THE "CHANGED CIRCUMSTANCES" CLAUSE
AFTER THE UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES (1968-69)

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The obligation of a state to perform under a treaty, after a substantial change of circumstances has occurred, is a question which has provided material for generations of international legal scholars. Many have expressed concern over the acceptability of *rebus sic stantibus*, as the doctrine is commonly called, as a recognized rule of international law. Many treatises and monographs have dealt with this problem, but no final resolution has yet been achieved.

The problem is how to define the principle, *rebus sic stantibus*, in a manner which will provide adequate safeguards against its arbitrary application; at the same time, it should not be restricted to such an extent as to render it ineffective. Even the commentary of the Interna-

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tional Law Commission (ILC) to article 59 of the Draft Articles on the Law of Treaties expresses doubt as to the legal basis attaching to the doctrine of *rebus sic stantibus*. This impression is strengthened by a careful scrutiny of the debates at the Conference, whether in the Committee of the Whole or in the Plenary meetings. The final article on "Fundamental Change of Circumstances" reflects a vague, yet strong feeling on the part of the jurists and the states that something like a "safety-valve" was needed in the case of a treaty which becomes too burdensome for one party and the other party is unwilling to consent to termination or suspension.

The present brief study aims at examining the question of how far the "Changed Circumstances" clause of the Vienna Convention on the Law of Treaties is in line with traditional approaches to the problem. It is hoped that this will contribute to a clarification of its legal and political aspects and show whether the problem has been brought to a solution sufficient for the purposes of international practice.

I. HISTORICAL DEVELOPMENT

The changed circumstances clause has its historical roots in Roman

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4*Id.* at 78.
7Commentary to the Draft Articles, *supra* note 3, at 78.
9Under the provisions of Article 84, the Vienna Convention will enter into force thirty days after the deposit of the thirty-fifth instrument of ratification or accession. So far the following states have ratified: Jamaica on July 28, 1970, 63 *Dep't State Bull.* 316 (1970); Yugoslavia on August 27, 1970, 63 *Dep't State Bull.* 403 (1970); Barbados on June 24, 1971 and the United Kingdom on June 25, 1971, 65 *Dep't State Bull.* 188 (1971); New Zealand on August 4, 1971, 65 *Dep't State Bull.* 272 (1971); Morocco (with declarations) on September 26, 1972, 67 *Dep't State Bull.* 743 (1972); Argentina (with reservations and declaration) on December 5, 1972, 68 *Dep't State Bull.* 216 (1973); and the Philippines on November 15, 1972, 68 *Dep't State Bull.* 247 (1973). In addition the following states have deposited accessions: Syria (with reservations) on October 2, 1970, 63 *Dep't State Bull.* 664 (1970); Canada (with a declaration) on October 14, 1970, 63 *Dep't State Bull.* 712 (1970); Tunisia on June 23, 1971, 65 *Dep't State Bull.* 188 (1971); Niger on October 27, 1971, 65 *Dep't State Bull.* 691 (1971); Central African Republic on December 10, 1971, 66 *Dep't State Bull.* 219 (1972); Paraguay on February 3, 1972, 66 *Dep't State Bull.* 614 (1972); Lesotho on March 3, 1972, 66 *Dep't State Bull.* 777 (1972); Spain on May 16, 1972, 67 *Dep't State Bull.* 75 (1972); and Mauritius on January 18, 1973, 68 *Dep't State Bull.* 411 (1973). The Convention was signed by the United States on April 24, 1970. It was transmitted by the President to the Senate for its advice and consent on November 22, 1971, 65 *Dep't State Bull.* 684 (1971). At the present time it has not been ratified.
law⁹ and was not unknown to medieval scholars, among them Thomas Aquinas.¹⁰ In the 19th century the clause passed through a period of remarkable influence which culminated in the Italian and German interpretations of the doctrine. These countries availed themselves of the tempting possibilities of a not too scrupulous application of the clause on their way to national unity, thus enabling themselves to excuse acts the legality of which would otherwise have been doubtful. However, the doctrine suffered a serious setback with the rise of the positivist school of law.

Grotius is sometimes regarded as the first to take a stand against the theory, said to be inherent in all treaties, that an agreement would come to an end if the accompanying circumstances change. Although one passage in his famous treaties, "De iure belli ac pacis," suggests such an interpretation,¹¹ other passages stress the need for an equitable construction of a treaty.¹² Grotius thought that no one should be obligated to carry out an obligation if in good faith performance would be onerous and burdensome. While it had to be regarded as a breach of the treaty if a promise was not fulfilled and the conditions which existed at the making of the treaty still prevailed, a change in circumstances gave the right to reconsider the extent of the obligation.

This idea came to a clear expression in some of the most important codifications of civil law during the age of enlightenment. The Bavarian Landrecht of 1756 presupposed that all agreements tacitly contained the clause rebus sic stantibus.¹³ The Prussian Allgemeines Landrecht of 1793 referred to an unforeseen change as a ground for withdrawal from any treaty not yet executed if the realization of its object and purpose had become impossible.¹⁴ The Austrian Allgemeines Buergerliches Gesetzbuch of 1811 made the clause a fundamental principal of law.¹⁵

With the decline of the natural law school in the nineteenth century, the supporters of the clause were increasingly put in a defensive position.

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²Curiously enough, it was the Ukrainian delegate, Mr. Lukashuk, who drew attention to this theologian as a supporter of the doctrine of rebus sic stantibus. U.N. Doc. A/CONF. 39/C.1/SR.63 at 368, (1968).
³GROTIUS, DE IURE BELLI AC PACIS, Book II, chap. 16, § 25, no. 2: "The question also is commonly raised, whether promises contain in themselves the tacit condition, if matters remain in their present state. To this question a negative answer must be given, unless it is perfectly clear that the present state of affairs was included in that sole reason of which we made mention."
⁴Id. at § 27, nos. 1-3.
⁵Bavarian LANDRECHT, IV, chap. 15, § 12 (1756).
⁶Allgemeines LANDRECHT, I, chap. 5, § 378 (1793).
⁷ALLGEMEINES BÜRGERLICHES GESETZBUCH § 901-976 (1811) (Austria).
Among the first to lead an attack against the principle was the famous jurist Thibaut, who rejected the clause on politico-legal grounds. He argued that *rebus sic stantibus* had often been "wrongly construed and badly applied." Others followed suit, and as a consequence of this doctrinal development, the Saxonian Civil Code of 1865 expressly rejected the principle of "changed circumstances." Further, the German *Buergerliches Gesetzbuck* of 1900 does not speak of the clause as a general principle of law.

For these reasons, in 1931 Schneider expressed the opinion that:

In our times a survey of the legislation and the jurisprudence of the courts in the various countries shows a clear rejection of the clause *rebus sic stantibus* as a general legal institution. . . . A historical review comes to the result that the clause, according to general agreement a legal institution in earlier times, has ceased to exist.

While the traditional concept of the clause as being inherent in all treaties was based on constructions of natural law, modern empirical science, as expressed by Schneider, had come to regard the principle as unfounded and a mere legal fiction.

If this was true for municipal law at the height of positivism, international legal doctrine never went along with it.

At the same time when Schneider was announcing the end of the "changed circumstances" clause as a legal reality, another international legal scholar, Reut-Nicolussi, expressed the opinion that international practice gave unquestioned evidence of the fact:

that every state, by international customary law, follows another rule, i.e. that treaties are binding upon the parties only as long as the reasons and interests which prompted their conclusion, have not themselves disappeared.

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16A. THIBAUT, SYSTEM DES PANDEKTKENRECHTES § 201 (1814).
17"No one is permitted unilaterally to withdraw from an agreement and to refuse to carry out its performance because . . . of a change of the circumstances under which the agreement has been concluded." (author's translation).
18See H. SCHNEIDER, Die Voelkerrechtliche Clausula Rebus Sic Stantibus und Article 19 der Voelkerbundsatzung, in INTERNATIONAL LAW QUESTIONS, A COLLECTION OF PRESENTATIONS AND STUDIES 10 (1931).
19*Id.* at 10-12 (author's translation).
20This was the case for legal doctrine rather than the law itself. The old codes which were not revised under the influence of positivism, still served as the basis for the decisions of the courts. Thus, an unbroken line of precedents was preserved which was distorted very little by the academic struggles of the various schools of legal thought. It should be observed further that positivism was only of transitory effect on German private law thinking where it had been most deeply rooted. After World War II, the "changed circumstances" clause experienced a revival due to the "breakdown of legal positivism". See generally WIEACKER, HISTORY OF PRIVATE LAW IN MODERN TIMES 16 (1952).
21Reut-Nicolussi, Zur Problematik der Heiligkeit der Vertraege: Eine Studie ueber die Clausula
Numerous cases prove the correctness of this assertion: the annexation of Bosnia and Herzegovina by Austria-Hungary in 1908; the denunciation by Austria of its Concordate with the Holy See in 1870; the Free Zones Case; the Nationality Decree Case; the denunciation of the Sino-Belgian Treaty of 1865; and the denunciation of the Anglo-Egyptian Treaty of Alliance in 1951 have long enjoyed wide publicity. Others: like the termination of the United States-Brazil trade agreement; the termination of the United States-France reciprocal commercial agreement of 1898; the suspension of the payment of the French war debts in 1932; the suspension of the Permanent Court’s compulsory jurisdiction as to war events by various countries in 1939; and the suspension of the International Load Line Convention of 1930 by the United States have gained wider attention recently.

Some cases such as the denunciation by Austria and Prussia in 1864 of the Protocol of London of May 8, 1852 settling the question of the relationship between Denmark and Schleswig-Holstein, and the Belgrade Conference of 1948 declaring the Danube Convention of 1921 inapplicable because of the national and social changes in Eastern Europe, have met with little interest. The latter example is particularly useful as a demonstration of the communist approach to the doctrine of “changed circumstances.”

Rebus Sic Stantibus im Voelkerrecht, 7 Schriften des Instituts fuer Sozialforschung in den Alpenlaendern an der Universitaet Innsbruck 90 (1931).

For an account of this incident, see Wurmbrand, Die Rechtliche Stellung Bosniens und Herzegovina, 12 Wiener Staatswissenschaftliche Studien (1915).

Collectio Laciensis (Acta et Decreta Sacrorum Conciliorum 1721 (1890). See also C. Hill, The Doctrine of “Rebus Sic Stantibus” in International Law 66 (University of Missouri Studies, Vol. ix, 1934); and Wallace, The Papacy and European Diplomacy 1863-1874 (1948); Schwelb, supra note 2, at 44.


Mr. Meguid, the representative of the United Arab Republic referred to this as an example of the valid application of the principle of “changed circumstances”. U.N. Doc. A/CONF. 39/C. 1/SR.64 at 376 (1968).

See also Statement by the Representative of Albania, U.N. Doc. A/PV 1691 1968; Schwelb, supra note 2, at 44.


Hackworth Digest of International Law 429 (1943).


Proclamation by President Roosevelt, 6 Fed. Reg. 3999 (1941).

Lissitzyn, supra note 2, at 902.

Schmidt, Ueber die Voelkerrechtliche Clausula Rebus Sic Stantibus sowie einige verwandte Voelkerrechtssnormen 47 (1907).


This is reflected in the statement by Mr. Kovalev, the Soviet delegate, at the Vienna Confer-
All these cases have one thing in common; the unilateral invocation by one or more states of the clause *rebus sic stantibus*. This principle of law was invoked on the grounds of circumstances which were allegedly changed to such an extent as to justify its application. In most of these cases, however, the other party (or parties) insisted that such unilateral action was illegal and demanded some procedural safeguard to ascertain in a more objective manner whether the claims, raised by the other side were well founded.

In this regard the Pontus Case is the *cause célèbre*. Articles 11, 13, and 14 of the Peace Treaty of Paris of 1856 and a special agreement concluded between Russia and the Ottoman Empire limited the number of war vessels and prohibited the construction of marine bases in the Black Sea area. In a note dated October 31, 1870, and transmitted to the signatories of the Paris Peace Treaty, Russia informed them that she would not consider herself bound by these restrictive provisions. She invoked as a ground for this unilateral action the change in circumstances which had occurred since 1856. A conference was held in London in early 1871. In reviewing the correctness of the Russian step, the Conference came to the following conclusion:

> It is an essential principle of the law of nations that no power can free itself from the engagements of a treaty, nor modify its terms, except with the assent of the contracting parties by means of a friendly understanding.\(^{39}\)

This formulation seems to contain two somewhat contradictory notions. First, it implicitly acknowledges (at least) the possibility that changed circumstances may necessitate or make desirable a change in the treaty concerned, whether by complete termination or by the modification of its terms. On the other hand, it also asserts that any such termination or modification is dependent upon the consent of the other parties. Yet, requiring a state which has been harmed by a change of circumstances to wait for the other party's consent before performance can cease is clearly inconsistent with the principle contained in the clause. Such a change is an objective event and should be wholly independent of the will of any state. If a change in circumstances materializes, the principle should apply even if one or more parties to the treaty do not "consent." Certainly agreement among all parties in a case involving the clause *rebus sic stantibus* is desirable, but such an agreement should be re-

\(^{38}\)G. Martens, *Nouveau Recueil Général de Traités* XV 770.

stricted to the ascertainment of whether or not a change in circumstances exists and not to the legal consequences arising from such a change. Thus, the correct meaning of the paragraph quoted from the Annex to the 1871 Protocol seems to be that no state is permitted to withdraw unilaterally from a treaty on the grounds of changed circumstances unless it has previously sought the agreement of the other parties.\(^\text{46}\) Mr. Engel, the Danish representative at the Vienna Conference on the Law of Treaties spoke of this when he mentioned the danger to the security of treaties that would result from the adoption of the principle of *rebus sic stantibus* without a requirement of compulsory adjudication of conflicts arising from its application:

Since . . . the contracting parties, were likely to assess circumstances differently and to draw different legal conclusions from the facts, it was essential to insure that a state should not be entitled to withdraw from a treaty under article 59 unless it was prepared to submit any dispute on the point to the decision of an arbitral or judicial body.\(^\text{41}\)

Actually the powers present at the London Conference of 1871 regarded it as the duty of a state availing itself of the advantages of *rebus sic stantibus* to inform the other contracting parties and to seek an amicable solution prior to invocation of the doctrine. This appears from the phrase declaring that such procedure was "an essential principle of the law of nations."

At the first Session of the Law of Treaties Conference held in 1968, Mr. Bindschedler, the Swiss representative, made a strong point in the same direction. He stated that the majority of scholars were in agreement that a fundamental change of circumstances authorized the affected party only to demand negotiations for the purpose of terminating or revising the treaty. Further, he asserted that not a single case could be cited of unilateral application of the principle of "changed circumstances."\(^\text{42}\)

The correctness of this assertion was strongly contested by other delegations. Mr. Kovalev of the Soviet Union plainly rejected the views of the Swiss delegate on the impossibility of terminating a treaty unilaterally on the ground of fundamental change of circumstances. This position, Mr. Kovalev said, was "confirmed by neither practice nor history."\(^\text{43}\) A request for the revision of a treaty\(^\text{44}\) should be clearly


\(^{44}\) In this connection various delegations referred to Article 19 of the League of Nations Covenant
distinguished from a change of circumstances and would only be invoked when the parties disagreed.

Thus, the clause conceived corresponds to the notion that the legal consequences of change circumstances take effect independently of the desires of the other parties to the treaty.\textsuperscript{45} This view is also confirmed by the ILC which observed, in paragraph six of its commentary to article 59 of the draft, that there might remain

a Residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in this case that the \textit{rebus sic stantibus} doctrine could serve a purpose as \textit{a lever to induce a spirit of compromise in the other party}.\textsuperscript{46}

A survey of state practice and doctrine of the last hundred years and of the position taken by the delegations at the Law of Treaties Conference shows an overwhelming majority in favor of the “changed circumstances” clause as part of international law.\textsuperscript{47} However, before the conclusion of the 1969 Convention, the legal definition of the rule was less easy to ascertain. Until then, it could not be regarded as part of international treaty law, unless one deduces its nature from the London Protocol of 1871. The latter, however, was the embodiment, in a multilateral treaty among the great European Powers, of a procedural safeguard against a too liberal application of the clause. The London Protocol should be regarded as an implied recognition of the existence of the “changed circumstances” principle in general international law rather than its codification and transformation into treaty law, since any intention of the Powers to the latter effect was clearing missing.

The clause, to use the terminology of the Statute of the International Court of Justice, was regarded either as a norm of international customary law or as a general principle of law recognized by the various states.

\footnote{\textsuperscript{45}See Lissitzyn, \textit{supra} note 2, at 902-11; Kearney and Dalton, \textit{supra} note 2, at 542.}
\footnote{\textsuperscript{46}Commentary to the Draft Articles, \textit{supra} note 3, at 78 [emphasis added].}
\footnote{\textsuperscript{47}A number of statements on this point were made during the debates of the Committee of the Whole, \textit{supra} note 5. See, e.g., the statement of Mr. Lukashuk of the Ukrainian S.S.R., U.N. Doc. A/CONF. 39/C.1/SR. 63 at 368 (1968); and the statement of Sir Francis Vallat, U.N. Doc. A/CONF. 39/C.1/SR. 63 at 369 (1968); and the statement of Mr. Harry from Australia, U.N. Doc. A/CONF. 39/C.1/SR.64 (1968).}
However, both the Commentary of the ILC and the statements by the various delegations at the Vienna Conference indicated that a clear ascertainment of its character was either not considered to be of great use or seemed too difficult to undertake. The ILC commentary speaks of the existence in international law of the principle of changed circumstances and cites its recognition by "many systems of municipal law." The commentary also refers to various international cases in which, "the evidence of the principle in customary law" was considerable. This formulation conveys the impression that the ILC was glad to base the clause on customary precedent as well as on the less precise idea of rebus sic stantibus as a principle of law in order to broaden the platform of consent to the article among the states.

At the Conference, Mr. Phan Van Thinh, representative of South Vietnam, considered the "changed circumstances" clause to be a principle equalling pacta sunt servanda in that both are based on the idea of justice and on an equitable balance of obligations. Mr. Stuyt from the Netherlands, while considering the question primarily a practical problem not to be solved merely by reference to the logical principal of good faith, regarded the clause as an exception to pacta sunt servanda, since the latter becomes questionable after a fundamental change of circumstances.

According to the representative from Cyprus, Mr. Jacovides, the "changed circumstances" clause had something to do with equity. He reasoned that a treaty concluded under different conditions might become, after the change had occurred, an undue burden on one party. The Cuban delegate, Mr. Alvarez Tabio, seconded this and spoke of the clause as a "principle, based on grounds of equity and justice." Mr. Avakov from Belorussia called it "a very ancient principle." Mr. Kovalev, the Soviet delegate, considered rebus sic stantibus a useful complementation of pacta sunt servanda, which if rigidly applied under changed circumstances, might introduce an element of injustice into the contractual relations between states. Finally, Mr. Harry from Australia said that although there was justification for maintaining that international law recognized a doctrine of rebus sic stantibus, the "precise
conditions under which that doctrine applied could not be regarded to be settled.” In his opinion there was an absence of a sufficiently uniform custom for the establishment of a rule of customary international law.

The Swiss representative, Mr. Bindschedler, said his delegation agreed that the rule relating to fundamental change of circumstances formed part of contemporary general international law i.e., something more than a mere principle. He discussed it at length with reference to various international cases. Mr. Tabibi, the representative from Afghanistan, took the principle of rebus sic stantibus to have been long accepted in international law and referred to the Free Zones case. According to Mr. Al-Rawi, delegate from Iraq, the “changed circumstances” clause was, not only recognized by the internal law of most countries and accepted by the overwhelming majority of authors, but had existed in international state practice for centuries.

Apparent as these differences in the evaluation of the precise legal character of the clause were, neither the delegations at the Vienna Conference nor Sir Humphrey Waldock, Special Rapporteur of the ILC, took pains to clarify this point. This lack of scholarly interest is only partly explained by the fact that an international conference (even one for the codification of international law with many of the most brilliant international scholars present) is not a law seminar, but an arena for competing political interests. A further explanation is that the main purpose of the Conference was to find acceptable legal formulations for the time to come and not to make elaborate inquiries into the past. The law, whatever it may have been, was not so much of interest as was the problem of how it was to be restated to offer a sound basis for the solution or decision of future cases.

II. Examination of Article 62

Compared with the rather vague concept of rebus sic stantibus in the international law of the past, Article 62 of the Vienna Convention on the Law of Treaties gives detailed rules for the application of the principle in the future. It provides:

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with

54 Id. at 372.
56 Supra note 24.
58 Supra note 8.
regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or
(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

This text corresponds almost exactly to that of the ILC draft. Apart from a minor drafting improvement adopted at the second session of the Conference, the only important change made was the addition of paragraph 3 in the course of the first session. The reason for this lack of change was the widely held conviction at the Conference (carefully nourished by the ILC) that the ILC draft was a well balanced compromise. Further, it was felt that any substantial alternation could only lead to disagreement.

An analysis of the text permits the following observations.

(a) The principle that a change of circumstances may be a ground for a change of the parties' obligations is expressly recognized by the Convention; while at the same time, the principle has been made subject to various restrictions.

The exceptional character of the rule is emphasized by the negative form in which the article is cast. It does not state a general rule that

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3 Although Sir Humphrey Waldock, the Special Rapporteur of the ILC for the Law of Treaties, acted as Expert Consultant of the Conference and of its First Committee, various members of the ILC served in the delegations of their native countries. It was widely rumored at the Conference that the ILC members had agreed to defend "their" text as much as possible.
4 This was done in the other provisions of Part V, section 3. See the official text supra note 8.
certain changes in the circumstances existing after the conclusion of a treaty may be invoked as a ground for termination or withdrawal and then restrict that rule by various exceptions. Instead it says that a change of circumstances does not constitute a legal ground for ending performance unless various conditions are fulfilled. This is consistent with the difficulties the principle has met for decades both in doctrine and in state practice, as well as with the doubts expressed in this connection by many delegations at the Conference.

The Swiss delegate, Mr. Bindschedler, claimed that it was essential to make the rule as restrictive as possible in order to provide safeguards against abuses. Mr. Osiecki expressed the concern of the Polish delegation about the insertion of the “changed circumstances” principle into the Convention. Once such a possibility was provided, he said, it was open to serious abuse. This concern was shared by many countries.

Some of the delegations, however, would have favored a more relaxed approach to the “changed circumstances” clause. The Venezuelan delegation presented an amendment to give the rule a positive instead of a negative form. In introducing this amendment, Mr. Carmona argued that the text of the article, as it stood, disrupted the balance between the status quo and the need to take changing situations into account. As *rebus sic stantibus* was an independent rule and not just a derivative of *pacta sunt servanda*, it would be logical to frame the clause in a positive form.

In the discussion, the Venezuelan amendment found the support of Mr. Alvarez Tabio of Cuba who called it an improvement.

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**Footnotes:**

41According to the Commentary to the Draft Articles, “Most jurists . . . enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked. . . .” *Supra* note 3, at 76.

42Mr. Lukashuk of the Ukrainian S.S.R. pointed to the extreme caution of practice and the reluctance of governments to recognize the doctrine and, thus, create precedents. In the past, governments have been afraid of endangering the security of treaties and the principle of *pacta sunt servanda*. U.N. Doc. A/CONF. 39/C.1/SR.63 at 368 (1968).

43Id.


47“*At the present stage of the development of international law, it could not be claimed that the status quo should be maintained without taking into account the development of international relations, since if it were, international law would become so petrified that there would be a risk of serious explosions, with disastrous consequences for the integrity of the treaty.*” U.N. Doc. A/CONF. 39/C.1/SR.63 at 366 (1968).
of the text. Mr. Alcivar-Castillo felt that the intention of the ILC to continue to regard the principle of changed circumstances as a mere exception to the *pacta sunt servanda* rule was "indefensible at the present stage of the evolution of international law." However, the discussion indicated that the Venezuelan amendment, if voted on, would not have been approved. It was withdrawn and the text remained unchanged.

It should be noted that the application of the principle is restricted to cases which satisfy the two requirements of subsections (a) and (b) of paragraph one. Only a change in circumstances constituting an essential basis of the consent of the parties is counted in applying the rule. In addition, the change of circumstances must result in a radical transformation of the extent of the obligations.

These formulations were the subject of some criticism at the Conference. The representative of the Netherlands, Mr. Stuyt, called draft article 59 the only one that contained a number of ambiguous terms. The employment of expressions like "essential basis" and "radically" in a legislative text constituted a danger arising from the uncertainty of those terms. This statement was possibly influenced by Lissitzyn who said that the article "results in a piling up of subjectivities rather than their diminution" and that the ILC's treatment of the problem served "to obscure and confuse the issues." This criticism is only partly correct. The phrase "to transform the extent of obligations" in paragraph 1(b) is misleading. A change of circumstances or an alteration of facts has no direct effect in law on the extent of the obligations. It can, however, have the factual result of making a party's burden of fulfilling its obligations inequitably heavy. Here the "changed circumstances" rule relieves the party from the unjust burden by changing the extent of the obligation. It is the legal principle of *rebus sic stantibus* that works the legal effect, not the change of circumstances as such. Although this

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13*Id.* at 375-6.
15See Lissitzyn, *supra* note 2, at 916-7 and Schwelb, *supra* note 2, at 54 where the text of paragraph 1 is censured for being flawed. If read literally, the provision implies that a change which was foreseen may be invoked as a ground for termination or withdrawal. Strangely enough, no attempt was made at the Conference to improve the provision on this point. This failure was probably due to the preference of the majority for the negative formula. However, it would have easily possible to correct the flaw by taking out the phrase "and which was not foreseen by the parties" from the first sentence and transforming it into a third exception to the negative rule ("... unless: (a) it was not foreseen by the parties; and ... ").
17Lissitzyn, *supra* note 2, at 915.
obscenity was felt, the Conference never came to grips with it. In fact, the phrase "to transform the extent of obligations" was the result of an effort by the Drafting Committee to clarify the text which had previously contained the term "scope" in the place of "extent." According to the Committee's chairman, Mr. Yasseen, "the meaning of that phrase should be sought in the French and the Spanish versions, namely, 'portee des obligations' and 'alcance de las obligaciones.'" While the author agrees with Mr. Yasseen that "extent" is closer to the meaning of "portee" and "alcance" than "scope", it might have been preferrable to substitute expressions that could be properly translated into English and the various other languages.

The criticism of the various other terms employed demonstrates the general fear of the application, in a legal context, of more general expressions which are often found within the positivist school of law. This is hardly a justifiable objection. The uncertainty of the meaning of "essential" and "radically" exists in ideology rather than in reality. The use of common sense, though seldom expressly stated in a legal rule, is always required. At the conference Mr. Waldock referred to an English judge who had stated in an analogous situation that "it was almost impossible by any nice combination of words to state a rule in advance of any possible controversy; all that could be done was to state as strictly as possible circumstances in which the rule might apply." 

(b) Treaties establishing boundaries are always exempted from the operation of the principle of "changed circumstances."

This is an exception from, rather than a restriction to the rule. Therefore, it is correctly stated in a separate paragraph, instead of being grouped together with the restrictions provided for in paragraph 1. This exception is not inherent in the principle and some members of the ILC suggested that the total exclusion of these treaties from the rule might go too far. A majority of the commission, however, thought it necessary to exempt treaties establishing boundaries. They feared that instead of being an instrument of peaceful change the clause might become a source of international friction and a danger to international peace.

At the Conference some delegations complained about the exclusion of a treaty establishing a boundary from the benefits of the article. The

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59 In fact, the problem involves the question of the natura rerum and can be traced back to the traditional dispute in legal philosophy between realism and nominalism. Although of great importance in doctrine, it is of little usefulness in practice, where a positivist or nominalist approach is impossible anyway.
61 Commentary to Draft Article 59, supra note 3, at 79.
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representative of Vietnam, Mr. Phan Van Thinh, said such treaties belonged in the category of the political and perpetual treaties and that an unrestricted operation of the "changed circumstances" rule was particularly important. The Bolivian delegate, Mr. Kempff Mercado, called for its application both to treaties establishing boundaries and to manifestly unjust peace treaties. Paragraph 2(a) was, in his opinion, devoid of all valid legal grounds. Mr. Tabibi from Afghanistan saw in the exception a weakening of the principle "in the name of the stability of treaties but to the detriment of the interests of nations and individuals." The exception was also criticized by Mr. Alcivar-Castillo from Ecuador who, while ranking the principle of rebus sic stantibus higher than even pacta sunt servanda, could not conceive how a certain category of treaties could be excluded from its application.

In this context, the question of the relationship between the "changed circumstances" clause and the principle of "self-determination," was raised. Was it compatible with the United Nations Charter, to unduly restrict the clause through the exception embodied in paragraph 2(a)? The ILC, in its commentary to Draft Article 59, took the view that "self-determination" as envisaged in the Charter, "was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article." This point was taken up at the Conference by the Afghan delegate, Mr. Tabibi, who feared for the practical application of the principle of self-determination if treaties establishing boundaries were excepted from the "changed circumstances" rule.

This offered an opportunity to the Soviet delegations to extemporize on the question of unequal treaties. The latter were illegal, said Mr. Avokov from Byelorussia; illegal treaties should be regarded as void, not only under the "changed circumstances" clause, but also as conflicting with ius cogens. Similarly, Mr. Khlestov, delegate of the USSR, assigned illegal and unequal treaties, not to Part V., section 3, but to section 2 (invalidity of treaties). The discussion was authoritatively brought to an end by Mr. Waldock who explained that the question of

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83 Id. at 370.
85 Id. at 375.
86 See U.N. CHARTER art. 1, para. 2 and art. 55.
87 Commentary to Draft Article 59, supra note 3, at 79.
90 Id. at 382.
illegality belonged to the scope of *ius cogens* and was treated in the draft by two separate articles.\(^9\)

While various delegations had criticized paragraph 2(a) for being an unwarranted exception to the rule of *rebus sic stantibus*, Mr. Kearney from the United States found the term “a treaty establishing a boundary” unduly restrictive. It failed to cover several important groups of agreements. While not “establishing” boundaries in the strict sense of fixing a new, disputed or uncertain boundary between two states,\(^9\) these treaties did establish territorial status or settled territorial disputes.\(^9\) His delegation presented an amendment to the effect that all treaties establishing territorial status be covered.\(^9\) For example, treaties in which the parties in the light of mutual concessions relating to such matters as the treatment of minority groups, customs regulations, or the joint development of resources, having agreed not to press their claims, recognized a status quo or created a regime which took the place of establishing a boundary. The United States proposal found the support of Japan,\(^9\) the United Kingdom,\(^9\) France,\(^9\) Italy,\(^9\) and particularly that of Switzerland. Mr. Bindschedler of the latter added various examples of treaties involving territorial status from Swiss practice.\(^9\)

The United States amendment met with serious objections from the part of both the socialist and the developing countries. The Cuban representative, Mr. Alvarez Tabio, called it “incompatible with the principle of self-determination and contrary to resolutions of the Gen-

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\(^9\)Draft Articles 50 and 61 *supra* note 3. These later became articles 53 and 64 of the Vienna Convention on the Law of Treaties, *supra* note 8. The concern of the Afghan delegate, however, was not totally unfounded. This resulted from the fact that neither the ILC or the Conference dared to approach the problem of *ius cogens* in other than a purely formalistic manner which gave it a definition that covers everything and nothing. It might be easier in the future to plead “changed circumstances” in a given case rather than establish the existence of a particular norm of *ius cogens*.

\(^9\)Although the ILC commentary to Draft Article 59 pointed out that the expression “treaty establishing a boundary” had been substituted by the Commission for “treaty fixing a boundary” in order to make the expression a broader one embracing treaties of cession as well as delimitation (*supra* note 3, at 79), the difference between the two expressions is not very great. True, “fixing” is more a technical term and “establishing” is more a legal term, but both are only two sides of the same coin, that of delimitation. The substitution of one for the other might have made the text more juridical, but it has hardly made it any broader.


\(^9\)Id.


eral Assembly condemning all manifestations of colonialism.\textsuperscript{100} Mr. Tabibi from Afghanistan said, without expressly mentioning the U.S. proposal, that he would vote against all amendments calculated to protect colonial and "inequitous" treaties.\textsuperscript{101} The delegate of Ecuador, Mr. Alcivar-Castillo, censured the proposed expression as tending to perpetuate existing colonial systems and territorial regimes established by force.\textsuperscript{102} The Soviet delegate, Mr. Kovalev, added that the formula chosen by the U.S. delegation was very vague and evoked the idea of a cease-fire or armistice line.\textsuperscript{103} Mr. Outrata from Czechoslovakia warned that the amendment, if not precise enough, might lead to unjustified interpretations. According to the Hungarian delegate, Mr. Maraszt, it was bound by its ambiguity to become the source of unnecessary disputes.\textsuperscript{104} A vote was taken at the end of the discussion and the United States proposal was rejected 43-14, with 28 abstentions.\textsuperscript{105} Though the decision was obviously influenced by political considerations, the sponsor can find consolation in the fact that the legal importance of paragraph 2(a) will be a limited one since territorial questions tend to call for a political rather than a legal solution.

(c) Paragraph 2(b) applies to the rule of rebus sic stantibus the general principle of law that a party cannot take advantage of its own wrong.

This principle was previously pronounced by the Permanent Court of International Justice in the Factory at Charzow Case.\textsuperscript{106} It is a logical restriction to the working of the clause rather than an exception formulated in positive law (as is the case with 2(a)). Its place should not have been in paragraph 2, but among the restrictions of paragraph 1. This structural flaw however will not impede the correct application of the rule in practice.

Some members of the ILC had favored a provision to the effect that a subjective change in the attitude or policy of a government should be strictly regarded as a self-caused changed. Therefore, it would never offer a ground for terminating or withdrawing from a treaty. Other members, while agreeing in principle, assumed that there could exist a radical change of policy by the government of a country which might

\textsuperscript{101}Id. at 373.
\textsuperscript{102}Id. at 376.
\textsuperscript{103}Id. at 374.
\textsuperscript{105}Id. at 382.
\textsuperscript{106}[1927] P.C.I.J., ser. A, No. 9, at 31. See also Commentary to the Draft Articles, supra note 3, at 79.
make the continuation of the performance of certain treaties (e.g., alliances) unacceptable from the point of view of both parties. The point was taken up by the United Kingdom in the Committee of the Whole. Sir Francis Vallat observed that it would have been preferable to state expressly the prohibition of invoking one's own political change in the context of rebus sic stantibus. In the absence of an explicit statement to this effect, he relied on the travaux preparatoires where he found "with satisfaction" that there had been general agreement in the Commission on this question.

This discussion provided the Soviet delegate, Mr. Kovalev, an opportunity to explain the communist version of "changed circumstances." He emphasized that the profound transformation brought about by a genuine social revolution or by decolonization meant that there was a fundamental change of the circumstances. In such a case, it would be a violation of the people's sovereignty to impose the application of the treaty. At the same time, a mere change in a country's internal policy was not a fundamental change of circumstances.

This is clearly an untenable position. What is the meaning of a "profound transformation?" What is the difference a "mere change in a country's internal policy" and a "genuine social revolution?" Since these expressions have a special meaning in marxist dialectic, part of the latter would have to be taken over into the international legal system in order to provide a meaningful application of the criteria laid down by Mr. Kovalev. Under such a rule, a political change in a member country of the Warsaw Pact would presumably have to be regarded as counter revolutionary and thus, not a valid legal ground for withdrawing from the Alliance. A corresponding change in a state party to NATO would constitute a "genuine social revolution" and justify the termination of its co-operation in the organization. This theory not only has no basis in contemporary international law, but is contrary to common sense and to the principle of peaceful co-existence between states with different political, social and economic structure which is continuously proclaimed by the communist countries.

(d) In certain cases, rebus sic stantibus may be invoked for the suspension of a treaty.

The article as drafted did not contain the present third paragraph. Waldock explained to the Committee of the Whole that the ILC had felt a fundamental change of circumstances might conflict with the idea.

107Id.
of mere suspension. To allow for suspension could work to the disadvan-
tage of either party. If the change was really fundamental, the termi-
nation of the contractual relationship is the only logical solution. There-
fore, the other party should not have the right to object by demanding
mere suspension. Also, the possibility of suspension might weaken the
strict philosophy of the whole article and give the impression that a
change of circumstances need not be quite so fundamental.

These considerations were not regarded as sufficiently persuasive by
the Conference. Both the Canadian and the Finnish delegations offered
amendments including a reference to suspension of a treaty. Mr. Wer-
shof, when introducing the Canadian amendment, said that the possibil-
ity of suspension could be excluded from the article only if the require-
ment of "fundamental change" was to be regarded as synonymous with
irreversible, permanent, or unalterable change. He did not think this
was justified. Depending upon the nature of the change, the proper effect
might be the suspension or limitation of performance as well as its
termination. He was seconded by Mr. Castren from Finland, who
said that in the view of his delegation the parties might resort to less
stringent measures than the termination of a treaty i.e., to its suspen-
sion. The amendments were supported by various delegations and
accepted by the Committee in a vote taken at the end of the discussion
of Draft Article 59.

While the Committee regarded the Canadian and the Finnish amend-
ments as identical in principle, their presentation indicated that the
sponsors had quite different concepts in mind. The Canadian idea of a
fundamental but transitory change of circumstances is logical and finds
some support in state practice. On the other hand, whether suspension
or termination of a treaty is the adequate measure must be judged from

In fact, it would always be to the detriment of the politically less powerful state or group of
states.


Chile, India and the U.S.S.R. in U.N. Doc. A/CONF. 39/C.1/SR.64 (1968); Greece, Hun-

The principle contained in these amendments was approved 31 to 26 with 28 abstentions. This
vote shows that the Committee had no strange feelings on this matter. See U.N. Doc. A/CONF.

The suspension of the International Load Line Convention of 1930 by the United States in
1941 (supra note 33) was justified on the grounds that the ongoing war in Europe had changed
the conditions under which it had been concluded. War can certainly be regarded as a transitory,
but nevertheless fundamental change of circumstances.
the facts (transitory or perpetual change) and should not depend on the will of the parties. How can a fundamental change of circumstances which constituted an essential basis for the consent of the parties and was clearly irreversible, entail only the suspension of the treaty? It seems illogical to give the parties the right to choose the legal consequences when the latter should be inferred from, and solely dependent upon, the actual situation.

Unfortunately, this formula was adopted by the Drafting Committee. Its chairman, Mr. Yasseen, justified the text of new paragraph 3 by stating it was the belief of his Committee, that the majority of delegations wished to have the choice of invoking the rule of *rebus sic stantibus* for either suspension or termination of a treaty. The Drafting Committee felt that a party might prefer in some circumstances a simple suspension to breaking a contractual relationship. Mere suspension, as the less stringent measure, offered a greater possibility for seeking a common solution to the difficulties caused by a fundamental change of circumstances. Thus, it was less likely to lead to friction and to endanger international peace. If the Drafting Committee was right in this view it failed to give sufficient explanation why it had discarded the considerations of the ILC which had led to the noninclusion of the possibility of suspension. It is possible that the addition of paragraph 3 will induce some states, not to invoke a temporary change for the provisional non-application of a treaty, but to " provisionally," suspend performance of burdensome treaty provisions. This might be done to find out the reaction of the other parties without going all the way to the final step of termination or withdrawal. Paragraph 3, by inducing states to a looser application of the clause of *rebus sic stantibus*, seems to defeat the purpose which had motivated the ILC to draft the article as restrictively as possible.

(c) The application of the "changed circumstances" rule does not depend upon the previous consent of the other party.

This does not mean, of course, that a state invoking the rule does not have to follow the procedure provided for in section 4 of Part V of the Vienna Convention. However, this procedure, except for disputes arising from cases allegedly involving *ius cogens*, does not include compulsory adjudication or arbitration. In any other case, the parties are only obliged to settle their dispute by some other peaceful means, including the procedure of conciliation as laid down in the Annex to the Convention. The chance that the parties to a dispute will thereby come to an agreed solution is limited to say the least.

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According to the commentary, the ILC was of the opinion that if one party were obdurate in opposing a change where a fundamental change of circumstances placed an undue burden on the other,

... the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the states concerned. In such a case, the dissatisfied state might ultimately be driven to take action outside the law.

True as this may be the ILC overlooked (or refused to notice) the fact that this development could go the other way round. To use the formulations employed by the ILC, the fact that a state unilaterally terminates or modifies a treaty, might very well impose a serious strain on the relations between the states concerned. Why should the dissatisfied state in such a case not be ultimately driven to take actions outside the law?

The alternatives posed by the ILC of either unilateral or agreed modification of the treaty serves to obscure rather than to clarify the question. The adequate procedure in case no agreement between the parties can be reached is, not unilateral action, but a third party decision. In this connection it should be recalled that according to article 36(3) of the Charter of the United Nations, "legal disputes should, as a general rule, be referred by the parties to the International Court of Justice."

Many delegations at the Conference made their acceptance of the rebus sic stantibus principle dependent upon the adoption of a satisfactory procedure for the settlement of disputes arising from the application of the same principle. In this and other connections the failure of the Conference to adopt a compulsory machinery for the final settlement of disputes arising from the nonperformance of a treaty must be regarded a considerable setback to the progressive development of international law.

III. Analysis and Criticism

The text of Draft Article 59, which corresponds essentially to the adopted text of article 62 of the Vienna Convention on the Law of

1Commentary to the Draft Articles, supra note 3, at 78.
3On the problem of a compulsory settlement of disputes and the Law of Treaties Conference see Kearney and Dalton, supra noe 2, at 545-555; Verdosta, supra note 2, at 699-777; and Fischer and Koeck, Oesterreichische Zeitschrift fuer Aussenpolitik, supra note 2, at 293-296.
Treaties, has been criticized by Lissitzyn. He felt it was ambiguous\textsuperscript{122} and that this resulted from a desire on the part of the ILC to establish an objective rule of law.\textsuperscript{123} Further, he felt that this distinction between objective and subjective rules, when applied to the problem of the legal effects of changes of circumstances became highly misleading and abstract.\textsuperscript{124} Lissitzyn would have preferred instead of this search for an objective rule, an expectation of the parties approach. Since “[t]he basis of much of the law of treaties . . . is the community policy of protecting and giving effect to reasonable expectations, and in particular to those stemming from agreements. . . . A treaty should not be applied in circumstances which are so different from those which the parties sought to provide that its application would be contrary to the parties’ shared expectations and would defeat their apparent objectives.”\textsuperscript{125} It is clear that seen in this way the question of “changed circumstances” becomes one of treaty interpretation.\textsuperscript{126}

As Lissitzyn himself concedes, “in most cases . . . the parties have no definite intentions or expectations with respect to unforeseen future situations.”\textsuperscript{127} This is correct. In fact, the author of this study has some difficulties imagining how parties in any case can foresee future situation which could, as soon as they have materialized, still be regarded as unforeseen. Is not this \textit{contradictio in se}, the foreseen “unforeseen future,” which is at the bottom of Lissitzyn’s theory of \textit{rebus sic stantibus} sufficient proof that the principle can be everything except a question of interpretation? Verdross\textsuperscript{128} pointed to this contradiction when he said, “[The problem of the changed circumstances clause] arises only if no answer can be given from the common intention appearing in the treaty, because of the occurrence of circumstances which the parties have not thought of when concluding the treaty.”\textsuperscript{129} Lissitzyn tries to save his theory by taking refuge in the notion of “reasonable expectations.” It would be the task of the interpreter to decide what those reasonable expectations would have been had the parties foreseen the new situation.\textsuperscript{130}

To base the working of the “changed circumstances” clause on the

\textsuperscript{122}Lissitzyn, \textit{supra} note 2, at 915.
\textsuperscript{123}\textit{Id.} at 913.
\textsuperscript{124}\textit{Id.} at 915.
\textsuperscript{125}\textit{Id.} at 915.
\textsuperscript{126}\textit{Id.} at 896.
\textsuperscript{127}\textit{Id.}
\textsuperscript{128}VERDROSS, \textit{supra} note 40, at 180.
\textsuperscript{129}Author’s translation.
\textsuperscript{130}Lissitzyn, \textit{supra} note 2, at 896.
“reasonable expectations” of the parties—expectations never had but solely imputed—seems to be an unnecessary detour in order to save, by introducing an objective element, the theory that rebus sic stantibus is merely a question of interpretation. As soon as it is recognized that the applicability of the clause is not dependent upon the original expectations of the parties, but on the general and objective standard of the “reasonable” state, the theory of rebus sic stantibus as one of interpretation should be discarded as a legal fiction devoid of any foundation in reality. The ILC is to be commended for the adoption of the objective standards contained in article 62.

If the article as it stands leaves still some doubts about the workability of the principle of “changed circumstances” in contemporary international law, this is due, not so much to any theoretical defect for which the drafters could be held responsible, but only to the inability or the unwillingness of the Conference to provide the procedural safeguards that alone would have made the article a useful instrument in the field of a treaty law. Such a procedure lacking, the principle presently offers no more than a possibility for the developing countries in connivance with the communist states, to threaten the Western countries with the unilateral termination of certain of their treaty relations. The principle of “changed circumstances” must today, therefore, be regarded as a device for political pressure rather than as a legal means of peaceful change.