STATEMENT OF PURPOSE

The study of international affairs as an academic discipline no longer belongs exclusively to the specialists in that field; rather, its scope has been extended to include the work of other related disciplines in recognition of the fact that international problems are not exclusively political in nature. It is the purpose of this journal to speak on matters involving international problems with many academic voices. More important, it is the purpose of this journal to permit undergraduate students to try their wings in describing, analyzing, and possibly suggesting solutions to the problems that have vexed nations in their contacts with each other.

The underlying premise of this journal is that undergraduate students *can* contribute effectively to a reasoned, moderate, academic analysis of international problems and that such contributions will have a more profound effect on the study of international affairs as well as on the student contributors to this journal than the passionate, partisan, and emotionally charged outbursts which have in the past permeated American campuses.

Consequently, the *Journal* invites contributors to take an active interest in this publication. It encourages students as well as members of the Towson State faculty, and the students and faculty from other campuses to contribute articles, reviews, and other pertinent materials.

AN ANALYSIS OF THE BRITISH LABOUR PARTY PLATFORM ON WITHDRAWAL FROM THE EUROPEAN ECONOMIC COMMUNITY

by Oliver C. Dziggel*

In October, 1981, the British Labour Party formally announced its political platform, the most striking component of which is the proposed withdrawl from the European Economic Community[1] (EEC). Although the next general election is not expected to be due until May, 1985 at the latest,[2] the Labour Party "threat" is important for a number of significant reasons, but particularly in the context of international law, since article 240 of the Treaty Establishing the EEC clearly states: "The duration of the treaty is unlimited,"[3] and no explicit withdrawal provision exists in the Treaty.

While it is far from certain that the anti-Market Labourites will indeed be elected into a position to carry out their radical platform, it can nonetheless be instructive to explore the issue (before the fact) on the legal theoretical plane as well as on the political philosophical plane. In the former context, the exercise has merit in light of the unique legal ramifications of the EEC Treaty. On accession to the EEC, a member state is committed to the principle that a certain portion of national sovereignty is ceded to the supranational organization(s) contained within the EEC (articles 1 and 237)[4] and, furthermore, that Community Law in all instances takes precedent or is superior to National Municipal Law, applying retroactively to all Community Regulations and Directives enacted (art. 189).

These two provisions make the EEC a unique legal entity, and present particular legal difficulties in the particular case of Britain, where the doctrine of supreme parliamentary sovereignty has a long historic tradition. The Labour party feels that the incumbent British government overstepped its authority in ceding sovereignty to the EEC, and now wishes to redress this situation.

With respect to the political philosophical implications of the course of action to be taken by present, or future, British government vis-à-vis the EEC, the resolution of the question of the mutual relationship could determine the continued effectiveness of the Community internally and externally, as well as be a determinant on Community expansion (Spain and Portugal are expected to accede by 1983). It could, indeed, be seen as a test case of the international organization and cooperation.

Here, too, the Labour Party has proclaimed objectives vastly different from those presently pursued by the incumbent government, and alas, even from its Continental allies. It has alluded to the need for withdrawal as a contingent step towards the eventual socialisation of Europe—it seeks the formation of a united Socialist Europe, presumably with the British Labour Party as the vanguard for this new societal structure. Ironically, all the official Socialist Parties of Western Europe,

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[1]British Labour Party (Platform), "Withdrawal From the EEC: Statement By the National Executive Committee to the 1981 Conference," (3 Oct.) 1981.

[2]The Financial Times (London), 2 Oct. 1981.

[3]All EEC Treaty citations are quoted from: 1 CCH Comm. Mkt. Rep. # 1–5449; also available in 298 UNTS 14–94; popularly known as the Treaty of Rome.

[4]Costa v. ENEL, European Court of Justice, decision, Case 6/64, CCH Comm. Mkt. Rep. p. 7384, # 8023.

(except Denmark but including the Confederation of the Socialist Parties)[5] are in favour of the EEC and disagree with the British Labour Party position of withdrawal.

The scope of this paper is to be primarily a preliminary inquiry into the international legal issues, options and consequences of the proposed British Labour Party policy on withdrawal from the EEC. It will examine the substantive reasons for withdrawal promulgated by the Labour Party which it feels outweigh the legal implications of its actions; the legal structure of the EEC Treaty with respect to national sovereignty and the relation of Community Law and National Law; the body of international legal opinion and judgment on the sanctity of treaties and the issues of unilateral withdrawal, denunciation and claims of changed circumstances; and possible alternative strategies both on the part of the conservative government to avoid the Labour action, as well as the Labour Party to successfully carry out its pronounced objectives. Although the main thrust of the analysis will focus on the international legal component of the Labour Party proposal, it would be unrealistic and perhaps a bit too naive to refrain entirely from the injection on the proper occasions, of an element of the political realities of the Labour Party stance.

The Treaty Establishing the EEC[6] entered into force on January 1, 1958, upon the ratification of the agreement by each government and the deposition of the documents by the original six members—Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands. Under Art. 230 of the Treaty, which provides that any European country may be granted membership upon meeting certain criteria, Britain acceded to the EEC on January 1, 1973 together with the Republic of Ireland and Denmark. On January 1, 1981, Greece gained membership and negotiations are presently underway which are expected to result in the admission of Spain and Portugal by 1983.

The groundwork for the creation of an international organziation comprising the bulk of the industrialized countries of Western Europe for the purpose of economic cooperation, peace and security, was laid by a series of overlapping institutions formulated after World War II, including the Benelux Customs Union (entered into force 1948) and the Organization for European Economic Cooperation (OEEC) (entered into force 1948). But the most significant forerunner of the community was the European Coal and Steel Community ECSC (entered into force July, 1952), which was created by the original six to serve as a forum "to promote the rational expansion and modernization of production and to better conditions of employment and living for the employees in the industries."[7]

Using as a foundation the ECSC provisions for the abolition of duties and non-tariff barriers (such as quantitative restrictions) on trade in coal and steel, the six initiated negotiations in June, 1955 to proceed towards further European integration on an economic—and it was hoped, eventual political—integration. The negotiations proceeded under the skilful and determined leadership of Paul Henri Spaak and were concluded in short order. The treaty was signed on March 25, 1957.

[5](EEC) Institutions and Policy Coordination (Bulletin) # 809, 3 Oct. 1981.

[6]Also created at that time was the European Atomic Energy Community (Euratom), which, together with the European Coal and Steel Community, has been incorporated into the European Community.

[7]British Information Service, "Britain in the European Community," publ. # 73/RP/81 (Apr. 81), p. 4.

Britain's enthusiasm for the Customs Union was lukewarm at best, as evidenced by the fact that Britain did not, in fact, even take part in the final rounds of negotiations.[8] Concerns for the future status of the British Commonwealth, as well as Britain's peculiar parliamentary legal pre-eminence were cited as reasons for lack of complete support and participation.[9] Britain opted instead for a less formal organization, with a less rigid overall structure, and less obligatory requirements and political aspirations. Together with the six other countries who were part of the OEEC but had not joined the EEC for various political or economic reasons (Austria, Denmark, Norway, Portugal, Sweden, and Switzerland), Britain formed the European Free Trade Association (EFTA) (entered into force May 3, 1960). Finland signed an association agreement with EFTA in March, 1961, and Iceland became a member in March, 1970. The basic economic difference between a Common Market such as the EEC and the EFTA is that by definition the former implies a common external tariff barrier and political integration, while the latter is less restricted in allowing bilateral tariffs and discriminatory trade preferences.

The EEC also has a provision for the establishment of association status on a bilateral basis with third parties (art. 238). It has concluded such agreements with most of the members of the EFTA as well as with numerous African countries.[10] The basic reasons for seeking associate status are: 1) as a "second best" situation for countries unable to fulfill the economic conditions for accession; 2) as a preparatory step for membership; 3) for the economic benefit of a free trade area.[11] The abolition of customs duties occurs over a twelve year period, with association status extensions possible.[12] The association status also functions as an important window for Britain to maintain certain trade relations with British Commonwealth countries (although, much to Britain's annoyance, agricultural products are generally excluded from the preferences list). (art. 131–136).

In addition to providing for horizontal growth (i.e. expansion with the addition of new members), the Treaty also has provisions for vertical growth—meaning it can enhance its own power and jurisdiction through subsequent formulation of regulations and revisions of the Treaty itself. Art. 210 attributes to the community a legal personality, which endows the EEC with a "competence to establish relations with other states and international organizations under the rules of international law,"[13] and conclude international treaties (art. 228).

The Treaty is distinguishable from other international agreements in that it has created its own binding legal suprastructure which governs the conduct of its members irrespective of municipal law.[14] The European Court of Justice is the institution created by the Treaty to: 1) interpret the treaty; 2) the acts of the institutions of the community; and 3) the statutes of the institutions (art. 177). Under this provision it is possible to interpret the Treaty expansively, for the purpose of

[8]Ibid, p. 5

[9]Ibid, p. 5.

[10]Werner Feld, "The Association Agreements of the European Communities: A Comparative Analysis," 19 Inter. Organ., p. 243.

[11]Ibid, p. 227.

[12]Ibid, p. 2230.

[13]CCH Comm. Mkt. Rep. # 5202 (art. 210).

[14]P.S.R.F. Mathijsen, *A Guide to European Community Law*, p. 4.

giving full effect to its objectives.[15] Furthermore, under the "implied powers," which can be interpreted under Article 235, it is possible to close loopholes in the Treaty and "take appropriate measures,"[16] to attain the objectives of the EEC. But more importantly, Article 235 provides flexibility to the Treaty, allowing it to adapt to changed conditions.[17]

Just as flexibility in the diplomatic sphere led to the successful conclusion of negotiations in the formulation of the EEC, flexibility in the legal sphere is a necessary requirement for the continued good relations within the community as it moves in the direction of the professed goal of political as well as economic integration. Britain's relationship with the EEC has not been the model of flexibility, however, either on the part of Britain with respect to a willingness to make concessions to speed the accession process, or on the part of the community in its efforts to embrace it as a new member.

In all, Britain made three formal applications for membership to the Community.[18] The first attempt, initiated in 1961, was squashed singlehandedly by General DeGaulle in a dazzling display of power politics. At a press conference in Paris, he unilaterally declared that he would veto the British application, as he felt they were as yet unfit for membership. Since a unanimous consent by the Council of Ministers is necessary,the issue was dropped almost immediately. The second application was initiated by Britain on May 10, 1967, shortly after Pompidou took office. Though the chances for admittance were considerably better in this round, negotiations broke down shortly thereafter. Finally, the third round of negotiations proved fruitful, and the Treaty of Accession was signed on January 22, 1972, under the conservative leadership of Prime Minister Edward Heath.

It was made quite clear at this time that the Community's system of revenue collection, based on a direct government contribution, plus revenue raised from customs duties and a slice of each country's Value Added Tax (VAT) would very likely "result in a very large British net contribution to the budget," as acknowledged by a government white paper issued in 1971.[19] One reason Britain's contribution can be expected to be high is that roughly 75% of the Community's budget goes to CAP, agricultural price supports paid primarily to French and German farmers (part of the concession Britain made to France for the privilege of entry). Britain employs only 2½% of the population in agriculture[20] and, therefore, receives a smaller share of these payments. Secondly, Britain is a net importer of food from outside the EEC and has a broad VAT base.[21] This works out to be a double penalty for Britain, since it not only has to pay a higher price for the food with the external tariff levied, but then also fails to retain any of the potential revenues collected from that tariff.

[15]John Kozyris, "National and Supranational Law in the EEC on the Eve of British Entry," Law Contemp. Prob., Spring 1972, p. 287.
[16]CCH Comm. Mkt Rep., p. 4396, # 5325.
[17]Ibid, p. 4399, # 5332.
[18]For a good historical account of Britain's early accession efforts, see: Miriam Camp, *Britain and the European Community, 1955-63,*" Princeton Uni. Press, Princeton, 1964.
[19]British Information Service, 73/RP/81, p.7.
[20]The Economist, 17 Nov. 1979, p. 24.
[21]Ibid, p. 24.

It was equally obvious that the enabling Bill of Accession, the European Communities Act which was passed on October 17, 1972, would in fact limit the sovereignty of Parliament to the degree stipulated by Art. 189 of the Treaty. Sir Derek Walker-Smith had this to say about the Act in a speech before the House of Commons on February 15, 1972:

> "It may perhaps be an odious Bill, but at any rate it is an honest Bill. Clause 2 is drafted and impeccably drafted, to give precise effect to Art. 181 of the Treaty. The key words of the article are that the regulations are to be directly applicable. If Britain were to seek membership of the Community and failed to ensure that the regulations were directly applicable to this country, we should be in breach of our Treaty obligations. The obligation goes with membership."[22]

Britain does not have a comprehensive constitution,[23] which is due in part to the traditional doctrine of parliamentary sovereignty which asserts that no parliament can bind its successor.[24] This would imply that there can be no guarantee that any act can be spared from annulment or amendment at a future date, which is inconsistent with Art. 189 of the Treaty. The situation is further complicated in that conventions traditionally do not have the force of law in Britain.[25]

However, as the Queen's Counsel, Andrew Martin pointed out (unofficially) in 1969, contemporary British theory on the subject of Parliamentary sovereignty tends to abridge the absolute powers somewhat: "It is part of the contemporary theory of the British Constitution that the sovereign power of parliament admits of actual limitations even though it does not admit of legal limitations."[26] The prime example, though there are many,[27] is the Statute of Westminster of 1931 in which Parliament surrendered a portion of its sovereignty by agreeing not to legislate over the wishes of the Commonwealth and Dominion states without prior consent. Of the present members of the Community, Britain is unique in its implicit legal barrier vis-à-vis the sharing of sovereignty and the implementation of the Treaty, while the others vary only in the degree of their compatibility: the Netherlands providing the most explicit legal synchronisation instrument, followed by the Federal Republic of Germany, Italy, France and so on.[28]

Given the fact that (at least) these two factors were known and accepted by the British government by virtue of the passage of the European Communities Act in 1972, and more importantly by the British people who supported the entry into the Common Market by a margin of two to one in the 1975 Referendum[29] (the Labour Party was in office in 1975!), the question arises: Why is the British Labour Party committed to withdrawing Britain from the EEC at this time? Indeed, is this another manifestation of the "British disease"?

[22]Mathijsen, p. 11.
[23]Terence Lane, "The Legal Implications of British Entry Into the Common Market," Law Contemp. Prob., Spring 1972, p. 359.
[24]Kozyris, p. 304.
[25]Lane, p. 359.
[26]Andrew Martin, "The Accession of the UK to the European Community: Jurisdictional Problems," 6 Comm. Mkt. L. Rev. (1969), p. 23.
[27]Lane, p. 359.
[28]Kozyris, pp. 296–98.
[29]See generally: *Anthony King, Britain Says Yes: The 1975 Referendum on the Common Market,* American Enterprise Institute, Washington, 1977.

Francis Pym, leader of the House of Commons commented in July, 1981 that, "Only in Britain is the overwhelming political and economical case for working for greater West European cohesion obscured by a dense smoke screen of myths and prejudices mingled with some quite genuine grievances."[30] Citing as major accomplishments the creation of a Europe of 350 million consumers all under one economic umbrella, the counterbalancing of the political bi-polarity of East-West (US v. USSR) tensions, a Europe of which was among West European countries is unthinkable, he concludes: "It is impossible to quantify the extent of these benefits but they are no less real because they cannot be measured."[31]

It is the opinion of the British Labour Party, however, that things are not going so well in Europe, and they have a substantial amount of figures to support their position. More importantly, contend the Labourites, things are not well in Britain, (which is really what counts) and they place the blame squarely on the shoulders of the EEC, and on the present conservative government for failing to act swiftly and effectively to resolve the inequities suffered by Britain.

In 1979, the Labour Party issued a "manifesto"[32] declaring that if fundamental reforms were not carried out by the government with respect to EEC operations, it would "consider very seriously whether continued EEC membership was in the best interest of the British people."[33] Yet five years previous to the ultimatum, when Labour was still in office, their proposals for re-negotiating more favourable terms for Britain were unsuccessful.

In essence, the basic reasons for Labour disenchantment with the EEC remain today virtually the same as before:

—"Fundamental reform of CAP;
—New and fairer methods of financing the budget;
—The return to Parliament of those powers over the British economy necessary to ensure efficient industrial, fiscal and regional policies;
—Safeguards for the interests of the Commonwealth developing countries."[34]

However, their solution to the problem today has become more radical. Calling for complete withdrawal according to the 1981 platform, the withdrawal would be *negotiated*[35] and proceed on a set time table (hoped to be one year) to proceed as follows:

1. Prior to the General Election, we would seek to undertake preliminary discussions, at whatever level is thought to be appropriate, in order to discuss the broad outline of our proposals. These discussions would include talks with relevant socialist parties and with the appropriate trade and producer organizations and would begin as soon as possible after Conference. It would be clearly understood, however, that the negotiations themselves could only take place after the election.

[30]Interview with Pym, in: "Why the European Community Is Important to Britain," Europe (EEC), July 1981, p. 6.
[31]Ibid, p. 6.
[32]Labourites are often quoted issuing "manifestos" and addressing other "comrades." See, for example, Labour Party Leader Barbara Castle in part of speech reprinted in Institutions and Policy Coordination (EEC) Bulletin, # 809, 3 Oct. 1981.
[33]*The Economist*, 17 Nov. 1979, p. 24.
[34]From the Labour Party Platform. In addition, the Institutions and Policy Coordination (EEC) Bulletin # 809, three additional objectives, not listed in the Platform: 1) import controls, 2) state aid to industry and 3) exchange controls. These are not only incompatible with EEC guidelines, but GATT as well.
[35]Labour Platform, p. 16.

2. Shortly after our return to power, we will open preliminary negotiations to establish the necessary timetable. This timetable would be published as a White Paper, within weeks of our taking office.
3. As soon as possible after the House assembles, we will introduce a Bill to amend the 1972 European Communities Act—the Act which gives authority in the UK to the Treaty of Accession. This will end completely the power of the Community to make and implement law in the UK, and abolish the powers of the European Court over British Courts. In this Bill we will also make provision for the repeal, possibly by statutory instrument, of those sections of Community law which have been imposed on the UK and which we do not find acceptable; and we will take all the powers we need to carry through the agreed timetable.
4. The main negotiations should begin immediately after the publication of the White Paper. In particular, they will include the negotiation of new agreements on trade; and they will involve negotiations both with our EEC partners, and with non-EEC countries. We may not, at this stage, withdraw from the Council of Ministers or other institutions. But our representatives on these bodies would be there solely to discuss matters relating to our withdrawal.
5. A period of transition will clearly be necessary, in order to minimize any possible disruption, both in terms of our own internal legislative needs, and in order to 'run-in' the new trading and other arrangements. During this period, we will disentangle Britain from the mass of EEC regulations, directives and decisions, and from the complex administrative arrangements involved, for example, in running the CAP in Britain. At the same time we will, of course, be phasing in alternative domestic arrangements.

   Equally, as the various sets of negotiations come to fruition, we would wish to phase in the new arrangements. It will be necessary, for example, to allow other countries time to adjust to the fact that we are outside the Community. If, for example, we are to purchase more food from Australia or New Zealand, then these countries will need time to gear up their industries to exploit the new market. This could take considerable time, and in some areas, therefore, the process of transition might extend beyond the time for our final withdrawal from the EEC.
6. As the final stage in withdrawal we would repeal the 1972 European Communities Act—thus breaking all of our formal membership links with the Community—withdraw from all of the EEC institutions, including the European Parliament and the Council of Ministers. As we have noted, up to this point we would have maintained a formal 'representation' on the various institutions. This would now end.[36]

The assumption put forth is that the actions taken in either step one or step two will permit step three. Yet neither previous steps explicitly mentions that negotiations are to be held on this point of permission or that the Treaty would be amended which is in effect what step three proposes. As unequivocably made clear by Mr. Walker-Smith above, the Act guaranteeing British compliance with Art. 189 is an integral component to the Treaty in its entirety. As such, there can be no option for re-negotiation on those terms. Should Britain fail to fulfill its obligations under the Treaty at this point, the matter could be referred to the European Court of Justice under Art. 169 and 170, which would advise in a declaratory judgment, but no

[36]Ibid, p. 16–7.

sanctions are provided for.[37] "It is irrelevant that according to the constitutional law of the member state the failure to act is due to an organ over which the state has no control."[38] "There are no checks and balances to control Parliament as there are in the U.S."[39]

Even if there are sanctions available (Art. 235 could conceivably be stretched to include measures to bring an offending member back into line), there is no obvious institutional way the sanction could be carried out, since Britain would be able to veto its own sanctioning so long as it retains its seat in the Council of Ministers.[40] This observation led one commentator to conclude (with respect to France's escaping with impunity after disobeying the Court's ruling against curbs in lamb imports from Britain) that "precedent suggests that in Community affairs action is 9/10 of the law."[41] It appears in the final analysis that the primary reason for first divorcing Community Courts from Municipal Courts is to prevent the Municipal Court from acting as agents for the Community Court, as required by Art. 171 and 177.

The extrapolation of the assumption that an amendment of the Accession Act is permissable because no sanctions are effective could lead to the argument that the Labour Party could simply repeal the Accession Act to begin with, thereby affecting withdrawal much sooner. However, since in both cases it would be equally clear to all parties involved that Britain's withdrawal from the EEC is the actual goal of the preliminary action, it is not so obvious what incentive the Community would have for granting such an amendment, save for the release of an unwilling partner from a contractual obligation. In the likely event the Community is unwilling to negotiate on this point, and the Labour Party persisted in its desire for withdrawal, the only option still left open to it is denunciation of the Treaty itself.[42]

It should be noted that Britain, like most countries, adheres to the principle of the sanctity of international agreements, a tradition in Britain which is clearly enunciated in the Declaration of London 1871:

> "It is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a Treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of amicable arrangement."[43]

[37]K. Lipstein, *The Law of the EEC*, Butterfields, London, 1974, p. 314.

[38]Ibid, p. 315.

[39]*The Guardian*, 9 July 1981, p. 9. Also from Werner Feld, "Legal Dimensions of the European Communities: A Comparative Analysis," 19 Inter. Organ. 223, 1965, to note: "Foreign affairs are conducted basically on behalf of the Crown by his/her Majesty's Ministers as part of the Royal prerogative, *the negotiation and ratification of treaties can be performed theoretically without consultation of Parliament*. However, if the rights of citizens should be impaired or obligations imposed on them by self-executing clauses of the treaty, consent of Parliament is required. (emphasis added) With regard to the extent of the impact on the individual British citizen, Lipstein writes: "The structure of the EEC is not fully hierarchical and *only rarely reaches the individual directly* in his relations with other private persons." (art. 85–90, 215) *The Law of the EEC*, p. 10. (emphasis added) The question is whether the rights of citizens are limited by a treaty limiting Parliament.

[40]*The Guardian*, 9 July 1981, p. 9.

[41]*The Guardian*, 11 Mar 1980, p. 11.

[42]Margaret Thatcher has suggested she would withhold VAT payments from the EEC budget if she didn't get her way on a reduction of Britain's share of the budget (the Economist, 22 March 1980, p. 52). She did get her way; in May 1980, a substantial decrease in Britain's net contribution to the budget was successfully negotiated (Europe, July 1981; the Economist, 7 June 1980, pp. 52–3).

[43]Harold Tobin, *The Termination of Multipartite Treaties*, Columbia Uni. Press, New York, 1933, p. 194.

Since Art. 240 states that the Treaty shall have unlimited duration, "it has been argued therefore that states are either bound in perpetuity or preceeded from denouncing it except by unanimous decision, or possibly, only if they can rely on the *clausula rebus sic stantibus*, self-preservation or fundamental breach."[44]

The unlimited duration clause is a necessary component of a Treaty of this nature, since it required a considerable amount of diplomatic bargaining to secure the participation of all of the member states, and an easy escape clause (withdrawal, exemption) would, under its effectiveness potentially lead to its unraveling.[45] On the other hand, where no "reasonable duration is fixed in the Treaty and a party continues to exact indefinite or prolonged performance,the claimant party will choose its own time for termination and it will naturally choose the time and methods most convenient for itself."[46]

The British Labour Party has chosen this moment to begin to gather support for its withdrawal proceedings. Although not officially claiming the doctrine of clausula rebus sic stantibus, some aspects of their argument allude to a change of circumstances. Although scholarly opinion on the subject is divided, "the usefulness of the provision for unilateral denunciation is apparent. It facilitates the securing of the consent of doubtful states to convention! Aiming at universality by removing the fear that changed conditions will make continued adherence inconvenient or ever dangerous."[47]

The new application of the clause "operates on the grounds that reasonable parties would not have undertaken the obligation had they foreseen the essential conditions, that moved them to conclude the Treaty, would change so fundamentally."[48] This new application has also encompassed elements of economics, as in the Second Best Optimum theory by Lipsey as applied to law: "When changes are introduced into an optimal arrangement which violates one or more of the optimal conditions, the relationship is less than optimal, and therefore no longer desirable."[49]

Article 62 of the Vienna Convention accepts the theory of changed conditions, but in the case of the British Labour Party, the argument would be negated by the fact that the changed conditions were, in fact, predicted by one or both of the parties. Even if this were not the case, the claimant still has no authority to unilaterally terminate the Treaty, but rather must seek a mutually satisfactory solution, by negotiation or adjudication.[50]

Continental lawyers tend to support the clause, using as a foundation the French legal concept of "imprevision," which means a change of circumstances which frustrates the objectives of the agreement.[51] Although the clause has never been upheld by an international tribunal, the French used the argument in the Free Zones Case (1932). But since the burden of proof was not met, the Court deemed it

[44]Lipstein, p. 17.

[45]Tobin, p. 204.

[46]Arie David, *The Strategy of Treaty Termination*, Yale Uni. Press, New Haven, 1975, p. x.

[47]Tobin, p. 202.

[48]David, p. 32.

[49]Ibid, p. 49.

[50]Ibid, p. 54.

[51]Ibid, p. 51.

unnecessary to consider the question of the validity of the clause itself.[52] According to McNair, the case of a purely commercial treaty would be the only reasonable application of the clause "on the ground that it requires revision from time to time in order to bring it into harmony with changing conditions." He concluded by saying that Britain has never claimed to exercise this clause.[53]

On the subject of the Free Zones case, Judge Kellogg of the Permanent Court of Justice commented that in the case of a political or economic policy, it is within the sovereign jurisdiction of independent states and should not be imposed upon the courts for settlement.[54] Lauterpacht was even more succinct on the issue, "*clausula rebus sic stantibus* is not a rule of law, rather a maxim of politics."[55] And finally, in response to the British Labour Party claim that their return to office would be a mandate to withdraw from the Treaty (based solely on their election to office), McNair wrote "It is clear that the parties to treaty obligations are states and not their governments." And the change of parties from Conservative to Labour cannot be interpreted as being a "revolutionary break in legal continuity," of the order stipulated by McNair.[56] "As things, conditions or circumstances never remain the same, any principle of changing conditions, if taken literally, would mean that treaties would be binding for scarcely any length of time."[57]

However, since the possibility of revision due to changed circumstances is foreseen under Art. 236 (even to the extent of adopting an entire new Treaty, subject to ratification) it would appear to preclude the liberal use of the clausula rebus sic stantibus except in situations of the most serious order, such as self-preservation. Art. 61 of the Vienna Convention (1969) allows for termination under the proviso that it would be impossible to fulfill the commitments of the Treaty without imperiling the state's own existence.[58] Although Britain is indeed in severe economic straits, the conditions of recession, stagflation and high unemployment are by no means unique to its territory.

In an amusing turn of the tables, Britain could claim under Art. 60(3)(b) that "violation of the provision is essential to the accomplishment of the object or purpose of the Treaty."[59] Britain would then claim that its withdrawal from the EEC would benefit the remaining members, thereby fulfilling Art. 1 of the EEC Treaty. It may in fact be a plausible argument, but hardly one which Britain could realistically promote.

Perhaps the most realistic option for the British Labour Party would be to follow the example set by General DeGaulle when he "re-establish(ed) a normal situation of sovereignty" in France by deciding to sever ties with the integrated NATO Command in 1966. 'L' Affair est essentiellement politique"[60] was the answer given

[52]Eric Stein and Dominique Carreau, "Law and Peaceful Change in a Subsystem," 62 AJIL 577 (1968), p. 614.
[53]Arnold McNair, *The Law of Treaties*, Columbia Uni. Press, New York, 1938, p. 367.
[54]David, p. 40.
[55](Sir Hersch Lauterpacht; helped draft the ILC paper in 1966 with Brierly, Sir Gerald Fitzmaurice and Sir Humphrey Woldock.) Quote from: David, p. 38.
[56]McNair, p. 383.
[57]David, p. 44
[58]Werner Levi, *Contemporary International Law*, Westview, Boulder (CO), 1979, p. 229.
[59]J.M. Sweeney et al, *Documentary Supplement to Cases and Materials in the International Legal System*, Foundation Press, Mineola (NY), 1981, p. 211.
[60]Stein, p. 601.

by Foreign Minister before the General Assembly in response to their inquiry. For most observers, the situation was already obvious—it was DeGaulle successfully playing power politics again:

> "Nothing can cause a law that is no longer in accord with custom to remain unamended. Nothing can cause a treaty to remain wholly valid once its purpose has been altered. Nothing can cause an alliance to continue as it stands when the conditions in which it was created have changed."[61]

France neither followed the procedural commitments to NATO, nor took the necessary steps to secure a legal termination (the Treaty does contain a withdrawal provision). Therefore, there is no doubt that France was in violation of its multilateral treaty obligations, in spite of any claim of changed circumstances.[62]

By all indications, it seems highly unlikely that Britain will resort to a violation of international law in attempting to resolve its grievances with the EEC. The present government has affirmed its "wholehearted commitment," has "pledged to play a full and constructive role in its development" and "support. . . measures designed to promote a greater convergence in the economics of member states."[63]

Nonetheless, Lord Carrington, the Secretary of State for Foreign and Commonwealth Affairs, has made it clear that the government was not in total agreement with all of the Community's policies. Above all the Government is committed to:

1. restructure the Community budget based on reformed and slimmed CAP
2. formulation of a lasting solution to the budget so that no one state feels the cost of membership to be greater than the benefits
3. completion of a common market with free movement of goods, people, and services
4. more political cooperation on a common foreign policy.[64]

Contrary to the pessimistic picture painted by the Labour Party, Prime Minister Margaret Thatcher has been remarkably successful in negotiating a more favorable contribution to the EEC budget. In May, 1980, Britain secured an additional 645 million British pounds by way of refunds from the EEC; two thirds of the savings were then committed to regional investment programs.[65]

Furthermore, a loophole has recently been discovered (disclosed), giving the European Parliament the option of actually cutting the farm budget, provided its amendments are supported in the EEC Council of Ministers by at least 18 out of the 58 weighted votes. The big member countries each have ten votes so Britain and Italy together could theoretically ensure that any Parliamentary amendment to this effect is implemented. Ironically, in the November 23, 1979 vote, Britain refused, and only Italy (with ten votes) and Holland (with five votes) supported the Parliament. At the same session, Italy and Britain voted to increase regional and social spending (a benefit to Britain). While 75% of the proposed budget was still

[61]Ibid, p. 577.
[62]Ibid.
[63]British Information Service, 73/RP/81, pp.1–2.
[64]British Central Office of Information, London, "Fact Sheet: The European Community—British Government Views," Dec. 1980, p. 1.
[65]Europe, July 1981, p. 7.

earmarked for farm payments, the budget overall was to increase by 8% over the previous year. It was rejected by the Council, and the EEC stayed at the same budget allocation amounts as the previous year.[66]

With respect to the "bad press" that the CAP has generally been getting, an independent study reported that the CAP caused food expenditures to be *less* (in Britain) than they otherwise would have been for the years 1975 and 1976. In effect, the price effects were smaller than the British government's subsidy program for food.[67] Roy Jenkins, President of the European Commission, confirmed this conclusion saying that the "Government stated effect of CAP price increases on the retail price index has been extremely small."[68]

In overview, it seems that the British do indeed have a great deal more to gain by staying in the EEC than any alternate option. Membership has been a key to attracting outside investment and has made more easy the movement of ordinary individuals for tourism or employment reasons.[69] Export from Britain to the EEC rose from 30% before 1973 to 43% in 1980. Furthermore, 60% of all exports went to EEC and EFTA countries combined and approximately 2¼ million jobs are derived from the export industry.[70] Perhaps the best argument for continued membership in the EEC is the one advanced by the Economist which observed that a Britain outside the EEC would still be affected by EEC policies but would have no hand in shaping them.[71]

Opinion on the Continent has been conspicuously silent on the Labour Party "threat" of withdrawal. It has been reported to be a reflection of the belief that Labour won't get into office — that Roy Jenkins' pro-market alliance of Liberals and SDP have a stronger chance; that even if Labour were to be elected, it wouldn't carry out its proposal, but rather use it as a negotiating chip in the discussions for more favorable EEC policies; that Europe is weary with the perennial British EEC problem; and that many believe precious little will change either way—that the GATT restrictions are too narrowly defined to allow Labour much maneuvering room.[72]

[66]*The Economist*, 1 Dec 1979, pp. 51–2.
[67]Background report on Roy Jenkins' speech on 29 Sept. 1977, EEC Bulletin.
[68]Ibid.
[69]Europe, July 1981, p. 7.
[70]Ibid, p. 6.
[71]*The Economist*, 17 Nov. 1981, p. 25.
[72]*The Guardian*, 26 Aug. 1981, p. 9.

NUREMBERG AND TOKYO: UNCERTAIN MANDATE IN THE REALM OF INTERNATIONAL LEGAL SANCTIONS

Richard B. Finnegan*

I. INTRODUCTION

"On no subject of human interest, except theology" wrote John Chipman Gray, "has there been so much loose writing and nebulous speculation as on international law."[1] This observation made in 1927 holds true today and encompasses a broad range of interpretations of international law from churlish rejection to myopic idealism. The resurrection of the discussion of The Nuremberg Principles engendered by the United States' actions alleged or actual in Vietnam has fallen prey to the same sort of expansive overgeneralization, restrictive logic chopping and blasé dismissal of principles concerning aggressive war, war crimes and crimes against humanity.

Opinions vary on the weight to be given to international legal restraints even holding aside the difficult questions of interpretation and application. Some see international law as virtually non-existent:

> The very concept of 'International Law' is...in today's world situation either a self-contradictory or else an ironically humorous one despite the fact that numberless courses on so-called International Law are being given in innumerable colleges and universities.[2]

Schilpp is joined by no less a figure than Dean Acheson who suggested that "much of what is called international law is a body of ethical distillations..."[3]

Such cynicism would certainly color perceptions of the nature of the Nuremberg Trials suggesting, for example, that the trials were nothing more than the political eradication of the vanquished by the victor thinly lacquered with moral rhetoric and legal trappings.

Other interpretations of international law exist, however. Louis Henkin asserts: "The law works. Although there is no one to determine and adjudge the law, there is wide agreement on the content and meaning of law..."[4] Sir Cecil Hurst argues that "...a state cannot except from subjection to international law, or to put it slightly differently, international law is the necessary concomitant of statehood. International law is, in fact, binding upon states because they are states."[5] This view of international law would spawn an interpretation of Nuremberg which would see states binding themselves implicitly or explicitly to international norms clearly forbidding aggression and war crimes. Germany and Japan break the laws, German and Japanese leaders were tried and punished. Case closed.

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[1]Hans J. Morgenthau, *Politics Among Nations*, 3rd ed., (New York, Knopf, 1960), p. 233.
[2]Paul Schilpp, "National Sovereignity and International Anarchy", in *The Critique of War*, ed. by R. Ginsberg, (Chicago, H. Regnery, 1969), p. 183.
[3]Dean Acheson, *ASIL Proceedings*, (Washington, 1963), p. 13.
[4]Louis Henkin, *How Nations Behave*, 1st ed., (New York, Praeger, 1968), p. 252.
[5]Cecil Hurst, *International Law*, (London, Stevens, 1950), p. 9.