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“Rebus Redux”: The Potential Utility of Fundamental Change of Circumstances Doctrine to Enforce Human Rights Norms

Introduction

The all-too-frequent news of government atrocities across the globe¹ starkly highlights the failure of the international community to enforce human rights norms effectively. Failure almost certainly stems from a reluctance of States, individually and collectively, to hold violating States accountable for human rights abuses.² Even if a concerned State is willing to take action, few meaningful measures are available under international law.³ A concerned State contemplating sanctions against a treaty partner has traditionally faced a particularly difficult dilemma. On the one hand, the State might impose sanctions on its treaty partner, while at the same time continuing to perform its treaty obligations. In such a scenario, the concerned State remains tainted by its continuing legal ties to an objectionable regime. Alternatively, the concerned State could breach the treaty, distancing itself from the violating State and reinforcing the political and economic effects of the sanction. Breaching an international obligation, however, has many costs. Breach tears at

1. For example, between 1975 and 1978, Pol Pot and his Khmer Rouge government murdered four million Cambodians. *Deathwatch: Cambodia*, TIME, Nov. 12, 1979, at 42. Under the Amin and Obote regimes, Uganda has tortured and slaughtered approximately 400,000 citizens and alleged political enemies. See, *End of a Monster*, AMERICA, Apr. 28, 1979, at 344; *Toward Ceaseless Chaos*, TIME, May 4, 1981, at 42. The slaughter of hundreds of Hutu tribesmen by the Burundi Army in August, 1988 provides a recent example of State-sponsored killings. See Perlez, *Army May Have Added to Revenge in Burundi*, N.Y. Times, Aug. 29, 1988, at A8, col. 1.

2. See Watson, *The Limited Utility of International Law in the Protection of Human Rights*, AM. SOC'Y OF INT'L L. PROC. 1, 3 (1980):

Recent history has shown only too clearly that while there might be some verbal condemnation, there seldom is any tangible action sufficient to make a State act differently. The world tends to stand by as governments slaughter the political opposition, native populations on desirable land, or racial minorities.

3. See Henkin, *Human Rights and "Domestic Jurisdiction"*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 29, 31 (T. Buergenthal ed. 1977). "The effort to create an international law of human rights has been largely a struggle to develop effective machinery to implement agreed norms. Arduous effort has not brought forth machinery of notable effectiveness." *Id.*

the fabric of international law. Moreover, the injured State may file an international legal action for reparations or take a variety of coercive countermeasures.⁴ As a means of encouraging treaty partners to adhere to human rights norms, neither approach is satisfactory.

A recent application of the international law rules that govern treaty termination provides a possible solution to this dilemma, and may more effectively protect human rights. In December, 1982, the military authorities of Suriname⁵ murdered fifteen members of the political opposition. In response, the Netherlands suspended its long-term development aid treaty with its former colony on the grounds that these human rights violations constituted a "fundamental change of circumstances" that justified suspension or termination of the treaty under international law.⁶ The Netherlands offered to resume performance only if Suriname gave sufficient guarantees for the protection of human rights and respect for the rule of law.⁷

The Netherlands's decision to invoke the fundamental change of circumstances doctrine (also called "*rebus sic stantibus*")⁸ instead of merely breaching the treaty marked the first time that a State has

4. A State injured by another State's breach of an international agreement is entitled to take one or more forms of available self-help measures: reprisals, reciprocal measures, or retorsion. L. HENKIN, *INTERNATIONAL LAW* 541-42 (2d ed. 1987). Reprisals are countermeasures, otherwise considered illegal under international law, taken by one treaty member in reaction to a prior illegal act by another treaty member. *Id.* at 541. Legal reprisals must evidence both necessity under the particular circumstances and proper proportion to the injury suffered. *Id.* at 542. The necessity requirement would leave an injured State unlikely to take reprisals in response to a mere breach of an agreement. Reciprocal measures refer to a decision by an injured State not to perform its obligations to the breaching State when the obligations are directly linked to the breach. *Id.* at 541. The injured State will almost certainly resort to reciprocal measures in response to another State's breach of a treaty. Retorsion refers to those countermeasures taken regardless of a breach, but which are generally permissible under international law. *Id.* at 542. These measures may include suspending diplomatic relations, cessation of trade, or curtailment of immigration from the offending State. *Id.* at 548.

In addition to self-help measures, the injured State may file an action to receive reparations for damages caused by the breach. *Id.* at 552-54. Types of damages awarded in a suit for reparations include restitution or expectancy damages but do not include punitive or exemplary damages. *See id.*

5. Suriname is also referred to as "Surinam" in many texts.

6. Lindemann, *The Repercussion Resulting from the Violation of Human Rights in Surinam on the Contractual Relations Between the Netherlands and Suriname*, 44 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT* 64, 92 (1984) (English summary of German language text).

7. *Id.* In response, Suriname denied that a fundamental change had occurred, Bossuyt & Griffiths, *Report of a Mission: Human Rights in Suriname*, 30 *REV. INT'L COMM'N OF JURISTS* 52, 61 (1983), and denounced the Netherlands' action as an unlawful intervention into its internal affairs. Lindemann, *supra* note 6, at 92.

8. The relevant Latin maxim is "conventio omnis intelligitur rebus sic stantibus" which translates approximately to "every [agreement] must be understood to hold only while things remain in the same State." A. MCNAIR, *THE LAW OF TREATIES* 681 n.1 (1961).

attempted to apply this much discussed⁹ but rarely invoked¹⁰ doctrine based on a treaty partner's human rights violations. Today, the development aid treaty remains suspended without the Netherlands having paid reparations.

This Note will examine the legality and the wisdom of allowing human rights violations to serve as grounds for invoking the fundamental change of circumstances doctrine to terminate or suspend treaties. It will examine both human rights law and fundamental change of circumstances doctrine, considering the doctrine as a potentially powerful tool in the narrow class of cases to which it applies. The Note will use the actual facts of the Suriname/Netherlands dispute, a paradigm case for legitimate application of the doctrine, as a foundation for its analysis.

I. Background of the Suriname/Netherlands Dispute

A. Surinamese Independence and the Development Cooperation Plan

Suriname is a small tropical country located on the northeast coast of South America¹¹ populated by approximately 350,000 inhabitants.¹² Suriname was a Dutch possession for over 300 years, first as a colony and, after 1948, as a self-governing unit of the Kingdom of the Netherlands with a locally-elected representative Parliament.¹³ Since colonial times, Suriname had benefitted from a peaceful social and political environment free from State-sponsored human rights problems.¹⁴ In 1972, the Dutch government initiated a series of conferences to discuss Suri-

9. See I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 192-96 (2d ed. 1984): "All international lawyers are aware of the pitfalls surrounding the application of the [doctrine of fundamental change of circumstances] and the controversies which have raged as to its admissibility as a ground for the unilateral denunciation or termination of a treaty." *Id.* at 192. Significant recent contributions to the scholarly literature on the subject include A. DAVID, *STRATEGY AND TREATY TERMINATION* 1-55 (1975); A. VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW* 2-216 (1985); Haraszti *Treaties and the Fundamental Change of Circumstances*, 146 *RECUEIL DES COURS* 1 (1975-III); Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 *AM. J. INT'L L.* 895 (1967); and Toth, *The Doctrine of Rebus Sic Stantibus in International Law*, *JURIDICAL REVIEW* 56, 147, 263 (1974). Toth's three-part article provides a superb comprehensive analysis of the history and scope of the doctrine. SINCLAIR, *supra* at 193-96, provides a succinct overview of the doctrine.

10. A. VAMVOUKOS, *supra* note 9, at 61-117 and 153-84. Vamvoukos records approximately 50 instances since 1955 in which parties or courts implicitly or explicitly raised the issue of whether changing circumstances justified terminating or modifying a treaty. States have only invoked the doctrine twice since 1968: in the 1973 *Fisheries Jurisdiction Cases* before the International Court of Justice, discussed *infra*, at notes 106-08, and in the Suriname/Netherlands dispute.

11. E. DEW, *THE DIFFICULT FLOWERING OF SURINAM* 1 (1978).

12. Bossuyt & Griffiths, *supra* note 7, at 62.

13. See Bos, *Surinam's Road from Self-Government to Sovereignty*, 7 *NETHERLANDS Y.B. INT'L L.* 133-34 (1976). England controlled Suriname for most of the period between 1799 to 1816. See *id.* at 133.

14. See E. DEW, *supra* note 11 for an overview of Surinamese history.

name's eventual political independence.¹⁵ The talks focused on attribution of Surinamese nationality, treaty succession, future diplomatic representation, institutionalization of development cooperation, and other diverse matters.¹⁶ Dutch legislators found the absence of a Surinamese constitution protecting the human rights of its citizens to be a major obstacle to a final grant of independence.¹⁷ Only after a Surinamese leader gave adequate assurances that Suriname would enact a State constitution prior to independence did the motion to sever the remaining legal ties obtain sufficient votes in the Dutch Parliament.¹⁸

On November 25, 1975, Suriname and the Netherlands signed a series of treaties which, among other things, legalized Suriname's status as an independent nation.¹⁹ One treaty outlined the terms of a development cooperation plan²⁰ under which the Netherlands placed a total of 3.5 billion guilders at the disposal of Suriname for ten to fifteen years, together with 350 million guilders already committed.²¹

15. *Id.* at 135-36. The talks also involved the possible independence of the Netherlands Antilles.

16. *Id.* at 133.

17. See E. DEW, *supra* note 11, at 189: "Dutch opposition legislators insisted that the protection of human rights in Surinam was the responsibility of the Dutch under the Kingdom Statute, and that there must be assurances from the Surinam Government that a new constitution would be in place before independence could be voted on."

18. *Id.* at 189-90. The Surinamese Parliament enacted the new constitution by unanimous vote on November 19, 1975, almost one week before the date set for Suriname's independence from the Netherlands. Regarding the debates over the content of the new constitution, "members of both government and opposition benches generally applauded the wide-ranging list of fundamental human rights guaranteed in the preamble and first nineteen articles." *Id.* at 191. Concerning the constitutional debates generally, see *id.* at 190-96.

19. For more information on the various treaties concluded on November 25, see Bos, *supra* note 13, at 140-53.

20. *Tractatenblad van het Koninkrijk der Nederlanden*, no. 140 (1975).

21. See Bos, *supra* note 13, at 145. In summary, the treaty and protocol create the following framework of Netherlands-Suriname development cooperation:

- (1) The basis of the cooperation is a development plan, produced by Suriname in 1975. The object and purpose of the plan is the enhancement of Suriname's economic strength, the promotion of employment, the improvement of social conditions for the entire population and the development of outlying districts.
- (2) Each year, Suriname prepares a development scheme and submits it to a Joint Consultative Committee composed equally of representatives from the Netherlands and Suriname. If the Committee cannot decide on the appropriateness of a proposed program in the development scheme, the subject matter is referred to the two governments for consultations.
- (3) In addition to the Netherlands' cash contributions, Surinamese savings, and Netherlands' technical assistance, help from other donor countries, organizations, and private investments will supplement the development plan's implementation.

Id.

B. Suspension of Development Cooperation Assistance

On February 25, 1980, a group of non-commissioned officers in the Surinamese Army led a successful *coup d'état* against the constitutionally established government.²² The military authorities appointed a new civilian government, but retained ultimate political authority.²³ Fueled in part by instances of human rights misconduct—including arbitrary arrests, mistreatment of detained persons, and suppression of freedom of the press²⁴—various Surinamese interest groups held a series of protests seeking return to democratic rule.²⁵ On December 8-9, 1982, in an apparent attempt to force an end to the protests, military authorities arrested sixteen protest leaders²⁶ and shot all but one.²⁷ Observers testified that nearly every corpse showed signs of severe torture.²⁸ On the same day, the army razed two radio stations, a newspaper office, and the building which housed the largest trade union in Suriname.²⁹

The Netherlands government responded on December 10 when it announced its decision to suspend the development cooperation program.³⁰ In a diplomatic note dated December 16, the Dutch government asserted that circumstances prevailing in Suriname differed fundamentally from the circumstances existing at the moment the two governments concluded the development treaty, that the contracting parties did not foresee this change, and that circumstances prevailing at that time were an essential precondition for completing the program.³¹ The Surinamese military authorities stated in rebuttal that the purpose of the development cooperation plan was merely to accelerate the social and economic development of Suriname and that its social-economic situation had not fundamentally changed.³²

II. Traditional Responses to a Treaty Partner's Human Rights Violations

A. Overview of International Efforts to Protect Human Rights

Since the end of World War II, the international community has focused its efforts to secure human rights primarily on promulgating a series of international instruments designed to enumerate and make binding a

22. Bossuyt & Griffiths, *supra* note 7, at 53.

23. *Id.*

24. *See id.* at 58-59.

25. *Id.* at 54-55.

26. For information on the prominent roles that each of the arrested played in the pre-incident protests, see *id.* at 53-55. The 16 consisted of four journalists, four lawyers, two university teachers, two businessmen, two trade unionists and two army officers. *Id.* at 55.

27. *Id.* at 55-56. Out of the 16 arrested, only trade-unionist Fred Derby survived.

28. *Id.* at 56. *See also The Report of the Dutch Lawyers Committee for Human Rights, The Events in Paramaribo, Suriname, 8-13 December 1982*, U.N. Doc. E/CN.4/1983/55.

29. Bossuyt & Griffiths, *supra* note 7, at 55-56.

30. *Id.* at 60.

31. *Id.* at 61.

32. *Id.* For a summary of the object and purpose of the treaty, see *supra* note 21.

broad range of human rights norms.³³ United Nations sponsored efforts include the U.N. Charter,³⁴ the Universal Declaration of Human Rights,³⁵ the twin Covenants on Civil and Political Rights ("CCPR"),³⁶ the Covenant on Economic, Social and Cultural Rights ("CESCR"),³⁷ and a host of multilateral conventions regulating specific violations such as racial discrimination,³⁸ apartheid,³⁹ genocide,⁴⁰ and torture.⁴¹ Other human rights treaties have been promulgated by regional organizations such as the Council of Europe,⁴² the Organization of American States,⁴³

33. A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 60-61 (2d ed. 1982).

34. U.N. CHARTER. For provisions in the Charter related to human rights, see, e.g., art. 1, para. 3; arts. 13 and 55; and art. 76, § c.

35. G.A. Res. 217 A (III), U.N. Doc. A/810, at 43 (1948). The U.N. General Assembly intended the Declaration to set forth a body of rights which would serve as "a common standard of achievement for all peoples and nations." *Id.* at Preamble. It was adopted 48-0 with eight abstentions (South Africa, Saudi Arabia and most of the Eastern Bloc). The Eastern European States have since expressly accepted the Declaration in the Final Act of the 1975 Helsinki Conference. L. HENKIN, *supra* note 4, at 986. While enacted as a non-binding instrument, the Declaration has produced "a marked impact on the pattern and content of international law and [acquired] a status extending beyond that originally intended for it." *Survey of International Law, Report by the Secretary-General*, at 196, U.N. Doc. A/CN.4/245 (1971), reprinted in L. SOHN & T. BUERGENTHAL, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 522 (1973).

36. G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). As of July 1, 1986, 84 States have ratified or acceded to the CCPR. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, (R. Lillich ed. 1986), at 170.39. In addition, 32 States have ratified an Optional Protocol to the Covenant that creates a more rigorous complaint procedure.

37. G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). As of July 1, 1986, 89 States have ratified or acceded to the CESCR. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 36, at 180.18.

38. International Convention on Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 60 U.N.T.S. 195. As of July 1, 1986, 126 States have ratified or acceded to this convention. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 36, at 160.24.

39. International Convention on the Suppression and Punishment of The Crime of Apartheid, 28 U.N. GAOR SUPP. (No. 30) at 166, U.N. Doc. A/9030 (1974). As of July 1, 1986, 82 States have ratified or acceded to this convention. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 36, at 421.7.

40. Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, 78 U.N.T.S. 277. As of July 1, 1986, 96 States have ratified or acceded to this convention. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 36, at 130.11.

41. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR SUPP. (No. 51) at 197, U.N. Doc. A/39/51 (1984). As of July 1, 1986, 41 States have ratified or acceded to this convention.

42. See European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222 (All 21 members of the Council of Europe have ratified the Convention. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 36, at 500.1.) and European Social Charter, signed Oct. 18, 1961, 529 U.N.T.S. 89 (As of July 1, 1986, 14 States have become parties to the Charter. *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, *supra* note 36, at 520.1.).

43. American Convention on Human Rights, signed Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc. 21, rev. 2 (English 1975). As of July 1, 1986, 19 States were parties to the Convention.

and the Organization of African Unity,⁴⁴ and by private groups, most notably the International Labor Organization.⁴⁵

These various agreements seek to protect a panoply of individual and group rights.⁴⁶ Human rights treaties such as the U.N. Charter, the Covenants, and other U.N. and regional conventions are directly binding on signatory States.⁴⁷ Some norms contained in human rights agreements may bind non-signatory States as reflecting customary international law.⁴⁸

B. Approaches to Enforcing Human Rights Norms

1. *Complaint Provisions in Human Rights Agreements*

Virtually all human rights agreements contain at least some provision for addressing alleged violations by signatory States.⁴⁹ Therefore, if the concerned State and the violator State are both parties to the same human rights agreement, the concerned State may respond to violations

44. African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 58. As of 1986, 10 member States have ratified the charter; ratification of more than half of the 50 members of the OAU will bring the Convention into force. L. HENKIN, *supra* note 4, at 1038.

45. For an overview of the work of the I.L.O., see generally Valticos, *The International Labour Organization* in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 363-95 (K. Vasek rev. Engl. ed. 1982); Wolf, *Human Rights and the International Labour Organization* in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: THE LEGAL AND POLICY ISSUES 273-99 (T. Meron ed. 1984).

46. The CCPR, for example, the cornerstone of the U.N. human rights effort, protects political rights such as the right to life, freedom from torture and inhuman treatment, and right of assembly. International Covenant on Civil and Political Rights, *adopted* Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). In contrast, the CESCPR preserves social rights such as the right to form and join trade unions, the right to strike, and the right to social security. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 220 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). The U.N. conventions governing specific rights spell out these and other rights in greater detail. The regional systems' protection of rights largely parallels those enumerated in the U.N. treaties, see L. HENKIN, *supra* note 4, at 1027, 1034-35, while the I.L.O.'s 100-plus conventions focus on labor and other social conditions.

47. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 10 (B. Hannum ed. 1984). See Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 34 (K. Vasek ed. 1982): "States undertake, by ratifying conventions on human rights to: respect the clauses they contain; take adequate measures to maintain or establish a State of affairs postulated by the conventions; and provide for a particular system of appeal for the benefit of citizens."

48. Article 38 of the statute of the International Court of Justice states that a source of international law is "international custom, as evidence of a general practice accepted as law." Article 38(1)(b). The Restatement lists the following types of violations as contravening customary international law: genocide, slavery, murder, or causing disappearance of individuals, torture, prolonged arbitrary detention, systematic racial discrimination, and "consistent patterns of gross violations of internationally recognized human rights." See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986).

49. See generally Sohn, *Human Rights: the Implementation and Supervision by the United Nations*, in HUMAN RIGHTS IN INTERNATIONAL LAW 379-84 (T. Meron ed. 1984) (discussing procedures for dealing with inter-State complaints).

by filing a complaint in accordance with the appropriate treaty provision. For example, the CCPR provides that State parties may file a claim with a Human Rights Committee established by the Covenant if it believes that another party has not fulfilled its treaty obligations.⁵⁰ The Committee,⁵¹ or in some cases an *ad hoc* Conciliation Committee, then initiates a fact-finding and dispute resolution process and makes non-binding recommendations to help settle the case.⁵² Implementation provisions in most other human rights agreements are similar to the CCPR procedures described above; however, some agreements, such as the Genocide Convention,⁵³ provide for International Court of Justice jurisdiction over Convention-related disputes.⁵⁴

Complaint provisions in human rights agreements suffer from important limitations. With the notable exception of the European Convention,⁵⁵ virtually no international convention provides for any form of coercive sanction to force a violating State to cease its treaty violations. Instead, the fact-finding and conciliation procedures merely inform the violating State that a treaty partner is concerned about the violations. Moreover, despite the largely symbolic nature of the procedures, concerned States seldom file complaints because of fear of States abusing the complaint process for political purposes.⁵⁶

2. ECOSOC's Human Rights Commission

States may also file complaints with the U.N. Economic and Social Council's ("ECOSOC") Commission on Human Rights. In 1970, the General Assembly empowered the Commission to receive complaints of human rights violations and to report on situations which evidence a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."⁵⁷ After receiving such a complaint, the Commission may either consider the matter itself or, with the consent of the

50. CCPR, *supra* note 36, at art. 41. In order for the Committee to receive a complaint, the alleged violating State must first recognize the competence of the Committee to do so. In order to file a complaint, the complaining State party must first itself recognize the competence of the Committee to hear claims against it. *Id.*

51. *Id.*

52. *Id.* at art. 42(1)(a).

53. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 40, at art. 9.

54. For discussion of other conventions which submit disputes to the International Court of Justice, see Sohn, *supra* note 49, at 379-80.

55. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42. Under the Convention, States or individuals may file complaints with the European Commission on Human Rights about alleged violations. *Id.* at art. 25. After fact-finding, the Commission may forward the complaint plus its recommendations to the Council of Ministers for action on an inter-State level or to the European Court of Human Rights for binding adjudicative settlement. *Id.* at arts. 31, 48.

56. Shelton, *International Enforcement of Human Rights: Effectiveness and Alternatives*, AM. SOC'Y INT'L L. PROC. 6, 11 (1980).

57. E.S.C. Res. 1503, U.N. Doc. E/4832/Add. 1 at 8 (1970). See also Sohn, *supra* note 49, at 386.

accused State, refer it to an *ad hoc* committee for investigation.⁵⁸ The Committee or *ad hoc* committee must subject all complaints to an extensive fact checking process. All information must be kept confidential unless and until the Commission decides to make a recommendation to the ECOSOC. In addition to the above described procedures, the Commission has established working groups to investigate human rights allegations in specific areas, such as South Africa, Chile and the Israeli occupied territories.⁵⁹

The great advantage of the Commission's procedures is its absence of a precondition that the violating State be a signatory of any human rights agreement. However, the system has several drawbacks. The confidential nature of the fact investigation prevents the proceedings from placing significant public pressure on the violating State. Indeed, the Commission has produced only one report for public scrutiny since its inception.⁶⁰ In addition, the Commission has avoided making recommendations regarding certain protracted and egregious violations, such as in Uganda and Cambodia,⁶¹ the situations most deserving of the Commission's attention.

3. Security Council Measures

States may also petition the U.N. Security Council to take action against a violating State. Chapter VII of the U.N. Charter grants the Security Council the power to take economic or even military action against a State whose actions constitute a "threat to peace, breach of peace, or act of aggression."⁶²

The Security Council procedure, however, is fatally flawed. Substantive decisions require the unanimity of the Council's five permanent members—the United States, the Soviet Union, France, the United Kingdom, and China.⁶³ In practice, such unanimity has proved impossible to achieve,⁶⁴ and the Security Council has not significantly furthered the cause of human rights.

58. Sohn, *supra* note 49, at 386.

59. See generally, Sohn, *supra* note 49, at 386-89. Based on the Commission's recommendations or lead from the working groups, the General Assembly has condemned human rights violations in Chile and the Israeli-occupied territories. *Id.*

60. See *id.* at 391-92. The Commission publicly criticized Malawi for prosecuting Jehovah's Witnesses.

61. *Id.* at 389. For information regarding the violations in Cambodia and Uganda, see *supra* note 1. For criticism and suggested reforms of the Commission's work, see Sohn, *supra* note 49, at 391-92.

62. U.N. CHARTER, art. 39. See also U.N. CHARTER, arts. 41 (regarding severance of economic and diplomatic relations) and 42 (regarding military action).

63. L. HENKIN, *supra* note 4, at 680.

64. In the human rights area, the Security Council has only acted twice, ordering economic sanctions against Rhodesia, S.C. Res. 253, 23 U.N. SCOR (1428th mtg.) at 5, U.N. Doc. S/DV.1428 (1968), and South Africa, S.C. Res. 418, 32 U.N. SCOR (2046th mtg.) at 1, U.N. Doc. S/DV.2046 (1977), on the grounds that their apartheid systems constituted a threat to peace.

4. Unilateral Political and Economic Sanctions

Individual States also respond to another State's human rights violations by taking any number of political or economic actions unilaterally.⁶⁵ Examples of political steps include speaking publicly against the State, halting immigration or travel from the State, and suspending diplomatic relations altogether. Breaching a particular treaty may also be viewed as a political action. Examples of economic actions include embargoes and boycotts.

Political sanctions can be effective in exerting public pressure on a violator to conform its behavior to international law norms. Economic sanctions, too, can have a significant deterrent and punitive effect. In the absence of multilateral coercive action, unilateral political and economic sanctions are probably the most effective means of enforcing State adherence to human rights norms that are currently available. Even so, as the case of South Africa illustrates, in practice such sanctions have enjoyed little success in deterring human rights abuses.⁶⁶

The option of breaching an agreement as a political response to a treaty partner's human rights violations is particularly problematic. The advantages of such an action are apparent: the concerned State cleanly severs its ties to a regime it finds objectionable; its political statement is consistent and unambiguous. The concerned State, however, will itself be violating international norms if it breaches an obligation as a protest against human rights violations.⁶⁷ A concerned State thus faces a dilemma. It can condemn the violator State, but continue treaty relations, thereby diminishing the force of the condemnation. Or it can breach a treaty altogether, in which case it runs the risk of itself violating international law.

States concerned about human rights violations need more choices. In certain cases, the doctrine of fundamental change of circumstances may offer a useful alternative strategy.

III. Fundamental Change of Circumstances Doctrine in Treaty Law

The fundamental change of circumstances doctrine provides a vehicle for severing treaty relations with an objectionable regime without violating international law. Where it applies, the doctrine avoids the "breach

65. These measures are known by the technical legal term "retorsion." See L. HENKIN, *supra* note 4. For a refutation of the claim that the presence of enforcement provisions in a human rights agreement precludes a signatory State from imposing sanctions outside of those provided in the agreement, see Henkin, *supra* note 3, at 29-33.

66. See, e.g., Wright, *Comprehensive International Sanctions Against South Africa*, AFRICA TODAY, at 5-24 (2d & 3d qtrs. 1986).

67. International law holds a clear presumption against the breach of international obligations. A State's breach is excused if it is in response to a treaty partner's breach of obligation and satisfies the elements for reprisals, reciprocal measures or retorsion. See L. HENKIN, *supra* note 4. If a State violates the human rights of its own citizens, a concerned State's breach of a treaty unrelated to human rights will not meet any of the three exceptions. See *id.*

or condone" dilemma that States seeking to punish human rights violators have traditionally faced.

A. History of Doctrine

The concept of a subsequent change in circumstances altering obligations arising from an agreement is of ancient origin, probably from early Roman Canon law.⁶⁸ Over time domestic legal systems embraced the concept and by the sixteenth century, scholars had incorporated a form of the change of circumstances doctrine into early treatises on international law.⁶⁹ While scattered examples of States disavowing treaties on grounds of changed circumstances appear as early as the sixteenth century,⁷⁰ only in the latter half of the nineteenth century did States begin to assert regularly a change of circumstances to terminate or seek modification of treaty relations.⁷¹ During the pre-World War I period, States frequently abused the doctrine by invoking it to escape inconvenient or burdensome international obligations.⁷² For this reason, the doctrine fell into disfavor among scholars because of the excessive risk it posed to the security of treaties.⁷³ States, however, continued to invoke the doctrine through the inter-war period and beyond.⁷⁴

In the late 1940s, the International Law Commission ["the Commission"] began to advocate the inclusion of a revised version of the change of circumstances doctrine in its codification of the law of treaties. The resulting 1969 Vienna Convention on the Law of Treaties⁷⁵—with article 62 on "Fundamental Change of Circumstances"⁷⁶—established the

68. Haraszti, *supra* note 9, at 10-13. For a more detailed discussion of the origin and early history of change of circumstances doctrine, see Toth, *supra* note 9, at 58-62.

69. See Toth, *supra* note 9, at 58-62. For example, Gentili, the first publicist to include the doctrine in an international law treatise, maintained that a treaty need not be performed when "the conditions of affairs is changed, if the change could not be foreseen." Haraszti, *supra* note 9, at 10.

70. See Toth, *supra* note 9, at 148 n.2.

71. See *id.* at 148-52 (citing examples). See also A. DAVID, *supra* note 9, at 1-29.

72. I. SINCLAIR, *supra* note 9, at 193.

73. *Id.*

74. See Toth, *supra* note 9, at 150 n.6 (citing examples). For a detailed discussion of the evolution of the doctrine through the mid-1920s, see Garner, *The Doctrine of Rebus Sic Stantibus and the Termination of Treaties*, 21 AM. J. INT'L L. 509 (1927).

75. U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 AM. J. INT'L L. 875 (1969) [hereinafter "Convention"].

76. *Id.*, 63 AM. J. INT'L L. at 894-95. Article 62 reads:

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 as a ground for terminating or withdrawing from a treaty:
 - (a) if the treaty established a boundary; or

modern formulation of change of circumstances doctrine in treaty law.

B. The Vienna Convention and Fundamental Change of Circumstances

1. *Elements and Scope of Article 62*

Article 62 empowers a State to call for termination or suspension of a treaty if the alleged change and the underlying circumstances meet five limiting conditions:

- the change must be of a fundamental character;
- the change must have been unforeseen;
- the circumstances which have changed must have been “an essential basis of the consent to be bound by the treaty”;
- the effect of the change must be to transform radically the extent of the obligations of the party invoking the change as a ground of termination; and
- the obligations in question must still have to be performed under the treaty.⁷⁷

The Commission clearly intended that these conditions should be difficult to satisfy, thereby preserving the “exceptional” character of the doctrine.⁷⁸ Beyond this guidance, however, the “legislative history” sheds little light on the precise meaning or scope of the five conditions.⁷⁹

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

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

77. Report of the International Law Commission on the work of its Eighteenth session, U.N. Doc. A/16309/Rev. 1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 259 [hereinafter YBILC], U.N. Doc. A/CN.4/Ser. A/1966/Add. 1.

78. *Id.*, 2 YBILC at 259. “The Commission attached great importance to the strict formulation of these conditions . . . [a]nd emphasize[d] the exceptional character [of the rule] by framing the article in negative form.”

79. See Lissitzyn, *supra* note 9. Lissitzyn sharply criticized the Commission for including terms with ambiguous meanings—e.g., “fundamental change,” “not foreseen by the parties,” “essential basis of the consent to be bound” and “radically to transform the extent of obligations to be performed”—without defining them. *Id.* at 915. A. DAVID, *supra* note 9, similarly attacked the rule drafters for setting forth the rule “without empirical reference or connection to preferred goals and clarified policies” and concluded “[w]hat is wrong with this article? Nothing is right.” *Id.* at 44-45. Several scholars have attempted to define the key terms in article 62. For example, Toth, *supra* note 9, defines the key terms in article 62 as follows:

—“not foreseen by parties” means that the change was not foreseen or anticipated by a party when the treaty was entered into, or that the change was not expressly or impliedly provided for in the treaty; a party is not barred from asserting the doctrine where the change was “objectively foreseeable” but not actually foreseen.

Id. at 266.

—“essential basis of the consent to be bound” has two meanings, one subjective, the other objective. The subjective component refers to circum-

The Commission asserted that article 62 constituted an "objective rule of law by which, on grounds of equity and justice," a State could call for termination of a treaty.⁸⁰ It rejected the traditional "implied term" justification of the doctrine⁸¹ supported by many scholars⁸² because this

stances on which the parties had a "common intention" at the time the treaty was concluded, the presence or absence of which were "essential" to the performance of the treaty. The objective component refers to circumstances present at the time the parties concluded the treaty which were also essential to the treaty even though the parties did not realize their importance at the time. Although it may seem counter-intuitive for a factor to be essential to the parties' consent to be bound *but* not taken into account by the parties at the time of contracting, the parties may have taken the existence of the condition for granted or assumed as self-evident that the condition would exist without change. Equating the "essential basis" provision to include only factors on which the parties had a "meeting of the minds" would lower article 62 to a mere device for treaty interpretation and remove from the article's reach the cases in which it has the most utility.

Id. at 265-69.

—"fundamental change" refers to a change of sufficient magnitude to prevent the "object and purpose" of the treaty from being accomplished.

Id. at 269.

—"radically to transform the scope of obligations to be performed" may be tested through three inter-related questions

1. Did the change render performance of the obligation "essentially different" from that which was originally undertaken in the treaty?;

2. Did the change upset the original balance of mutual performances in an excessive manner going beyond risk of the contract?;

3. Does performance impose on the invoking State an "intolerable burden" or an "unreasonable sacrifice" not contemplated under the treaty?

Id. at 269.

80. YBILC, *supra* note 77 at 258. In support of its decision to formulate the change of circumstances article as an objective rule of law, the Commission's Special Rapporteur Sir Humphrey Waldock stated that "[i]n most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner." *Id.* Despite the Commission's preference for an "objective rule" formulation, article 62 takes into account the parties' intentions through the "essential basis of the consent of the parties to be bound by the treaty" language in section (1)(a). Lissitzyn, *supra* note 9, criticized the Commission's distinction of "objective" and "subjective" rules as confusing and "not explicitly or adequately explained." *Id.* at 913-15.

81. Under the "implied term" justification, the law creates a presumption that the parties intended that the agreement automatically terminate if circumstances changed in an unforeseeable manner subsequent to the treaty's conclusion. Thus, either party could invoke the doctrine to terminate the treaty unless the other State could rebut the presumption through proof of intent to exclude such a means of termination at the time the treaty was concluded. The implied term theory treats the changed circumstances doctrine as an issue of treaty interpretation, with the intent of the parties, presumed or actual, determining whether the doctrine could be invoked.

82. *See, e.g.*, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 153 (1965) (*Rebus* "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"); *see also* Lissitzyn, *supra* note 9 (suggesting that the intention of the parties approach is superior to the Commission's approach). Hill, *The Doctrine of "Rebus Sic Stantibus" in International Law*, 9 THE UNIVERSITY OF MISSOURI STUDIES QUARTERLY No. 3 (1934); Harvard Research in International Law, *Law of Treaties*, 29 AM. J. INT'L L. (Supp.) 653, 1096-1126 (1935) (Draft Article on "Rebus Sic Stantibus" and accompanying comments, based on an intention of the parties

increased the risk of “subjective interpretation and abuse.”⁸³

Article 62 does not apply to certain categories of treaties. The article expressly excludes from its scope treaties creating a boundary⁸⁴ and disputes in which the invoking State’s breach of an international obligation caused the asserted change in circumstances.⁸⁵ The article also impliedly excludes some treaties from its reach. For example, while the Commission refused to limit application of the doctrine to perpetual or long term treaties, the Special Rapporteur commented that article 62 “would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.”⁸⁶

Article 62 also disqualifies certain types of change of circumstances claims. For example, a State cannot invoke the doctrine if its obligations under the treaty are fully executed, since the doctrine requires duties “still to be performed under the treaty.”⁸⁷ Moreover, if a treaty includes a provision contemplating that the human rights situation might radically change, the State could not invoke the change of circumstances doctrine since the parties foresaw the potential for change.⁸⁸

International law doctrines also may affect the legality of a fundamental change of circumstances assertion. Because States may derogate by treaty from the application of fundamental change of circumstances, the article will not apply where the contracting States explicitly or implicitly exclude the possibility of its application in the treaty.⁸⁹

2. Purposes of Article 62

The Commission advanced two interrelated policy rationales for including a rule on fundamental change of circumstances in its codification of the law of treaties. The Commission’s primary purpose in drafting article 62 was to encourage and facilitate peaceful change by creating a “safety valve” in treaty relations.

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.⁹⁰

approach). *But see* RESTATEMENT (REVISED) *supra* note 48, which follows article 62 in formulating fundamental change of circumstances as an objective rule of law.

83. *See supra* note 80.

84. Convention at art. 62(2)(a), *supra* note 75, at 894.

85. *Id.* Art. 62 (2)(b).

86. YBILC, *supra* note 77, at 259.

87. *See* L. HENKIN, *supra* note 4, at 492.

88. *Id.*

89. *See* Toth, *supra* note 9, at 264: “The rule will not apply if the parties expressly excluded the possibility of its application. . . .”

90. YBILC, *supra* note 77, at 258.

Article 62 serves either “to induce a spirit of compromise in the other party,”⁹¹ or “at least to secure a solution by legal means.”⁹²

The Commission also sought to preserve the security of treaties. While it might appear counter-intuitive to preserve treaty security by providing a means of escaping international obligations, one commentator noted:

Since it is impossible to bring to an end the centuries old practice of governments claiming a fundamental change of circumstances in order to free themselves from burdensome treaty obligations, the course recommended by the . . . Commission . . . to regularize the practice and at the same time to regulate it, seems to recommend itself.⁹³

3. *Procedural Requirements for Invoking Article 62*

The Convention requires a State invoking article 62 to follow procedural requirements set forth in articles 65 and 66.⁹⁴ In brief, these rules mandate: (1) that the invoking State give notice to the other party; and (2) if the other party objects, that the parties are obligated to seek a solution to the dispute through measures contained in article 33 of the U.N. Charter.⁹⁵ If these measures fail to lead to a settlement within 12 months after the other party objects, either party may call for a Conciliation procedure described in an Annex to the Vienna Convention.⁹⁶

As noted above, article 62 empowers the invoking State only to call for termination of the treaty. International law will not recognize the termination unless one of three events occurs: (1) the treaty partner expressly or by default accedes to termination; (2) an international tribunal rules that the circumstances meet the article 62 conditions; or (3)

91. *Id.*

92. T. ELIAS, *THE MODERN LAW OF TREATIES* 121 (1974).

93. Schwelb, *Fundamental Change of Circumstances*, 29 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT* 39, 69 (1969).

94. *See id.* at 60: “Attached to the present article . . . [are] the specific procedural safeguards set out in [arts. 65 and 66].” The Convention also applies the same procedural rules to all other grounds of invalidity, termination or suspension of a treaty. Such grounds include error, fraud, corruption of a State official, coercion, conflict with a peremptory norm of international law (*jus cogens*), conclusion of an inconsistent later treaty, material breach, and supervening impossibility of performance.

95. Convention, at art. 65(1), *supra* note 75, at 895. Article 33 of the U.N. Charter refers to the following dispute resolution mechanisms: “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” U.N. CHARTER, at art. 33.

96. Convention, at art. 66(b), *supra* note 75, at 896. The Annex establishes grounds for selecting a five-person Conciliation Commission to hear the dispute. The Commission makes only non-binding recommendations for settling the dispute. Nevertheless, in the great majority of cases the suggestions of the Commission will carry great weight. Rosenne, *The Settlement of Treaty Disputes Under the Vienna Convention of 1969*, 31 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT* 1, 60-61 (1971). Although many delegates to the Vienna Convention sought compulsory jurisdiction of either the International Court of Justice or a newly constituted group over change of circumstances disputes, these delegates failed to win approval of such a provision. *See* A. VAMVOUKOS, *supra* note 9, at 148.

the invoking State in good faith fulfills all procedural requirements set forth in article 65 and the parties still fail to reach an agreement over the dispute.⁹⁷ Some scholars argue that the third event provides an open door for States to abuse the doctrine. As the Commission's Special Rapporteur noted, "the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are obvious."⁹⁸ These risks are ameliorated by the fact that bad faith invocation of the doctrine or bad faith refusal to negotiate a solution will, upon termination, constitute a breach of the treaty; the injured State may then seek reparations or take retaliatory measures authorized by international law.⁹⁹

4. *Legal Effect of Article 62 Termination or Suspension*

Substantively, a treaty's legal termination under article 62 releases the parties from further performance of obligations under the agreement as of the date it is lawfully established that article 62 applies.¹⁰⁰ Alternatively, if the party invoking article 62 merely suspends performance, the treaty remains in force, but the parties are released from performing obligations during the suspension period.¹⁰¹

C. The Status of Article 62 in International Law

The article 62 fundamental change of circumstances provision presently governs disputes among the more than 50 States that are parties to the Vienna Convention.¹⁰² The Convention entered into effect in 1980.¹⁰³

The effect of article 62 and the Vienna Convention on non-signatory States is less clear. Scholars have argued that much of the Vienna Convention represents a codification of customary law and therefore binds all States—including non-signatories.¹⁰⁴ Unfortunately, no consensus exists that article 62 codified customary law rather than new law that one must examine for customary usage on its own merits.¹⁰⁵ Evi-

97. See Haraszti, *supra* note 9, at 83-87.

98. YBILC, *supra* note 77, at 257.

99. Haraszti, *supra* note 9, at 86.

100. Convention, at art. 70(1)(a), *supra* note 75. Termination, however, "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to termination." *Id.* at art. 70(1)(b).

101. Convention, at art. 72(1), *supra* note 75. Under the Vienna Convention, parties under a suspended treaty must refrain from acts obstructing the resumption of the operation of the treaty. *Id.* at art. 72(2).

102. A. VAMVOUKOS, *supra* note 9, at 139. For a list of the parties to the Vienna Convention, see MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, 1988, at 767, U.N. Doc. ST/LEG/SER.E6, U.N. Sales No. E.88.v.3 (1988).

103. I. SINCLAIR, *supra* note 9, at 1.

104. L. HENKIN, *supra* note 4, at 387.

105. A. VAMVOUKOS, *supra* note 9, at 150-51; Toth, *supra* note 9, at 170; and Haraszti, *supra* note 9, at 46 all assert that the article 62 codification of changed circumstances constitutes a customary international law norm. This cannot be considered settled because no court, international or otherwise, has either accepted a State's invocation of change of circumstances as being legal, Toth, *supra* note 9, at 171, or stated that fundamental change of circumstances constitutes an international

dence that the article 62 formulation binds all States is found in the *Fisheries Jurisdiction Cases*,¹⁰⁶ the first and only change of circumstances dispute decided by an international tribunal since the Convention's promulgation. In *Fisheries*, the International Court of Justice clearly recognized the existence of the article 62 formulation of fundamental change of circumstances as a rule of general international law,¹⁰⁷ even though it held the doctrine inapplicable to the facts of the dispute.¹⁰⁸

IV. Human Rights Violations as Grounds for Fundamental Change of Circumstances Treaty Suspension or Termination

A. Legality of Human Rights Violations Serving as Grounds for Applying Fundamental Change of Circumstances

Although the underdeveloped State of both international human rights law and fundamental change of circumstances doctrine make a conclusive answer difficult, no legal impediments appear to bar human rights violations from serving as grounds for terminating or suspending a treaty. By its terms, article 62 does not expressly exclude human rights violations from its scope. Nothing in the text or legislative history supports a claim that the human rights violations are implicitly beyond the article's reach. While a State may have difficulty proving that human rights violations meet all of article 62's limiting conditions—particularly the requirements that the change be "fundamental" and that the absence of human rights violations was an essential basis of the consent to be bound—the factual circumstances in which human rights violations occur do not appear inherently incompatible with article 62's requirements.

Similarly, no human rights law doctrines conclusively affect the validity of a change of circumstances claim. Scholars, however, have

law norm. YBILC, *supra* note 77, at 258. Several International Court of Justice majority and individual opinions have, however, commented favorably on the nature of the doctrine as customary law, yet refused to hold it applicable to the facts before them. *See id.* at 171-78. One may explain the absence of judicial holdings on several grounds including judicial reluctance to encourage a doctrine historically subject to widespread abuse. *See supra* notes 72-75 and accompanying text, in conjunction with the possibility that strong change of circumstances claims are acceded to without litigation.

106. *United Kingdom v. Iceland*, 1973 I.C.J. 3 (Judgment of Feb. 2, 1973), *reprinted in* 12 I.L.M. 290 (1973). *See also* the companion case, *Federal Republic of Germany v. Iceland*, *reprinted in* 12 I.L.M. 300 (1973) (decided on the same day). The two judgments are in most respects identical. The disputes involved treaties that recognized Iceland's 12-mile exclusive fishing limit in return for Iceland's agreement that the International Court of Justice would decide any future dispute concerning Iceland's efforts to further extend its fishing limits. When Iceland extended its fishing limits to 200 miles in accordance with subsequent State practice, England and Germany invoked the compromissory clause triggering the jurisdiction of the Court. Iceland contested the validity of the Court's jurisdiction on the grounds that changes in fishing technology and the international law governing fishing limits rendered the earlier treaties obsolete and void.

107. Toth, *supra* note 9, at 176.

108. 12 I.L.M. at 298-99.

identified two potential impediments to sanctions against a State that violates the human rights of its citizens. The first potential barrier is exclusivity of remedies. Some scholars have argued that when human rights agreements contain complaint or remedy provisions, signatories seeking to take action in response to a treaty partner's human rights violations are limited to those provisions;¹⁰⁹ alternatively, a State must exhaust such procedures as a condition precedent to taking additional measures.¹¹⁰ The problem with this argument is that except for article 62 of the European Convention on Human Rights,¹¹¹ no human rights agreement expressly or by clear implication states that its complaint provisions are intended to be exclusive. Under international law, States are generally allowed to take any action unless a countervailing legal principle prohibits it.¹¹² Unless and until human rights agreements demand exclusivity of remedies, such arguments should not prevent a State from invoking change of circumstances or taking other action available under international law in response to human rights violations.

The more difficult barrier to applying the change of circumstances doctrine involves the "domestic jurisdiction" clause of the U.N. Charter. The Charter, at article 2(7), states that "[n]othing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."¹¹³ The Charter does not define "domestic jurisdiction" and many scholars have debated whether it prevents concerned States from taking action against States that violate the human rights of their own citizens.¹¹⁴ The meaning of the domestic jurisdiction clause has never been litigated in international courts.¹¹⁵ Suriname impliedly asserted the domestic jurisdiction defense when it claimed that the Netherlands had unlawfully

109. See Bastid, *Observations as to the Consequences on the International Plane of Failure to Respect Human Rights*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 41 (T. Buergenthal ed. 1977).

110. See Frowein, *The Interrelationship Between Helsinki's Final Act, The International Covenants on Human Rights, and The European Convention on Human Rights*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 30-31 (T. Buergenthal ed. 1977).

111. Reprinted in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, *supra* note 36, at 500.11.

112. See Henkin, *supra* note 3, at 30-31.

113. U.N. CHARTER art. 2(7). See generally L. HENKIN, *supra* note 4.

114. Compare L. HENKIN, *supra* note 4 (arguing for limited scope of domestic jurisdiction clause), accord Bossuyt, *Human Rights and Non-Intervention in Domestic Matters*, 35 INT'L COMM'N JURISTS REV. 45, 50-52 (1985), with Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60 (1977).

115. The International Court of Justice dealt indirectly with the domestic jurisdiction clause when it held that all States have an *erga omnes* interest in protecting "basic rights of the human person, including protection from slavery and racial discrimination." Case Concerning the Barcelona Traction, Light and Power Company, Limited, 9 I.L.M. 227, 259 (1970). To the extent a State's human rights violation constitutes an *erga omnes* interest of all States, domestic jurisdiction will not prevent international measures against the violator.

intervened in its internal affairs.¹¹⁶

International tribunals have not yet provided a conclusive interpretation of the Charter's domestic jurisdiction clause. Nevertheless, several factors suggest that in most cases the clause would not bar a State from asserting the change of circumstances doctrine based on human rights violations. By its terms, article 2(7) only prohibits intervention by the U.N. itself and does not address actions by individual States. Even if international courts were to adopt an interpretation of the domestic jurisdiction clause that encompassed unilateral State action, it would probably not bar all actions taken in response to human rights violations.¹¹⁷ The U.N. itself asserts authority to take measures when a State is guilty of "consistent patterns of gross violations" of human rights¹¹⁸ and the International Court of Justice has endorsed international measures against States that violate "basic rights of the human person," even if the violations occur internally.¹¹⁹ Finally, Professor Henkin argues that by signing a human rights agreement, a State "internationalizes" its citizens' human rights, in effect estopping it from asserting the domestic jurisdiction clause as a defense to sanctions.¹²⁰ For all of these reasons, the domestic jurisdiction clause should not provide an effective defense to most assertions of change of circumstances.

B. Potential Utility of Invoking Fundamental Change of Circumstances Against a Treaty Partner

1. *Potential Benefits*

Use of fundamental change of circumstances doctrine in human rights cases provides benefits to both the State seeking redress and the international community generally. First, the State invoking the doctrine avoids the "breach or condone" dilemma discussed above. It publicly interposes a legal barrier between itself and the violating State, avoiding the appearance of supporting an abhorrent regime and preventing the legal relationship from undermining the force of other political, legal, or economic efforts. At the same time, as long as the invoking State acts and negotiates in good faith, it should not be automatically liable for reparations or suffer other consequences associated with the breach of an international obligation.¹²¹

Second, the fundamental change of circumstances doctrine may advance human rights law by providing an entrance into international

116. *See supra* text accompanying note 7.

117. *See* Henkin, *supra* note 3, at 33: "As blanket objections to international concern with human rights, the claims of domestic jurisdiction and non-intervention have been long dead."

118. *See* RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) which asserts that "[a] State violates international law if, as a matter of State policy, it practices, encourages or condones . . . consistent patterns of gross violations of internationally recognized human rights."

119. *See supra* note 115.

120. *See* Henkin, *supra* note 3, at 35.

121. *See supra* note 99 and accompanying text.

courts for human rights related litigation. A State invoking the doctrine gains the right to terminate the treaty if the other State does not protest. If it wishes to preserve the treaty, the alleged violator State must sue. By invoking the doctrine, therefore, the complaining States may succeed in forcing the accused State into court. Litigation would provide courts with an opportunity to clarify such hotly debated terms as "domestic jurisdiction,"¹²² "basic rights of the human person,"¹²³ and "gross and consistent violations of human rights."¹²⁴

Finally, the use of fundamental change of circumstances based on human rights violations may also foster improved international relations through its function as a "safety valve" between treaty partners. One can argue strongly that it is better to allow States bound by treaty to a State committing heinous crimes to seek legal termination of their relations than to compel them to breach the agreement or, more dangerously, take extra-legal measures against the offending government to remove the source of its irritation.¹²⁵ Moreover, the doctrine channels acrimonious international disputes into a regularized dispute resolution process that discourages outright breach.¹²⁶

2. Potential Costs

Despite its benefits, application of the change of circumstances doctrine against a treaty partner involves at least three possible drawbacks. First, the invoking State must be prepared to pay the potential economic and political costs of losing should the accused party contest the claim and win. The courts' historic dislike of the doctrine,¹²⁷ combined with the difficulty of meeting article 62's exacting conditions, create a relatively high possibility that an accused State's defenses will succeed in litigation. Of course, this risk is somewhat mitigated by an important strategic advantage of the invoking States; namely, the violating State may decline to contest the claim in order to avoid drawing public attention to its human rights problems.

Second, the underdeveloped state of change of circumstances law decreases the certainty with which the concerned State can invoke the doctrine. Until case law develops, States contemplating use of the doctrine will have no basis for determining what facts will satisfy article 62's exacting yet ambiguous requirements. At best, the invoking State can seek to ensure that the circumstances do not violate express or clearly implied conditions for invoking the doctrine and that the circumstances provide the strongest possible equitable case in favor of granting relief.

122. See *supra* notes 113-120 and accompanying text.

123. See *supra* note 115.

124. See *supra* note 57 and accompanying text.

125. Wider adoption of the doctrine conceivably may have the unintended benefit of encouraging States to enter international accords by providing a legal means for severing ties should a treaty partner unexpectedly act in an abhorrent manner at some point in the future.

126. See *supra* notes 94-96 and accompanying text.

127. See *supra* note 105.

The third, and perhaps most important potential cost involves possible abuse of the doctrine. Allowing the use of the doctrine of fundamental change of circumstances based on human rights violations creates a heightened risk that States will invoke the doctrine as a pretext for escaping an inconvenient obligation or for illegitimate political reasons. The checkered history of the doctrine underscores the reality of this threat.¹²⁸ The powerful reactions which allegations of human rights violations typically evoke suggest that abuse of the doctrine could create significant international tension. At worst, abuse could disturb the fragile consensus developed over the last 40 years that human rights are a legitimate object of international concern.

3. *Evaluation of Benefits and Costs*

On balance, the potential benefits of using fundamental change of circumstances doctrine against human rights violators outweigh the accompanying risks. Significant checks lessen the likelihood of abusive invocation of the doctrine. The most important safeguard is the restrictive formulation of article 62. Meeting the article's stringent requirements will require more than a mere assertion of fundamental change of circumstances.

International courts offer a second check on potential abuse. While States may generally be hesitant to appear in a public tribunal to defend against charges of human rights abuse, such reluctance is not without limits. Wrongly accused States may actively seek public exoneration, particularly when they derive important benefits from the treaty. And once the wrongly accused State initiates litigation, underlying judicial suspicion of the change of circumstances doctrine will further diminish the likelihood that bad faith claims will succeed.

V. *Application of Analysis to Suriname/Netherlands Dispute*

The Suriname/Netherlands dispute represents a paradigm case for invoking fundamental change of circumstances doctrine. Given the current absence of directly applicable judicial rulings, the case should serve as a benchmark for States considering application of the doctrine.

The facts of the case do not appear to contravene any express or implied condition for invoking the article. The dispute did not involve a boundary.¹²⁹ Breach by the Netherlands did not cause the change in circumstances.¹³⁰ The treaty was not terminable at will,¹³¹ or fully executed.¹³² It did not expressly or implicitly provide for changes in human rights¹³³ or exclude application of the change of circumstances

128. *See supra* notes 73-75 and accompanying text.

129. *See supra* note 84 and accompanying text.

130. *See supra* note 85 and accompanying text.

131. *See supra* note 86 and accompanying text.

132. *See supra* note 87 and accompanying text. In 1982, the Development Cooperation Plan treaty had three to eight years left to run. *See supra* note 20.

133. *See supra* note 90 and accompanying text.

doctrine.¹³⁴

The facts also at least arguably and perhaps strongly satisfy the elements of article 62. Given the ambiguous wording of article 62, it is impossible to predict whether a court would hold that the continuation of respect for human rights in Suriname was an "essential condition of the consent to be bound."¹³⁵ The statement of object and purpose of the development aid treaty does not explicitly discuss human rights as fundamental to the treaty relationship. Nevertheless, the facts indicate that the Netherlands did consider the future maintenance of human rights to be essential. Most importantly, the Netherlands refused to sever ties with its former colony until Suriname agreed to adopt a constitution guaranteeing citizens human rights.¹³⁶ The guarantee of human rights, therefore, was arguably an essential pre-condition to the independence treaties, including the Development Cooperation Plan.

The Netherlands also meets article 62's requirement that the change be unforeseen. Suriname had no history of human rights violations prior to or contemporaneous with the conclusion of the independence treaties.¹³⁷ It would be unreasonable to suggest that a *coup d'état* followed by systematic, violent elimination of the opposition could have been foreseen seven years before the event.

The final important inquiry under article 62 concerns the question of whether Suriname's human rights violations were "fundamental" *vis-a-vis* the treaty and whether they "radically transformed the scope of the obligations to be performed under the treaty." One can make a strong argument that the *coup* and the subsequent gross human rights violations did represent a fundamental change, radically altering the extent of the Netherlands' treaty obligations. The Netherlands entered the treaty promising to provide development assistance to a democratic State with constitutional guarantees on human rights. After the *coup*, continuation of the treaty's obligations would have forced the Netherlands to subsidize a regime guilty of torture, murder, and various other violations of human rights. The change in regimes was clearly fundamental.¹³⁸ The obligation of supporting such a regime is radically different from the obligation the Netherlands agreed to undertake.

Beyond meeting the *prima facie* elements of an article 62 change of circumstances claim, no evidence indicates any bad faith on the part of the Netherlands. In fact, the Netherlands demonstrated good faith by agreeing to suspend, not terminate, the agreement and by offering to resume performance if Suriname gave guarantees of future adherence to

134. See *supra* note 91 and accompanying text.

135. See *supra* note 21.

136. See *supra* notes 17-18 and accompanying text.

137. See *supra* note 14 and accompanying text.

138. The relatively small number of victims should not by itself preclude application of the article given the small population of Suriname, its long history of violence-free government, and the careful selection of victims. Bossuyt & Griffiths, *supra* note 7, at 62.

basic human rights principles.¹³⁹

In sum, the Netherlands/Suriname dispute presents a paradigm case for application of the fundamental change of circumstances doctrine in a human rights context.

Conclusion

The implementation of human rights norms has not been effective because States too often lack the inclination to respond to violations. When they do decide to act, concerned States face barriers that weaken their ability to sanction effectively the violating State. Where it is applicable, the doctrine of fundamental change of circumstances offers a potentially effective vehicle for punishing offensive States and for increasing future deterrence.

Because of the uncertainties concerning the legality and scope of the fundamental change of circumstances doctrine, a State should invoke it in the human rights context only when: (1) the circumstances underlying the violations appear to meet the article 62 requirements and do not contravene express or clearly implied prohibitions on its use; (2) the violations involved are sufficiently "gross and consistent" so that the equities of the situation demand relief; (3) the State is able and willing to suffer the consequences of breach should the claim be challenged and rejected; and (4) it invokes the doctrine with the good faith belief that the treaty relationship has fundamentally changed and not for economic or political gain.

In an area where international law often appears to offer few meaningful methods for punishing transgressors, use of the fundamental change of circumstances doctrine may provide the basis for effective, affirmative action.

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139. See Bossuyt & Griffiths, *supra* note 7 and accompanying text.

