Fundamental Change of Circumstances

Notes on Article 59 of the Draft Convention on the Law of Treaties as recommended for Adoption to the United Nations Conference on the Law of Treaties by its Committee of the Whole in 1968

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I. Introductory

In December, 1966, the General Assembly of the United Nations decided that an international conference of plenipotentiaries was to be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate [1]). It referred to the Conference the draft articles on the law of treaties contained in the 1966 reports of the International Law Commission [2]) as the basic proposal for its consideration. The Assembly requested that the first session of the Conference be convoked early in 1968 and the second session early in 1969. In December, 1967 the General Assembly decided that the first session should be convened at Vienna in March, 1968 [3]). At that first session the Conference established a single Committee of the Whole. The document which, at the time of writing, records the results of the work of the Committee is the "Draft Report of the Committee of the Whole on its work at the first session of the Conference" consisting of two volumes and submitted by the Rapporteur, Mr. Eduardo Jiménez de

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[1]) General Assembly resolution 2166 (XXI) of 5 December 1966, General Assembly Official Records (G.A.O.R.): 21st session, Supplement No. 16 (A/6316).

[2]) Reports of the International Law Commission on the second part of its 17th session and on its 18th session, G.A.O.R.: 21st session, Supplement No. 9 (A/6309/Rev. 1); also in Yearbook of the International Law Commission (YBILC) 1966 vol. II, pp. 169 *et seq.*

[3]) General Assembly resolution 2287 (XXII) of 6 December 1967, G.A.O.R.: 22nd session, Supplement No. 16 (A/6716).

Aréchaga (Uruguay) [4]). Among the provisions which the Committee of the Whole recommends to the Conference for adoption is the following text of draft art. 59.

"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 extent 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 an obligation of 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 that ground for suspending the operation of the treaty".

It is the purpose of the present article to present a number of preliminary observations on this draft provision which purports to codify or to develop the law relating to that ground for terminating or suspending the operation of treaties which has been traditionally known as the principle or the *clausula rebus sic stantibus* and which in the terminology proposed by the International Law Commission and accepted by the Committee of the Whole of the Vienna Conference is styled "fundamental change of circumstances". A comprehensive doctrinal analysis of the principle is neither required nor appropriate at the present juncture, the less so as the *clausula* has been extensively treated in all current as well as in older text books of International Law [5]), as the number of monographs devoted to it is legion

[4]) UN Doc. A/CONF. 39/C. 1/L. 370 (22 May 1968) and A/CONF. 39/C. 1/L. 370/Add. 1–7 (22 to 24 May 1968) (2 volumes). The text of the articles recommended by the Committee of the Whole to the Conference is reproduced in International Legal Materials, vol. 7, No. 4, July, 1968, pp. 770–808.

[5]) See the Selected Bibliography on the Law of Treaties, UN Doc. A/CONF. 39/4, in particular Chapter I (Treatises on International Law and other general works touching on the Law of Treaties), pp. 11–30; Chapter II (Specialized works relating to the Law of

and as there already exist observations by learned writers on draft art. 59 as prepared by the International Law Commission [6]). The reports of two successive Special Rapporteurs on the Law of Treaties of the International Law Commission [7]) contain invaluable presentations of the history of the subject and analyses of the problems it poses.

In examining draft art. 59 as approved by the Committee of the Whole we must proceed from the fact that the article prepared by the International Law Commission has not only been "the basic proposal" for the consideration of the Conference, as requested by the General Assembly, but that, subject to three changes which do not affect a fundamental principle and which will be mentioned below, it was approved as submitted.

The Commission considered what is now draft art. 59 at its fifteenth session in 1963 [8]) on the basis of Sir Humphrey Waldock's Second Report [9]), and reconsidered it at the second part of its seventeenth session in January, 1966 [10]), in the light of government comments [11]) and recommendations presented in the Rapporteur's Fifth Report [12]). At its 18th session in July, 1966, it adopted the text of the article, then numbered 44, as approved in January, 1966 without debate and without change [13]).

Discussions on the draft Articles on the Law of Treaties which also touched on individual articles, including draft art. 59, took place in the Legal Committee (the Sixth Committee) of the General Assembly at various

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Treaties, section 5 (b) Termination and suspension of the operation of treaties, pp. 104–115).

[6]) See, in particular, Institut de Droit International, Onzième Commission. Terminaison des traités collectifs. Rapport provisoire présenté par M. Shabtai Rosenne, Geneva, May, 1967, pp. 31, 155–158 and *passim;* Oliver J. Lissitzyn, Treaties and Changed Circumstances (Rebus sic Stantibus), American Journal of International Law (AJIL) vol. 61 (1967), pp. 895 *et seq.*

[7]) Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, YBILC 1957 vol. II, draft arts. 21–23, pp. 32–33; commentary pp. 56–65; Sir Humphrey Waldock, Second Report of the Law of Treaties, YBILC 1963 vol. II (Waldock II) draft art. 22, pp. 79–85; *idem,* Fifth Report on the Law of Treaties, YBILC 1966 vol. II (Waldock V), draft art. 44, pp. 39–44.

[8]) 654th to 697th, 710th, 717th and 721st meetings all in YBILC 1963 vol. I, Report of the International Law Commission (ILC) covering the work of its 15th session, G.A.O.R. 18th session, Supplement No. 9 (A/550) Chapter II, draft art. 44; also in YBILC 1963 vol. II, p. 207.

[9]) Note 7 above.

[10]) 833rd to 835th and 842nd meetings, all in YBILC 1966 vol. I part I.

[11]) The Government comments on the 1963 draft of art. 59 (then 44) are reprinted in the Annex to the 1966 Reports of the Commission, note 2 above; also in YBILC 1966 vol. II, pp. 279 *et seq.*

[12]) Note 7 above.

[13]) 893rd meeting, YBILC 1966 vol. I part II, p. 332. The Commission made a slight stylistic change in the French version of the article.

sessions, particularly in 1966 [14]) and 1967 [15]). Government comments on the Commission's final draft were solicited and made [16]). At the Vienna Conference, consideration of draft art. 59 took place in three meetings of the Committee of the Whole in May, 1968 [17]). A revised version of art. 59, as proposed by the Drafting Committee, was approved by the Committee of the Whole on 22 May 1968 [18]).

[14]) G.A.O.R. 21st session (1966), Agenda item 84, Annexes, Report of the Sixth Committee, A/6516, paras. 95–96; 907th to 911th, 913th and 914th meetings of the Sixth Committee. For a complete listing of the pre-1967 documentation relating to draft art. 59 see Guide to the Draft Articles on the Law of Treaties adopted by the International Law Commission at its 18th session (1966), prepared by the Secretariat, UN Doc. A/C. 6/376, 11 May 1967.

[15]) G.A.O.R. 22nd session (1967) Agenda item 86, Annexes, Report of the Sixth Committee, A/6913, para. 49; 969th and 974th to 981st meetings of the Sixth Committee.

[16]) UN Doc. A/6827 and Add. 1 and 2 in G.A.O.R. 22nd session (1967) Agenda item 86, Annexes. The document contains also comments by the Secretary-General, by Specialized Agencies and by the International Atomic Energy Agency. These have, however, no bearing on article 59. Additional government comments were circulated in advance of the Vienna Conference in UN Doc. A/CONF. 39/6 and Addenda 1 and 2.

[17]) UN Docs. A/CONF. 39/C. 1/SR. 63, 64 and 65. Where in the following footnotes summary records (SR) without any other indication are quoted, the reference is to the provisional summary records of the Committee of the Whole.

[18]) SR. 81. The amendments proposed to the Committee of the Whole are reproduced and the stages of the Committee's proceedings concerning draft art. 59 are summarized in the Draft Report of the Committee, note 4 above, vol. II, pp. 60–64.

The successive drafts for the provision of art. 59 as it stands at the close of the 1968 session of the Conference were as follows:

(i) Art. 22 in W a l d o c k II (note 7 above).

(ii) Art. 22 proposed by the Drafting Committee of the International Law Commission on 28 June 1963 (YBILC 1963 vol. I, p. 249).

(iii) Revised text of (ii) proposed by the Drafting Committee on 9 July 1963 (*op. cit.*, p. 295).

(iv) Art. 44 of the 1963 Report of the ILC, identical with preceding item (iii) (note 8 above). This text was as follows:

"1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only".

The Brazilian member of the International Law Commission, Mr. Gilberto Amado, recalled early in the debates of the Commission that, confronted with the clause *rebus sic stantibus*, the jurists of his generation felt that they should advise caution, because of its exceptional character. Those who had been brought up to believe in the sanctity of the maxim *pacta sunt servanda* and the inviolability of treaties were always inclined to adopt a defensive attitude to the insiduous wiles of that serpent of the law, the *rebus sic stantibus* clause [19]). A scholar of a still earlier generation, Triepel, had spoken of the "ignominious theory of the *clausula rebus sic stantibus*" [20]).

The International Law Commission introduced its commentary to draft art. 59 by saying that almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which the article is concerned and added that most jurists, "at the same time 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; for the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are obvious" (para. 1 of the Commentary).

As already indicated, it is not proposed to describe in this article the

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(v) Art. 44 in Waldock V (note 7 above).

(vi) Art. 44 proposed by the Drafting Committee of the International Law Commission on 27 January 1966 (YBILC 1966 vol. I part I, p. 130).

(vii) Art. 44 of the Report of the ILC on the Work of the second part of its 17th session (A/CN. 4/184; mimeographed).

(viii) Art. 59 of the Report of the ILC on the Work of its 18th session (note 2 above); text identical with preceding item (vii). This text was as follows:

"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".

(ix) Art. 59 as proposed by the Drafting Committee of the Conference and approved by the Committee of the Whole on 22 May 1968 (Draft Report note 4 above, vol. II, p. 64 and Addendum 6, p. 7). This text is reproduced on page 40 above.

[19]) YBILC 1964 vol. I, 694th meeting, para. 65, p. 142.

[20]) Triepel, Völkerrecht und Landesrecht (1899), p. 90 (»die berüchtigte Theorie von der clausula rebus sic stantibus«).

innumerable incidents of recent and not so recent history in which a fundamental change of circumstances has been invoked as these are dealt with in the reports of Sir Gerald Fitzmaurice and Sir Humphrey Waldock [21]) and in the abundant literature [22]). A learned writer has most recently supplemented the references contained in earlier writings with an analysis of cases which that older literature had not been in a position to deal with, such as the action taken in 1939 by the United Kingdom, France and five other belligerents in regard to their acceptances of the compulsory jurisdiction of the Permanent Court of International Justice or the suspension by the United States, while not yet a belligerent, in August, 1941, of the performance of its obligations under the International Load Line Convention of 1930 [23]).

The cases of – generally unilateral – invocation of the doctrine of fundamental change of circumstances range, as the following examples show, widely in time, in place and in subject matter:

From the abrogation, in 1870, of the Austrian Concordat of 18 August 1855 [24]) by the Emperor of Austria on the ground that through the proclamation of the dogma of the Infallibility of the Pope by the Vatican Council of 1870, one of the contracting parties to the agreement had vitally changed [25]), to the denunciation, on 14 September 1968, by Albania, of the Warsaw Treaty of 1955 as a consequence of the invasion of Czechoslovakia by the USSR and four other parties to the Treaty [26]). The doctrine of

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[21]) Note 7 above.

[22]) Note 5 above.

[23]) Lissitzyn, *op. cit.* note 6 above, pp. 905 to 911.

[24]) Léopold Neumann, ed., Recueil des Traités et Conventions conclus par l'Autriche avec les puissances étrangères depuis 1763 jusqu'à nos jours (Leipzig 1859) vol. 6 No. 596, pp. 234–235. The Concordat was promulgated by Imperial Patent of 5 November 1855 in the Austrian *Reichsgesetzblatt* under No. 195.

[25]) Dispatch of Foreign Minister Count Beust of 30 July 1870 in Collectio Lacensis (Acta et Decreta Sacrorum Conciliorum) (Freiburg i. Br. 1890) vol. 7, pp. 1721 *et seq.* See Lillian Parker Wallace, The Papacy and European Diplomacy, 1863–1878 (Chapel Hill, University of North Carolina Press 1948), pp. 349 *et seq.* Chesney Hill, The Doctrine of "Rebus sic stantibus" in International Law (University of Missouri Studies 1934), p. 66, and Helmut Ridder, article »Konkordat« in Strupp-Schlochauer, Wörterbuch vol. 2, p. 278.

[26]) Statement by the representative of Albania in UN Doc. A/PV. 1691, 11 October, 1968 (Provisional), pp. 31–33; statement by the Chairman of the Council of Ministers of the People's Republic of Albania, Press Release dated 18 October 1968 of the Albanian Mission to the United Nations. The Treaty of Friendship, Co-operation and Mutual Assistance between Albania, Bulgaria, Hungary, the German Democratic Republic, Poland, the USSR and Czechoslovakia, signed in Warsaw on 14 May 1955, entered into force on 6 June 1955. Its art. 10 provides that it shall remain in force for twenty years (United Nations Treaty Series [UNTS] vol. 219 [1955] No. 2962).

rebus sic stantibus has also played a considerable role in the arguments adduced in support of the French withdrawal from the integrated command under the North Atlantic Treaty and other related arrangements [27]).

II. Observations on Paragraph 1 of Draft Article 59

The conditions under which a change of circumstances may be invoked as a ground for terminating a treaty or for withdrawing from a multilateral treaty are defined in para. 1 of the draft article. This definition contains, as the Commission said in para. 9 of its Commentary to the article, a series of limiting conditions:

> "(1) the change must be of circumstances existing at the time of the conclusion of the treaty;
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> (2) that change must be a fundamental one;
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> (3) it must also be one not foreseen by the parties;
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> (4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and
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> (5) the effect of the change must be radically to transform the scope of obligations still to be performed under the treaty".

"The Commission", its commentary goes on to say, "attached great importance to the strict formulation of these conditions. In addition, it decided to emphasize the exceptional character of this ground of termination or withdrawal by framing the article in negative form: 'a fundamental change of circumstances ... may n o t be invoked as a ground for terminating or withdrawing from a treaty u n l e s s etc.'".

These limiting conditions were fully maintained in the text as approved by the Conference Committee of the Whole. Except for the replacement, in para. 1 (b) of the English version, of the expression "scope of obligations" by the phrase "extent of obligations", the text of para. 1 was not changed in Vienna. An amendment by Venezuela to give to the provision a positive form [28]) was withdrawn in the light of the strong opposition which had been voiced against it, "since its effect would be to change the emphasis of the article by transforming it from a negative rule accompanied by exceptions, to a positive rule subject to the fulfilment of certain conditions" [29])

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[27]) Eric S t e i n and Dominique C a r r e a u, Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization, AJIL vol. 62 (1968), pp. 577 *et seq.*, at pp. 614 *et seq.*

[28]) UN Doc. A/CONF. 39/C. 1/L. 319, statements by Venezuela in A/CONF. 39/SR. 63; also in the 914th meeting of the Sixth Committee, para. 6.

[29]) United Kingdom in SR. 63, p. 14.

and because it "had the disadvantage of reversing the principle laid down in article 59 and turning the exception into the rule. It thus considerably enlarged the scope of a provision the application of which should be subject in every case to the greatest possible precautions" [30]).

There was general consensus among delegations at the Vienna Conference that the rule formulated in art. 59 has an exceptional character. The representative of the United Kingdom stated that, in general, his delegation approved the manner in which the International Law Commission had sought to delimit the scope of the doctrine by casting it as a "right to invoke" rather than as an absolute rule, and by setting out the provisions in negative terms, subject only to limited and narrowly defined exceptions [31]). The French statement on similar lines has just been quoted [32]). In the view of the representative of Australia the article laid down fairly clear conditions [33]). The representative of Switzerland said that when formulating the rule it was essential to make it as restrictive as possible in order to provide safeguards against abuse. The text of art. 59 was satisfactory in that respect; in particular, the negative presentation served to stress that the case envisaged in the article was an exception to the higher principle of *pacta sunt servanda* [34]). The representative of Italy praised the article in general as one of the most successful articles drafted by the Commission that was remarkably well balanced, and emphasized that it linked a traditional notion with a new idea, namely, that it was not a change of circumstances alone, but, in addition, a radical transformation of the obligations which were required to enable a State to invoke grounds for the termination of a treaty [35]).

The necessity of restrictive interpretation of the rule was not stressed by Western Powers only. The representative of the Ukrainian S.S.R. said that the socialist countries did not reject the existence of the doctrine but considered that it should be applied only in very exceptional cases and with the greatest possible caution [36]). The representative of Poland fully shared this view and added that the required radical transformation of the

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[30]) France in SR. 64, p. 22. Among those opposing the Venezuelan amendment were also Chile (SR. 64, p. 15), Congo (Democratic Republic) (*ibid.*, p. 23), Czechoslovakia (*ibid.*, p. 20), Hungary (SR. 65, p. 6), India (SR. 64, p. 11), Poland (*ibid.*, p. 5) and the USSR (*ibid.*, p. 13). Only Ecuador (SR. 64, p. 17; also in the 981st meeting of the Sixth Committee, para. 33) and Cuba (SR. 64, p. 3) supported the Venezuelan amendment.

[31]) *Loc. cit.* note 29 above.

[32]) *Loc. cit.* note 30 above.

[33]) SR. 64, p. 7.

[34]) SR. 63, pp. 9/10.

[35]) SR. 65, p. 9.

[36]) SR. 63, p. 9.

scope of the obligations imposed by a treaty could happen only in utterly unusual circumstances which drastically upset the balance in the legal situation of the parties [37]). Recourse to the rule could only be exceptional, and in any case was not easy, the representative of the USSR said [38]); the representative of Czechoslovakia also stressed the exceptional character of the rule and the need to set limits to its application [39]). The representative of the Byelorussian SSR emphasized that the article would have to be worded very strictly, since unduly elastic interpretation was undesirable [40]).

Those delegations which were of the view that the conditions laid down in the article were not sufficiently precise must also be considered as favouring a restrictive interpretation of whatever text would emerge from the proceedings of the Conference. Among governments that placed on record their views to this effect, that of the Netherlands must be mentioned. Its representative said it was impossible to know with certainty what was meant by such terms as "fundamental", "with regard to", "foreseen", "essential basis", "radically" and "the scope of obligations". He claimed it would be dangerous to employ such expressions in a legislative text [41]). The representative of Libya on the Sixth Committee of the General Assembly said that art. 59 required closer definition, in order to avoid its abuse [42]). In its written comments, Yugoslavia held it advisable to include in para. 1 a special condition to the effect that it must have become evident in the application of any particular treaty that the vital interests of one of the contracting parties are threatened [43]). The Bulgarian delegation indicated that it would like the conditions under which the principle would operate stated with greater clarity and precision [44]). The United States, which, in its written comments on both the 1963 and the 1966 drafts of the Commission, had been consistently critical of the draft article on fundamental change of circumstances belongs into the same category [45]).

While there exists general consensus among the delegations to the

[37]) SR. 64, p. 5.
[38]) SR. 64, p. 13.
[39]) SR. 64, p. 20.
[40]) SR. 65, p. 3.
[41]) SR. 63, p. 8.
[42]) 980th meeting of the Sixth Committee, para. 24.
[43]) G.A.O.R. 22nd session (1967) Agenda item 86, Annexes, Doc. A/6827, p. 10.
[44]) SR. 64, p. 12.
[45]) In comments submitted in 1965 the United States doubted whether the incorporation in the draft of the rule would be a progressive development of international law (Annex to the 1966 Reports of the ILC, note 2 above, p. 179) and in its 1967 comments it said that when the dangers implicit in art. 59 are weighed against the advantage of providing a "safety valve in the law of treaties" the balance is against the article as drafted (G.A.O.R. 22nd session [1967] Agenda item 86, Doc. A/6827/Add. 2, p. 28).

Vienna Conference and therefore among the prospective parties to the draft treaty on treaties on the proposition that the rule contained in art. 59 provides for an exception to a general principle of law and calls for restrictive interpretation, there are a number of questions involved in para. 1 of the article on which it is more difficult to assert that general agreement exists. One of these points of difference has to do with the relationship between the draft article and the principle or right to self-determination; this problem will be discussed below in connection with para. 2 (a) of the draft article which exempts boundary treaties from the operation of the rule. Another subject of controversy is, or was, the question to what extent changes of governmental policy might qualify as fundamental changes of circumstances within the meaning of the article [46]). This question will more conveniently be discussed when we address ourselves to the second of the exceptions set forth in para. 2 under (b) (fundamental change as the result of the breach of an obligation). There is, of course, also the most fundamental problem of procedure and third-party adjudication the satisfactory solution of which many governments have made a condition of their positive attitude to art. 59. This is a question which arises in regard to the whole of the draft convention and, in particular to its Part V on the invalidity, termination and suspension of treaties and is, as such, outside the scope of the present article although some general remarks on it will be made below.

At the present stage of our investigation we propose to concentrate on: (a) the general objection which asserts that the terms used in para. 1, such as "fundamental", "essential basis", "radically to transform" are too vague, too general and ambiguous and (b) a problem of interpretation which arises from the phrase "not foreseen by the parties" and includes the question of what the effect of treaty provisions regulating future developments, including future changes of circumstances, is and what status the fundamental change of circumstances rule has in the hierarchy of norms.

Is the formulation of article 59 vague and ambiguous?

In regard to (a) the following may be said:

Those who, like the governments of the Netherlands, Libya or Bulgaria have advocated a more precise formulation or who, like Professor Lissitzyn [47]) discern ambiguities in the general terms used in art. 59 certainly have a point. However, as the representative of Iran said, in reply, "the criticisms of the Commission made in the course of the debate

[46]) See notes 41, 42 and 44 above.

[47]) *Op. cit.* note 6 above.

seemed hardly constructive. The Commission had been accused of using vague terms, but the amendments put forward did not suggest any changes that would improve the text" [48]). Sir Humphrey Waldock, the Special Rapporteur of the Commission, who attended the Vienna Conference as the "Expert Consultant", interpreted questions put by the representative of the Netherlands [49]) as indicating some uneasiness as to whether the conditions had been tightly enough drawn. He replied by quoting what an English judge had said in connexion with an analogous situation in English law, that it was almost impossible by any nice combination of words to state a rule in advance of any possible controversy. "The Commission had felt that it had had to be particularly careful in formulating the article from the point of view of the stability of treaties. It had examined many combinations of words before it had arrived at the present text; if the Conference, however, could improve the text by making it stricter and more objective, so much the better" [50]).

There does not exist any legal system which does not operate with general concepts which leave a wide margin of appreciation to those who are called upon to interpret and to apply them [51]). Public international law is no exception [52]). The problem which draft art. 59 poses does not, therefore, consist in the use of general terms in defining the substantive law but depends on whether or not the draft Convention provides for appropriate procedures for their objective interpretation and application.

Changes for the consequences of which the treaty provides

As far as the problem under (b) above is concerned, the situation is as follows: Sir Humphrey Waldock's 1963 draft (art. 22) exempted

[48]) SR. 65, p. 8.

[49]) See at note 41 above.

[50]) SR. 65, pp. 10/11.

[51]) Examples are the standard of the "reasonable man" or of the man on the Clapham omnibus in the law of torts; the *diligentia boni patris familias* of Roman law; the concepts of *les bonnes mœurs* or *die guten Sitten* of the French and German Civil Codes; the "important reason" *(wichtiger Grund)* which justifies the immediate dissolution of a contract of service (section 626 of the German Civil Code) or other contractual relationships or the *justes motifs* which authorize the dissolution of a partnership (art. 1871 of the French Code Civil). The latter two examples are jurisprudentially very much akin to the termination of an international treaty because of a fundamental change of circumstances or breach.

[52]) Exemples are: "a situation which might lead to international friction or give rise to a dispute" (Art. 34 of the Charter); "the obligation to promote to the utmost the well-being of the inhabitants" (Art. 73 *ibid.*; taken over from the Mandates system); "procedural matters" (Art. 27 *ibid.*); "important questions" (Art. 18 *ibid.*).

from the operation of the *rebus sic stantibus* rule cases where the change of circumstances "has been expressly or impliedly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question" [53]).

The 1963 ILC draft (art. 44) would have provided that the rule did not apply: "... (b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself" [54]).

The 1966 text of the Commission and the text adopted by the Committee of the Whole in Vienna in 1968, while making it a condition for the application of art. 59 that the fundamental change was not foreseen by the parties, does not contain a provision corresponding to the provisions of the Waldock and ILC drafts of 1963 and defining the effect of art. 59 on treaties which have made provision for changes of circumstances.

Neither the records of the January 1966 meetings of the Commission, nor the 1966 Reports to the General Assembly throw any light on the reasons why the passage "and for the consequences of which [the parties] have made provision in the treaty itself" was deleted. It seems, however, that this omission is of considerable importance not only for answering the concrete question to which the deleted phrase would have given the reply, but, beyond that, for the more general problem of the status of the fundamental change of circumstances rule in the hierarchy of norms as conceived by the authors of the 1966 draft and, in particular, of those among them who were instrumental in effecting the deletion. The proceedings of the Drafting Committee from which the new text emerged took place *in camera*.

Without expressing or implying a view on the status which the proceedings of the International Law Commission will eventually acquire for the purposes of interpreting the Convention, in the following paragraphs certain statements made during the 1963 session of the Commission will be compiled which may conceivably explain the attitude of some members of the ILC to the question under consideration and which may have furnished the reason for the deletion of the passage.

In the view of Mr. Yasseen (Iraq) *rebus sic stantibus* was not a clause, but an objective rule of *ius cogens* from which derogation was not possible by express provision [55]).

In commenting on Sir Humphrey's proposal quoted at note 53 above, Mr. Bartoš (Yugoslavia) dissented on the ground that *rebus sic*

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[53]) Notes 7 and 18 (i) above.
[54]) Note 18 (iv) above. Emphasis added.
[55]) YBILC 1963, vol. I, pp. 143–144 para. 59.

stantibus was not now regarded as an implied clause which could be set aside by the parties, but as a general rule supplementing the *pacta sunt servanda* rule. Otherwise the stronger State would always exert pressure to secure the inclusion of a clause such as that referred to in Sir Humphrey W a l d o c k's draft [56]). When criticizing a different formulation of Sir Humphrey's original proposal, submitted by the 1963 Drafting Committee [57]), he said that the exact meaning of the proposed clause ("changes of circumstances for which the parties have made provision in the treaty itself") was not clear to him. Was it for the change of circumstances that the parties had made provision, or for the circumstances themselves? A general clause stating that a change of circumstances had no effect on a treaty was very dangerous [58]). Mr. B a r t o š observed that a saving clause specifying that no change of circumstances would affect the treaty was included in treaties made by the International Bank for Reconstruction and Development and even in many treaties between strong and weak States. It might, he said, perhaps be accepted that certain changes could be provided for by the parties, but the *rebus sic stantibus* rule was a rule of *ius cogens*, and it would be dangerous to adopt a text that might lend itself to the perhaps mistaken interpretation that derogations from the concept of the *rebus sic stantibus* rule as established *ius cogens* were permitted under contractual clauses in treaties. He would not rule out the possibility of the parties making provision for c e r t a i n changes and even adopting subsidiary provisions to remedy situations caused by a change of circumstances, always provided that the parties to the treaty were aware not only of the changes in question, but also of their possible effects.

Mr. T u n k i n (USSR) [59]) supported by Mr. P a l (India) [60]) thought the clause ought to be deleted because it was inconceivable that the parties could foresee changes of circumstances that would wholly transform the character of the obligations undertaken in the treaty.

Mr. G r o s (France, now a member of the International Court of Justice) pointed out that there were, in practice, treaties which made provision for the possibility of fundamental changes during their execution. Recent economic treaties contained provisions on the eventuality of "serious disequilibrium" or "fundamental disturbances" in a country's economic situation, which established remedial methods and procedures. If such

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[56]) *Op. cit.*, p. 149 para. 63.
[57]) *Op. cit.*, pp. 249/250 para. 27.
[58]) *Op. cit.*, p. 251 paras. 50–51.
[59]) *Op. cit.*, p. 253 para. 83.
[60]) *Op. cit.*, p. 254 para. 5.

provisions had not been included in the treaty, it might be claimed in such circumstances that a fundamental change had occurred; but where the treaty made provision for the change and prescribed the remedy, that remedy must be applied, not the general system of fundamental change of circumstances laid down in the article[61]). The late Mr. de Luna (Spain) supported Mr. Gros's argument by adducing as an example a treaty drafted in 1962 under the auspices of OECD under which the parties were required to honour the guarantee of the repatriation of property only so long as their balance of payments situation permitted them to do so within reason[62]).

Replying to Mr. Gros's comments Mr. Tunkin said that the deletion of the clause would not mean that provisions concerning changes of circumstances included in the treaty itself would not apply, but that they would be subject to the conditions set out in what now is para. 1 of art. 59. On the other hand, if the clause were retained it would, in Mr. Tunkin's view, override the provisions of the present art. 59 (1)[63]). This statement appears to indicate that in the speaker's opinion the *rebus sic stantibus* rule would operate also vis-à-vis the type of treaty provision mentioned by Mr. Gros and Mr. de Luna, provided the other conditions of art. 59 are met. In other words: the treaty clause making provision for changes of circumstances would be void to the extent it is repugnant to art. 59 *i. e.* if it imposes more stringent conditions for the invocation of change of circumstances than art. 59.

In his 1963 report Sir Humphrey Waldock had explained that the clause he was proposing[64]) covered the contingency that the parties might themselves have foreseen the possibility of a particular change of circumstances and provided for it expressly or impliedly in the treaty; in that case the treaty would govern the case and the *rebus sic stantibus* doctrine could not be invoked to set aside the treaty[65]). In his reply to the critics Sir Humphrey said he had been considerably startled by Mr. Yasseen's contention that the clause would be contrary to internationl law because the principle of *rebus sic stantibus* was a rule of *ius cogens* from which the parties could not derogate. Personally, he (Sir Humphrey) considered that the parties would be well advised to provide for a change of circumstances in the treaty itself, if that could be effectively done, and that such

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[61]) *Op. cit.*, p. 253 para. 87.
[62]) *Op. cit.*, p. 254 para 99.
[63]) *Op. cit.*, p. 254 para. 100.
[64]) Quoted at note 53 above.
[65]) YBILC 1963 vol. 2, p. 85 para. 16.

provision would in no way run counter to the doctrine. As far as he could judge, the Commission as a whole did not subscribe to Mr. Yasseen's view [66]). At a later occasion Sir Humphrey repeated that it seemed to go without saying that the parties were always at liberty to make their own arrangements for changes which they had themselves foreseen [67]).

It seems that if the clause in a treaty providing for the consequences of change indicates that the parties foresaw the concrete change that has occurred, then art. 59 by its very terms ("which was not foreseen by the parties") does not apply. If, however, the treaty clause concerned is of a more general nature and does not conclusively prove that the particular change was contemplated and foreseen then the question arises whether under the 1966 and 1968 texts of the article the arguments of Mr. Yasseen and Mr. Bartoš or those of Messrs. Waldock, Gros and de Luna prevail.

Is article 59 ius cogens?

The view of Mr. Yasseen and Mr. Bartoš was based on the proposition that the rule embodied in art. 59 is a rule of *ius cogens* as defined by the International Law Commission [68]). The Commission as a whole did not subscribe to this view. Only one statement by a government representative on the question is on record: The representative of Sweden said in the Sixth Committee in 1967 that "presumably articles 23 *(pacta sunt servanda),* 48 (coercion of a representative), 49 (coercion of a State) and 59 (fundamental change of circumstances) could not be rendered ineffective or modified by express agreement between States" [69]). While the peremptory character of the rules in draft arts. 48 and 49 cannot be questioned, the Swedish view concerning art. 23 is open to doubt [70]) and the observation that art. 59 presumably partakes of *ius cogens* status does not seem convincing, particularly in the light of subsequent developments at the Vienna Conference. The specific question whether art. 59 lays down a

[66]) YBILC 1963 vol. I, p. 157 para. 14.

[67]) *Op. cit.*, p. 256 para. 20.

[68]) Art. 37 in the 1963 draft, art. 50 in the 1966 draft. For references to the literature on international *ius cogens* see Scheuner in ZaöRV vol. 27 (1967), at p. 520. See also Schwelb in AJIL vol. 61 (1967) where, on p. 965, the question whether the doctrine of *rebus sic stantibus* is part of *ius cogens* is referred to.

[69]) 980th meeting of the Sixth Committee, para. 10.

[70]) See, *e. g.* the statement by Sir Humphrey Waldock as Chairman of the International Law Commission in the 969th meeting of the ILC ("The rule of *pacta sunt servanda* could not of itself be considered a peremptory norm, for while the parties were mutually bound by treaty obligations, they could in general agree to release each other from those obligations or to vary them").

peremptory rule of international law from which no derogation is permitted was not, as such, the subject of extended discussion at Vienna. The work of the Committee of the Whole has nevertheless contributed to its clarification. The Committee adopted a new and narrower definition of *ius cogens* by providing in its version of art. 50 that "for the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" [71]). Considering that a number of important States, among them the United States, are opposed to the contents of draft art. 59 even as a norm of *ius dispositivum*, it can hardly be maintained that it is accepted and recognized by the international community of States as a whole as a norm of *ius cogens*. If in the view of the majority of the International Law Commission the principle of *rebus sic stantibus* did not come within the wider concept of *ius cogens* as defined by the Commission, it can hardly be claimed that it is covered by the term as defined in the 1968 draft.

A flaw in the drafting of paragraph 1

Professor Lissitzyn has drawn attention to a drafting point which has arisen as a consequence of the elimination of the phrase "and for the consequences of which they have made provision in the treaty itself" [72]). The 1968 text provides that "A fundamental change of circumstances ... which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: . . .".

If the provision is read literally, it means that a change which was foreseen may be invoked. This is, of course, not the intended meaning, as is indicated by para. 9 of the commentary according to which the change "must also be one not foreseen by the parties". This is a flaw which can be easily corrected, by restoring the 1963 text or otherwise.

III. Observations on Paragraph 2 of Draft Article 59

Treaties establishing a boundary

Under para. 2 (a) of the draft article a fundamental change of circum-

[71]) Draft Report of the Committee of the Whole, A/CONF. 39/C. 1/L. 370/vol. II, Add. 2, p. 31 and Add. 6, p. 4. Emphasis added.

[72]) *Op. cit.* note 6 above, p. 916.

stances may not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary. This exception and its scope was much disputed both during the consideration of the question by the International Law Commission and at the 1968 session of the Vienna Conference. Some members of the Commission and some Governments wanted the exception to be widened. Other members of the Commission and Governments wished to have the exception deleted.

In Sir Humphrey Waldock's 1963 draft [73]) the exception had been formulated in wider terms:

> "(a) stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights;
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> (b) stipulations which accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement".

The 1963 Drafting Committee [74]) proposed the formula: "a treaty establishing a territorial settlement", a phrase which like Waldock's draft was intended to cover not only a transfer of territory itself but also ancillary rights arising from the transfer [75]). This proved not to be acceptable to the majority which wished to avoid any reference to the grant of territorial rights and to limit the exception to treaties which either established a territorial boundary or actually transferred territory [76]). The phrase "a treaty fixing a boundary" was therefore used in the 1963 draft of the Commission. The Governments of the Netherlands [77]) and of Australia [78]) suggested a widening of the exception and the Special Rapporteur agreed that it seemed logical to deal with a treaty transferring territory on the same basis as one settling a boundary. In his 1966 redraft he therefore proposed the exemption from the rule of treaty provisions "fixing a boundary or effecting a transfer of territory" [79]). In the January, 1966, meetings he pointed out that it was not sufficient to refer to treaties which fixed boundaries. The expression "to fix a boundary" referred to the actual delimitation of frontiers and would exclude such cases as the cession of an island [80]). Accordingly the final text as approved at the January, 1966, meetings and confirmed both at the eighteenth session of the Commission and at Vienna

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[73]) Waldock II, note 7 above and note 18 (i).
[74]) Note 18 (ii) above.
[75]) YBILC 1963 vol. I, p. 250 paras. 27 and 31.
[76]) *Op. cit.*, p. 255 para. 18.
[77]) 1966 Reports, note 2 above, Annex, pp. 143–144.
[78]) *Op. cit.*, p. 107.
[79]) Waldock V, note 7 above and note 18 (v).
[80]) YBILC 1966 vol. I part I, p. 86 para. 16.

in 1968 speaks of a "treaty establishing a boundary" which embraces treaties of cession as well as delimitation treaties[81]).

At the Vienna Conference the United States reopened the question by moving an amendment under which the exception would have covered "a treaty drawing a boundary or otherwise establishing territorial status"[82]). In support of this amendment the representative of the United States said that the sub-paragraph (2(a)) failed to cover several important groups of treaties, which, while not establishing boundaries, established territorial status or settled territorial disputes. He gave as examples condominium agreements which settled disputes; treaties to settle territorial disputes by which the parties agreed not to press their claims in the light of concessions relating to such matters as treatment of minority groups, customs concessions, or joint development of resources; treaties creating joint commissions which had jurisdiction over a wide range of territorial problems[83]). The representative of Switzerland said that the phrase proposed by the United States ("establishing territorial status") would be very helpful to a country like his which had concluded many treaties with neighbouring States on the joint utilization of rivers forming boundaries, freedom of navigation in certain rivers or rights of passage[84]). The representative of Australia, supporting the United States amendment, suggested a slightly modified formula, such as "treaty relating to the status of territory"[85]). The Czechoslovak delegation was prepared to accept the general idea, though not the wording of the United States amendment[86]). The Italian delegation had considerable sympathy for it since it made clearer the notion of territorial status as an absolute exception to the *rebus sic stantibus* rule[87]). The amendment met, however, with strong opposition. The representative of the USSR declared it to be unacceptable because it irresistibly evoked the idea of a cease-fire or armistice line[88]). Sir Humphrey Waldock as Expert Consultant explained that he had some sympathy for the United States amendment. He himself had raised the question in the International Law Commission in the form of a possible enlargement of the para. to cover territorial régimes. The Commission, however, had considered that

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[81]) Commission's commentary to art. 59 para. 11.

[82]) UN Doc. A/CONF. 39/C. 1/L. 335; draft Report of the Committee of the Whole, note 4 above, vol. II, p. 62.

[83]) SR. 63, p. 7.

[84]) SR. 63, p. 11.

[85]) SR. 64, p. 9.

[86]) SR. 64, p. 21.

[87]) SR. 65, p. 9.

[88]) SR. 64, p. 14.

it would be too hard to find a form of words which would not unduly enlarge the exceptions and had come down firmly for the present provision [89]). The United States amendment was rejected by 43 votes to 14, with 28 abstentions [90]).

The opposition against the boundary treaties clause claimed that it was inconsistent with the principle of self-determination. That principle, it was said, had a bearing on all territorial settlements. Any attempt to keep a treaty in force against the wishes of a people would involve a greater danger to peace than the application of the *rebus sic stantibus* doctrine [91]). The draft, it was claimed, must not recognize that a treaty effecting a transfer of territory need take no account of future changes resulting from the right of self-determination [92]). Other members of the Commission, among them the USSR and Polish members, did not agree that art. 59 was of special importance to the newly independent States. Unequal treaties or treaties imposed on former colonies might be challenged on the basis of other articles of the draft [93]). The article had no relevance to the question of self-determination [94]).

Sir Humphrey Waldock said that the principle of self-determination might be invoked on the political plane as a special and even legal justification for carrying out territorial changes, but it ought not to be introduced as an element in the quite distinct doctrine of treaty law about changes of circumstances affecting the validity of a treaty. He agreed with Mr. Tunkin that the issue was just as likely to arise between new States as between new and old States [95]).

Sir Humphrey said in a later intervention that if changes in territorial sovereignty were necessary, they would be brought about by other means and other procedures than the operation of the doctrine of *rebus sic stantibus*. He did not underestimate the political and legal importance of the principle of self-determination, even if its precise content was extremely difficult to define. He was not one of those who denied that it had any claim to be a legal concept; but it was not a concept which had any particular place in the law of treaties [96]).

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[89]) SR. 65, p. 12.

[90]) SR. 65, p. 13.

[91]) Mr. Tabibi (Afghanistan) in YBILC 1963 vol. I, p. 139 para. 34; p. 251 para. 46, p. 253 para. 97 and p. 256 paras. 24 and 25.

[92]) Mr. Bartoš (Yugoslavia) *op. cit.*, p. 149 para. 64; p. 251 para. 52.

[93]) Mr. Tunkin (USSR) *op. cit.*, p. 155 para. 56.

[94]) Mr. Lachs (Poland); now a member of the International Court of Justice, *op. cit.*, p. 252 para. 78.

[95]) *Op. cit.*, p. 158 para. 18.

[96]) *Op. cit.*, p. 256 para. 19.

The Commission itself summed up its consideration of this problem in para. 11 of the Commentary to art. 59 as follows:

> "Some members of the Commission suggested that the total exclusion of these treaties [treaties establishing a boundary] from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception from the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also 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. By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed".

The exchange of views on the exclusion of boundaries treaties was continued in the Sixth Committee of the General Assembly and at Vienna. The representative of the USSR spoke in favour of para. 2 (a): "However far-reaching the change of circumstances, the interests of peace required that the rule could not be invoked with respect to a boundary treaty" [97]). The representative of the Byelorussian SSR [98]) appreciated the Afghan representative's concern [99]), but said it should not be forgotten that the article dealt only with legal treaties. Unequal treaties would be void where they conflicted with a rule of *ius cogens*. The representatives of Poland [100]) and the Ukrainian SSR [101]) also supported the exception.

The representative of Thailand on the Sixth Committee said in 1967 that para. 2 (a) "had been appropriately added . . . for the protection of Asian and African countries" [102]). Of particular interest is the statement of the representative of Kenya who said that some delegations had been understandingly reluctant to admit that exception in view of the arbitrary way in which some boundaries, including many former colonial territorial boundaries, had been established. Nevertheless, territorial boundaries were so inextricably interwoven with the sovereignty and integrity of a State that the Commission had been wholly justified in excluding treaties establishing boundaries from the ambit of *rebus sic stantibus* [103]). The representa-

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[97]) SR. 64, p. 13.
[98]) SR. 65, p. 4.
[99]) See below note 104.
[100]) SR. 64, p. 6.
[101]) SR. 63, p. 9.
[102]) 976th meeting of the Sixth Committee, para. 14.
[103]) SR. 65, p. 10.

tives of Afghanistan [104]), Bolivia [105]), Ecuador [106]) and Morocco [107]) pleaded for the deletion of para. 2 (a). The reader who is familiar with Asian, African and Latin American political history will have no difficulty in finding the reasons for the attitudes for or against the clause.

A formal motion to delete para. 2 (a) was not made and it has remained part of the text.

Breach of an obligation

The second exception from the *rebus sic stantibus* rule is contained in sub-para. 2 (b). It provides that a fundamental change of circumstances may not be invoked if the fundamental change is the result of a breach by the party invoking it either of an obligation of the treaty or of any other international obligation owed to any other party to the treaty [108]). The Waldock draft of 1963 had contained a similar but much wider clause ("if it [the change] was caused, or substantially contributed to, by the acts or ommissions of the party invoking it"), but this provision did not appear in the 1963 ILC draft. The arguments adduced against it at the 1963 session included the argument of Mr. Elias (Nigeria) who opposed the provision "because of the complications that the theory of contributory negligence, already a difficult one in municipal law, might introduce in the international sphere" [109]). Mr. Bartoš's opposition had more substance: He contended that a change which was caused by the acts or omissions of the party invoking it could be taken into consideration, [*i. e.* not bar the party from invoking the change] for example, in the case of an agricultural country in the process of industrialization, which wished to withdraw from certain trade treaties, if at the time of their conclusion the

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[104]) SR. 64, p. 9.

[105]) SR. 63, p.15.

[106]) SR. 64, p. 17.

[107]) SR. 65, p. 7.

[108]) On the recommendation of the Drafting Committee the Committee of the Whole approved a change in the wording of para. 2 (b) to bring it into line with that it had adopted for a similar provision which it had, on Netherlands initiative, inserted in art. 58 (supervening impossibility of performance). The phrase ". . . a breach . . . either of the treaty or of a different international obligation owed to the other parties to the treaty" was replaced by ". . . a breach either of an obligation of the treaty or of any other international obligation owed to any other party to the treaty". See the statement of Mr. Yasseen (Iraq) as Chairman of the Drafting Committee in SR. 81, p. 8. The replacement in art. 59 (2) (b) of "a different . . . obligation" by "any other . . . obligation" had been suggested by the representative of Greece (SR. 65, p. 3) with reference to the Netherlands amendment to art. 58.

[109]) YBILC 1963 vol. I, p. 147 para. 50.

parties had had the agricultural nature of the country in mind [110]). The 1963 ILC draft being silent on the question, it was raised again by the comment of the Government of Pakistan which proposed that changes of circumstances which have been deliberately brought about or created by one of the parties to the treaty should be excluded from its [the *rebus sic stantibus* rule's] operation [111]). The Pakistani suggestion did "not attract much comment in the Commission" [112]).

The exception remained thus restricted to cases where the party invoking the change was guilty of the violation of a legal obligation.

The exception as thus circumscribed was

> "simply an application of the general principle of law that a party cannot take advantage of its own wrong . . . As such it is clearly applicable in any case arising under any of the articles. Nevertheless having regard to the particular risk that a fundamental change of circumstances may result from a breach, or series of breaches, of a treaty, the Commission thought it desirable specifically to exclude from the operation of the present article a fundamental change of circumstances so brought about". (Para. 12 of the Commentary to Art. 59).

Change of governmental policy

In his 1963 draft Sir Humphrey Waldock had proposed to provide expressly that

> "A change in the policies of the State claiming to terminate the treaty, or in its motives or attitude with respect to the treaty, does not constitute an essential change in the circumstances forming the basis of the treaty . . .".

In 1963 the Commission was strongly divided on this question. Mr. Yasseen [113]), Mr. Tunkin [114]) and Mr. Bartoš [115]) favoured the deletion of the paragraph. Mr. Jiménez de Aréchaga (Uruguay) [116]) and Mr. Rosenne (Israel) [117]) were also critical of it. On the other side, Mr. Briggs (United States) agreed that the exception was

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[110]) *Op. cit.*, p. 149 para. 63.

[111]) 1966 Reports, note 2 above, Annex, p. 148; Sir Humphrey Waldock in YBILC 1966 vol. I part 1, p. 78 para. 2. See also Schwelb in the Indian Journal of International Law vol. 7 (1967), p. 316.

[112]) Sir Humphrey Waldock in *op. cit.* note 111 above, p. 86 para. 17.

[113]) YBILC 1963 vol. I, p. 142 para. 61.

[114]) *Op. cit.*, p. 145 para. 22.

[115]) *Op. cit.*, p. 149 para. 62.

[116]) *Op. cit.*, pp. 149/150 para. 70.

[117]) *Op. cit.*, p. 151 para. 20.

worth keeping [118]). The most emphatic support for the exclusion of subjective political change as constituting a change of circumstances came from Mr. (now Judge) Gros (France) and from Mr. Ago (Italy). What the Commission was concerned with, the former said, was the case of treaties which, while not incapable of performance, ought to be revised for reasons of equity, an essential change having occurred in the external circumstances which had been taken into consideration at the time of their conclusion [119]). Mr. Ago added that if a change in the policies of one of the parties was to be regarded as adequate grounds for impugning the validity of a treaty concluded by that party when it was following another policy, it would be no use concluding treaties [120]). Sir Humphrey Waldock pointed out in reply to the critics, that it was conceivable that in certain types of treaty a change of policy could be regarded as a change in circumstances affecting the possibility of continued execution. He replied to an argument adduced by Mr. Yasseen that if a political party or movement came to power whose aim was the country's non-alignment, an earlier treaty of alliance could not be maintained in force. He reminded the Commission that that particular problem would not have come up if the Commission had followed the suggestion he had made, *i. e.* that an implied right of termination for treaties of alliance or similar agreements should be provided for [121]).

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[118]) *Op. cit.*, p. 146 para. 33.

[119]) *Op. cit.*, p. 153 para. 35.

[120]) *Op. cit.*, p. 154 para. 43.

[121]) In draft art. 17 of his second report (YBILC 1963 vol. II at p. 64), which corresponds to the present draft art. 53 relating to the denunciation of a treaty containing no provision regarding termination, it had been suggested that a party shall have the right to denounce or withdraw from certain types of treaties by giving twelve months' notice. Sir Humphrey Waldock had proposed that commercial treaties, treaties of alliance or of military co-operation, treaties for technical co-operation and treaties of arbitration, conciliation or judicial settlement should be subject to denunciation or withdrawal. The ILC provided in art. 39 of its 1963 draft that 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 appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In art. 53 of the Commission' 1966 draft the conditions for the denunciation of a treaty which is silent on the question were tightened and it was said that such a treaty "is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal". In 1968 the Committee of the Whole of the Vienna Conference adopted by a narrow majority (26 votes to 25, with 37 abstentions) a United Kingdom amendment adding the phrase "or unless the character of the treaty is such that a right of denunciation or withdrawal may be implied" (UN Doc. A/CONF. 39/C. 1/L. 311). On the recommendation of the Drafting Committee the clause was re-worded to read "or;

In its comments the United Kingdom Government "doubted whether a subjective change of policy . . . can ever be regarded as a fundamental change of circumstances" [122]). The problem was not taken up at the January 1966 meetings when the Commission's final text of art. 59 was established. In para. 10 of the commentary to the article the following is said:

> "The question was raised in the Commission whether general changes of circumstances quite outside the treaty might not sometimes bring the principle of fundamental change of circumstances into operation. But the Commission considered that such general changes could properly be invoked as a ground for terminating or withdrawing from a treaty only if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty. Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty. They represented that, if this were not the case, the security of treaties might be prejudiced by recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the government of a country might make it unacceptable, f r o m t h e p o i n t o f v i e w o f b o t h p a r t i e s, to continue with the treaty. The Commission considered that the definition of a 'fundamental change of circumstances' in paragraph 1 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, and that it was unnecessary to go further into the matter in formulating the article" [123]).

The emphasis on unacceptability "from the point of view of both parties" is, perhaps, not too relevant because, if both parties believe that the continuation of the treaty is against their interest then the invocation of the fundamental change of circumstances becomes unnecessary and the treaty can be terminated by consent of the parties (art. 51).

At the 1968 session of the Vienna Conference the question was not re-opened. Only a few comments were made on the effect of changes of governmental policy on treaties. The United Kingdom delegation believed

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(b) a right of denunciation or withdrawal may be implied from the nature of the treaty" and approved in a separate vote by 56 votes to 10, with 13 abstentions. This was, of course, a modification of the provision on the general lines which had been recommended by Sir Humphrey W a l d o c k in 1963.

[122]) 1966 Reports, note 2 above, Annex p. 169.

[123]) Italics in the original.

that it would have been preferable to include an express provision on the point, but noted with satisfaction that there had been no dissent in the Commission on that question. In regard to the reference in the Commission's commentary to the view of some members of the Commission that a treaty of alliance was a possible case where a radical change of political alignment by the government of a country might make it unacceptable, from the point of view of both parties, to continue with the treaty, the British representative did not dispute that general proposition but doubted whether the case should be discussed under the heading *rebus sic stantibus* [124]). He pointed out that the United Kingdom amendment to art. 53, which had been adopted by the Committee of the Whole, had been intended to deal with that type of case by indicating that the particular character of the treaty could be such that a right of termination on reasonable notice might be implied [125]). The representative of Australia said that, as indicated in para. 10 of the commentary, the Commission had been divided on that point. His delegation, for its part, found it difficult to agree with those members of the Commission who had maintained that a treaty of alliance was a possible case where a radical change of political alignment might make it unacceptable, from the point of view of both parties, to continue with the treaty. If a change of political attitude made the treaty unacceptable to both parties, they should obviously agree to terminate it. The Australian delegation was firmly of the opinion that a change in government should in no event be invoked as a ground for unilaterally terminating a treaty [126]). The representative of the USSR, while asserting that as a result of the social revolution and decolonization, the reservation concerning fundamental changes of circumstances had become a fully fledged principle of international law, emphasized that a mere change in a country's internal policy or government was not a fundamental change of circumstances. In that respect the Soviet delegation supported the statement in the last sentence of para. 10 of the commentary [127]). This is where the matter stands at the conclusion of the first session of the Conference.

IV. Observations on Paragraph 3 of Draft Article 59

The Third paragraph of the article provides that if, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances

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[124]) SR. 63, p. 13.
[125]) See note 121 above.
[126]) SR. 64, p. 8.
[127]) SR. 64, p. 13. For the sentence endorsed by the USSR see at note 123 above.

as a ground for terminating or withdrawing from a treaty, it may also invoke that ground for suspending the operation of the treaty. This is a provision which was inserted by the Committee of the Whole of the Conference.

In its comments on the Commission's 1963 draft the government of Israel had suggested that the article could also envisage the suspension of the operation of the treaty, in whole or in part [128]). No provision to this effect appeared, however, in the Commission's draft.

The delegations of Canada [129]) and of Finland [130]) moved, in the Committee of the Whole, amendments to the effect that a fundamental change of circumstances might be invoked as a ground for the suspension of the operation of a treaty as an alternative to termination or withdrawal. In support of his amendment the representative of Canada said that the possibility of suspension could be excluded from the article only if it were considered that "fundamental change" was synonymous with irreversible, permanent or unalterable change. Few representatives would be likely to accept any of those terms as a substitute for "fundamental change" [131]). The representative of Finland said that his delegation had submitted its amendment in order to render the provision more flexible and to restrict the effects of its application on treaty stability [132]).

The Committee of the Whole was divided on the Canadian and Finnish amendments. These amendments represent one of the rare cases where apparently jurisprudential rather than political considerations were decisive for the attitudes of governments. This is illustrated by the fact that the amendments were supported by the USSR [133]), the Ukraine [134]) and Hungary [135]), and opposed by Byelorussia [136]), Czechoslovakia [137]) and

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[128]) 1966 Reports, note 2 above, Annex p. 123. A suggestion to this effect had been made by Mr. Rosenne (Israel), YBILC 1963 vol. I, p. 252 para. 62.

[129]) UN Doc. A/CONF. 39/C. 1/L. 320; Draft Report of the Committee of the Whole, vol. II, p. 61.

[130]) UN Doc. A/CONF. 39/C. 1/L. 320; *op. cit.*, vol. II, pp. 61/62.

[131]) S. 63, p. 4. The Canadian delegation found support in the opinion expressed by Professor Lissitzyn in his article on Treaties and Changed Circumstances (note 6 above) at p. 916.

[132]) SR. 63, p. 5.

[133]) SR. 64, p. 13.

[134]) SR. 63, p. 9.

[135]) SR. 64, p. 5. The representative of Hungary invoked in support of his positive attitude the suspension, by the United States, of the International Load Lines Convention. See above, at note 23; Lissitzyn, *op. cit.* note 6.

[136]) SR. 64, p. 4.

[137]) SR. 64, p. 21.

Poland [138]). Chile [139]), Greece [140]) and Italy [141]) were among the supporters, the Democratic Republic of the Congo [142]), Pakistan [143]) and Spain [144]) among those who were opposed. The representative of Switzerland had doubts regarding the inclusion of a provision on suspension. Where a change of circumstances was so fundamental as to bring into operation art. 59, the only conclusion would seem to him to be that the treaty must be terminated or revised; there would be no room for mere suspension. However, the Swiss delegation would not oppose those amendments, since there might conceivably be cases in which it would be sufficient to suspend the operation of the treaty; should that be so, it was undesirable to go any further [145]).

As Special Rapporteur of the Commission, Sir Humphrey W a l d o c k had said that to accord as an alternative the right of suspension whenever the right of termination was recognized would not be possible in cases of termination on grounds of conflict with *ius cogens* or because of a change of circumstances [146]). At the Conference, summing up as Expert Consultant, he said that the Commission had considered adding the notion of suspension and had found it difficult to reach a clear conclusion. The Commission's view had been that art. 59 might conflict with the idea of mere suspension. The real relevance was to a situation where one party wished to terminate a treaty and the other resisted. In such a case, the notion of suspension was not really practicable. Even more important, however, was the feeling that, if the possibility of suspension were added, that might weaken the strict philosophy of the whole article. To allow suspension might give the impression that the change of circumstances might not be quite fundamental. That reasoning had induced the Commission not to include a provision for suspension [147]).

The Committee of the Whole adopted the principle contained in the Canadian and Finnish amendments to include a reference to suspension of a treaty by 31 votes to 26, with 28 abstentions [148]). The Chairman of the Drafting Committee reported that that Committee had noted that it would

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[138]) SR. 64, p. 6.
[139]) SR. 64, p. 16.
[140]) SR. 65, p. 2.
[141]) SR. 65, p. 9.
[142]) SR. 64, p. 23.
[143]) SR. 64, p. 20.
[144]) SR. 64, p. 4.
[145]) SR. 63, p. 11.
[146]) YBILC 1963 vol. I, pp. 242/243 para. 57.
[147]) SR. 65, p. 11.
[148]) SR. 65, p. 13; Draft Report of the Committee of the Whole, vol. II, p. 63 para. 6 (a).

be difficult to solve the problem raised by the Canadian and Finnish amendments by the mere mention in para. 1 of the suspension of the operation of the treaty, since that might give the impression that the application of art. 59 extended to purely temporary fundamental changes of circumstances, which was apparently not the intention of the Committee of the Whole. The Drafting Committee believed that the Committee of the Whole wished a party to have the choice between invoking art. 59 for the suspension of the operation of a treaty, and invoking it for purposes of termination or withdrawal. In some circumstances a party might prefer a simple suspension to breaking contractual relations, since the former offered greater possibilities of seeking a common solution to the difficulties caused by a fundamental change of circumstances by means, for example, of a revision of the treaty. In order to express that idea more clearly and to avoid any misunderstanding, the Drafting Committee had dealt with the matter by adding a para. 3 to the text drafted by the Commission [149]). The added para. 3 was approved by the Committee of the Whole together with the rest of art. 59 [150]).

V. Procedures for the Settlement of Disputes Arising from Claims Based on Allegations of a Fundamental Change of Circumstances

Very many governments have in their comments and statements emphasized the dangers which art. 59 may have for the security of treaties unless it is made subject to some form of independent adjudication. Basically, this is a problem which is not restricted to the application of art. 59, but concerns all cases in which a party claims that a treaty is invalid or alleges a ground for termination, withdrawal or suspension [151]). It is therefore not within the scope of the present article, in the context of which only the following observations are offered:

The Government of Denmark stated in its written comments that if the principle of the binding force of treaties is not to be unduly weakened, it is essential to include in art. 59 a provision to the effect that a State should not be entitled to withdraw from a treaty under this article unless it is ready to submit any controversy on this point to the decision of an arbitral or judicial tribunal. The representative of Denmark repeated this position at

[149]) Statement by Mr. Yasseen as Chairman of the Drafting Committee in SR. 81, p. 8.

[150]) SR. 65, p. 10.

[151]) For an analysis of the general problem see: Briggs, Procedures for Establishing the Invalidity or Termination of Treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties, AJIL vol. 61 (1967), pp. 976 *et seq.*

Vienna [152]). The Government of Japan suggested that it was desirable to designate or establish a body (taking advantage of Art. 29 of the Statute of the International Court of Justice) which would be invested with standing competence to pass objective and purely legal judgments upon disputes, *i. a.*, centering upon the phrase "radically to transform" in art. 59 [153]). The delegation of the Netherlands was in favour of combining arts. 59 and 62 (the procedures article) [154]). The Australian delegation would have preferred an article inviting the parties to negotiate in good faith a review of the treaty [155]), a consideration which would have implied some special procedural arrangements in regard to art. 59 different from, or supplementary to, those set forth in art. 62. It is of interest to note that in his observations on draft art. 59 the representative of Poland on the Sixth Committee of the General Assembly said in 1967 that his delegation considered that the just solution found by the International Law Commission enabled mutual legal obligations to be adjusted to circumstances, while at the same time the admissibility of the application of the clause would be subject to international adjudication, thus safeguarding the stability of agreements by precluding unilateral breaches [156]). No formal proposal for procedural provisions specifically applicable to art. 59 were, however, made at the 1968 session of the Conference. The general procedural arrangements to cover the whole draft Convention which will eventually be worked out at the second session of the Conference in 1969 will also apply to disputes concerning the *rebus sic stantibus* rule.

At the 1968 session, the Committee of the Whole approved without basic change draft art. 62 as prepared by the International Law Commission. Para. 3 of that draft article provides that if objection has been raised to the invocation, *e. g.*, of a fundamental change of circumstances, by any other party, the parties shall seek a solution through the means indicated in Art. 33 of the Charter of the United Nations. This provision is widely considered as unsatisfactory. The second session of the Conference will have before it a comprehensive proposal of thirteen States of Africa, Western Europe, Latin America and the Middle East for a new art. 62 *bis* purporting to establish Conciliation Commissions and arbitral tribunals to settle disputes which are not solved under art. 62 [157]) and Swiss proposals for adjudication

[152]) G.A.O.R. 22nd Session (1967) Agenda item 86, Annexes, Doc. A/6827, p. 6 and SR. 65, p. 5.

[153]) UN Doc. A/6827 (note 152 above), p. 7.

[154]) SR. 63, p. 8.

[155]) SR. 64, p. 7.

[156]) 977th meeting of the Sixth Committee, para. 10.

[157]) Proposal by the Central African Republic, Colombia, Dahomey, Denmark, Finland,

by the International Court of Justice or a committee of arbitration [158]). Amendments by Japan, the United States and Uruguay to art. 62 and aiming at its improvement were withdrawn on the understanding that the sponsors reserved the right to re-submit those amendments to the second session of the Conference for consideration together with the proposed new art. 62 *bis* [159]). These highly interesting amendments and proposals cannot be dealt with in the present article.

VI. Concluding Observations

In para. 13 of its commentary to art. 59, the International Law Commission replied to the Governments which in their comments had emphasized the dangers, inherent in this article, for the security of treaties, unless it is made subject to some form of independent adjudication. In general the Commission did not consider the risks to the security of treaties involved in the present article to be different in kind or degree from those involved in the articles dealing with the various grounds of invalidity or in art. 57 [breach], 58 [supervening impossibility of performance] and 61 [emergence of a new peremptory norm]. The Commission did not think that a principle, valid in itself, could or should be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification, it believed, was to minimize those risks by strictly defining and circumscribing the conditions under which recourse may properly be had to the principle; and this it has sought to do in the present article.

> "The Commission was faced" (the Special Rapporteur had said) "with the alternatives of either stating that no such rule existed, or trying to define it with sufficient strictness for it to be acceptable as part of the codification of the law of treaties. The first course was ruled out because it would certainly not receive the support of the majority of governments. Having taken the second course, the Commission had to a large extent discharged its task by adopting a close definition of the conditions for the operation of the rule ... the position had been reached where the Commission had arrived at a text which, if applied in good faith, should not leave any room for abuse of the *rebus sic stantibus* principle" [160]).

Gabon, Ivory Coast, Lebanon, Madagascar, Netherlands, Peru, Sweden and Tunisia, A/CONF. 39/C. 1/L. 352/Rev. 2. The Text of this and of all other amendments and proposals relating to procedure will be found on pp. 4 to 24 of Addendum 3 in vol. II of the Draft Report of the Committee of the Whole.

[158]) UN Doc. A/CONF. 39/C. 1/L. 347.

[159]) UN Docs. A/CONF. 39/C. 1/L. 339, L. 355, L. 343.

[160]) YBILC 1966 vol. I part I, p. 85 para. 2.

In support of the choice which the Commission made and which it believed it had to make between denying that the *rebus sic stantibus* rule existed on the one hand and narrowly defining and circumscribing it, on the other, the following municipal law analogy from an entirely different field may, perhaps, be not entirely irrelevant. Under the French Code of Criminal Procedure of 1808 an improper practice, that of *la garde à vue* was constantly employed by the police. An offender caught red-handed had to be brought before the *Procureur de la République* within twenty-four hours; this provision was held to authorize *a contrario* the police to keep him without warrant during the said twenty-four hours. But this system was – illegally but constantly – extended to all other cases where the police got hold of a suspect. The reform of the French law of criminal procedure of 1957–1959 introduced a change. In the words of a commentator:

> "Whenever it is impossible to bring an evil to an end it is preferable to accept it willingly and to recognize the practice rather than to feign ignorance. Therefore, in a number of cases, the new Code regularises the situation but at the same time regulates it. Nobody may be kept in custody for more than twenty-four hours subject to a possible extension of another twenty-four hours under written order from the *Procureur de la République*" [161]).

Similarly, since it is impossible to bring to an end the centuries old practice of governments of claiming a fundamental change of circumstances in order to free themselves from burdensome treaty obligations, the course recommended by the International Law Commission and approved by the Committee of the Whole to regularize the practice and at the same time to regulate it, seems to recommend itself.

Almost sixty years ago Erich Kaufmann wrote about the problem which is occupying us here:

> "If it [the clause *rebus sic stantibus*] were a legal institution . . . this would ensure the rule of law far more safely than would be the case if the clause, the intrinsic justification and teleological necessity of which is recognized, were kept waiting at the gates of the law for all eternity" [162]).

The United Kingdom Government is among those governments which have been, and continue to be, most concerned about the risks to the security

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[161]) Jacques Patey in International and Comparative Law Quarterly, vol. 9 (1960), p. 360.

[162]) Author's translation. Erich Kaufmann, Das Wesen des Völkerrechts und die clausula rebus sic stantibus (Tübingen 1911), p. 54. In the original the passage reads as follows: »Wenn sie ein Rechtsinstitut wäre, . . . würde daher die Herrschaft des Rechtsgedankens viel gesicherter sein, als wenn man die als innerlich begründet und als teleologisch notwendig erkannte Klausel in alle Ewigkeit vor den Toren des Rechtes stehen läßt«.

of treaties inherent in the doctrine of *rebus sic stantibus*. Nevertheless, its representative on the Sixth Committee of the General Assembly said in 1966 that "any convention on the law of treaties must contain provisions governing such controversial questions as ... *rebus sic stantibus* ..." [163]). The representative of Australia on the Sixth Committee said in 1967 that "that branch of the law, including as it did such controversial subjects as ... the *rebus sic stantibus* clause, had never become amenable to settlement by the customary law of nations; its codification would therefore be the crowning achievement of the Vienna Conference" [164]).

As far as substantive law is concerned the text of draft art. 59 carefully and narrowly circumscribes the scope of the application of the fundamental change of circumstances rule. The legislative history, as presented in the preceding pages, strongly supports the need for restrictive interpretation of the exception which art. 59 defines.

As of the beginning of the year 1969 it seems within the range of possibility – though undue optimism in this regard is not justified – that acceptable procedural arrangements for conciliation, arbitration or adjudication for the whole draft Convention will be worked out at the second session of the Conference.

Certain critics question the desirability of the whole project of the draft Convention if no satisfactory provisions on third-party settlement are achieved. This is an arguable proposition, albeit one with which one need not agree. But what cannot, in this writer's view, be advocated is the production of a work of codification of the law of treaties which remains silent on *rebus sic stantibus* and keeps it, in the words of the publicist just quoted, waiting at the gates of the law.

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[163]) 908th meeting of the Sixth Committee, para. 26.
[164]) 981st meeting of the Sixth Committee, para. 13.