invalidity. The main criteria are drawn from several sources as: the literally analysis of the phrase "termination and ending of the effects", the study of the effects that are being terminated, the study of social realities which often prove that facts can have a normative weight, the

observation of the effects regarding one or the other party and last but not least the research of literature. Regarding this last source one can notice that writers usually group in 3 categories. Some writers believe that treaties terminate only on the grounds specified by the 1969 Vienna Convention; others think that treaties terminate both on the grounds specified by the Vienna Convention and by customary law independent from the Convention and there are writers who add the grounds for invalidity two the categories mentioned above. This chapter concludes that that the closest opinion to reality is the second one i.e. that one that considers as grounds for termination both those specified by the Vienna Convention and those found in international customary law. On the other hand the research done in this thesis is not limited to the above grounds but also includes the grounds for invalidity. The reason for this approach is that during the human history void treaties were concluded and the obligations imposed by some of these treaties were fulfilled. Also, the research is based on the fact that one of the grounds for invalidity, the conflict with a jus cogens norm, may emerge after the conclusion of a treaty.

The third chapter (The termination of treaty effects. Coordinates) deals with the general coordinates that should be followed when establishing and describing the termination of treaty effects as: the termination of treaty effects in time, the termination of treaty effects from a material point of view, the automatic or no automatic character of the termination in relation with the grounds for termination. Regarding the grounds for termination of a treaty one can notice that their effects are neither ex tunc nor ex nunc. The distinction between termination and suspension is underlined as both imply an ending of treaty effects while the suspension of a treaty means only a temporary ending of its effects. It is also important to point out the relation between the two because the bona fides obligation entails both parts to abstain from any acts that could hinder the restoration of the application of a treaty. Taking into account the problem of treaty invalidity from a temporal point of view, excluding these grounds from the main category of the grounds for termination is a relative approach.

The invalidity of a treaty is rooted in the principle of ab initio ineffectiveness of such a convention. The crucial factor is the effect the invalidity has on the treaty. This governs all practical aspects regarding who can invoke grounds for invalidating a treaty, when can someone lose the right to invoke such a ground, what elements of the convention are shaped by cases of invalidity, to what extent the invalid treaty could be re-established or to re-establish the status quo ante. Regarding the consequences invalidity has on a treaty the issue that here arises is when the effects of such a treaty are fully or only partially ended. In order to get an

answer to this question, the rule laid down in article 44 of the Vienna Convention will be followed. According to this rule, the separability of treaty provisions may be invoked unless "continued performance of the remainder of the treaty would be unjust". Another issue how the termination functions id est when does it have an automatic character and when it doesn't. The way the grounds operate is different according to the attitude parties have towards the actual circumstances of the case or according to the grounds themselves. Usually the grounds for termination function the way the parties envisaged they would function, while in other situations procedural safeguards are necessary as notifying the other parties even negotiating and arbitration by an international court.

The fourth chapter deals with the following causes that can lead to the termination of a treaty: execution, expiry of the fixed period the treaty remains in force, the abrogation of a treaty, denunciation, withdrawal, breach of treaty obligations, supervening impossibility of performance, outbreak of hostilities, extinction of the international legal personality of a party, state succession, fundamental change of circumstances (rebus sic stantibus).

If all the provisions of a treaty have been carried out, and none of them has any residual purpose then one may say that the treaty has terminated by its execution because the treaty is nothing else but a mean in accomplishing the will of the parties. That is to say if the will of the parties has no legal effects the treaty will have no effects either. The expiry of the fixed period the treaty remains in force is a ground for termination usual in international relations. According to Article 54 of the Vienna Convention, states may freely agree upon termination clauses. Treaty practice highlights three categories of termination clauses: that establish a date when the treaty will be terminated, a conditional clause and a clause regarding denunciation. That is to say, usually states agree upon the duration of a treaty when concluding the treaty. This period lasts until a certain or ascertainable date according to the parties' agreement.

The will of the parties regarding the expiry of the period takes different shapes. This has been underlined also in the 1963 International Law Commission's commentaries. The Commission showed that most modern treaties contain express provisions establishing a certain duration when they remain in force. This duration is set in years, dates or until a certain event will occur or a certain condition will be fulfilled. Other similar shapes can be found in international treaty practice. Sometimes parties add in a termination provision as a final term or they add in a conditional clause. The abrogation of a treaty is a ground for termination unanimously accepted by authors. There are several opinions on the shapes taken by abrogation.

The reason lays on its intricacy generated by the express or implicit agreement of the parties necessary when abrogating a treaty. The abrogation of a treaty is rooted in the parties' consent because they can terminate a treaty at any given time just as well they concluded it. Also the parties are free to choose the form their consent will take.

The abrogation is based on several theories the most important of which are the contrarius actus theory and the contraction of acts theory. The abrogation operates regardless its stipulation or lack of stipulation as a ground for termination in the initial treaty. The abrogation agreement can also take an implicit form that results from the parties' deeds as when two or more states conclude a treaty on the same subject matter as an earlier treaty to which they are parties, but the terms of the treaties are not compatible which leads to the conclusion they understood to terminate the earlier treaty. The implicit abrogation raises several controversial issues because the implicit agreement seldom takes an unambiguous shape and removes possible contentious issues on the termination of a treaty. Among these controversial issues regarding implicit abrogation is the desuetude. Undoubtedly the desuetude is a ground for termination. But the meaning of this ground does not avoid doubts on the matter. Some writers believe that the meaning of desuetude is the consent of the parties as evidenced by their conduct. The present writer thinks that a treaty, in order to become obsolete, the following conditions must be fulfilled: there should be no explicit or implicit abrogation; the treaty should be considered as no longer in force due to the fact that the object of its provisions, as envisaged by the parties, has never appeared or has not appeared for a long time; the situation regulated by the provisions of the treaty has never occurred for reasons regardless of the parties' actions. These reasons emerge out of realities that more or less oppose the will of the parties or even destroy their reason to act according to the provisions of the treaty. But international courts generally overrule the hypothesis of desuetude. The judgment from the 14th of December 1971 of the European Court of Justice in France v. Commission is instructive. Denunciation is a ground for termination. However its legal regime is governed by the rule that no State can unilaterally seek to terminate its participation in a treaty. The word denunciation has a precise meaning under the Vienna Convention on the Law of Treaties. This meaning is other than a unilateral act by any party to terminate its participation in a treaty without any explicit or implicit consent on the conclusion of that treaty. Denunciation takes different shapes and a special case is of legal denunciation. Although this procedure enhances the efficiency of the parties' consent on the grounds for termination it is a rather unsuitable one for denunciation. Such a hypothesis is found in Article 13 of

the 1968 World Labor Organization Convention on discrimination in the field of labor relations. Withdrawal is a ground for total or partial termination of a treaty because it leads to the destruction of a treaty's legal element: the rights generated by the treaty. The reason for the withdrawal is that is without prejudice to the parties to a treaty and looks like a liberality. Given the above arguments (non-prejudicial and liberality) withdrawal manifests itself within the boundaries of the parties' consent. Therefore any state can waive its legal competence granted by the treaty and such a withdrawal is considered as a one party act. If a party doesn't perform the treaty (breach of treaty obligation) serious consequences can follow which could lead even to that treaty termination. Furthermore we should mention the well-known idea that the breach of treaty obligations gives rise to the right of denouncing in favor of the other party or at least of its latent configuring when having multilateral treaties. It is the case of bilateral treaties where the consequences of the breach of obligations are crucial as they can unbalance the whole treaty. However, the condition for the ending of treaty effects resulting from the breach of its provisions is that this breach should be substantial (highly serious). Yet the party which, by its conduct, generated this cause cannot invoke this situation. The international legal practice acknowledges the idea that the pacta sunt servanda rule obligates the parties to perform what they agreed upon even though the performance of one treaty's obligations was not properly carried out. A reference example is the Gabcikovo-Nagymaros case settled by International Court of Justice.

Supervening impossibility of performance means a treaty ending as a result of any event other than the parties' consent. The effect is that this treaty is considered obsolete. The treaty may be ended and cannot be carried out for it loses its object, rights and obligations. The supervening impossibility of performance takes two different forms: physical and legal. Nevertheless most specialists don't accept the legal supervening impossibility both because it is not expressly mentioned in the stipulations of Vienna Convention and because its nomination as a termination clause leaves too much room for arbitration. In the 20th century most cases of diplomatic practice in the field of treaties acknowledge that war has a complete abrogation effect on treaties no matter any prior established exceptional situations (humanitarian treaties, certain multilateral treaties etc,). Still this was not a univocal practice and consequently certain situations were considered exceptions. The literature indicates that the total extinction of the international personality of one of the parties ends the treaty it is part of. There is also the idea that this ending is carried out without considering the "conditions" and the "way" this extinction occurred.

However this final statement contradicts the fact that such a termination ground is not regulated by the Vienna Convention. Moreover, in the doctrine the extinction of a state's international legal personality and its effect on treaties is an issue frequently related to state succession. Thus new hypotheses can be launched among which that of transferring rights and obligations. The doctrine closely relates the extinction of state's international legal personality to state succession. When the international community structure is transformed, when sovereignty over certain territories is changed, when new states emerge as result of fusion or separation, when "territorial changes occur, when new international law issues appear, or when people free themselves from the colonial rule" the hypothesis of state succession is forwarded. There are also authors who consider that revolutionary changes in the political regime of a state, making reference to the socialist states, raise the same issue of "succession". The relation between state succession and the law of treaties is an old concern in the international law literature because the effects succession has on treaties can have connections with the effects of certain rules from the law of treaties. Following the succession certain treaties are terminated. Therefore, from this point of view succession can be considered as one of grounds for treaty termination or ending. After 1989 issues of state succession have come up in the proximity of Romania's territory, thus influencing our country's position regarding certain international treaties. These problems are closely related to the falling apart of the former Soviet Union, the division of The Socialist Republic of Yugoslavia, or that of The Republic of Czechoslovakia, or by the Baltic States independence. Likewise there is a strong connection between states' self-determination and the development or ending international treaties these states are part to. The fundamental change of circumstances (rebus sic stantibus) is probably one of the most debated causes for treaty termination and continues to generate controversy. The 1972 Anti-Ballistic Missile Treaty is a contemporary example where the issue of applying this cause is raised. Many years from now on there will be still held the question on how international law is able to give an answer to the world seismic changes from geopolitical, military and strategic, economic or ideological point of view. Accordingly, how and to what extent international law can adjust to the new circumstances. International society lacks legislative authorities for an immediate and authoritative reaction to radical changes that occur periodically within what we call an anarchical society. The consequence is that less precise and safe legal mechanisms have to be used for adjusting changes. As long as international customary law often changes by its own norms' violation, the Roman law aphorism - ex injuria jus non oritur (the violation of law doesn't generate a right) is not

as final in international law as it is in national law systems. At the same time another Roman law aphorism ex factis jus oritur (deeds tend to become rights) has more relevance to international law than to national law. Treaties can be renegotiated, overruled, denounced, or can become obsolete. The principle of pacta sunt servanda doesn't require and cannot require that treaties stay unchanged and in force forever. Moreover, international law includes a concept that was specially designed to answer changing circumstances: the provision of rebus sic stantibus.

The fifth chapter analyses the grounds treaty invalidity by considering the following: The void of consent according to domestic law; Error; Fraud; The corruption of the representative of a state or of an international organization; The coercion of the above mentioned representative; The coercion of a state or an international organization by the threat of force; The conflict with a peremptory norm of general international law. A large interest is shared for the conflict with a jus cogens norm. This was advanced as a ground for termination by Hungary in the Gabcikovo-Nagymaros case before the International Court of Justice, but the Court did not take it into consideration.

The sixth chapter draws a parallel between the law of treaties and the international responsibility. It starts from the rule that the 1969 Vienna Convention norms are without prejudice to any matter that can be related to a treaty as a result of state succession or international responsibility.

The conclusion highlights the main issues of the research and advances proposals for lege ferenda on the Romanian law system, focusing on the provisions of Law No. 590/ 22nd December, 2003 that deals with treaties. This law is welcomed as it gives details for concluding and performing international treaties as well as for their ending and so on. This law is essential, as Romania is not part to any Vienna Conventions system of treaties.