

Crisis and the Performance of International Agreements: The Outbreak of War in Perspective

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Introduction

Parties¹ enter an international agreement with assumptions and expectations as to its impact. These expectations and assumptions in turn form the basis for future policies anticipated by the agreement. Expectations about the future course of relations between the parties will be shaped by their assumptions about the events leading to the agreement. The parties may have made some of their expectations explicit during the negotiating process while others remained implicit. Some assumptions may be shared and understood at the time of agreement; others may remain submerged until subsequent events reveal them.

Traditional analysis has treated the effect of crisis (usually war) on international agreements as a unique phenomenon. Once war is declared, parties may be able to suspend or terminate treaties. This Article will view the impact of crisis in a broader perspective. Any changes in underlying expectations can alter the expected value of the agreement. The parties must then weigh the treaty's benefits, consider modifications of the performance process, and anticipate the demands that in turn may be made by other parties. The range of responses, as well as the possible changes in circumstances giving rise to them, are wide and diverse. This Article will focus on the criteria parties should use to make and evaluate claims relating to international agreements in times of crisis and the criteria the world community should use to evaluate those claims.

I. The Theoretical Framework

This Article will analyze the effect of crisis on international agree-

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1. The parties to an international agreement can be any international actors, such as States, international organizations, private parties, and even individuals. In this Article, "parties" refers to States unless otherwise noted.

ments in contextual fashion. The crisis and the parties' responses to it cannot be separated from their expectations and perceptions. Any analysis of the validity and lawfulness of the responses must also take the context into account.

A. *Definition of "Crisis"*

A crisis is a change in circumstances that threatens the values on which the agreement rests. A crisis occurs when political elites perceive a threat to their own position or to the security of the State itself. The elites then urge extreme measures to restore the situation or naturalize the threat. The elites may be parties to a number of international agreements containing obligations contrary to the policies they wish to pursue in the face of these changed conditions, and so they will have to determine how far they can compromise these obligations.

A determination that a "crisis" exists reflects the parties' perceptions, not a declaratory analysis of facts. Because the perception of threat arises from the impact of events on the expectations and values of the parties, a crisis cannot be separated from its context.² Except for natural disasters, most crises do not occur suddenly but stem from a series of perhaps seemingly trivial acts that threaten group values.³

The crisis only need affect one of the parties to change the expectations of many;⁴ indeed, it may only affect a third State not party to the agreement. Serious famine or a sudden change in a State's economic position caused by a fall in the price of a vital export will alter the value of certain agreements. A State may perceive internal changes in the power structure of another as an ideological threat of crisis dimensions.⁵

The crisis may threaten values other than power or security. Epidemics of infectious diseases or a chronic "brain drain" could lead to demands to modify long-standing international obligations. An elite

2. See Delaume, *Excuse for Non-Performance and Force Majeure in Economic Development Agreements*, 10 COLUM. J. TRANSNAT'L L. 242, 263 (1971) ("Under the circumstances the paramount consideration is much less the occurrence of a particular event than its impact upon the carrying out of the venture and the response of the parties in relation thereto.")

3. See generally C. BELL, *THE CONVENTIONS OF CRISIS* (1971); W. CHURCHILL, *THE GATHERING STORM* (1948). Of course, the inevitability of crisis may seem much clearer in retrospect. See C. BELL, *supra*, at 23 ("twenty-twenty hindsight").

4. See Note, *The Effects of Domestic Hostilities on Public and Private International Agreements: A Tentative Approach*, 3 W. L. REV. 128 (1964) (study of effect of internal revolution on treaties; proposes that English municipal doctrine of frustration be used as starting point for solution of problem).

5. The United States perceived Cuba's adoption of a Marxist-Leninist form of government, an internal event, as a threat to essential community values of the hemisphere. See 56 AM. J. INT'L L. 604-08 (1962) (report of 1962 O.A.S. Conference).

may view economic changes threatening a State's financial stability as a crisis.⁶ Changes in affection or respect between elites may vitally affect the value of mutual assistance or military cooperation treaties.⁷

Deteriorating relations between States involving measures far short of open warfare can affect treaty regimes.⁸ On the other hand, war may not constitute a crisis if elites of different States anticipate future conflict. The outbreak of hostilities could accord with rather than defeat their expectations and thus involve no threat to the values on which the agreement rested.⁹

In addition, the institutional world community could act to oblige nations to suspend or terminate treaty obligations with an international law-breaker. While such authoritative determinations are rare, they do

6. In 1971, the United States government decided that balance of payments deficits and inflation rates had reached such levels that they threatened the stability of international trading arrangements. The United States deemed emergency measures justified, regardless of the terms and policies of the General Agreement on Tariffs and Trade (G.A.T.T.) and of the International Monetary Fund (I.M.F.). Without denouncing these international commitments, the U.S. government implemented regulations that conflicted with them. Jackson, *The New Economic Policy and United States International Obligations*, 66 AM. J. INT'L L. 110 (1972). The United States may have considered the U.S. dollar and the U.S. position in international commerce to be of such paramount importance to the world economic system that a failure to act, which arguably would threaten the stability of that entire system, would constitute irresponsible behavior. While the measures adopted did not comply with the legitimate expectations of the other elites party to these economic agreements, those actions may still be justified in the long term.

Both G.A.T.T. and the I.M.F. can impose sanctions for deviant behavior. The repeated failure of the global community to use these powers may suggest tolerance of such deviation. Such tolerance may even be, in practice, desirable. Jackson describes a "respectable body of opinion" that considers deviance necessary to show the need to reform the system. *Id.* at 117-18.

7. For example, Ethiopia and Somalia switched sides in the Cold War in the mid-1970's because their patrons failed to support their local interests with sufficient vigor. See N.Y. Times, Nov. 14, 1977, at 1, col. 1.

8. While war obviously is the paradigm of crisis, the distinction between "peace" and "war" has become increasingly blurred in the modern world. The policies developed in this Article do not depend on the location of this inexact line. In the large number of armed clashes since the Second World War, formal declarations of war have been exceedingly rare. See D. WOOD, *CONFLICT IN THE TWENTIETH CENTURY* (1968); Arbitration Award between Dalmia Cement, Ltd., New Delhi (India) and the National Bank of Pakistan, Karachi (Pakistan), Dec. 18, 1967, reprinted in Documents filed by Pakistan, Appeal Relating to the Jurisdiction of the I.C.A.O. Council, I.C.J. Pleadings 748 (1973) (discussion of problem of defining the onset of war in absence of a declaration). In addition, hostilities may be overt or covert. Covert hostilities include instances where one State shelters or assists groups in its own territory that then attack selected targets in another State. Such conflicts can seriously threaten the victim, and the same policies should apply to claims made against this background as apply to other, more conventional conflict situations. Cf. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 32 (1972) (reprisals against guerrilla activity "have proved to be productive of greater violence rather than a deterrent to violence").

9. See the discussion of the India-Pakistan "serial war" at text accompanying notes 84-85 *infra*.

represent instances of a *legal* crisis leading to demands to modify agreements.¹⁰

Whatever the causes, crises will vary in intensity, duration, and seriousness. The appropriateness of the response to the crisis is therefore similarly contextual. A decision-maker should determine the responses according to the level of intensity and coercion involved. A reaction deemed appropriate for a moment of intense threat may be considered ill-advised or arbitrary at an earlier or subsequent moment.

B. *The Decision Process: Interests and Actors*

Once a crisis exists, States will make their demands and counter-demands known through diplomatic channels or regional or world fora. Other actors with stakes in international agreements will also press their own interests. Private parties may have depended on international obligations for their legitimate financial or personal interests.¹¹ Most of the municipal case law on treaty suspension or termination has involved the rights of individuals in treaties during wartime. In addition, private interests may help determine national policy regarding an agreement. In making and evaluating these demands, decision-makers—whether other elites or an impartial third party before whom the claims have been brought—should consider the interests of all involved parties, not just those parties who signed the agreement.¹²

10. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, discussed at note 25 *infra*.

11. The canon of statutory interpretation that a statute should be presumed not to conflict with an international obligation reflects the policy that arrangements made in compliance with a treaty should not be thwarted unreasonably. See text accompanying note 62 & notes 62, 65 *infra*; *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920) (upholding will with foreign beneficiaries due to treaty allowing foreigners to inherit); *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930) (assumption of tonnage payable in U.S. ports based on treaty provisions). See generally Edwards, *Abrogation of Contracts by War*, 44 GROTIIUS SOC'Y TRANSACTIONS 91 (1958).

12. British and West German fishermen relied on their access to fishing grounds in the waters off Iceland after the conclusion of the 1961 Exchange of Notes between the United Kingdom and the Icelandic governments. Dependence on these fishing grounds of the fishermen, processing industries, and the economies of certain British communities continued. The unilateral claim by Iceland to terminate their rights in those waters on the ground of changed circumstances threatened the livelihoods of many individuals, who then pressed their governments not to tolerate Iceland's behavior. See *Fisheries Jurisdiction Case (U.K. v. Ice.)*, [1974] I.C.J. 3 (Jurisdiction). The decision in the *Fisheries Jurisdiction Case*, which gave great weight to the priority of the coastal State in the exploitation of fishing resources, also greatly affected other States not directly involved in the case. Third World nations that might have considered starting long-range fishing fleets as a relatively inexpensive means to develop new protein sources now found themselves barred from fishing in productive areas of the oceans. While Iceland's actions did not directly affect those nations which had yet to launch their fleets, Iceland did foreclose options formerly available to them, a fact considered neither by the Icelandic elites nor by the International Court of Justice.

Private business associations, banks, and other commercial organizations make arrangements in direct reliance on international economic agreements. Actions such as the 1971 United States devaluation of the dollar¹³ may thwart their expectations. A major dislocation of contracts will give rise to private claims from individuals as well as public demands from the elites involved.¹⁴ More directly, a crisis may create demands to alter economic development or concession agreements, whether the parties are States or a State and a multinational corporation.¹⁵

Any worthwhile analysis must balance the protection of private investment through *pacta sunt servanda* with the allowance of necessary flexibility for the host State.¹⁶ For example, private agreements relating to carriage of goods by sea or air, transportation and insurance costs, and international transit timetables depend on agreements for rights of passage through international waterways or for air-transit rights.¹⁷ A complete analysis must balance private interests in the stability of such arrangements with the need for flexibility to protect the security of the State.

13. See note 6 *supra*.

14. The freezing of Iranian assets by President Carter in November, 1979, despite a relevant bilateral treaty, Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 [hereinafter cited as Treaty of Amity] caused just such an outcrop of claims, primarily from U.S. banks and businesses that had relied on continued stability between the two States. The overthrow of the Imperial government and the institution of new values within Iran were perceived by Iran as threatened by the United States. The seizure of the American Embassy and the possibility of an economic crisis within the United States caused by a withdrawal of the assets led to the freeze to protect U.S. national interests beyond the sum total of the private claims. See generally Lambert & Coston, *Friendly Foes in the Iranian Assets Litigation*, 7 YALE J. WORLD PUB. ORD. 89 (1980).

15. Many of these economic development agreements incorporate *force majeure* clauses to determine the relations between parties in the event of war. See Delaume, *supra* note 2, at 248 for examples of such clauses. The trend toward the internationalization of concession contracts between States and private investors (where the contracts make international law rather than any particular domestic law applicable) will require developing applicable principles of international law. See generally *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Libyan Arab Republic (Caltex Case)*, Award on the Merits (1977), reprinted in 17 INT'L LEG. MAT. 1 (1978); *Arbitration between Revere Copper and Brass, Inc. and Overseas Private Insurance Corporation (O.P.I.C.)*, reprinted in 17 INT'L LEG. MAT. 1321 (1978).

16. A change of government leading to domestic economic reforms ostensibly requiring nationalization programs may lead to claims from those who had concluded concession agreements with the previous government. See A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* 213-302 (1962); G. SCHWARZENBERGER, *FOREIGN INVESTMENTS AND INTERNATIONAL LAW* (1969). The conflicting doctrines of *pacta sunt servanda* (treaties must be respected) and *rebus sic stantibus* (changed circumstances) provide little guidance to a decision-maker evaluating such claims, particularly in a world of often changing circumstances.

17. See part IV. B. *infra* for a discussion of international transit agreements.

C. *Options Available*

Once faced with a crisis, the parties must select strategies and tactics. The range of options available is wider than termination, withdrawal, or suspension. A party may consider a treaty worth upholding despite the higher costs, among which is the cost of likely counter-demands by other parties. A party may do nothing, either breaching the agreement or attempting to maneuver the other side into material breach. The party may interpret the other parties' actions as breach justifying termination. Non-performance may spur renegotiation, or parties may try to sever certain provisions while keeping others in force.

The parties may prescribe for the outcome in the case of unforeseen or unexpected events threatening the values projected by the agreement.¹⁸ Of course, where such provisions exist, the parties should comply with them. Unfortunately, in many cases the imprecise terms do little more than alert the parties to the possibility of differing obligations under such circumstances. Often the agreement refers the party to norms of international law independent of the agreement (a technique of limited usefulness due to the uncertain nature of the law in this field).¹⁹ Events that can trigger such a clause are usually described in general terms. Although the phrases used—"war," "beyond the reasonable control of any party," "enemy action"—are objectively framed, the claimant party normally will decide for itself when the situation warrants application of the clause.²⁰

18. Such provisions frequently appear in economic development agreements. See note 15 *supra*. Agreements concluded between States not uncommonly also contain such clauses. For example, Article 9 of the Agreement between India and the U.S.S.R., Sept. 28, 1959, providing for financial assistance to India, states that

If the performance of the present Agreement is interfered with for any length of time by wars, enemy action, embargoes, blockades or any other cause beyond the control of either Party, the representatives of the Government of India and the Government of U.S.S.R. shall immediately consult with each other and co-ordinate measures to be taken and if such agreement cannot be reached within any acceptable period of time, the Indian authorities may complete the [development project] in such manner as may be deemed necessary; but even in that case the rights and liabilities of the parties, arising under the present Agreement till then shall remain in force.

Reprinted in Delaume, *supra* note 2, at 249.

19. See Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 89, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 296 [hereinafter cited as Chicago Convention] ("In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals.")

20. In rare instances, machinery is available for third-party determinations of the existence of emergency conditions. The European Court of Human Rights has performed in this capacity. See Lawless Case, [1961] Y.B. EUR. CONV. ON HUMAN RIGHTS 430 (Eur. Ct. of Human Rights).

II. Community Policies

When deciding on the appropriate response to changed circumstances, a decision-maker must first recognize and then attempt to balance the various (and often conflicting) interests at stake. The State must protect values it regards as essential to its integrity and threatened by the crisis. Beyond the individual State's interest in defending its security lie the interests of the international community in minimum world order and the least necessary disruption to international life.

The first concern of the international community is the containment of conflict by encouraging a cease-fire, troop withdrawals, and the opening of negotiations. Containment of the conflict, moreover, connotes minimum interference with international trade, commerce, and communications. This interest in stability and *pacta sunt servanda* exceeds the requirements of minimum order; it is the stability necessary for commercial planning and the maintenance of private expectations necessary to beneficial economic exchanges.²¹

These community policies apply without regard to the legality of the hostilities. While allowing termination or suspension in the event of a conflict may allow an aggressor to choose those agreements it intends to honor,²² any other conclusion would subordinate a decision about the continuing applicability of agreements to a determination of aggression. Such a determination, realistically, is unlikely, at least until the conclusion of the hostilities. In the event of a subsequent authoritative determination of aggression, further claims (for example, for reparations) could then be made.

Third parties who determine that a particular party is an aggressor may suspend or terminate their agreements with that State to avoid giving it assistance. Even without a determination of aggression, suspension or termination may help contain the conflict.²³ An authoritative decision as to aggression by the institutionalized world community

21. This need for stability must be weighed against the need for flexibility; the international interests should not demand performance where it no longer conforms to the shared expectations of the parties. See text accompanying note 29 *infra*; Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895 (1967).

22. "It has been rightly suggested, with regard to the abrogation of treaties as the result of war, that it may be improper for courts to recognize, in a way benefiting the aggressor State, the automatic termination of treaties in consequence of a war launched by him." 2 L. OPPENHEIM, INTERNATIONAL LAW 219 (7th ed. 1952).

23. An example is the cessation of arms supplies by the United Kingdom to all States involved in the Middle East conflict, regardless of any determination of aggression. The United Kingdom asserted that it was "inconsistent to call for an immediate end to the fighting and yet to continue to send arms to the conflict." 1973 KEESING'S CONTEMPORARY ARCHIVES 26235.

justifies such an action to a greater degree.²⁴ Still, interference with treaty rights should be taken only with respect to those agreements relevant to the specific terms of the sanction.²⁵

The interests and strategies of the world community can be summarized in four recommendations. First, no deviation from fundamental human rights policy should be tolerated. Even at times of severe crisis seriously threatening group values, humanitarian limits must restrict the options available to national elites. This policy underlies the principle of *jus cogens* in the Vienna Convention on The Law of Treaties ("Vienna Convention").²⁶ Second, principles of economy and reciproc-

24. A sanction imposed by the Security Council under Article 25 of the U.N. Charter justifies the suspension of pre-existing agreements with the deviant State. Layton, *The Effect of Measures Short of War on Treaties*, 30 U. CHI. L. REV. 96 (1962). This action follows from Article 103 and is intended to force compliance with the norms prescribed by the world community. More problematic are similar demands made by the General Assembly, which of course has no compulsory powers. For example, in G.A. Res. 2107, 20 U.N. GAOR, Supp. (No. 14) 62, U.N. Doc. A/6014 (1965), members of the General Assembly urged States to "refuse landing and transit facilities to all aircraft belonging to or in the service of the Government of Portugal and to companies registered under the laws of Portugal." Compliance with this Resolution would have been inconsistent with the Chicago Convention, *supra* note 19. See Letter dated Mar. 30, 1966 from the Secretary-General of the International Civil Aviation Organization addressed to the Secretary-General, U.N. Doc. A/6294 (1966). A General Assembly Resolution with political motivations should not, in the view of many scholars, justify the suspension of international agreements.

25. In the Namibia Case, the judges of the I.C.J. expressed different opinions as to the appropriate behavior of States with respect to agreements made with South Africa. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16. The basis for such sanctions rested on the illegality of South Africa's presence in Namibia. The breach of the Mandate Agreement threatened the basic values (respect for human dignity and promotion of the well-being of the Mandatory peoples) of the Mandate system. The world community wished to act to restore those protections to the Namibian people.

The majority opinion took a comparatively conservative approach; no further treaties should be concluded with South Africa where that government purports "to act on behalf of or concerning Namibia." *Id.* at 55. Nations should not make new or apply existing bilateral agreements but apparently need not suspend or terminate them; nations should respect multilateral agreements with humanitarian goals where not to do so would adversely affect the inhabitants of Namibia.

In a separate opinion, Judge Ammoun was prepared to go much further. He characterized South Africa's presence and activities as acts of aggression and open warfare against the Namibians, not merely as acts of illegality. The world community could only respond to South Africa's immoral attack against fundamental values by extreme and sweeping measures. Treaty relationships must yield. "[O]bligations contained in those treaties cannot prevail over the obligation not to assist an aggressor State." *Id.* at 67, 94. None of the other judges wholeheartedly supported this radical minority view. Judge Ammoun's statement remains, however, a clear policy approach for decision-makers where there has been an unambiguous and authoritative determination of aggression.

26. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, arts. 53, 64, reprinted in 8 INT'L LEG. MAT. 679 (1969) [hereinafter cited as Vienna Convention]. See also O'Boyle, *Emergency Situations and the Protection of Human Rights*, 28 N. IRE. LEGAL Q. 160 (1977). On the Vienna Convention generally, see Kearney & Dalton, *The*

ity militate against the termination or suspension of agreements with no direct bearing on the conduct of hostilities.²⁷ The unnecessary destruction of values increases the cost of handling the crisis for other parties and most likely will provoke countermeasures. Parties should also act to cause the least possible destruction of the legitimate expectations of third parties, whether other elites or private persons, especially those parties least able to absorb the loss.²⁸ Elites must attempt to limit demands that may prejudice the welfare of individuals, either within that State or in other States. In all cases, a comprehensive evaluation of the effects of the acceptance of those demands must be made so that the impact on all global values can be assessed before reaching a decision.

Third, within these limits, parties should be allowed to deviate from their international obligations when they perceive that strict adherence will threaten essential values. While parties should not view claims of crisis as an easy escape from onerous obligations, some flexibility must be tolerated. Legitimate changes in expectations, based on verifiably changed situations, should be upheld. To hold parties to obligations entered into under different circumstances may cause disrespect for treaty relationships, foster resentment, discourage States from concluding international agreements, and make breach the only realistic option.²⁹

Finally, the principles of reasonableness, proportionality, and necessity, as applied to determine the lawfulness of actions allegedly taken in self-defense,³⁰ should also act as a limit on States' freedom of action. An essential element of proportionality is specificity. It requires that claims relate to the values threatened by the conflict in question and would classify as unreasonable claims based on agreements that are

Treaty on Treaties, 64 AM. J. INT'L L. 495 (1970); *U.S. Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L L. 470 (1979); section III. A. *infra*.

27. See M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 42-43 (1961).

28. See Paust & Blaustein, *The Arab Oil Weapon—A Treat to International Peace*, 68 AM. J. INT'L L. 410 (1974) (1973 Arab oil embargo violated provisions of G.A.T.T. and was unjustifiable in view of the global dislocation of values it caused).

29. See Lissitzyn, *supra* note 21. The rule that states cannot plead an internal law to justify failure to perform an international obligation, see Vienna Convention, *supra* note 26, art. 27, must be modified to this extent, especially where performance of the agreement would be self-destructive.

30. In his famous letter concerning *The Caroline* incident, Daniel Webster said that force should be employed in self-defense only when "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Letter from Secretary of State Webster to Lord Ashburton, Aug. 6, 1842, *quoted in* 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

peripheral to those threatened values.³¹ Claims should be evaluated according to a sliding scale that depends on the extent, duration, and severity of the threat to the group values. Parties should consult with other parties before taking unilateral action. Attempting to minimize the adverse and disruptive consequences means that suspension is preferred to termination and renegotiation to either.

Decision-makers should consider their strategies with respect to international agreements in times of crisis with these criteria in mind. A principal consideration in the formulation of a party's demands will be the likely community response to those claims. These criteria will determine the community response, thus making these policies vitally important elements in initial considerations of strategy.

III. Past Trends in Decision: The Relevant Prescriptions

This section will review and evaluate the law of the effect of crisis on international agreements, including the Vienna Convention, municipal court decisions, and the writings of jurists. Traditionally, scholars have classified the effect of crisis on treaty relationships under one of three doctrines: impossibility of performance, fundamental change of circumstances, and the effect of war on agreements. This Article argues that one should view all three as different responses to changed circumstances resulting in a crisis and then assess the adequacy of the response in terms of the goals posited.

A. *The Vienna Convention on the Law of Treaties*

The Vienna Convention, the major source of law in this field, describes the consequences of termination,³² suspension,³³ and allows for the severability of provisions impossible to perform.³⁴ The Convention and its Annex set out the procedures for making these demands.³⁵ The inclusion of these procedures represented a compromise aimed at preventing arbitrary, unilateral, or secretive claims so as to achieve a balance between the rights of the objecting State and those of the

31. W. REISMAN, NULLITY AND REVISION 836-58 (1971).

32. Vienna Convention, *supra* note 26, art. 70.

33. *Id.*, art. 72. See also Petition of Nederlandsche Rijnvaart-Vereeniging, District Court of Rotterdam, [1958] N.J. 473, reprinted in 24 INT'L L. REP. 99 (1957).

34. Vienna Convention, *supra* note 26, art. 44. Demands for withdrawal from a bilateral agreement amount to demands for termination. In contrast, withdrawal from a multilateral convention will leave the agreement in force between all the other parties, with the claimant State no longer bound by its provisions. See *id.*, arts. 54-57. The analysis in this Article applies to both bilateral and multilateral treaties. Given the multiplicity of factors to be considered, however, analysis of a multilateral treaty could be more complex.

35. *Id.*, arts. 65-68.

claimant State.³⁶ Unfortunately, the procedures do little more than reiterate the pre-existing obligation to settle disputes peacefully.³⁷ The claimant State must allow the other parties time for their reply so that the latter are not pressured into a premature response. This delay, however, is not required in times of "special urgency," which would probably include most crises. Indeed, the Vienna Convention specifically excludes from its coverage the effect of war on treaty relationships.³⁸

Article 61 of the Vienna Convention, dealing with impossibility of performance, allows for termination, suspension, or withdrawal from an agreement when an object indispensable to performance has been destroyed or lost. An essentially pragmatic provision with little policy basis, Article 61 legitimates the simple proposition that no purpose is served by demanding impossible performance. Its application is extremely limited. A strict interpretation would apply the provision to natural disasters but only in exceptional cases to conflicts between the parties.³⁹ In the latter instance, the changed relationship between the parties, not the destruction of some vital object, usually would precipitate the claim.⁴⁰

Article 62, on fundamental changes in circumstances, represents a compromise between opposing positions at Vienna.⁴¹ The language adopted provides for terminating or suspending international obliga-

36. See Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 AM. J. INT'L L. 736 (1971) (discussing views of U.S. and Austrian representatives at conference that drafted Vienna Convention).

37. U.N. CHARTER, art. 2(3). See note 44 *infra*.

38. Vienna Convention, *supra* note 26, art. 73.

39. Article 61(1) reads:

A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Id., art. 61(1). The limited scope of the article is illustrated by the examples given by the International Law Commission (I.L.C.), such as a river drying up or changing its course. U.N. Conference on the Law of Treaties, Official Records 75-76, U.N. Doc. A/CONF.39/11/Add. 2 (1971).

40. Article 61 might occasionally be relevant to the effects of conflict on treaties. For example, the destruction of an oil field during a war could lead to Article 61 claims to excuse failure to supply oil. However, Article 61(2) disallows the impossibility defense where the impossibility is the "result of a breach by that party . . . of any other international obligation." If the State whose oil field was destroyed was itself an aggressor and in breach of Article 2(4) of the U.N. Charter, this defense would not be available to it.

41. There was anxiety that its inclusion would justify unilateral withdrawal from agreements and undermine the stability of treaty regimes. On the other hand, the newly independent States may have seen the article as a means lawfully to avoid onerous or unprofitable commitments that changed circumstances had made intolerably burdensome. See [1966] 2 Y.B. INT'L L. COMM'N 169, 256-60, U.N. Doc. A/CN.4/Ser.A/1966/Add. 1.

tions because of changed circumstances, but its wording is restrictive and phrased in the negative.⁴² Because the original situation must have formed an essential basis for the commitment, lawyers often must speculate as to which combination of factors was instrumental in persuading a party to conclude an agreement.

The Vienna Convention does not prescribe the effect of war on agreements; Article 73 is instead a compromise provision that resolves nothing.⁴³ Its inclusion does support the view that neither the States at Vienna nor the International Law Commission considered Articles 61 and 62 sufficient to cover this problem, leaving the need for a contemporary reappraisal.⁴⁴

42. Article 62 reads:

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 as a ground for terminating or withdrawing from a treaty:

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

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

Vienna Convention, *supra* note 26, art. 62.

43. "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty . . . from the outbreak of hostilities between States." *Id.*, art. 73.

44. A number of States voiced concern about the lack of any provision covering the effect of war on agreements. *See, e.g.*, U.N. Doc. A/CONF.39/C./L. 279 (1969), *reprinted in* U.N. Conference on the Law of Treaties, Official Records 199, U.N. Doc. A/CONF.39/11/Add.2 (1971); Nahlik, *supra* note 36, at 753. The International Law Commission concluded that the effect of hostilities on agreements could not be stated without a separate analysis of Article 2(3) of the U.N. Charter, an analysis it could not conveniently deal with "in the context of its present work upon the law of treaties." [1966] 2 Y.B. INT'L L. COMM'N 176-77, U.N. Doc. A/CN.4/Ser.A/1966/Add.1. With all due respect, the I.L.C. simply avoided a problem of increasing practical importance by stating that the U.N. Charter made the matter more complex.

Nonetheless, the obligation of the peaceful settlement of disputes exists independently of the Vienna Convention, *see* U.N. CHARTER, art. 2(3). In addition, Article 73, while specifically reserving the issue of the effect of war on treaties, may nonetheless allow such a claim to be within the Convention for the purposes of Article 62. On policy grounds, arbitrary claims should not be encouraged at a time of crisis, as these might exacerbate already tense situations. The procedures in the Vienna Convention may provide a means to limit such claims. Within these limits, claimants should be entitled to make demands regarding agreements whether or not these possible strategies are explicitly included as permissible within a particular agreement.

International legal authority available to the drafters of the Vienna Convention similarly is inadequate to deal fully with the effects of hostilities. Years before the formulation of Article 62, the Permanent Court emphasized the difference between wartime conditions in general and those conditions necessary to transform the burdens required by an agreement.⁴⁵ The existence of war, by itself, does not meet the rigorous requirements of Article 62.⁴⁶ Nonetheless, depending on the severity and intensity of the conflict, war can represent a fundamental change of circumstances, even for a neutral State. Larger community values, as well as national interests, may weigh in favor of modification. For example, one of the most widely-discussed incidents of such a modification was the United States' decision to suspend the Load Line Convention in 1941, long before the Vienna Convention was drafted.⁴⁷ Even though the United States was still a neutral, the suspension can be justified under the policies suggested above. Through widespread and intense warfare, one power had seized control of most of Europe. The fall of Britain would have threatened American group values. The President's response was limited to the issue at hand, was directly caused by the changed conditions, appeared proportional to the intense crisis, and was arguably necessary for British survival. The United States secured the cooperation of a number of other parties to the Convention who also became involved in its suspension. Moreover, the

45. In response to claims arising out of World War I, the Court stated that:

[i]t cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bond holders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations. . . .

Serbian Loans, [1929] P.C.I.J. Ser. A, Nos. 20/21, at 39-40.

46. In the Fisheries Jurisdiction Case (U.K. v. Ice.), [1973] I.C.J. 4, 22 the Court emphasized the "radical transformation" necessary to demonstrate changed circumstances. "The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken."

47. In 1941, just prior to the United States entry into World War II, President Roosevelt announced that the U.S. would suspend the application of the International Load Line Convention, signed July 5, 1930, 47 Stat. 2228, T.S. No. 858, 135 L.N.T.S. 301, for the duration of the "present emergency", in order to increase the tonnage of goods crossing the Atlantic for British use. See 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 186-90 (1968); 14 *id.* at 483-85 (1970). Attorney General Biddle justified the suspension on the grounds of *rebus sic stantibus*, 40 Op. Att'y Gen. 119 (1949), a justification which received criticism. See, e.g., Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 AM. J. INT'L L. 89 (1942). If judged against the criterion of Article 62, the criticism appears appropriate. The parties intended the Load Line Convention to regulate shipping and commerce. The wartime conditions did not in themselves change the extent of American obligations under the Convention; it was neither more difficult nor more expensive for the United States to comply. Since all that had been transformed was the desire of the United States to comply with the restrictions imposed by the Convention, this case illustrates the inadequacy of the subsequently drafted Article 62 for dealing with all the effects of war on agreements.

United States announced its willingness to comply once again with the Convention after the conclusion of the war. Finally, many community policies much more fundamental than the values embodied in the Load Line Convention militated in favor of aiding the British in their battle against Nazi Germany. The suspension did compromise the neutrality of the United States as well as suspend an otherwise valid multilateral treaty commitment. Yet the human rights policies served by the suspension seem much more powerful than either of those objections.⁴⁸

B. *Historical Approaches to the Effect of Hostilities*

In light of the lack of guidance by the Vienna Convention, it is necessary to examine the historical development of the law of the effect of war on agreements and then to consider how it applies in the world of the U.N. Charter. Despite voluminous writings on this topic, confusion remains. Since there is no international decision directly on point, excessive emphasis has been placed on *dicta* made in other contexts. There is surprisingly little conclusive State practice, nor has much jurisprudential attention been focused on the subject.⁴⁹

Most of the available authority derives from municipal court decisions determining the internal effect of war on treaty relationships. While municipal law normally constitutes good evidence of State practice, some major problems prevent reliance on these cases. First, the courts of different States have expressed a considerable diversity of opinion; jurists have found it difficult to derive one accepted view.⁵⁰ Second, the municipal court may give excessive weight to current policies of its executive.⁵¹ Third, municipal courts often will be greatly influenced by a desire to protect private, vested rights, the context in

48. See Rank, *Modern War and the Validity of Treaties: A Comparative Study* (pts. 1-2), 38 CORN. L.Q. 321, 511 (1953).

49. See 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 267 (2d ed. 1949). Schwarzenberger asserted that the reason for this lack of attention was clear: "[i]f belligerents attach any importance to treaties concluded before the outbreak of a war between them, the peace treaty offers ample opportunity to settle the matter beyond doubt. . . ." This analysis has little utility today, since there is often no formal declaration of or conclusion to an outbreak of hostilities and consequently no peace treaty. See note 8 *supra*.

50. See generally Rank, *supra* note 48, at 511-20.

51. See, e.g., *Clark v. Allen*, 331 U.S. 503, 513 (1947); *Karnuth v. United States*, 279 U.S. 231, 238 (1929); *Soc'y for the Propagation of the Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 494 (1823). In *Karnuth*, the Court decided that the Jay Treaty of 1794 had been abrogated by the War of 1812. Some Indians claimed that they had been granted the right of free passage and repassage across the U.S.-Canadian border by the Treaty. The Court paid great deference to the executive's immigration policy at the time of the case. That policy surely also influenced the Court in deciding that the Treaty was abrogated and not merely suspended, as there had presumably been many such border crossings since that war.

which most of these cases arise.⁵²

Originally, in both municipal decisions and the writings of jurists, war was thought to be incompatible with the existence of normal relations between States so that an outbreak of war automatically abrogated all agreements.⁵³ Such a rule at least had the advantage of certainty. Yet it disregarded the needs of the global community because a war could disrupt the totality of normal intercourse between States. Whole areas of international affairs formerly controlled by agreements could become deregulated for the duration of a conflict, with only the hope for renegotiation afterwards. This regime would cause the defeat or confusion of legitimate expectations in fields totally unrelated to the arena of conflict.

In place of the traditional rule grew the view that only certain treaties should be considered terminated, while others should be suspended, and still others should continue in force throughout the crisis. Those activities peripheral to the conduct of the war should continue as usual. The rejection of the blanket abrogation rule made some sort of classification process necessary. While parties could, of course, decide on an *ad hoc* basis, three general guiding principles emerged. Some writers considered the relationship of the agreement to the causes of war to be the decisive factor.⁵⁴ Others argued that the intention of the parties, stated explicitly or implicitly, should prevail.⁵⁵ The major practical difficulty with this second solution is the frequent impossibility of accurately determining the parties' intentions, even assuming them ever to have been formulated.⁵⁶ Finally, other jurists developed formal classifications of agreements according to their nature or pur-

52. Decision-makers in municipal arenas, however, are those most likely to be aware of the dislocation caused individuals through the frustration of expectations resting on an international agreement. In these instances, their opinions can constitute good international authority.

53. See H. TOBIN, *THE TERMINATION OF MULTIPARTITE TREATIES* 13-125 (1933); A. McNAIR, *THE LAW OF TREATIES* 693-728 (2d ed. 1961); and de La Pradelle, *The Effect of War on Private Law Treaties*, 2 INT'L L.Q. 555 (1948) for historical discussions of both municipal law decisions and the writings of jurists on this point.

54. H. TOBIN, *supra* note 53, at 27, quotes Lawrence and Westlake as holding this view.

55. Hurst, *The Effect of War on Treaties*, 2 BRIT. Y. B. INT'L L. 37 (1921). See also Rank, *supra* note 48.

56. The parties may not have envisaged an outbreak of hostilities between them (or may not wish to admit to having considered this eventuality) so that their intentions will have to be inferred from surrounding circumstances such as the wording of the agreement and the actions of all branches of the government. These branches may themselves give out conflicting signals depending on their various perspectives. Another crucial point is the relevant time for determining the parties' intentions. If the commencement of hostilities is preferred to the conclusion of the agreement, there is the additional complicating factor that denunciation of treaties is itself a coercive strategy, the timing of which may be significant. Rank, *supra* note 48, at 335-36, argues that war or conflict of itself cannot destroy a legal order or

pose. The appropriate consequence of termination, suspension, or continuation depended on the category.⁵⁷ This solution made little allowance for the many agreements that prescribe for a variety of topics. Since an agreement may involve a continuing relationship between the parties, with a constant chain of action, reaction, and exchange of values, it is problematic to assert one characteristic as the dominant object of the agreement.

In this century, two attempts have been made to codify the principles governing the effect of war on treaty relationships. Ironically, each one occurred shortly before the outbreak of a major war. The first was in 1912, by the Institute of International Law.⁵⁸ The analysis stated as its first principle that war does not affect treaty relationships between the protagonists. Yet, a number of agreements to which this rule does not apply are subsequently listed. In effect, the Institute adopted the classification method. Contemporary evaluation found these provisions to offer some guidance but concluded that there was still too much uncertainty for the rules to become widely accepted.⁵⁹

The second attempt was part of the Harvard Research on the Law of Treaties, which used another technique.⁶⁰ The authors provided no overall scheme for determining the effects of war on different types of agreement; instead they proposed two criteria against which to measure all treaties in addition to giving significant weight to the intention of the parties.⁶¹ The Harvard Research drew on judgments by American courts, principally the case of *Techt v. Hughes*.⁶² The standard adopted

relationship created by agreements. Instead, the intention of the parties that the agreement cannot survive this altered state of affairs causes the discontinuance of the commitment.

57. A. McNAIR, *supra* note 53, gives such a categorization of different types of agreements.

58. *Effects of War Upon Treaties and International Conventions*, 7 AM. J. INT'L L. 149 (1912).

59. Davis, *The Effects of War Upon International Conventions and Private Contracts*, 6 PROC. AM. SOC'Y INT'L L. 124 (1912).

60. Harvard Research in International Law, *Law of Treaties*, 29 AM. J. INT'L L. SUPP. 973 (1935) [hereinafter cited as Harvard Research].

61. *Id.*, commentary to Article 35, at 1183-1204.

62. 229 N.Y. 222, 128 N.E. 185 (1920). In that case, then-Judge Cardozo formulated a pragmatic test resting on the compatibility of the specific treaty provision with the safety of the nation during the emergency caused by the war. He concluded that where there would be little or no interference with the executive policy concerning the conduct of the war, he could see no reason against continuing to give effect to the treaty. He thus favored stability of treaty regimes except where they impeded the President's handling of the crisis. The authors of the Harvard Research highlighted the lack of any clear analytical principles to be drawn from municipal law decisions. Cardozo acknowledged that a judge looks in vain either for "uniformity of doctrine or for scientific accuracy of exposition." He concluded that the judge must decide in "keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing and the honor of the nation," 229 N.Y. at 247, a list of little practical assistance. Coupled with the other problems associated with applying these

has the advantage of considering the issue from a policy standpoint, although it gives excessive weight to national at the expense of global interests. It avoids the rigidities of artificial categorization and of reliance on mythical intentions of the parties.

There has been little further development of this subject since the end of World War II despite the outbreaks of hostilities causing threats to group values.⁶³ Academic analysis of the subsequent Peace Treaties was generally limited to the peculiar nature of those agreements.⁶⁴ Subsequent municipal decisions also are of limited usefulness for formulating generalized principles of international law.⁶⁵ This subject remains confused; O'Connell described it as an "obscure topic with only

particular municipal law decisions to derive general principles of applicable international law (*see* text accompanying notes 50-52 *supra*), it can be seen that reliance on them does not resolve the issue.

63. The notable exception is Rank, *supra* note 48, who sets forth an excellent comparative survey of the municipal case law of a number of countries, as well as a more general discussion. *See also* Institute of International Law, Fifth Commission, *The Effects of Armed Conflicts on Treaties, Provisional Report and Proposed Draft Resolution* (1976) (on file with *The Yale Journal of World Public Order*) [hereinafter cited as *The Effects of Armed Conflicts on Treaties*]. The Report will be presented in a forthcoming YEARBOOK of the Institute. *See* note 111 *infra* for a fuller description of its contents.

64. Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, [1948] 2 HAGUE RECUEIL 259. *See* S. MCINTYRE, *LEGAL EFFECT OF WORLD WAR II ON TREATIES OF THE UNITED STATES* (1958) for a detailed empirical study of the effects of World War II on treaties entered into by the U.S. prior to the war.

65. *E.g.*, *Brownell v. City and County*, 126 Cal. App. 2d 102, 271 P.2d 974 (1954) (treaty on tax exemption unaffected by World War II); *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957) (extradition treaty with Italy suspended by World War II); *Clark v. Allen*, 331 U.S. 503 (1947) (Treaty of 1923 between Germany and the United States regulating reciprocal inheritance rights unaffected by World War II in absence of evidence that the political branches deemed Germany incapable of fulfilling its treaty obligations); *In re Dirk's Applications for Patent*, [1960] Pat. Cas. 1 (International Patent Convention deemed suspended between U.K. and Germany for duration of World War II); *Petition of Nederlandsche Rijnvaart-Vereeniging*, District Court of Rotterdam, [1958] N.J. 473, *reprinted in* 24 INT'L L. REP. 99 (1957) (Rhine Convention suspended in practice but not in law by outbreak of World War II). While all these cases concern the effect of World War II on agreements, no consistency has developed. Moreover, cases concerning other subsequent conflicts appear to be extremely rare.

Little conceptual attention has been paid, in particular, to the difference between suspension and termination. Most decisions have instead rested on the facts of the case and the perceived desirable result. For example, in *Karnuth v. United States*, 279 U.S. 231 (1929), a decision of suspension would have made the government's current immigration policy ineffective; therefore a determination of termination was preferred. In the *Nederlandsche Rijnvaart-Vereeniging* case, the relevant governments had resumed giving full effect to the Rhine Convention so it was sensible to the court to say that the Convention had only been suspended by the War. Other courts seem to have followed the classification method, *see* text accompanying note 57 and note 57 *supra*, as when they hold that extradition treaties fall into the class of treaties deemed suspended by war. In general, courts have favored a pragmatic approach, based on the exigencies of war, noninterference with executive policy, and a desire not to upset private rights and expectations. The incompatibility test propounded by Cardozo in *Techt v. Hughes*, 229 N.Y. 222 (1920), was also used twenty-five years later in *Clark v. Allen*, 331 U.S. 503 (1947).

the vaguest guiding principles.”⁶⁶

IV. Recent Claims Relating to Agreements During Conflicts

The analytic model developed in part I and the principles of decision described in part II can best be understood by applying them to several recent examples of claims relating to agreements during conflicts. Claims relating to international communications agreements present in dramatic fashion the tensions created by conflicting interests and value choices. Communications are essential to the diplomacy and security of any individual State and to its conduct of policy, including hostilities. In an interdependent world, the effective functioning of normal international commerce depends on the continued availability of free and open communication between States. The examples selected show the often glaring conflict between national policies and community values. Countries often seek to modify these agreements to serve pressing short-term needs. The systems of international communications between national elites, however, serve the long-range interests of all States. The tension created between these two sets of interests means that criteria of evaluation are of great practical importance.

A. *Diplomatic Immunity: The Iranian Hostages Incident*

The seizure of the United States Embassy in Tehran and the forced detention of its personnel presented the International Court of Justice with an opportunity to provide guidance on claims relating to the performance of an international agreement in times of undeclared hostilities.⁶⁷ On one side of the dispute, the United States had an immediate interest in the liberation of its people and property coupled with the more significant global interest in the free and uninhibited intercourse between elites through long-established mechanisms protected by the provisions of the Vienna Conventions on Diplomatic and Consular Relations.⁶⁸ The United States demanded the performance of Iran's obligations under those Conventions and reparations for their breach. On the other side, Iran claimed the Embassy seizure helped protect its revolutionary values from intervention by other States. An internal change in situation (here, the overthrow of the Imperial Government in

66. 1 D. O'CONNELL, *INTERNATIONAL LAW* 286 (1965).

67. Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), [1980] I.C.J. 4.

68. Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261, 21 U.S.T. 77, T.I.A.S. No. 6820. See also Treaty of Amity, *supra* note 14.

early 1979 and the establishment of the Islamic Republic) had brought to crisis the relations between the United States and Iran. Each nation wanted to protect its respective values. Iran urged that its claims against the United States justified the actions taken; that this extraordinary change in circumstances warranted the failure to abide by the Vienna Conventions on Diplomatic and Consular Relations. The Iranians considered their actions necessary, as they had no other means of securing redress against the United States for past wrongs, and reasonable, because they were directed primarily at the Embassy, the focal point for the alleged earlier misdeeds. The Iranians did not announce a suspension of the Conventions; indeed, they demanded its implementation against a State towards which they felt only a little less hostile than toward the United States.⁶⁹ The Iranian claim was that the protection of other values justified isolated treaty breaches.

The decision of the Court resoundingly affirmed the global importance of the protection of diplomats and of diplomatic communications for the maintenance of a minimum public order. It appears from this unanimous decision that no degree of crisis between the States and no threat to internal group values would support derogation from the performance of these agreements. Even if an embassy carries out subversive activities that threaten the internal security of the host nation, the host nation must still respect the Conventions. In powerful language, the Court asserted that war between the parties would not have altered its conclusion.⁷⁰ Iran made extraordinary demands and took arbitrary

69. In May, 1980, the Iranians demanded that the United Kingdom restore their Embassy in London to them after it had been taken over by gunmen. N.Y. Times, May 1, 1980, at 1, col. 1; *id.*, May 3, 1980, at 4, col. 1.

70. "Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises . . . must be respected by the receiving State." [1980] I.C.J. at 41. Even if the United States and Iran had broken diplomatic relations prior to the take-over of the Embassy, that action, of itself, would not have affected the treaty relationships. "The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty." Vienna Convention, *supra* note 26, art. 63.

Additionally, state practice supports the policy of the Convention. An obvious example is the continuation of the agreement for the maintenance of Guatánamo Naval Base despite the severance of diplomatic relations between the United States and Cuba. Lease of Lands for Coaling and Naval Stations, Feb. 16, 1903, United States-Cuba, 31 Stat. 898, T.S. No. 418.

Elites regularly break diplomatic relations with other elites. Some severances represent serious changes in situation, while others result from trivial incidents that should not create widespread legal consequences. Even armed conflict might not lead to the breaking of diplomatic relations where the parties deem their maintenance beneficial. India and Pakistan severed diplomatic relations for the first time in 1971 despite a major outbreak of hostilities in 1965. Not every break in relations should undermine legitimate expectations arising from

actions contrary to the purposes of the U.N. Charter without availing itself of prescribed remedies, which the Vienna Conventions on Diplomatic and Consular Relations provide,⁷¹ and without prior direct warning. These actions could not be said to be necessary or reasonable methods for protecting the perceived values, especially in the face of available alternatives.⁷²

B. *International Transport Agreements*

Demands relating to international transport agreements provide further examples of the conflicting tensions produced by an outbreak of hostilities on the performance of agreements. States and individuals have legitimate expectations of free and convenient shipping and air routes for international trade and commerce and travel needs. These expectations often conflict with the claims of the transit States for protecting security and integrity through closure or the imposition of transit conditions. Unlike diplomatic relations between States, restrictions on any given route do not threaten the entire structure of interstate communications. If acceptable alternative routes exist, the demands of the transit States are more likely to be deemed reasonable.

The pragmatic (and probably inevitable) solution initially reached for sea and air landing facilities made them part of the State's territory. Despite any previous agreement,⁷³ States regularly close transit to ships or aircraft of a hostile State. Generally, no State tolerates such an invasion of its territory and corresponding threat to its security under such circumstances. The situation is less clear where the conflict does not directly involve the States in question—action taken either to retaliate

an international agreement. Those incidents that result from serious crisis conditions should be treated in accordance with the policies in part II *supra*, while less serious incidents should not be allowed to disrupt global values. Diplomatic relations rarely form the basis of an agreement and normally are not an essential prerequisite for performance. Elites will continue to use diplomatic relations as a manipulative political instrument; legal repercussions need not accompany this strategic instrument.

71. See, e.g., Vienna Convention on Diplomatic Relations, *supra* note 68, art. 45. Such remedies include declaring one or more diplomats *persona non grata*, breaking of relations, and closure of diplomatic or consular establishments.

72. But see Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT'L L. 411 (1980) (I.C.J. excessively protective of the values asserted by U.S. and dismissive of those claimed by Iran).

73. Access to ports is generally governed by bilateral agreements. See Declaration of Paris Respecting Maritime Law, Apr. 16, 1856, 115 Parry's T.S. 2. In the *Aramco Arbitration*, Saudi Arabia v. Arabian American Oil Company (Aramco), Award of Aug. 23, 1958, at 108-09, reprinted in 27 INT'L L. REP. 117, 212 (1958), the Tribunal stated that "the ports of every State must be opened to foreign merchant vessels and can only be closed when the vital interests of the State so require" (footnote omitted).

for support to the "wrong" side in an external crisis or to demonstrate sympathy for a specific cause.

It is doubtful whether support for an external crisis can justify suspending treaty rights. Such action is not specific to the conduct of the conflict and therefore seems unnecessary. Elites enter into agreements on landing rights for aircraft precisely because such agreements provide reciprocal benefits to all parties as well as aid the orderly functioning of the world community.

1. *Closure of Airports in the Middle East and the Cuban Quarantine*

Various Arab States closed their air and sea ports to United States and United Kingdom vessels as a consequence of the 1967 Middle East War.⁷⁴ These closures could not be justified on grounds of military necessity (except perhaps in the cases of Egypt and Syria) and appeared to be retaliatory action intended to force the withdrawal of support for Israel. Neither the United States nor the United Kingdom had committed a prior illegal act against the Arab nations; therefore, retaliation could not be justified. Article 2(4) of the U.N. Charter prohibits acts of coercive retaliation. While suspending the term of an agreement does not require any use of armed force, it may be coercive in its effect and therefore contrary to the purposes of the Charter.⁷⁵

The actions of Senegal, Guinea, and Canada in October, 1962 provide an interesting contrast. To make effective the "defensive quarantine" of Cuba, the United States requested that the three nations refuse

74. Syria refused overflight rights and closed Damascus airport to U.S. and U.K. aircraft. Iraq, Sudan, and Egypt acted likewise. 1967 KEESING'S CONTEMPORARY ARCHIVES 22135.

75. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 122, U.N. Doc. A/8028 (1970), Principle I: "States have a duty to refrain from acts of reprisal involving the use of force."

It could be argued that the suspensions, given the extremely tense situation of the 1967 war, were justified as collective self-defense by members of the Arab League. In addition to Egypt and Syria, both Iraq and the Sudan declared war on Israel. The limited nature and duration of the suspensions, along with the availability of alternative air routes and ports, meant no permanent dislocation of expectations. Moreover, the special character of an airport, located deep within a State's territory, might add to the reasonableness argument. However, the need for collective self-defense, *see* U.N. CHARTER, arts. 52-54, does not by itself make more reasonable or necessary the suspension of agreements with third parties.

Members of the Arab League view the very existence of Israel as an act of aggression justifying the collective right of self-defense. In this light, they could view the support of the United States and United Kingdom for Israel as an attack on the Arab States justifying the suspensions. Only under this interpretation could the Arab States postulate a threat in the absence of direct actions by the Western powers giving rise to the right of self-defense.

See also Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H., [1962] A.C. 93 (seller held to shipping contract despite closure of Suez Canal).

landing rights to Soviet aircraft bound for Havana. The immediate dispute between the United States and the Soviet Union did not directly threaten the group values of these States, unless the build-up of missiles would have so altered the world strategic balance as to create a global crisis. The Cuban quarantine seems more reasonable, proportionate, and directly related to the crisis, however, than the Arab flight ban.⁷⁶ The comparison between these two examples underlines the need for contextual analysis of the changed situations, in particular the relation of the demands made concerning the agreement to the crisis.⁷⁷

2. *The Greek-Turkish Dispute*

The conflict between Greece and Turkey, involving the suspension of overflight rights as well as of landing rights, provides another illustration of these types of claims. Tension mounted between Greece and Turkey during the 1970's, primarily as a result of the Turkish invasion of Cyprus in July, 1974 and the continuing dispute over the delimitation of the continental shelf in the Aegean Sea. Both sides placed their armed forces on alert and the incidents led to the suspension of air

76. The United States undertook the quarantine of Cuba with the support of a regional organization; the Organization of American States (O.A.S.) voted unanimously to support the United States. 47 DEP'T STATE BULL. 723 (1962); *see also* note 5 *infra*. Superficially, the actions of States not members of the relevant regional organization may seem less justified than the Arab States' refusal of landing rights, note 75 *supra*. However, the ban on Soviet aircraft was more restricted, limited to only those en route to Cuba. Second, the ban was enforced against the State precipitating the changed situation creating the crisis, not less-involved third States. If the Cuban quarantine was legal under Article 51 or 53 of the U.N. Charter, then other States' assistance in the collective self-defense of the Western Hemisphere was also legal. Third, the specific ban here was necessary and proportionate; the effectiveness of the embargo strategy depended on limiting air traffic to Cuba. Finally, the ban on Soviet overflights was lifted as soon as was possible. *See* Akehurst, *Enforcement Action By Regional Agencies with Special Reference to the O.A.S.*, 42 BRIT. Y.B. INT'L L. 175, 197-203 (1967); Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963).

For a more general defense of the legitimacy of the Cuban quarantine, *see* A. CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE RULE OF LAW* (1974); McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963). *Contra* Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963).

77. Professor Cheng acknowledged the ease with which States can suspend or terminate air space agreements, especially bilateral ones. Cheng admits that the present regime causes unavoidable uncertainty and the disruption of legitimate expectations but considers these drawbacks an inevitable concomitant to crisis. B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 113-15, 483-84 (1962).

However, as the global needs for ever more reliable air routes grow, such interference is likely to become less acceptable. Possibly a higher standard of proof will be imposed upon States claiming that suspension of landing or overflight rights is a reasonable and necessary response to a crisis. *See* Lauterpacht, *Freedom of Transit in International Law*, 44 GROTIIUS SOC'Y TRANSACTIONS 313, 351 (1958) (while there is at present no international right of air transit, partly for economic and partly for security reasons, it may develop because "freedom of transit is one of the most fundamental needs of the community").

rights.⁷⁸

After the invasion of Cyprus, Turkey declared parts of the Aegean Sea "dangerous zones" for all air traffic. Later, Turkey demanded control of all flights to and from Turkey to "the middle of the Aegean," causing considerable interference with flights over Greek islands. In 1976 Greece banned flights over maritime areas that it perceived as the boundaries between Greece and Turkey, thus disrupting air traffic between Athens and Istanbul. After negotiations, the two States reached an agreement allowing resumption of normal air traffic in September, 1976.

In neither case was there actual armed conflict between Greece and Turkey, although such a possibility clearly existed. Neither of these suspensions was a necessary part of any military action, nor essential to security, and both sets of demands were peripheral to the main disputes. Neither country's actions appear to be supportable. Turkey suspended the air rights to assist in making effective her occupation of Cyprus. The failure of any member of the world community to recognize the Turkish Federated State of Cyprus⁷⁹ underlines the global disapproval of this creation. Claims made in its furtherance also should be rejected.⁸⁰ On the other hand, Greece acted to further its territorial claims, which the Turkish representative at the United Nations characterized as an attempt to turn almost all of the international air space of the Aegean into internal air space.⁸¹ Greece presented her demands before such authoritative international arenas as the Security Council and the International Court,⁸² and also indicated its readiness to negotiate. Both actions suggested reasonableness. Nevertheless, unilateral suspensions of air flight agreements cannot be accepted as a means of pressing a territorial claim. Alternative methods are available to which resort should be made.

78. See 1976 KESING'S CONTEMPORARY ARCHIVES 27987 and references cited therein for a summary of these events.

79. The Turkish Federated State of Cyprus was proclaimed over the portion of the island under Turkish control in February, 1975. N.Y. Times, Feb. 14, 1975, at 1, col. 3.

80. Greece argued that the Turkish invasion was illegal under Article 2(4) of the U.N. Charter. Turkey, in turn, claimed that its actions were justified and even demanded by the Treaty of Guarantee, Aug. 16, 1960, [1961] Gr. Brit. T.S. No. 5 (Cmd. 1253), 382 U.N.T.S. 3. Negotiations between the interested parties have not resolved the situation. The lack of recognition for the Turkish Federated State may suggest lack of sympathy for Turkey's claims. *See generally* [1974] U.N.Y.B. 262-96; [1975] U.N.Y.B. 273-96.

81. Letters dated Apr. 8, 1975 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, 30 U.N. SCOR, Supp. (Apr.-June 1975) 7-8, U.N. Docs. S/11666 & S/11668 (1975). *See generally* [1975] U.N.Y.B. 320-22.

82. Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 4 (Request for Interim Measures). This interim judgment of the I.C.J. has clearly not settled the dispute between Greece and Turkey, which continues to the present day.

3. *The India-Pakistan Overflight Dispute*

In 1971, Pakistan claimed before the Council of the International Civil Aviation Organization (I.C.A.O.) that its aircraft had rights both to fly over India and to stop in India for nontraffic purposes. Pakistan based its claim on two multilateral aviation conventions and a bilateral treaty.⁸³ India responded to the treaty claim by alleging that these agreements had been suspended by the outbreak of military hostilities in 1965.⁸⁴ India used a "serial war" argument: the continuing abnormal relations between the two States since 1947, with frequent spasmodic outbreaks of overt conflict, had prevented the agreements from reviving. India asserted that Pakistan could have had no legitimate expectations of continuing rights of air passage when further conflict could not have been unanticipated. Because suspending these rights did not defeat any reasonably held expectations of Pakistan, India's action was a reasonable response to this latest episode of violence. India claimed that the only relevant agreement was the special agreement of 1966, which required specific permission for overflight.⁸⁵

Pakistan then claimed that India had not actually suspended the agreements or, in the alternative that, as an aggressor, it could not lawfully do so.⁸⁶ The Chicago Convention has a provision on the effect of war on the obligations of parties and allows freedom of action in case of war or national emergency.⁸⁷ States may suspend the agreements

83. Pakistan demanded performance of two multilateral conventions: the Chicago Convention, *supra* note 19, and the International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389, as well as the bilateral Agreement Relating to Air Services, June 23, 1948, India-Pakistan, 28 U.N.T.S. 143. For a full account of the proceedings before the I.C.A.O., see Memorial of India, Appeal Relating to the Jurisdiction of the I.C.A.O. Council, I.C.J. Pleadings 63-293 (1973).

84. India stated that the hostilities and a 1971 hijacking incident had placed on it "heavy burdens" with regard to its security and to the safety of aircraft. Letter dated Feb. 10, 1971 from the Minister of Tourism and Civil Aviation of India to the President of the I.C.A.O., reprinted in Memorial of India, Appeal Relating to the Jurisdiction of the I.C.A.O. Council, I.C.J. Pleadings 297-98 (1973).

85. This agreement was concluded after the termination of the 1965 hostilities. India argued that Pakistan's entry into that agreement was further proof that the latter had accepted the continuing suspension of the earlier agreements. By agreeing to seek special permission to exercise the "right" of overflight, Pakistan could have no reasonable expectation of the permanency of that right. *Cf.* Right of Passage over Indian Territory, [1960] I.C.J. 6 (if permission required for transit, right is not an enforceable servitude).

86. The relevance of a determination of aggression to claims relating to agreements again appears dubious, as India in turn inevitably presented Pakistan as the aggressor. With respect to the suspension of a bilateral agreement, it seems even more artificial to make the solution rest on an authoritative determination of aggression that is unlikely to be forthcoming. Note that although the Chicago Convention, *supra* note 19, is multilateral, it is bilateral in its effect between any two contracting parties.

87. Chicago Convention, *supra* note 19, art. 89. That Convention provided the basis of the I.C.A.O.'s jurisdiction, the issue presented to the I.C.J. See note 83 *supra*. India claimed

when conflict threatens their security. The military hostilities of 1965, although limited both in purpose and arenas, were intense and severe. It would be disruptive and possibly even destructive to a State to insist that it must allow the enemy to fly over and land in its territory.⁸⁸ It can be argued that this suspension was necessary to protect India's values, reasonable in that it affected primarily the protagonist, Pakistan, proportional to the intense nature of the conflict, and probably not unanticipated by Pakistan in the light of the history between the two States. Though the suspension of transit rights seemed of excessively long duration (six years), perhaps the "serial war" nature of the conflicts made the duration reasonable. While Pakistan did suffer considerable economic loss and severe inconvenience,⁸⁹ the existence of alternative routes, even though expensive and much less direct, did make India's action more reasonable.⁹⁰

To insist on rigid adherence to transport conventions without al-

that this provision, read in connection with Article 73 of the Vienna Convention, meant that principles of law independent of the Chicago Convention should govern. Vienna Convention, *supra* note 26, art. 73. See also note 43 *supra*.

The provisions made for national emergencies within the Chicago Convention indicate that the parties anticipated such steps and considered them legitimate. In situations of conflict with another State, States notify the Council of the I.C.A.O. The I.C.A.O. makes no independent judgment on these claims but does release information on them to other contracting parties, a response that does in part uphold their validity. Such a regime supports the view that determinations of aggression should be separate from the assessment of the appropriateness of demands relating to agreements. The only subjective assessment the I.C.A.O. does make is whether a state of emergency has been formally declared, not of the grounds for doing so. See T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* (1969).

An interesting contrast lies with a State's declaration of "prohibited areas" under the Chicago Convention for "national security reasons." Chicago Convention, *supra* note 19, art. 9. In April, 1967, Spain prohibited all foreign aircraft, both civil and military, from flying within specified areas around Gibraltar. Britain protested to the I.C.A.O. Council that Spain's action was unreasonable and coercive since it was intended to cut off Gibraltar from outside contacts. The Council refused to take sides in the dispute. 1967 KEESING'S *CONTEMPORARY ARCHIVES* 22039; T. BUERGENTHAL, *supra*, at 123 n.1.

88. *Cf.* *Karnuth v. United States*, 279 U.S. 231 (1929). The *Karnuth* Court felt that unrestricted crossing of the border between neighboring countries in time of war would constitute a threat to the security of the State and might even encourage treason. See note 51 *supra*. In *Karnuth*, the Court was concerned with foot-passage but a similar argument can be made for air travel as well.

89. Pakistani aircraft had to make a 2,400 mile detour because of the ban, make stopovers for refuelling in Sri Lanka, and pay extra airport tax. The ban affected eighty-two scheduled flights per week. Application of the Government of Pakistan to the I.C.A.O. Council dated Mar. 3, 1971, *reprinted in* Memorial of India, Appeal Relating to the Jurisdiction of the I.C.A.O. Council, I.C.J. Pleadings 25, 88-91 (1973).

90. *Contra* The Corfu Channel Case (U.K. v. Albania), [1949] I.C.J. 4 (merits). The Court stated that the non-necessary nature of the route and the existence of alternatives did not prevent the Corfu Channel from being an international highway. However, the cases can be distinguished on the difference between international straits, where transit rights exist, and national air space, where they do not.

lowing for outbreaks of conflict would reduce the readiness of States to enter into such agreements, a result ultimately prejudicial to the global community.⁹¹ Evidently both India and Pakistan viewed the air agreements as qualitatively different from other agreements about which they made no such claims.⁹² States might perceive air agreements as potentially more prejudicial to their security interests and thus expect that such agreements will be subject to special consideration.

4. *International Rights of Transit in Times of Crisis*

Pakistan might have pressed its claim with a third legal strategy. The divided character of its territory made communications by the most direct route essential to its existence. The extent of its reliance on the right of overflight estopped India from denying Pakistan a permanent right of transit across Indian territory, a contention not borne out by the facts.

In other contexts, however, the creation of such a right arguably has prevented any deviation from an agreement, even during a conflict. This argument has had its fullest appraisal in the context of interoceanic canals.⁹³ The three major examples (the Suez, Panama, and Kiel Canals) are regulated by international agreements entered into by a limited number of parties.⁹⁴

Third parties rely on these routes and conduct their commercial affairs on the assumption that the canals will remain open to foreign shipping.⁹⁵ Acceptance of international servitudes (or the legal right of

91. *Cf.* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 15, 23-26 (Court admits the necessity of allowing some reservations (unilateral modifications) to ensure widest possible participation, but not reservations that will gut the essential purposes of a convention).

92. The Indus Water Agreement, 1960, continued in effect, as did the Agreement to submit the Rann of Kutch dispute to arbitration. *See* Counter Memorial of Pakistan, Appeal Relating to the Jurisdiction of the I.C.A.O. Council, I.C.J. Pleadings 369, 375 (1973). For the decision in the Rann of Kutch Boundary Arbitration, see 17 R. Int'l Arb. Awards 1 (1968).

93. *See* R. BAXTER, *THE LAW OF INTERNATIONAL WATERWAYS* (1964) for a full discussion of the effect of war on transit through waterways.

94. Constantinople Convention, Oct. 29, 1888, [1889] Parl. Pap., Commercial No. 2 (Cmd. 5623), 171 Parry's T.S. 241 (Suez Canal); Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, 33 Stat. 2234, T.S. No. 431 (Hay-Bunau-Varilla Treaty), succeeded by Panama Canal Treaties, Sept. 7, 1977, United States-Panama, *reprinted in* 16 INT'L LEG. MATS. 1022 (1977); Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43, 225 Parry's T.S. 188, arts. 380-86 (Kiel Canal).

95. Under long-established principles of treaty law, a third party can acquire no rights under an agreement to which it is not a party. *See* Vienna Convention, *supra* note 26, arts. 34-36 (conditions under which rights for third parties can be created). However, two major legal doctrines consider interoceanic canals as exceptions so that the canals cannot be closed in time of war. The first doctrine holds that the respective agreements create international

international transit) would allow the general global need for open communication routes always to override the particular interests of the riparian State. International law recognizes such rights as conveyances of territory and leaseholds; there seems no reason why such a doctrine should not be adopted to protect the stability of international regimes in the face of local conflicts.⁹⁶

The most persuasive *dicta* in favor of an international right of transit through waterways (although the Court refrained from calling it a servitude) is found in the *S.S. Wimbledon* case.⁹⁷ The Permanent Court used far-reaching language to assert that where a waterway has been "dedicated to international use" the riparian can no longer act at its discretion to exclude other States. This view gives a higher priority to the value of protection of communication routes than those pertaining to neutrality. As such, it strongly supports the notion of an international servitude from which States cannot deviate during times of crisis.

Two factors weigh against this forceful and radical conclusion. First, the importance of the Treaty of Versailles may well have influenced the Court to uphold its language to the fullest.⁹⁸ Second, the Court ac-

servitudes over the canals. H. REID, *INTERNATIONAL SERVITUDES IN LAW AND PRACTICE* (1932); F. VÁLI, *SERVITUDES OF INTERNATIONAL LAW* (2d ed. 1958).

[A]n international servitude is a real right, whereby the territory of one state is made liable to permanent use by another state, for some specified purpose. . . . It establishes a permanent legal relationship of territory to territory, unaffected by change of sovereignty in either of them, and terminable only by mutual consent, by renunciation on the part of the dominant state, or by consolidation of the territories affected.

H. REID, *supra*, at 25.

The second doctrine is that a legal, although imperfect, right of international transit based on the essential nature of global communications exists. See Lauterpacht, *supra* note 77. Lauterpacht stated that the right was perfect and therefore enforceable, although he admitted his view was controversial.

96. Admittedly, State practice has not always harmonized with the policy grounds enunciated above. Throughout World Wars I and II, Britain restricted enemy shipping through the Suez Canal; the United States acted similarly to close the Panama Canal to the enemy. See J. OBIETA, *THE INTERNATIONAL STATUS OF THE SUEZ CANAL* 13-17 (2d ed. 1970); Smith, *Beyond the Treaties: Limitations on Neutrality in the Panama Canal*, 4 *YALE STUD. WORLD PUB. ORD.* 1, 18-22 (1977). These closures might indicate a pattern of accepted State practice contrary to the idea of permanently open international canals. On the other hand, the extent and severity of the warfare, coupled with the extremely high values at stake for all parties, justified extreme measures. In the wartime context, closure of shipping routes was among the least coercive of measures taken against the enemy.

97. See *The S.S. Wimbledon*, [1923] P.C.I.J. ser. A, No. 1. The case arose out of Germany's refusal to allow passage through the Kiel Canal to a ship carrying munitions to Poland during the Polish-Russian War of 1920. Germany asserted that its duties of neutrality to both belligerents obliged it to refuse access to the ship. However, the Treaty of Versailles declared the Canal "free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." Treaty of Versailles, *supra* note 94, art. 380. Both Poland and Russia were at peace with Germany in 1920.

98. The Versailles Treaty was a major peace treaty, constitutive of public order in Europe and the world. Germany had denied access to the Canal to ships belonging to France

knowledge that Germany would have been allowed greater freedom of action if it had been at war. This explicit concession in the Versailles Treaty suggests that the riparian's interest in its own protection would receive priority when the conflict threatens its own security. Even without the wording of the Treaty, many jurists contend that no State can be deprived, or deprive itself, of its inherent right of self-defense.⁹⁹ No State can be forced to allow an international right of transit where that right would assist in its own destruction.¹⁰⁰

Judgments about the existence of such a threat have differed. The international community reacted unfavorably to Egypt's closure of the Suez Canal to Israeli shipping and the exercise of the right of visit and search by Egypt.¹⁰¹ These decisions provoked considerable protest¹⁰² in contrast to the acquiescence that greeted the closing of the Suez and Panama Canals during the two World Wars.¹⁰³ Though perhaps based on sympathy for Israel, the protests over Egypt's action in 1967 also reflected the view that, unlike world war, a localized conflict did not justify closure. Closing the Suez Canal was not necessary for Egypt's defense. Nor was it proportionate or reasonable in the light both of Egypt's position that international acceptance of Israel represented a

and the United Kingdom. The Permanent Court heard the case shortly after the Treaty's conclusion. The Court perhaps desired to give full effect to the Treaty's provisions to endorse the new public order it created. At the least, no court would have wanted to approve a German modification of an international commitment so soon after the peace settlement.

99. See AMERICAN BAR ASSOCIATION SUBCOMM. ON INTERNATIONAL WATERWAYS, INTERNATIONAL RIGHTS OF PASSAGE UNDER A NEW PANAMA CANAL TREATY (1976) (Panama will have inherent right of self-defense regardless of any new treaty provisions); Smith, *supra* note 96.

100. See *The S.S. Wimbledon*, [1923] P.C.I.J., ser. A, No. 1, at 36-37 (dissenting opinion of Judges Anzilotti and Huber):

In this respect, it must be remembered that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purpose of national defence, it is entitled to do so even if no express reservations are made in the convention. . . .

. . . The right of a State to adopt the course it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it. . . .

101. See Baxter, *Passage of Ships through International Waterways in Time of War*, 31 BRIT. Y.B. INT'L L. 187 (1955); Khadduri, *The Closure of the Suez Canal to Israeli Shipping*, 33 J. L. & CONTEMP. PROB. 147 (1968); J. OBIETA, *supra* note 96; Gross, *Passage through the Suez Canal of Israel-Bound Cargo and Israel Ships*, 51 AM. J. INT'L L. 530 (1957); Lapidot, *The Reopened Suez Canal in International Law*, 4 SYRACUSE J. INT'L L. & COMM. 1 (1976).

102. Protests were lodged by the Netherlands (no less than three times), Turkey, the United Kingdom (at least ten times), the United States (twelve times), and France (twenty-two times). Gross, *supra* note 101, at 538.

103. See note 96 *supra*.

continuing threat and the extraordinary nature of a demand to close an international waterway. Egypt claimed a state of belligerency between itself and Israel existed and conveyed belligerent rights, including those of self-defense and the duty to protect the Canal. This behavior was consistent with Egypt's refusal to recognize Israel and allow Israeli aircraft to use its airspace.¹⁰⁴

These international canal incidents demonstrate how the need for reliable and secure communications for international trade and security has increased the justifications for guaranteeing certain strategic communication networks. Only the most severe conflict situation, threatening the territorial independence and political integrity of the riparian State, can justify the most extreme demands to terminate or suspend these rights. Lesser demands of modification such as the imposition of conditions for transit, might more readily be upheld.¹⁰⁵ Because public necessity is the basis for a right of transit, there should be a corresponding public duty to act collectively both to protect the communication route and to provide security for the threatened State.

Conclusion

Analysis of these examples of State practice suggests that the appropriate response to demands relating to the performance of an agreement has to be formulated with reference to all the factors at play in any given conflict situation. The major conditioning factors, which determine the reasonableness and proportionality of the demands, can be divided into two categories: those relating to the causes, extent, and conduct of the conflict, and those pertaining to the values projected by a particular agreement.

104. The international community condemned Egypt's selective closure of the Canal, but not the ban on air transit by Israeli aircraft. Such a reaction emphasizes the legal differences between these two modes of transport. Indeed, it makes even more controversial Lauterpacht's conception of a perfectable right of air transit, *see* notes 77 and 95 *supra*. However, the response does lend support to the conception of a permanently open international waterway.

Security Council Resolutions on peace in the Middle East affirm the necessity of guaranteed freedom of navigation through international waterways in the area. *See* S.C. Res. 242, 22 U.N. SCOR, Resolutions and Decisions 8, U.N. Doc. S/INF/22/Rev. 2 (1967); S.C. Res. 338, 28 U.N. SCOR, Resolutions and Decisions 10, U.N. Doc. S/INF/29 (1973). The wording of these Resolutions seems to support the assertion of permanent transit rights.

105. The 1951 Security Council Resolution on the Middle East, S.C. Res. 95, 6 U.N. SCOR, Resolutions and Decisions 10, U.N. Doc. S/INF/6/Rev. 1 (1965), does support a potential claim for modification at a time of conflict rather than for termination or suspension. *See also* The Corfu Channel Case (U.K. v. Albania), [1949] I.C.J. 4, 28, where the I.C.J. stated that Albania "in view of these exceptional circumstances [*i.e.*, war with Greece] would have been justified in issuing regulations in respect of the passage of warships through the strait, but not in prohibiting such passage. . . ."

The intensity and severity of the actual conflict is decisive. A major war, fought in many arenas, involving vast resources, and representing a fundamental threat to the values of the opposing States, will render reasonable more extreme demands relating to agreements than claims made in the context of a localized border war with limited arenas and purposes.¹⁰⁶ The duration of the conflict also is relevant. A brief conflict, however intensely fought, will not justify demands that would excessively disrupt the stability of international agreements. Excessive demands would be disproportionate to the duration of the conflict. If the underlying conflict continues only in a generally passive form, with spasmodic outbreaks of overt conflict, then States can formulate their expectations based on this continuing situation.¹⁰⁷ There should be no need to make extreme demands when a brief conflict actually erupts.

The degree of ideological difference between the protagonists in part may determine the perceived threat to the group values of either party and influence the seriousness with which they view the conflict and the intensity with which they fight. Each State's desire to protect its ideology accounts, in some measure, for the intensity of the prolonged dispute between Cuba and the United States.¹⁰⁸ While perhaps excessive for a confrontation between a superpower and a small power, the ideological perspective may help in perceiving extreme demands as more reasonable than similar demands between States with essentially compatible values.

The decision-maker must also consider the impact of the demands on third parties. A demand that threatens the interests of a superpower, raising the possibility of its entry into the conflict, creates a much greater danger to world order. This factor plays a major role in inhibiting the demands that States make in time of conflict.

The true motivation for a particular demand also needs examination. If its purpose is in fact peripheral to the central conflict and thus not necessary for its resolution, then the demand will not be deemed reasonable. The behavior of the parties in making their demands known is relevant in this connection. Arbitrary and unilateral action is less likely to be upheld than demands made according to regular procedures, through diplomatic channels, that keep the way open for

106. Compare the closure of the Suez and Panama Canals during World War I and II, note 96 *supra*, with the Egyptian closure of the Suez Canal following the 1949 Armistice, text accompanying notes 101-04 *supra*.

107. See the discussion of the India-Pakistan "serial war", text accompanying notes 84-85 *supra*.

108. See notes-5 and 76 *supra*.

negotiation.¹⁰⁹

Demands that other elites consider unreasonable, unnecessary, or disproportionate may provoke their own political, if not legal, sanctions. States that too readily excuse modifying or terminating an international obligation may find other States less willing to negotiate agreements with them. The benefits of international life, such as credit and credibility, may become less easy to obtain. Alternatively, the international community may signify a judgment of reasonableness by meeting demands with acquiescence and lack of protest.¹¹⁰ Such demands should not cause long-term adverse effects to the claimant State and may be instrumental in formulating new prescriptions for the future.

The examples of State practice chosen demonstrate that it is impossible to predict with certainty either the demands or the appropriate responses that will be made. An authoritative international body should continue work on this incomplete and confused area of the law of international agreements. A Resolution of the Institute of International Law, whose Fifth Commission has been working on the problem over a number of years, might fill this gap.¹¹¹ Meanwhile, a few proposals might be offered.

Participants to an agreement must make known their demands to other parties interested in the agreement. By putting the onus on the claimant party, this requirement also allows for some certainty. Others involved can reconsider their own positions and future actions in the light of the demands. Where no demands are made, the agreement presumably will continue in force. At the conclusion of a period of crisis, parties should again make clear their past positions relating to any agreements for the duration of that crisis. This desire for publicity of demands is especially important because formal declarations of war have become so rare.¹¹²

The International Court of Justice in the Iranian Hostages case¹¹³

109. See Vienna Convention, *supra* note 26, arts. 65-67; Chicago Convention, *supra* note 19, art. 89.

110. See, e.g., the lack of sanction under G.A.T.T. or the I.M.F. Agreement following the 1971 U.S. devaluation of the dollar, note 6 *supra*.

111. See *The Effects of Armed Conflicts on Treaties*, *supra* note 63. This report contains responses to a questionnaire on the topic from such eminent jurists as H.W. Briggs, M.S. McDougal, S. Verosta, S. Rosenne, and J. Žourek. A draft resolution for discussion is also included.

112. See note 8 *supra*. Notification and publicity requirements, see note 109 *supra*, also have the ancillary benefit of compelling the development of State practice. Public claims will either provoke international protest or meet with international acquiescence and thereby provide guidance for the future.

113. [1980] I.C.J. 4.

refused to allow serious crisis conditions between States to overturn or even suspend fundamental international values. This case did recognize the need to weigh the conflicting interests of the parties as well as the purpose and policy of the agreement itself. The judgment protected the interests of third parties with legitimate expectations based on the continuing sanctity of diplomatic premises.¹¹⁴ The case demonstrates that an agreement which protects essential values for a wide range of actors and on which many legitimate expectations have been based must be less easily overturned than a bilateral agreement incorporating limited objectives. Similarly, it seems foolish to allow abrupt termination of a long-term treaty on whose stability many participants have properly relied. Claims for suspension should be considered more reasonable when they relate to short-term agreements that do not project long-term and far-reaching policies.

Ultimately, the decision-maker must resolve this question through a process of interpretation of the agreement, taking into account all the many and various factors, such as the intensity, duration, arenas, and objectives of the conflict, in order to determine the reasonableness and necessity of the demands. No one of these factors can be regarded as conclusive and at all times the concerns of all interested parties must be weighed. Formal guidelines incorporating these principles would be of considerable value in the interpretive process.

114. The multilateral character of the Vienna Conventions on Diplomatic and Consular Relations, *supra* note 68, is not in itself conclusive of the expectations of third parties. Whether an agreement is bilateral or multilateral is another relevant factor for consideration. The effect of crisis on international agreements cannot be answered merely by reference to the category of agreement, nor is its purpose determinative.