Nathalie Clarenc. ***La suspension des engagements internationaux***. Paris: Dalloz, 2017. Pp. 550. €75. ISBN: 978-2247168392.

Nathale Clarenc's book, *La suspension des engagements internationaux*, is the published version of a doctoral thesis written under the supervision of Jean Combacau and defended at the Panthéon-Assas University in Paris in December 2015. It received both the Suzanne Bastid Prize of the Société française de droit international and the 2015 award for the best thesis of Panthéon-Assas University. The qualities of this doctoral research have thus already been recognized by eminent scholars and for good reason.

Clarenc's book is a highly ambitious and intellectually stimulating study of a complex topic: the suspension of international treaties (or, rather, engagements, to borrow the terminology recommended by the author, which encompasses both treaties and unilateral acts of states). Her terminological choice is appropriate, especially since the notion of 'engagement' is not as extraneous to international legal literature as the author seems to believe.[1] Terminological questions aside, her decision not to restrict her study to treaty commitments but, rather, to cover the suspension of unilateral acts as well is commendable, not the least since the International Law Commission (ILC) had left the question aside in its work on unilateral declarations.[2]

La suspension des engagements internationaux attempts to fill a gap created by the lack of any comprehensive study of the suspension of engagements in international law scholarship, and the author's approach differs from those adopted in existing works. Following the approach of the Vienna Convention on the Law of Treaties (VCLT), some authors have studied suspension together with termination,[3] while others simply analyse the operation of suspension under special conventional regimes or question the validity or the consequences of the claims of suspension made by states in particular cases. Clarenc, in contrast, separates suspension from the other techniques through which states try to escape, or at least to modulate, their international obligations in order to give an analytical definition of suspension as an autonomous concept and to specify this regime through a series of conditions that do not always follow the logic of the VCLT. Her study is first and foremost a doctrinal (re)construction of the concept and regime of suspension of engagements as an autonomous mechanism, and it is the first comprehensive one at that.

For this reason alone, *La suspension des engagements internationaux* deserves attention, but it is not the only one. In addition to being the first, the book puts forward a robust argument and challenges the dominant perception of suspensions as a rare phenomenon. To the contrary, according to Clarenc, suspensions are a regular feature of international relations. What is more, rather than being strictly regulated by general international law, Clarenc argues that decisions about suspensions are mainly dependent on the discretionary will of the state concerned, which is in the best position to appreciate whether it can fulfil its international obligations. Instead of viewing it as pathologic, undermining the principle of *pacta sunt servanda*, Clarenc considers

[1] See notably Charpentier, 'Engagements unilatéraux et engagements conventionnels: différences et convergences', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 367. French language textbooks also use it regularly. See, e.g., R. Rivier, *Droit international public* (2012); C. Santulli, *Droit du contentieux international* (2005).

[2] The International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations 2006', reprinted in 2 *ILC Yearbook* (2006) 380, Guideline 10 refer only to revocation.

[3] This is true, in particular, for the treatment of the Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Arts 59–62, 72. See, e.g., O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011); Capotorti, 'L'extinction et la suspension des traités', 134 *Recueil des Cours de l'Académie de Droit International de La Haye* (1971-III) 417.

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suspension to infuse an element of (necessary) flexibility, beneficial to the long-term life of international engagements, which remain in force even if they are temporarily put to sleep (or deactivated). Suspension – this Sleeping Beauty – is thus an alternative to termination and a less damaging option.

The book develops this argument in several steps.[4] The first part deals with the identification of the mechanism of suspension, while the second part analyses the legal regime applicable to it. In Part 1, Title 1 is devoted to what the author calls the 'extrinsic' or 'negative' identification of suspensions, which are distinguished from related mechanisms. Clarenc's fundamental proposition is that suspension is to be distinguished from other mechanisms by which a state can be liberated (provisionally or permanently) from its international obligations. Chapter 1 establishes why suspension is different from, first, the exemption of execution granted either by an international organization to its members or by the state creditor of an international obligation to the indebted state; second, the principle of *adimpleti non est adimplendum* and, lastly, the circumstances precluding wrongfulness in the law of state responsibility, such as necessity, distress and counter-measures. This chapter confirms that the law of treaties and the law of state responsibility co-exist as autonomous regimes, a conclusion already reached by the International Court of Justice (ICJ) in its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case.[5]

Chapter 2 of Title 1 distinguishes suspension from other mechanisms through which the international obligations are rendered inapplicable, including the operation of Article 103 of the Charter of the United Nations, which gives priority to obligations under the Charter over other treaty obligations; the adoption of a subsequent treaty modifying the obligations of the former (the rule of the *lex posterior*); the revision of the treaty and the state concerned creating a reservation. The author thus distinguishes suspension from the rules of conflict between international obligations and from the mechanisms through which states modulate their international obligations, either *a posteriori* or *a priori*.

In Chapter 2, Clarenc also underlines the similarity between suspension and termination/denunciation of, or withdrawal from, treaties; the essential common characteristic is that, through their operation, the engagement is no longer opposable to the state concerned, for the former on a temporary basis and for the latter permanently. This comparative approach leads the author to identify two essential elements of suspension – that is, its character as a unilateral act – and the effect resulting from it. This provisional conclusion is neither surprising nor revolutionary, but the meticulous analysis leading to it makes it difficult to challenge.

Title 2 of Part 1 – in particular, its Chapter 1 – refines this provisional conclusion. The analytical approach rests upon the fundamental premise that the unilateral engagement of states is the alpha and omega of international obligations; it is the source and the content of the obligation and the act through which the legal content becomes opposable to its author ('*l'énoncé légal devient opposable à son auteur*' [at 103]). Some unilateral engagements create a continuous obligation to perform (*obligation continue d'exécuter*). Suspension specifically 'releases the parties from this obligation to perform'. This consequence of suspension, referred to in Article 72 of the VCLT, is used by Clarenc as the criterion for defining the mechanism of suspension (at 132–133, 142–143).

Since the author considers suspension to be the mechanism that deactivates a continuous obligation to perform a certain action, this implies, a *contrario*, that treaties or unilateral acts

[4] Following the cartesian format often encountered in French doctoral theses (and the books based on them), each part is divided into titles, and each title is divided into chapters, whose numbering starts afresh with each title. There are thus four 'Chapter(s) 1', a format that makes referencing and reviewing somewhat cumbersome.

[5] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 38.

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whose effects are instantaneous or create no such continuous obligation are not amenable to suspension. This would be the case of boundary treaties or unilateral acts like notification and protestation. On the other hand, Clarenc analyses safeguard clauses in human rights treaties (such as Article 15 of the European Convention on Human Rights, which authorizes states to adopt derogatory measures in case of a state of urgency) or economic treaties (for example, the World Trade Organization's (WTO) Agreement on Safeguards) as mechanisms for suspension.[6]

Chapter 2 of Title 2 adopts a functional (or, rather, utilitarian approach) to suspension. It emphasizes various motivations that lead states to seek to be released from their obligations. Clarenc's thesis is that suspension is sought when the continuous compliance with an international obligation becomes too burdensome. Some authors would see these '*échappatoires à la rigueur de l'exécution*' (at 200) as attempts by states to evade their international obligations and, thus, violate international law. Clarenc, on the contrary, considers suspension to be a legitimate liberation from an obligation, on the account that 'execution becomes damaging to the interests' of the state (at 153). From this point of view, Clarenc's thesis does not lack originality and audacity.

Part 2 of the book is devoted to the legal regime governing suspensions. Title 1 reveals the author's fundamentally voluntarist approach of suspension (or, more generally, of international law). Clarenc considers suspension to be a prerogative of the state – a corollary to, and condition of, the state's engagement. Clarenc goes as far as to qualify suspension as a discretionary power of the state (at 246, 259), which leads her to consider that states could suspend engagements for reasons other than those recognized in the VCLT (at 239). In her view, this is part of the freedom of legal subjects to auto-determine their legal position ('*liberté légale du titulaire d'un engagement … qui permet une certaine auto-détermination par les sujets de leur situation juridique*' [at 305]). The limits posed to this prerogative are said to be merely formal (Chapter 3 of Title 1). The framework of regulation set out in the VCLT, whose motives and conditions for suspension are generally considered to be exhaustive and restrictive, fades away in this analysis. Suspension is no longer a mechanism strictly regulated but, rather, a discretionary power of the state, the validity of which is independent from compliance with objective conditions and whose effectiveness depends on the acceptance or rejection by other states (at 334–346). This is Clarenc's inter-subjective variation on the voluntarist theme.

Finally, Title 2 of Part 2 underlines and analyses the two main consequences that separate suspension from termination: on the one hand, the preservation of the suspended link ('*lien suspendu*' [at 351]) and, on the other hand, the possibility to revive the suspended obligation ('*la possibilité de la reprise*' [at 391]). Clarenc mentions here partial suspension, applicable in the case of separable obligations (Article 44 of the VCLT), which she considers to be another avatar of the discretionary power of the state to modulate the effects of suspension (at 361). In the final chapter devoted to the 'status of the suspending party', the author shows that this comprises rights and obligations established by the conventional regime or by international law, albeit more softly and imprecisely. Finally, reactivation is equally dependent on the will of the state (at 416).

This, in a nutshell, is the summary of a careful and ambitious study of a topic that demands the systematic analysis offered by Nathalie Clarenc. However, is her analysis convincing? The ability to convince is a quality dependent on extrinsic conditions, such as the doctrinal predisposition of the reader, as well as on the intrinsic quality of the study. The present reviewer does not share the fervent voluntarism of the author, which leads her to conclude that state obligations are not only dependent on their initial will to subscribe to them (the original engagement) but

[6] Agreement on Safeguards 1994, 1869 UNTS 154.

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also on their continuous will to apply it ('*la volonté d'appliquer*' [at 426–427]). Her voluntarist approach, applied to the topic of suspension, raises several important questions. What is left of the *pacta sunt servanda* if the state has to show a continuous will to apply its obligations by not activating its 'discretionary power to suspend'? What is left of the stability of conventions if the engagement is thus permanently dependent on the will of the state?

Beyond this doctrinal schism, the present reviewer would question some of the arguments developed on the basis of Clarenc's voluntarist premise. In particular, she does at times rely on fairly particular cases to advance rather general conclusions. To illustrate, many of the examples given by Clarenc throughout her study are based on practice under bilateral treaties or on the safeguard clauses found in plurilateral treaties. Very few examples are based on the general, recognized grounds justifying suspension under Articles 60, 61 and 62 of the VCLT. Even assuming that the invocation of safeguard clauses can be qualified as a suspension,[7] it is difficult to ignore the fact that these clauses are found in regimes whose institutional and substantive particularities are too important to allow for generalization. In regard to the suspension of unilateral engagements, the study is mostly a doctrinal analysis, rather removed from practice.[8] It also omits a discussion on the suspension of treaties under provisional application, which is a highly controversial, but widespread, mechanism on the front page of newspapers today and on the agenda of the ILC.

Clarenc's jurisprudential references are also scarce. Leaving aside the decisions of the WTO's Appellate Body, the European Court of Human Rights and the Court of Justice of the European Union – all of which concern a particular conventional framework – she primarily refers to the *Gabčíkovo-Nagymaros*, *Icelandic Fisheries* and *Jurisdiction of the ICAO Council* judgments of the ICJ.[9] No mention is made of the 2011 decision of the ICJ in the *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)* case or the partial award of 30 June 2016 in the *Arbitration between the Republic of Croatia and the Republic of Slovenia*.[10] Both of these cases discuss in some detail whether and how states can suspend substantive and jurisdictional obligations. They put into doubt some of the conclusions reached by the author, like those relating to the separate existence of the principle of *adimpleti non est adimplendum*, which Clarenc appears to take for granted, or the possibility of suspending jurisdictional engagements. Both decisions strongly support the view that the grounds of suspension are exhaustively set out in the VCLT. The 2016 award in the *Croatia–Slovenia* case clearly shows that a court or tribunal that has jurisdiction to assess the validity of a suspension is competent to annul or invalidate the

[7] Without being a specialist of these conventional regimes, the present reviewer is, *a priori*, not convinced. In human rights treaties, safeguard clauses in cases of emergency are generally presented as measures of derogation, which allow states temporarily to modify the substance of some of their obligations rather than to release them from their obligation. The safeguard regime of the World Trade Organization regime is more often, if not always, presented as an example of institutionalized counter-measures.

[8] E.g., the author considers that the unilateral acts that are suspendable by nature are mainly recognition and promises (at 117–120). Renunciation and notification, by contrast, cannot be suspended because they create no legal obligation (at 111, 115). But practice furnishes examples of notifications and renunciation that comprise a claim of suspension (for instance, notifications to the Commission on the Limits of the Continental Shelf). It would have been interesting to study these claims.

[9] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974) 3; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, 18 August 1972, ICJ Reports (1972) 46.

[10] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Reports (2011) 644; *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Partial Award, 30 June 2016, available at https://pca-cpa.org/en/cases/3/. The decision was rendered after the doctoral dissertation was defended but before the book was published.

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state's unilateral act. This stands in contrast to Clarenc's position, pursuant to which the judge has merely a power to consider suspension as an unlawful act and to engage the state's responsibility (at 346). It would have been interesting to see how Clarenc would have incorporated this wind of objectivism into her fundamentally voluntarist approach to suspension.

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Florian Couveinhes Matsumoto and Raphaëlle Nollez-Goldbach (eds). ***Les motifs non-juridiques des jugements internationaux***. Paris: Pedone, 2016. Pp. 213. €30. ISBN: 9782233000081 69.

The traditional view that regards judicial decisions as the outcome of a deductive process based on the application of the law to a set of facts in a syllogistic way has long been challenged; it offers, at best, only a partial explanation of the process by which judges reach their decisions. Contemporary theoretical approaches to the study of judicial reasoning have called attention to other factors, such as the indeterminacy of law and the political role of judges. These approaches stress the fact that judicial decisions reflect the moral and ideological choices of its author. They regard judicial reasoning as the instrument by which a judge seeks to persuade the parties and all those concerned about the correctness of its position. By showing the limits of a strict formalist analysis, these approaches have contributed to shed light on the fact that a full understanding of a judge's position requires taking into account both the legal and non-legal considerations.

Until recently, the interest of legal scholars, and particularly of legal theorists, towards the reasoning of judicial decisions was primarily confined to the decisions of domestic courts. While judgments and advisory opinions of international courts, and particularly of the International Court of Justice, are routinely scrutinized and dissected in a myriad of comments and publications, the international legal literature has traditionally analysed the impact of international decisions on the development of the law or on the conduct of the parties. Less attention has been paid to studying the ways in which international courts and tribunals approach the problem of justifying their decisions. There are signs, however, of a new trend in this respect, with an increasing number of publications entirely devoted to this subject.[1] The growing 'jurisdictionalization' of the international society and the increasing awareness of the role of international courts and tribunals appear to be the main reasons explaining this interest in delving deeper into the argumentative strategy employed by international judges to justify their decisions. In this perspective, judicial reasoning is increasingly regarded as being of crucial importance to the overall legitimacy of international courts, including their democratic legitimacy.[2]

[1] See, in particular, H. Ruiz Fabri and J.-M. Sorel (eds), *La motivation des décisions des juridictions internationales* (2008); G.-A. Alvarez and W.M. Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (2008).

[2] A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), at 111.

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