TREATIES AND CHANGED CIRCUMSTANCES
(REBUS SIC STANTIBUS)*

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OF THE BOARD OF EDITORS

The problem of a state’s right to cease or limit its performance of the provisions of a treaty on the ground that circumstances have changed is an old one. After centuries of doctrinal discussion, the existence, scope and modalities of such a right remain controversial and perplexing. Its practical importance may at times be exaggerated; but nations dissatisfied with the status quo continue to regard it as a welcome device for escaping from burdensome treaties, while others fear it as a threat to stability and to their interests. Terminology has complicated the problem. Scholars, in efforts to define the asserted right and its scope or to provide a doctrinal basis for its modalities, have resorted to numerous technical labels drawn largely from municipal legal systems. Governments, in asserting the right, have variously employed or refrained from employing such terms as rebus sic stantibus. Terminological diversity has sometimes served to obscure substantive similarities and differences in practice and to divert the attention of scholars from underlying community interests and policies.

The Draft Articles on the Law of Treaties formulated by the International Law Commission in 1966¹ contain several provisions relevant to the problem here discussed, including Article 59, which explicitly seeks to delimit the scope of the right. Standing by themselves, these provisions are likely to exert significant influence on doctrine and practice, for they are the most authoritative relevant formulations so far produced in the international community. Their importance is enhanced by the expectation that they will serve as the basis of discussion at the forthcoming Diplomatic

* This article is in part based on my paper entitled “Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances,” presented at the Sixty-First Annual Meeting of the American Society of International Law in April, 1967, and printed in the 1967 Proceedings of the Society at 186; it incorporates some of the language of that paper. Valuable help was provided by Memorandum No. 6, September, 1966, “Fundamental Change of Circumstances,” prepared for the Study Group on the I.L.C. Draft Articles on the Law of Treaties, American Society of International Law, by the Study Group’s Rapporteur, Dr. Egon Schwebel. My conclusions, however, do not necessarily agree with those of Dr. Schwebel.

Conference on the Law of Treaties. Before analyzing and appraising these provisions, it is well to establish a framework by identifying the considerations and community policies underlying the problem and the perplexities to which it has given rise.

The basis of much of the law of treaties, as that of the law of contracts in municipal legal systems, is the community policy of protecting and giving effect to reasonable expectations, and in particular to those stemming from agreements. This policy underlies the primary function of interpretation—that of deciding whether the application of an agreement to a particular situation is or is not in accordance with the shared intentions, expectations and objectives of the parties. Therefore a treaty should not be applied in circumstances which are so different from those for which the parties sought to provide that its application would be contrary to the parties’ shared expectations and would defeat their apparent objectives.

Thus viewed, the problem of the effect of a change of circumstances on treaty relationships becomes in principle one of interpretation—of establishing the shared intentions and expectations of the parties. This approach is consistent with the goal of stability in treaty relationships and with the principle of *Pacta sunt servanda*. If it is conducive to stability to protect and effectuate the shared expectations of the parties to a treaty, is it not also conducive to stability *not* to apply the treaty when the parties did *not* expect it to be applied? A treaty is not breached if it is not applied in circumstances in which the parties did not intend or expect it to be applied. Indeed, to exact performance contrary to shared expectations not only could be regarded as inconsistent with good faith, but could also produce resentment which would undermine rather than promote stability.

The process of interpretation is not always easy or simple. To ascertain the specific shared intentions and expectations of the parties is often difficult. In most cases, furthermore, the parties have no definite intentions or expectations with respect to unforeseen future situations. Sometimes the language of an instrument is a formula devised to conceal a lack of genuine agreement. Even when the original shared intentions and expectations are ascertainable, they may have been superseded by new shared expectations developed in the course of application of the treaty. But methods are available for overcoming the difficulties inherent in the process of interpretation. If the original shared expectations of the parties have given way to new ones, it is proper to give effect to the latter. When evidence as to the parties’ intentions and expectations specifically related to the new situation is lacking or conflicting, the task of the interpreter is to decide what would have been the reasonable expectations of the parties had they foreseen the new situation. This decision must be made in the light of the major purposes and objectives of the treaty; it must facilitate rather than obstruct the attainment of these objectives. Other factors, in-

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cluding the interests and expectations of the larger community to which
the parties belong, may also be taken into account.3 There is no reason
why these methods of interpretation cannot or should not be used in solving
the problem of reasonable expectations with respect to performance of
treaties when circumstances change.

Some would say that when the specific genuinely shared intentions and
expectations of the parties are not ascertainable, the imputation of "rea-
sonable expectations" transforms the process of interpretation into one in
which the decision-makers give effect to their own judgments as to what the
parties should have intended or expected and, therefore, to their own value
preferences and concepts of fairness or justice. But, inevitable though
this result be in many cases, it supplies no adequate reason for denying
that the problem of effect of changes of circumstances can be regarded as
one of interpretation.

Interpretation is an art rather than a science. A subjective element is
never absent from it. But this inevitable subjectivity is not limitless. It
is controlled in varying degrees by evidence as to the actual expectations
and objectives of the parties and the other factors that may properly be
taken into account. An interpretation manifestly contrary to such evi-
dence, or an imputation of improbable expectations, would be generally re-
garded as arbitrary and unjust. It would not be in accordance with law.

But giving effect to the ascertained or reasonably imputed expectations
of the parties may not be the only relevant community policy. There may
be a community policy in favor of peaceful change in some situations. The
community interest may be best served, regardless of the parties' earlier
shared expectations, by putting an end to obligations which come to be
felt so burdensome that attempts to exact their performance threaten gen-
eral stability and peace. Some writers and governments have regarded
the doctrine of rebus sic stantibus as justifying the repudiation of ex-
cessively burdensome treaty obligations. It may be urged that the goal of
stability would be furthered rather than frustrated by the development of
legal devices for putting an end to relationships which come to be resented
as intolerably burdensome and which the community is not strongly inter-
ested in enforcing. Stability and change are not necessarily antagonistic
goals. In a changing world stability must be envisaged as dynamic rather
than static. It requires continuous adjustments within the community.
Orderly change serves to maintain the general equilibrium and to prevent
catastrophic and destructive upheavals.

Although the two policies relevant to the effect of changes of circum-
stances are distinct in principle, they are not necessarily competing or
mutually exclusive in practical application. There may be situations in

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3 Subsequent expectations developed in the course of application of the treaty and
the interests of the community formed by the treaty may be particularly important in
the interpretation of treaties which are constituent instruments of international orga-
nizations. Cf., e.g., Gordon, "The World Court and the Interpretation of Constitutive
Treaties," 59 AJIL 794 (1965). See, in general, McDougal, Lasswell and Miller,
The Interpretation of Agreements and World Public Order (1967).
which the continued application of a treaty may be both contrary to the shared expectations of the parties and an intolerable burden on one of them. Furthermore, when the genuine shared expectations of the parties are not ascertainable, the burdensomeness of the performance of an obligation in a new situation may well be taken into account by the decision-makers as an important factor in the process of interpretation. Nevertheless, for purposes of clarification and analysis, it is well to keep in mind that the two policies are not identical and may not always lead to the same results.

It is not the purpose of this article to present an exhaustive review of past practice and opinion concerning the effect of changes of circumstances on treaty obligations. But since the problem is often treated as solely one of termination of treaties, it must be pointed out that its solution by the application of the policy of giving effect to the ascertained or reasonably imputed expectations of the parties—that is, treating it as one of interpretation—is far from novel. It has considerable support in the practice of states and opinions of writers. This fact has been obscured by the terminological diversity to which reference has already been made.

Chesney Hill, in a still valuable monograph, marshals the names of many writers who have viewed the problem of the effect of changes of circumstances as one of the intention of the parties. He says, further:

The doctrine as understood by States is clearly based juridically upon the intention of the parties at the time of the conclusion of the treaty. . . . The same reference to the intention of the parties at the time of the conclusion of the treaty appears in the idea that the circumstances must be of a nature to take away the raison d’être or cause of the treaty. . . .

Thus, the doctrine of *rebus sic stantibus* is based juridically upon the intention of the parties. A change of circumstances becomes relevant to the obligatory force of a treaty only in so far as it is related to the wills of the parties to the treaty at the time of the conclusion of the treaty. It is not an objective rule of international law which is imposed upon the parties, but is a rule for carrying the intention of the parties into effect.

Additional materials, however, remained unnoted by Hill or have become available since the publication of his monograph.

The Harvard Research in International Law, in its Draft Convention on the Law of Treaties, laid down the following substantive norm:

*Article 28. Rebus Sic Stantibus*

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or

4 Hill, The Doctrine of "Rebus Sic Stantibus" in International Law 8–10 (1934) (9 The University of Missouri Studies, No. 3).

authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.\(^6\)

The Comment to this article indicated that this black-letter text must be understood to refer to the intentions of the parties as the basic test, and that it was believed to reflect the views of many writers, opinions of national and international courts, municipal law analogies, and some state practice.\(^7\) In short, the effort of the Harvard Research to define the norm was not designed \textit{de lege ferenda}, but as approximating existing law.

Charles Cheney Hyde, an outstanding American writer on the law of treaties, while rejecting the term \textit{rebus sic stantibus} as "unhelpful," depicts in these words the proper scope of the legal effect of a change of circumstances:

If changed conditions ever serve on principle to confer upon a contracting State the right to free itself from obligations laid down in a treaty, it is because those conditions mark the existence of a new order of things which in a broad sense were not contemplated by the parties at the time of the conclusion of their agreement and which render highly unreasonable a demand for performance. . . . That which causes a demand for performance to be unreasonable, and which, conversely, clothes a party with freedom to rid itself of the obligation to perform is the coming into being of a new condition of affairs which was not only not brought to the attention of the parties when they concluded their agreement, but also one which, if it had then been brought to their attention, would have necessarily produced common acknowledgment that the agreement would be inapplicable, and hence permit a party to regard it as no longer binding in case that condition or situation should subsequently arise. This requirement, which refers the matter to the thinking of the contracting parties when they concluded their agreement, or to such implications from their thought at that time as are impregnable, involves primarily a fact-finding endeavor. No formula offers a substitute for it, or points unerringly to what needs to be ascertained.\(^8\)

The underlying criterion thus seems to be that of the reasonable expectations of the parties.

Lord McNair, in his treatise on the law of treaties, regards the problem as essentially one of intention of the parties, "implied conditions," or disappearance of the \textit{raison d'être} of the treaty, and deals with it mainly under the general heading of "Interpretation and Application of Treaties."\(^9\) The numerous examples from British practice presented by McNair, including some in which the legal advisers of the British Government upheld the propriety of non-application of a treaty provision by the other party in certain situations, could all be explained as instances of

\(^6\) Harvard Research in International Law, \textit{op. cit.} note 5 above, at 1096.
\(^7\) \textit{Ibid.} at 1100, 1106, 1110–1111, 1113, 1123.
\(^8\) 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States 1524 (2nd rev. ed., 1945). See also his comment on the suspension of the International Load Line Convention of 1930 by the United States in 1941, text at note 38 below.
effect given to the imputed intentions or reasonable expectations of the parties. His attitude toward broader interpretations of the doctrine of *rebus sic stantibus* is skeptical. McNair's approach is largely reflected in the following passage:

Conditions should be implied only with great circumspection; for if they are implied too readily, they would become a serious threat to the sanctity of a treaty. Nevertheless the main object of interpretation of a treaty being to give effect to the intention of the parties in using the language employed by them, it is reasonable to expect that circumstances should arise (as they do in the sphere of private law contracts) in which it is necessary to imply a condition in order to give effect to this intention. A test that is sometimes useful is to ask oneself whether it is clear that, if the parties engaged in negotiating the treaty had adverted to some contingency, e.g. the occurrence of famine or insurrection or similar emergency, they would have agreed to provide for it expressly in a particular way, as, for instance, by means of a power of temporary suspension of certain provisions; if so, it is reasonable to impute to them an intention to contract on the basis of such a provision and to imply it as a term or condition in the treaty.10

Professor Brierly, referring to the judgment of the Permanent Court of International Justice in the *Free Zones* case, says:

Despite the caution of the language of the Court it seems to define clearly the scope of the doctrine. . . . The clausula is not a principle enabling the law to relieve from obligations merely because new and unforeseen circumstances have made them unexpectedly burdensome to the party bound, or because some consideration of equity suggests that it would be fair and reasonable to give such relief. . . . What puts an end to the treaty is the disappearance of the foundation upon which it rests; or if we prefer to put the matter subjectively, the treaty is ended because we can infer from its terms that the parties, though they have not said expressly what was to happen in the event which has occurred, would, if they had foreseen it, have said that the treaty ought to lapse. In short, the clausula is a rule of construction which secures that a reasonable effect shall be given to the treaty rather than the unreasonable one which would result from a literal adherence to its expressed terms only.

On this view the similarity between the doctrine of *rebus sic stantibus* and that of the "implied term" in the English law of the frustration of contract is very close. . . . Both doctrines attempt not to defeat but to fulfil the intention, or as the English cases call it the "presumed intention," of the parties. . . .

As defined by the Permanent Court the doctrine of *rebus sic stantibus* is clearly a reasonable doctrine which it is right that international law should recognize. . . .11

He goes on to point out that, as so defined, the doctrine is of limited scope and does not solve the problem of oppressive treaties which the parties did not intend to be ended. He does not believe that this problem, essentially political, can be solved by existing law or by manipulation of legal doc-

10 *Ibid.* 436; see also 687–688, 690–691.
trines. The remedy is to be sought in political action. A similar view is taken by Professor Bishop, who says that if the doctrine "be limited to cases in which the parties contracted with reference to a set of conditions which has changed, and we can be confident that if they had foreseen the change they would have said that the treaty should lapse, the rule becomes a reasonable rule of construction of the treaty." 12

The intentions-of-parties approach finds a strong expression in the Restatement of the Foreign Relations Law of the United States. Section 153, which appears under the topic of "Special Problems of Interpretation," reads as follows:

Rule of Rebus Sic Stantibus: Substantial Change of Circumstances

(1) An international agreement is subject to the implied condition that a substantial change of a temporary or permanent nature, in a state of facts existing at the time when the agreement became effective, suspends or terminates, as the case may be, the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances.

(2) A party may rely on an interpretation of the agreement as indicated in Subsection (1) as a basis for suspending or terminating performance of the obligations in question only if it did not cause the change in the state of facts by action inconsistent with the purpose of the agreement and has otherwise acted in good faith.

(3) When the conditions specified in Subsection (1) apply only to a separable portion of the agreement, suspension or termination applies only to that portion. 13

The Comment adds in part:

The rule stated in this Section is a rule of interpretation designed to ascertain the intended obligations of the parties rather than a principle that relieves a party from performing its obligations. . . . The change of facts must be substantial, and only a particular state of facts, the continuing existence of which can be shown to have been assumed by the parties to be essential to the achievement of the objectives of the agreement, is relevant. 14

Placing rebus sic stantibus squarely under the rubric of "interpretation" may seem novel, but it is so only in form. It is the logical consequence of viewing the problem as one of giving effect to the ascertained or reasonably imputed shared intentions, expectations and objectives of the parties.

The extensive but largely unnecessary use by many writers of concepts derived from municipal law such as "implied term," "implied condition,"


14 Ibid. 468.
"resolutive condition," "frustration" and the like often obscures the underlying policy of giving effect to the ascertained or reasonably imputed shared expectations of the parties. Particularly confusing is the adoption by some writers of a "presumption" that an "implied term" or a "tacit clause rebus sic stantibus" is contained in every treaty. This unnecessary and formalistic fiction gives rise to just but basically irrelevant criticism by other writers and serves to obscure and discredit the view of the problem as essentially one of interpretation. Numerous writers, who do not need to be listed here, reject the intentions-of-parties approach in favor of an "objective rule of law" concept of the problem.

Some instances of invocation of a change of circumstances in state practice which have escaped the attention of Hill and the Harvard Research or occurred too late to be included in their surveys will now be examined.

In 1891, Brazil and the United States concluded by an exchange of notes a reciprocal trade arrangement. On the part of the United States, this arrangement was made under the authority of Section 3 of the Act of Congress of October 1, 1890. The arrangement provided for its termination by a three-months' notice which was to take effect either on January 1 or July 1, as the case might be. In 1894, another Act of Congress superseded, to the extent that they were inconsistent with the new law, the duties which had been proclaimed by the President to give effect to the arrangement. Upon learning of the new United States legislation, the Brazilian Government notified the United States of its intention to terminate the agreement as of January 1, 1895, pursuant to the termination provision in it. The United States, however, took the position that the new Act of Congress operated to terminate immediately the inconsistent provisions of the arrangements, and that no notice of termination was necessary. The United States Government viewed the arrangement as not a binding treaty, but nevertheless said:

It is manifest that the arrangement thus concluded rested wholly on legislation adopted by the United States of America and the United States of Brazil, respectively, and that the terms of this legislation were well known to the executive departments of both Governments, and were recognized by them as the basis of their action. So far,

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15 For some examples, see McNair, op. cit. note 9 above; Fairman, "Implied Resolutive Conditions in Treaties," 29 A.J.I.L. 219 (1935).

16 This does not mean, of course, that serious comparative studies of possibly relevant principles in municipal law may not usefully serve to clarify the underlying community policies and the appropriateness of their application in international law. Cf., e.g., Smit, "Frustration of Contract: A Comparative Attempt at Consolidation," 58 Columbia Law Rev. 287 (1958).

17 Harvard Research in International Law, op. cit. note 5 above, at 1100.

18 States sometimes invoke a change of circumstances without using the expression rebus sic stantibus or stating any general principle. This fact, of course, does not diminish the value of such invocations as precedents. This brief survey stresses state practice rather than its classification in doctrinal terms.


20 28 Stat. 509 (1894).
therefore, as the arrangement may have been considered as an international agreement, it was made subject to the terms of that legislation . . . it cannot be supposed that it was intended, by the simple exchange of notes . . . to bind our Governments as by a treaty . . . beyond the time when the Congress of the United States might, in the exercise of its constitutional powers, repeal the legislation under which the arrangement was concluded. By the terms of that legislation the President, so long as it was enforced, was invested with power to suspend its provisions touching the free entry of the specified articles, under certain conditions the existence of which was to be determined by himself. It is to be assumed that the stipulation in the notes referred to, in relation to the termination of the arrangement with Brazil was made with reference to that power, and that it was intended by the Executive merely as a declaration of the manner in which he would, in the particular case, exercise the special power conferred upon him. No other effect, it is conceived, can reasonably be ascribed to the stipulation.\textsuperscript{21}

A somewhat similar situation arose between France and the United States in 1909. Pursuant to Section 4 of the Tariff Act of 1909,\textsuperscript{22} the United States gave notice of termination of its 1898 reciprocal commercial agreement with France, which had been made on the basis of the Tariff Act of 1897 (expressly mentioned in the agreement) and contained no provision for termination.\textsuperscript{23} When the French Government objected, the Department of State wrote in part that these commercial agreements, not being treaties in the constitutional sense, and hence not requiring the concurrence of the Senate of the United States, but having been negotiated under the authority of and in accordance with the legislative provisions contained in section 3 of the tariff act of July 24, 1897, would, in the absence of enabling legislation by Congress, have been terminated \textit{epso facto} on the going into effect of the tariff act of the United States approved August 5, 1909, which has changed the bases on which these agreements were negotiated.\textsuperscript{24}

Although the United States perhaps regarded the agreements as not binding or as terminable at will, these cases must also be regarded as instances of the effect of a change of circumstances. The United States was prepared to maintain that, even if the agreements were binding, they were not intended nor could reasonably be expected to survive the passage of inconsistent legislation by Congress. This point was made with particular clarity in the correspondence with Brazil, but it is also implicit in the reply to France. The following should be specially noted: (1) The effect of the change of circumstances is related to the specific expectations of the parties as implied from their knowledge of the legislative basis of the agreements. (2) The agreements did not expressly provide for the

\textsuperscript{21}1894 U. S. Foreign Relations 80–81 (1895). For correspondence, see \textit{ibid}. 77–83.
\textsuperscript{22}36 Stat. 11, 83 (1909).
\textsuperscript{24}5 Hackworth, Digest of International Law 429 (1943).
effect of the change in their legislative bases, although the probability of eventual change must have been contemplated. (3) The fact that the Brazilian (unlike the French) agreement contained an express provision for termination on notice did not prevent, in the view of the United States, immediate cessation of performance when the essential basis of the agreement disappeared. (4) The change of circumstances was brought about by the deliberate action of the party invoking it; it was a change in the governmental policy of that party. (5) In the case of the Brazilian agreement, some of the provisions might have survived the change, since the new tariff act abrogated only provisions inconsistent with it. (6) No notice of termination was regarded by the United States as necessary, except as provided by Congress.

On December 14, 1932, the French Chamber of Deputies adopted a resolution declaring that the Franco-American agreements of 1926 providing for the payment of the French war debt had lost their force and should be renegotiated. In the preamble, the Chamber recited: "Qu'en vertu d'un principe reconnu du droit international public, les traités et conventions doivent être exécutés rebus sic stantibus." It asserted that the "determining circumstance" (la circonstance déterminante) of the war-debt settlement between France and the United States was the regime of payments which France had the right to expect from Germany under existing treaties, and referred to several statements to that effect made at the signature and ratification of the agreements. It then stated that this determining circumstance had been profoundly modified (intégralement modifiée) by the suspension of all intergovernmental payments in June, 1931, and the consequent Lausanne Conference, and that this modification of circumstances had been brought about on the initiative of President Hoover and was therefore the work of the American Government. It concluded:

La Chambre déclare que les circonstances déterminantes ayant été intégralement modifiées et devant le demeurer sous peine de voir s'aggraver la situation mondiale, les accords intervenus sur les dettes ont perdu leur force exécutoire et doivent faire l'objet de nouvelles négociations.

The Chamber had previously refused to appropriate the funds necessary for the payment of an installment due to the United States on December 15, 1932, causing the fall of the Herriot cabinet. Subsequently, the French Government never denounced the agreements in question, did not mention rebus sic stantibus, and disavowed any intention of breaking international engagements; but it marshaled and presented in detail the evidence tending to show that the United States had recognized the close connection between Allied war debts and German reparations. Despite repeated American reminders, France never resumed payments of its war debt.

This incident indicates that France in effect took the position that the debt agreements of 1926 were based on the expectation of continued payments of reparations by Germany and were tacitly conditioned on the latter. In other words, its position was that continuing performance by France of her debt agreements with the United States without revision after the payment of reparations had been suspended would not have been in accordance with the expectations of the parties. It did not purport to terminate the debt agreements, but insisted on their revision and suspended performance.

In 1939, shortly after the outbreak of war, seven belligerent governments notified the Secretary General of the League of Nations that their acceptances of the compulsory jurisdiction of the Permanent Court of International Justice under the Optional Clause of the Court’s Statute would not apply to disputes arising out of events occurring during the war, although none of them had made reservations to that effect at the time they accepted the Clause.28 The Government of the United Kingdom, which had accepted the Clause as from February 5, 1930, ‘‘for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance,’’ presented the most elaborate justification of its action.29 First, it stated the circumstances and assumptions under which the commitment had been made:

2. The conditions under which His Majesty’s Government gave their signature to the Optional Clause were described in a memorandum issued at the time . . . a copy of which is enclosed for convenience of reference. Paragraphs 15 to 22 of that memorandum state the considerations which then satisfied His Majesty’s Government that they could accept the Optional Clause without making a reservation (which they would have been fully entitled to make) as to disputes arising out of events occurring during a war in which they might be engaged. Those considerations were, in brief, that, by the building-up of a new international system based on the Covenant of the League of Nations and the Pact of Paris, a fundamental change had been brought about in regard to the whole question of belligerent and neutral rights. . . . The effect of this at the time of His Majesty’s Government’s signature was that conditions which might produce a justiciable dispute between the United Kingdom as a belligerent and another Member of the League as a neutral would not exist, since the other Members of the League would either fulfil their obligations under Article 16 of the Covenant, or, if they did not, would have no ground on which to protest against the measures which His Majesty’s Government might take to prevent action on their part which was inconsistent with those obligations.

It then pointed to the well-known facts of the breakdown of the League system and went on to say:

28 For convenience, the expression ‘‘accepted the Optional Clause’’ is used here to mean ‘‘accepted the compulsory jurisdiction of the Permanent Court of International Justice under paragraph 2 of Article 36 of the Court’s Statute [or, mutatis mutandis, the corresponding provisions of the Statute of the International Court of Justice].’’

No action has been taken under Articles 16 or 17 of the Covenant, or even under Article 11, and, in advance of hostilities, a number of States Members of the League have announced their intention of maintaining strict neutrality as between the two belligerents. His Majesty's Government are not making a complaint about this state of affairs, though they fully reserve their rights as a Member of the League. But the position to-day shows clearly that the Covenant has, in the present instance, completely broken down in practice, that the whole machinery for the preservation of peace has collapsed, and that the conditions in which His Majesty's Government accepted the Optional Clause no longer exist. This situation, so fundamentally changed from that which existed at the time of their signature of the Optional Clause, was mentioned as a possibility in paragraph 22 of the Memorandum of 1929, and it was there stated that His Majesty's Government could not conceive that, in the general collapse of the whole machinery for the preservation of peace, the one thing left standing should be the Optional Clause and the commitments of the signatories thereunder.

France, Australia, New Zealand, the Union of South Africa, India and Canada sent similar communications and invoked the same change of circumstances, but presented less detailed justification for their action than did the British Government. The five Commonwealth governments, like that of the United Kingdom, had accepted the clause for ten-year periods and thereafter until termination; the ten-year periods had not yet expired. France had renewed its acceptance of the Clause for another five-year period which expired in 1941. Eleven governments, then neutral, upon learning of the action of the seven belligerents, expressly reserved their rights or points of view, but none attempted to rely on the Optional Clause vis-à-vis the belligerents with respect to events occurring during the war.

The following points are significant: (1) The United Kingdom presented specific evidence of the nature and scope of the expectations and assumptions on the basis of which it originally accepted the Optional Clause. This evidence consisted primarily of a memorandum which had been published at the time of the acceptance but had apparently not been officially circulated to all other governments. Since the other Commonwealth governments concerned accepted the Clause at the same time as the United Kingdom and in similar terms, they probably acted on the same expectations and assumptions. France, which originally accepted the Clause in rather different terms, in its 1939 communication specifically referred to the British communication and indicated that it shared the same point of view.


31 Norway, Sweden and Denmark expressed their reservations "more particularly" as regards disputes not connected with the war, thus drawing attention to the question whether the justification given by the belligerents was sufficient to cover all disputes arising from events during the war regardless of their connection with the change invoked. 20 League of Nations Official Journal 410–411 (1939); 21 ibid. 45–47 (1940).
view. (2) The changed situation had been mentioned as a possibility in the 1929 memorandum; in other words, it cannot be said to have been completely unforeseen. The governments concerned had nevertheless refrained for understandable reasons from attaching a formal reservation or limitation to their acceptance of the Optional Clause. (3) The acceptances of the Clause had not been for unlimited periods of time, but all contained express provisions for termination. (4) The belligerent governments concerned did not terminate or suspend their obligations under the Optional Clause before the expiration of the terms for which they had accepted it, but sought to hold the scope of its application within the bounds of their original expectations; application to disputes arising out of events during the war was apparently regarded by them as being outside such bounds. In effect, the problem was held to be one of construction. (5) None of the governments concerned used the term *rebus sic stantibus* or stated any general doctrine.

The action of the seven belligerent governments in 1939 must be properly regarded not as termination, suspension, modification or revision of their obligations under the Optional Clause, but rather as their clarification. It is the clearest extant example of the effect of a change of circumstances on an international engagement being treated as a problem of giving effect to reasonable expectations, that is, as one of interpretation rather than termination. It may be urged in some quarters that this example is of little value as a precedent in the law of treaties, since the acceptance of the Optional Clause, though effected pursuant to a treaty, is a unilateral act and the obligations assumed were possibly terminable at will.\(^\text{32}\) Such a contention, however, would have little force. It is well established that an acceptance of the compulsory jurisdiction of the Court creates a *vinculum juris* with other states signifying similar acceptance. The Court has repeatedly held that a state which has accepted its jurisdiction under Article 36(2) of the Statute (the "Optional Clause") is bound to submit to it vis-à-vis any other state which has accepted it, on the basis of reciprocity, so long as the acceptance is in force. The state has assumed an international obligation. Even if the *vinculum juris* thus established is not regarded as a treaty relationship *strictu sensu*, it is not perceived why the principle underlying the justifications given by the belligerent governments would not have equally applied in the case of a treaty, *mutatis mutandis*. It is easy to visualize, for example, a bilateral treaty of compulsory arbitration concluded by the United Kingdom in 1930 with expectations and on assumptions identical with those on the basis of which it accepted the Optional Clause. If, after the outbreak of war in 1939, it could have shown that these expectations and assumptions had been shared by both parties, it is difficult to see why it would have been less justified in construing the scope of the treaty as not extending to disputes arising out of events during the war than it was justified in so construing the scope of its acceptance of the Optional Clause.

As a matter of fact, action similar to that with respect to the Optional Clause was taken by Australia and Canada with respect to their obligations under the General Act for the Pacific Settlement of International Disputes (a multilateral treaty which included acceptance of the Court's jurisdiction) and was justified on the same grounds. This precedent is clearly within the scope of the law of treaties. It indicates, moreover, that the governments concerned did not regard the acceptance of the Optional Clause as essentially different for this purpose from accession to a multilateral treaty.

Furthermore, the view that the obligation assumed by the acceptance of the Optional Clause is terminable at will until it has been invoked in a concrete case by another accepting state is highly controversial, and the belligerent governments do not seem to have acted on any such view. None of them claimed that their obligations were terminable at will. The Commonwealth governments waited until the expiration of the ten-year periods specified in their declarations of acceptance before giving notices of termination and filing new acceptances containing the wartime exclusion. Also, the fact that they sought justification for their action in 1939 in legal arguments based on original expectations and on the subsequent change of circumstances indicates that they did not act on the hypothesis that their obligations were terminable at will.

Another instance of wartime conditions giving rise to an invocation of a change of circumstances occurred in August, 1941, when the United States suspended the performance of its obligations under the International Load Line Convention of 1930, a multilateral treaty. At the time, the United States was a non-belligerent. The President proclaimed:

Whereas the conditions envisaged by the Convention have been, for the time being, almost wholly destroyed, and the partial and imperfect enforcement of the Convention can operate only to prejudice the victims of aggression, whom it is the avowed purpose of the United States of America to aid; and

Whereas it is an implicit condition to the binding effect of the Convention that those conditions envisaged by it should continue without such material change as has in fact occurred; and

Whereas under approved principles of international law it has become, by reason of such changed conditions, the right of the United

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33 The Australian Government, in a telegram of Sept. 7, 1939, to the Secretary General of the League, referred to its telegram of the same date concerning its obligations under the Optional Clause and said that the same considerations "apply with equal force in case of General Act." 20 League of Nations Official Journal 412 (1939). The Canadian communication made a similar reference. 21 ibid. 47 (1940). Acceptances to the General Act were for five-year terms with automatic extension for a like period if no notice of denunciation was given. Some neutral governments made reservations concerning the Australian and Canadian action. 20 ibid. 412 (1939), 21 ibid. 48-50 (1940). The other Commonwealth governments and France had no need to take action similar to that of Australia and Canada because prior to the war they had made the desired exclusion when modifying their accessions as permitted by Arts. 39 and 45 of the Act. For text of the General Act, see 4 Hudson, International Legislation 2529 (1931).

34 See Hudson, op. cit. note 30 above, at 7-9.
States of America to declare the Convention suspended and inoperative:

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, exercising in behalf of the United States of America an unquestioned right and privilege under approved principles of international law, do proclaim and declare the aforesaid International Load Line Convention suspended and inoperative in the ports and waters of the United States of America, and in so far as the United States of America is concerned, for the duration of the present emergency.85

This action was supported by an opinion of the Acting Attorney General, who wrote in part:

It is clear from its general nature that the convention was a peacetime agreement. As stated in its preamble the contracting governments entered into it "to promote safety of life and property at sea by establishing in common agreement uniform principles and rules with regard to the limits to which ships on international voyages may be loaded. . . . This general purpose, as the terms of the convention demonstrate, was to be achieved by limiting international competition in the loading of cargo vessels. That peacetime commerce and voyages were assumed as the basis of the convention is also demonstrated by the nature of its detailed provisions and regulations. A perusal of them leaves no doubt that peacetime commerce was a basic assumption of the treaty. The present situation with respect to shipping is a wholly different one. Conditions essential to the operation of the convention, and assumed as a basis for it, are in almost complete abeyance. . . . International shipping is not being carried on under normal conditions subject to agreements arrived at for the purpose of regulating international voyages freely undertaken and completed. On the contrary, the actual destruction of vessels engaged in such commerce, however loaded, is one of the principal means by which the war is now being conducted among various of the contracting parties. . . . It is well known that the international sea lanes are the rendezvous for varied instrumentalities of war set loose for the destruction of shipping. It is equally well known that a serious shortage exists in shipping in the case of numerous, if not all, signatories to the convention, including those whose defense the Congress has declared essential to the defense of the United States . . . In short the implicit assumption of normal peacetime international trade, which is at the foundation of the Load Line Convention, no longer exists.

Under these circumstances there is no doubt in my mind that the convention has ceased to be binding upon the United States. It is a well-established principle of international law, rebus sic stantibus, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change. . . .

It is sometimes said that the change which brings the principle into operation must be essential or fundamental. But whether or not this is an integral part of the principle itself, there can be no doubt that the changed conditions affecting the Load Line Convention are most essential and most fundamental.

As to the procedure to be adopted by the Government that relies on the principle of *rebus sic stantibus*, it may well be that ordinarily the procedure would call for the government to inform the other parties to the treaty with respect to the matter and request agreement for termination or suspension of the treaty. The matter of procedure, however, does not affect the right of termination or suspension. . . . The fundamental character of the change in conditions underlying the treaty . . . leaves the Government of the United States entirely free to declare the treaty inoperative or to suspend it for the duration of the present emergency.36

The action of the United States Government in this situation was criticized from different points of view by a number of commentators, notably Professors Briggs and Hyde. Professor Briggs pointed out the dubious status of the doctrine of *rebus sic stantibus* in international law. Citing Chesney Hill’s monograph, he added:

. . . the few states which have invoked it have been in agreement on one point: the doctrine has been “clearly based juridically upon the intention of the parties at the time of the conclusion of the treaty.”

He concluded, however, that “the evidence presented by the Attorney General fails to establish that the parties to the convention—the purpose of which was to establish minimum safety regulations—intended that the occurrence of war should release the parties from the obligations assumed.” Furthermore, he denied the existence of necessity for the suspension of the convention.37

Professor Hyde took a different position. He regretted the Acting Attorney General’s reliance on the phrase *rebus sic stantibus* and strongly doubted the existence in international law of a doctrine such as that stated in the opinion, but concluded:

There was doubtless good reason for the United States to proclaim its freedom from the further operation of the International Load Line Convention, at least during the continuance of the war. That reason was, in substance, the circumstance that it could not possibly have been the design of the contracting parties when they concluded the Convention, that it should remain necessarily binding upon the coming into being of the conditions to which both the Acting Attorney General and the President referred; and that when those conditions did come into being, a contracting party confronted with a situation such as that which prevailed in July 1941, might, by appropriate action, free itself, at least for the time being, from the burdens of the arrangement.38

38 2 Hyde, op. cit. note 8 above, at 1527.
The United States may have come to regret setting in such strong terms a precedent in favor of the existence of a doctrine of rebus sic stantibus. Nevertheless, the precedent cannot be ignored. The following points must be noted: (1) Implicit in the Acting Attorney General's opinion is the contention that it would have been contrary to the shared intentions and expectations of the parties to regard the convention as applicable in the circumstances which existed in the summer of 1941. (2) The convention was declared to be suspended and inoperative with respect to the United States "for the duration of the present emergency," but it was not denounced. The suspension was lifted and the convention re-entered into full force when the circumstances which caused its suspension ceased to exist. (3) The convention contained a provision permitting denunciation on twelve months' notice. (4) There was no attempt to invoke any traditional rule concerning the effect of war on treaties. Such rules generally apply only between opposing belligerents and the United States was not a belligerent at the time; it was not, therefore, in a technical sense a case of "the effect of war on treaties."

In the several instances of state action just reviewed, which are illustrative rather than exhaustive of recent practice, the governments invoking the changes of circumstances can all be regarded as maintaining in effect that their actions were not inconsistent with the general community policy of protecting and effectuating ascertained or reasonably imputable shared expectations of parties to international agreements. In short, these instances support the view that the problem of the legal effect of changes of circumstances on treaty relationships is one of determining the parties' shared intentions, expectations and objectives, that is, a problem of interpretation.99

The instances of state practice here reviewed and the approach to the problem of the effect of changes of circumstances as one of application of the shared expectations of the parties both lead to the following conclusions:

(1) Termination of a treaty obligation is not the only possible and proper effect of invocation of a change of circumstances. Depending on the expectations of the parties and the nature of the change, the proper effect may be suspension or limitation of performance, as the case may be.

(2) Strictly speaking, there is no requirement in all cases that non-performance be preceded or accompanied by a formal notice to the other parties, although concern for orderliness, prudence and courtesy make the giving of such notice generally desirable. If the treaty operates as municipal law, a formal enactment or proclamation may be necessary.

(3) The exercise of the right to cease or limit performance does not

99 It is noteworthy that in all these instances the governments which invoked the justification of a change of circumstances were successful in the sense that they effectively terminated, suspended or limited their performance of the obligations in question, although they were generally less successful in persuading other parties that the justification was valid.
depend on the specific consent of the other party or upon a third-party decision.

(4) The presence in a treaty of a clause limiting its duration or providing for denunciation does not exclude the invocation of a change of circumstances as a ground for immediately ceasing or limiting performance.

(5) A change of circumstances may be invoked even if it was not "unforeseen" in an absolute sense. The parties may have been aware of the possibility of the change but for various reasons failed to provide for it expressly.

These conclusions, though supported by practice and legal logic, may not in all cases lead to desirable results. International public policy may require the imposition of restrictions upon the exercise by states of a right to cease or limit their performance of treaty provisions on the ground of a change of circumstances even when it might be justified as an application of the policy of giving effect to the parties' shared expectations. Analogous restrictions can be found in the municipal law of contracts.

At this point, it is worth repeating that the policy of giving effect to reasonable expectations is not the only community policy relevant to the problem of effect of changes of circumstances. Another relevant policy is that of facilitating peaceful change in some situations. As already pointed out, it is not the purpose of this article to present an exhaustive survey of practice concerning the effect of a change of circumstances. The purpose has been merely to show the extent to which the expectations-of-parties approach has been adopted in recent practice and to indicate its modalities. A comprehensive survey would no doubt find instances of states invoking changes of circumstances in situations where the policy of giving effect to reasonable expectations might not explain the invocation. The two policies must be kept in mind as we examine the relevant provisions of the I.L.C. Draft.

In some degree, the I.L.C. Draft reflects both approaches to the problem of the rôle of changes of circumstances in treaty relationships—the expectations-of-parties approach and the intolerable-burden approach. The relevant articles of the Draft, however, fail to clarify or fully mesh the policies underlying the two approaches. The resulting formulations are open to differing interpretations and applications.

Article 59 of the Draft deals explicitly with the principle that a change of circumstances may be invoked as a ground for terminating or withdrawing from a treaty:

**Article 59**

*Fundamental change of circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a 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 scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(a) As a ground for terminating or withdrawing from a treaty establishing a boundary;
(b) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

The underlying purpose of this formulation is indicated, though not without ambiguities, in the Commentary to Article 59. Stressing its desire to establish "an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty," the Commission rejects as an undesirable fiction the concept of a "tacit condition" or "implied term," since it "increased the risk of subjective interpretations and abuse." The Commission points in the direction of having accepted the intolerable-burden approach in the following passages:

(6) The Commission concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty may remain in force for a long time and its stipulations come to place an undue burden on one of the parties as a result of a fundamental change of circumstances. Then, if the other party were obdurate in opposing any change, 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; and the dissatisfied State might ultimately be driven to take action outside the law. The number of cases calling for the application of the rule is likely to be comparatively small. . . . Nevertheless, there may 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 these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.

The Commission also refers to the doctrine as "an instrument of peaceful change." Yet it is aware of "the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction." The Commission also "decided that, in order to emphasize the objective character of the rule, it would be better not to use the term 'rebus sic stantibus' either in the text of the article or even in the title, and so avoid the doctrinal implication of that term."

The preference of the Commission for "an objective rule of law" and its rejection of the intentions and expectations of the parties as the test
are not explicitly and adequately explained. The rejection of the fiction of a "tacit condition" or "implied term" is not a sufficient explanation, since the members of the Commission must have been aware that the expectations-of-parties approach does not depend on the acceptance of this outworn fiction. Some indications of the reasons for the Commission's preference are perhaps to be found in the Second Report on the Law of Treaties submitted by Sir Humphrey Waldock, the Commission's Special Rapporteur on the subject, which formed the basis of the Commission's work on the topic of changes of circumstances. He rejects the fiction of an "implied term" as "undesirable" since, "by making the doctrine dependent upon the intentions of the parties, it invites subjective interpretations and adds to the risk of abuse." Yet he criticizes a draft submitted by the previous Special Rapporteur, Sir Gerald Fitzmaurice, as perhaps "framed in terms which are too subjective," which come "near to reintroducing the fiction of the implied condition and, if literally interpreted, might almost exclude any operation of the rebus sic stantibus doctrine." Trying to give effect to the intentions of the parties, in other words, is to be feared because it might either add to the risk of abuse or limit the operation of the doctrine too strictly. Nevertheless, Sir Humphrey states:

Although the doctrine is properly to be regarded as an objective rule of law, its application in any given case cannot be divorced from the intentions of the parties at the time of entering into the treaty; for the rationale of the rule is that the change of circumstances makes the treaty obligations today something essentially different from the obligations originally undertaken. The problem is to define the relation which the change of circumstances must have to the original intentions of the parties and the extent to which that change must have affected the fulfilment of those intentions.

The Commentary to Article 59 and the published records of debates in the Commission disclose a general desire to emphasize the need for the stability of treaties and the narrow and exceptional character of the doctrine of rebus sic stantibus. There was general agreement to state the doctrine as "an objective rule of law," but, in Sir Humphrey's words, there was some difference between what members meant when they spoke of the objective character of the rule. Some members regarded the doctrine as applicable only when the change related to circumstances which had originally constituted an essential foundation of the treaty; others seemed to regard the doctrine as an absolute overriding principle whereby subsequent changes, whether related to the original basis of the contract or not, could be invoked by a party as a ground for dissolution of the treaty.

40 1963 I.L.C. Yearbook (II) 36, at 83, 84.
41 Ibid. 84.
42 See, e.g., 1966 I.L.C. Yearbook (I), Pt. I, 75, 78–82, 85–86, 130. "In addition, it [the Commission] decided to emphasize the exceptional character of this ground of termination or withdrawal by framing the article in negative form . . ." 1966 I.L.C. Rep. 87 (Commentary to Art. 59).
43 1963 I.L.C. Yearbook (I) 166.
It was recognized that the Commission’s formulation of the principle combined subjective and objective elements.44

Although the final product of the Commission’s work, as formulated in Article 59, reflects unavoidable compromises, it is probably correct to say that it represents a leaning toward closely circumscribing the operation of the doctrine.45 The Commission’s treatment of the problem, however, serves to obscure and confuse the issues. In particular, the distinction between “objective” and “subjective” rules, borrowed from municipal law, is highly abstract and misleading when it is applied to the problem of the legal effect of changes of circumstances on treaty relationships. Although the intentions, expectations and objectives of the parties to a treaty are “subjective,” the ascertainment of their existence and their shared character requires reliance on objective evidence. Such evidence limits the subjectivity of the process of interpretation. On the other hand, an allegedly “objective” rule of law may be cast in such general and vague terms that it leaves room for wide differences in subjective appreciation of their meaning. This is true of Article 59. The ambiguities residing in the expressions “fundamental change,” “not foreseen by parties,” “an essential basis of the consent of the parties,” and “radically to transform the scope of obligation” are patent. The Commentary provides no useful explanation of these expressions. It fails to explain how “an essential basis of the consent of the parties” can be established without a large degree of “the risk of subjective interpretations,” let alone how Article 59 itself can be applied without such a risk.46 “Not foreseen” can have several meanings. “Foreseeing” a future event may mean expecting it as inevitable, expecting it as probable, or thinking of it as possible but not likely. In most cases of application of Article 59, “foreseeing” is likely to be imputed rather than shown as a fact. Does the expression “radically to transform the scope of obligations” really mean “greatly increase the burden of obligations”? Or something quite different? It is apparent that Article 59 results in a piling up of subjectivities rather than their diminution. The decision-maker must not only establish the shared intentions and expectations of the parties in order to determine what circumstances constituted “an essential basis of the consent of the parties,” but must also choose between the various meanings that can be attributed to the ambiguous terms of Article 59.

The dangers for the stability of treaties and of the international community residing in the doctrine of rebus sic stantibus can be exaggerated. The idea that it can play a significant rôle in unleashing determined law-


45 The Special Rapporteur pointed out that a rejection of the doctrine by the Commission “would certainly not receive the support of the majority of governments” and that the Commission’s task was “to define it with sufficient strictness.” Ibid. 85.

46 The vagueness of the word “essential” was alluded to by some members of the Commission. See, e.g., Ibid., 79, 80. The Harvard Research had referred to the test “that the changes shall be ‘essential’, ‘fundamental’, ‘vital’” as “abstract and subjective.” Harvard Research in International Law, op. cit. note 5 above, at 1100.
breakers and aggressors such as Hitler is fantastic. Great political issues are not decided by international law. Such risk of abuse as does reside in the doctrine and in the subjectivities inherent in Article 59 could be reduced by a requirement that the doctrine may be applied only by the decision of an international tribunal. Although a provision to this effect was favored by some members of the Commission and by some governments, it was not adopted. Article 62 of the I.L.C. Draft requires a party invoking the doctrine to give notice to the other parties, and, if objections are raised, the parties must seek a solution under Article 33 of the U.N. Charter. But this falls short of a requirement of adjudication and leaves open the question of the effect of the invocation of the doctrine when no agreement is reached. The decision of the Commission not to insist on adjudication is probably realistic in the current and foreseeable state of world affairs, but as a result the most effective safeguard against abuse is not provided. In this respect, however, the problem of _rebus sic stantibus_ is not unique. There are many norms and processes of international law, including the process of interpretation of treaties, that can be abused by particular states in the absence of compulsory international adjudication.

With respect to the various modalities of the operation of the doctrine that the Commission sought to spell out or imply in Article 59, largely as safeguards against its abuse and its threat to stability, the following points may be noted:

First, Article 59 does not provide that it may be invoked for the purpose of suspension or modification of the operation of a treaty. This limitation, which is not supported either by practice or by the logic of giving effect to the intentions and expectations of the parties, was not extensively discussed by the Commission. It is difficult to see how a right of suspension would present greater dangers than a right of termination. The Special Rapporteur rather cryptically remarked that according a right of suspension as an alternative whenever a right of termination was recognized would "of course" "not be possible" in the case of termination "because of a change of circumstances." As we shall see, however, Draft Article 54 deals with suspension.

Second, it is somewhat unclear what effect must be attributed to the phrase "which was not foreseen by the parties" in paragraph 1 of the article. As already noted, the term "foreseen" is ambiguous. Moreover, if the provision is read literally, the juxtaposition of two negatives seems to mean that a change which was foreseen may be invoked. But this does not seem to be the intended meaning, since the Commentary says that a change which may be invoked "must be one not foreseen by the parties." So interpreted, this limitation is not clearly supported either by practice or by the logic of giving effect to the intentions and expectations of the parties. An earlier draft provided for the exclusion of changes of cir-

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47 The addition of suspension as a possible effect of an invocation of a change of circumstances was suggested by Rosenne in the Commission (1963 I.L.C. Yearbook (I) 252) and by the Government of Israel in its comments on an earlier draft (see 1968 I.L.C. Rep. 123).


49 But see Art. 53 and its discussion below.
cumstances "which the parties have foreseen and for the consequences of which they have made provision in the treaty itself." 50 This formula unaccountably dropped out of the final draft. Yet it would have improved the logic of the limitation.

Third, the effect of the necessary change must be "radically to transform the scope of obligations still to be performed under the treaty." The perplexing character of this limitation has already been noted. Particularly puzzling is the term "scope." The limitation would exclude most of the changes invoked in the past or likely to be invoked in the future, unless the word "scope" is given the unnatural meaning of "burden." This limitation is clearly not supported by the logic of giving effect to the intentions and expectations of the parties, and has little support in practice. It replaced the equally perplexing but somewhat looser earlier formula, "the effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty," 51 and was apparently designed to make the limitations on the operation of the doctrine even stricter. 52

Fourth, Article 59 may not be invoked "as a ground for terminating or withdrawing from a treaty establishing a boundary." "The reason for that exclusion was not that the provisions of those treaties were 'executed' provisions, but that treaties of that type were intended to create a stable position." 53

At least two possible limitations on the operation of the doctrine were not accepted by the Commission. Article 59 is not limited in its application to "perpetual" treaties or those containing no provision for termination. Furthermore, the Commission did not exclude from the operation of the doctrine changes brought about by the state invoking them or changes in the governmental policies of that state. Instead, it adopted the narrower exclusion formulated in Article 59(2)(b).

Subjectively viewed, and regardless of the subjective intentions of the various members of the Commission, Article 59 seems to attach considerable weight to the policy of giving effect to the shared intentions and expectations of the parties in the application of the doctrine of rebus sic stantibus, but to limit it to the extent believed to be required by the policy of maintaining stability in treaty relationships and preventing, as much as possible, threats to that stability that might arise from the inevitably subjective factors in the interpretation of treaties. In formulating Article 59, the Commission introduced further subjectivities by the use of highly

51 Ibid.
52 The word "radically" was suggested in 1966 by Professor Tunkin, the Soviet member of the Commission, who said that the rule "concerning a fundamental change of circumstances did exist, but it was imprecise and for that reason presented a danger to the stability of treaties and international relations as a whole." "The Commission's task," he added, "was to define the rule clearly and make it applicable only in exceptional cases." The words "in an essential respect," he thought, "were not sufficiently definite." 1966 I.L.C. Yearbook (I), Pt. I, 80–81.
53 Walloch, ibid. 86.
abstract and ambiguous terms. But the formulation seems to be weighted in favor of stability rather than change.

To what extent is Article 59 designed to state existing law rather than to attempt to change it? As so posed, the question cannot be answered, although it may be raised in state papers and in the courts if the forthcoming diplomatic conference does not succeed in producing a generally acceptable formulation. *Lex lata* cannot always be clearly distinguished from *lex ferenda*, particularly in attempted formulations of highly controversial doctrines. Codification of the law cannot always be separated from its progressive development. The Commission itself states in its Report:

35. The Commission’s work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in Article 15 of the Commission’s Statute, and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of governments.\(^{54}\)

On the fundamental issue of the place of the doctrine of *rebus sic stantibus* in existing international law, the members of the Commission and the governments commenting on the drafts have been divided.\(^{55}\) The Commission, nevertheless, states: “Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*.” It also refers to “the evidence of the acceptance of the doctrine in international law” as “considerable.”\(^{56}\) But the Commission does not explain what particular conception of the doctrine it regards as already accepted in international law. To the extent that the Commission rejects the expectations-of-parties approach, it fails to reflect a significant element in recent state practice. Furthermore, the Commission and its members, in discussing the doctrine and its limitations, seem to have been more concerned with formulating desirable norms than with stating such norms as may already exist. The Commission’s work, therefore, leaves open the question of the meaning, scope and modalities of the doctrine in existing international law.

While Article 59 appears to be inspired by distrust of the expectations-of-parties approach, though leaving room for giving effect to the intentions of the parties, this approach is more prominent in another article dealing with unilateral termination of treaties:

\(^{54}\) 1966 I.L.C. Rep. 10 (footnote omitted).


ARTICLE 53

Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

The Commentary indicates that this article recognizes “an implied right” to denounce or withdraw from a treaty and emphasizes that the decisive test is “the intention of the parties” which “is essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case.” It is noteworthy that the Commission, so fearful of “subjective interpretations” in its Commentary to Article 59, expresses no similar fear with respect to Article 53. Furthermore, the Commentary indicates that the intention of the parties may be inferred from all relevant factors, including the character of the treaty, and need not be stated in the text.57

Neither the text of Article 53 nor the Commentary answers the question whether the Commission in drafting this article recognized that the implied right of denunciation could be conditioned upon the occurrence of certain events such as a change of circumstances. An affirmative answer, however, is indicated by the records of the Commission. The Netherlands Government, in its comments on a previous draft of this article, had suggested the inclusion of words “under certain conditions.” In response, the Special Rapporteur, while not accepting this suggestion, remarked:

The principle of the article is that denunciation or withdrawal is admitted only if such appears to have been the intention of the parties. Clearly, if what appears from the treaty or from the circumstances of its conclusion is an intention to admit the possibility of denunciation or withdrawal only in particular circumstances, this intention will prevail.58

This interpretation apparently met with no objection in the Commission. So interpreted, Article 53 complements Article 59, giving expression to expectations-of-parties approach in cases where the parties had foreseen the possibility of a change of circumstances. As in Article 59, however, the policy of giving effect to the shared intentions and expectations of the parties is hedged by restrictions. First, Article 53 (unlike Article 59) applies only to treaties which contain no provision regarding termination. Second, the provision for a twelve months’ notice seems to exclude the

57 Several members of the Commission raised the question of consistency of Art. 53 with Arts. 27 and 28 on interpretation. 1966 I.L.C. Yearbook (1), Pt. I, 44–45, 47, 122.
invocation of Article 53 in an emergency and may thus limit the effect
given to shared intentions and expectations.
Article 53, like Article 59, fails to provide for suspension of the opera-
tion of a treaty as distinct from termination or withdrawal. Yet it would
seem that suspension should be permitted. In some situations, it may
best accord with the intentions and expectations of the parties, since
it is a less radical measure than termination and since the change of
circumstances may be temporary.59 Suspension is dealt with, however,
in Article 54:

**Article 54**

*Suspension of the operation of a treaty by consent
of the parties*

The operation of a treaty in regard to all the parties or to a par-
ticular party may be suspended:

(a) In conformity with a provision of the treaty allowing such
suspension;

(b) At any time by consent of all the parties.

The term “consent” in this article is designed to include “tacit con-
sent.” It is possible to argue, therefore, that Article 54 in effect permits
a party to suspend its obligations under a treaty if consent to do so in
certain circumstances may be implied from the intention of the parties.
But the force of this argument depends on the temporal limitations of
the article. Does “consent,” as used in the article, include consent tacitly
given at the time of the conclusion of the treaty? Or must consent be
obtained immediately before or at the time of the exercise of the right of
suspension? There is nothing in the text of Article 54 or the Com-
mentary to it to provide a direct answer. But an answer is suggested
by Article 51, which provides that a treaty may be denounced or with-
drawn from “at any time by consent of all the parties.” This provision,
parallel to Article 54, would have made Article 53 unnecessary if it had
been intended to permit unilateral termination on the basis of consent
implied from the intention of the parties when the treaty was concluded.
It suggests, therefore, that suspension on the basis of tacit consent at the
time of the conclusion of the treaty was probably not within the intention
of the Commission.

The Draft Articles already mentioned are by no means the only ones
relevant to the broader problems of the effect of changes of circumstances
on treaty relationships. Articles 52 (“Reduction of the parties to a
multilateral treaty below the number necessary for its entry into force”),
56 (“Termination or suspension of the operation of a treaty implied from
entering into a subsequent treaty”), 57 (“Termination or suspension of

59 The Special Rapporteur tentatively accepted the suggestion of the Government of
Israel that the article provide for suspension. Ibid. The Commission’s decision to the
contrary must have been deliberate, but is not explained in the published records.
the operation of a treaty as a consequence of its breach”), 58 (“Supervening impossibility of performance”), 60 (“Severance of diplomatic relations”) and 61 (“Emergence of a new peremptory norm of general international law”) all deal with the consequences of certain kinds of changes. Also significant in varying degrees are Articles 23 (“Pacta sunt servanda”), 26 (“Application of successive treaties relating to the same subject-matter”), 38 (“Modification of treaties by subsequent practice”), 41 (“Separability of treaty provisions”), 42 (“Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty”), 45 (“Error”), 63 (“Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty”), 64 (“Revocation of notifications and instruments provided for in Articles 62 and 63”), 65 (“Consequences of the invalidity of a treaty”), 66 (“Consequences of the termination of a treaty”), 67 (“Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law”), 68 (“Consequences of the suspension of the operation of a treaty”) and 69 (“Cases of state succession and state responsibility”). Furthermore, the problem may not be covered in its entirety by the I.L.C. Draft. Article 39 provides in part:

2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Nevertheless, shortly before the Commission concluded its work on the law of treaties, the Special Rapporteur remarked that “it should be remembered that the Commission had not covered all the factual causes of termination in its draft articles; obsolescence, for example, had not been dealt with specifically.”

Time and space do not permit an exhaustive treatment here of all the Draft Articles relevant to the problem of the effect of changes of circumstances, but it is evident that in order to understand the full measure of the Commission’s contribution to the solution of the problem it is not enough just to read Article 59 and the Commentary to it. This contribution is substantial, but cannot be characterized as brilliant. The I.L.C. Draft leaves many questions unanswered. The door to varying interpretations is wide open. The Commission, indeed, seems at times to have deliberately avoided clarifying the intended effect of certain of its articles. This is not surprising. The results of the Commission’s work must be appraised in the light of a lack of complete agreement within the Commission. We cannot assume that the members of the Commission would agree on the meaning and effect of all the formulations in the Draft Articles.

The I.L.C. Draft indicates that a legal norm reflecting the expectations-of-parties approach to the problem of the effect of changes of circumstances on treaty relationships is easier to formulate than a supposedly “objective

61 Ibid. 149.
rule of law” which attempts in some degree to reflect the intolerable-burden approach. The Commission’s effort in Article 59 does not eliminate the subjectivity of the expectations-of-parties approach, but in fact multiplies it by the subjectivities inherent in the interpretation of the terms used in the article. The difference between an “objective” and a “subjective” rule of law is at best a relative one. “As so often, the opposites of subjectivity and objectivity are not absolute contrasts, but dissolve themselves into different degrees of subjectivity.” 62 But the subjectivities inherent in Article 59 are bound to be particularly troublesome in its practical application by unilateral decisions of states in the absence of compulsory adjudication. In fact, the hope to construct an effective “objective rule” in such general terms must remain a mirage unless the application of the rule is subject to continuous control by judicial decision. This explains why the concept of an “objective rule” has more substance in municipal law, where it originated, than in contemporary international law; and why revision or readaptation of treaty obligations on an objective basis is not a practical alternative to termination or suspension except in cases of multilateral treaties which provide for revision by specified majorities of the parties. In seeking to escape from the unnecessary fiction of an “implied term,” the Commission found itself embracing another fiction—that of an “objective rule of law.”

Theoretically, two distinct norms should reflect the two community policies—that of giving effect to shared expectations and that of facilitating peaceful change in some situations. To a limited extent, Articles 53 and 59 of the I.L.C. Draft represent efforts to devise such norms. The possible existence of such distinct norms is also suggested by the long-standing and far-reaching differences among writers in the interpretation of the doctrine of rebus sic stantibus. But the Commission’s work fails to convince this observer that a community policy in favor of peaceful change, if there be one, can ever be successfully translated into a formulated norm of general international law, and in particular into a norm of the law of treaties, at least so long as states refuse to submit themselves generally to the jurisdiction of an international tribunal which could perform in effect a prescribing or quasi-legislative function.

Yet it must be recognized that the distinction between the community policies which are reflected, respectively, in the expectations-of-parties approach and the intolerable-burden approach may be less important in the practical application of the law of treaties than in its theoretical clarification. In the absence of convincing evidence of the specific intentions of the parties, even an impartial decision-maker, in determining reasonably imputable expectations, may regard as relevant the relative burdensomeness of treaty obligations in a new situation. In the absence of adjudication, the actual outcome of controversies will continue to be determined more by political than by legal considerations.