1970 ACTA UNIVERSITATIS CAROLINAE — IURIDICA No. 2 Pag. 163—193

The Doctrine "rebus sic stantibus" in International Treaties

VLADIMÍR PAUL

There has been much controversy among writers on international law concerning the clausula rebus sic stantibus in international treaties. Many learned authors refer to this doctrine in connection with the question, whether a state may or may not get rid of its obligations coming out of the treaty, if an important change of circumstances appears in distinction to those, under which the treaty was concluded. The doctrine of rebus sic stantibus involves only the legal effect upon a treaty of a change of circumstances which occurs after the conclusion of the treaty. But the problem of the application of the clausula rebus sic stantibus has, moreover, a direct connection with another problem, with the basic principle, generally recognized in international law as pacta sunt servanda and with the confidence of states in the stability of treaty relations.

To solve this question is rather difficult, as the reasons why to apply the clausula rebus sic stantibus seem to be of the same importance as those opposing it. The problem must be looked at, therefore, from the point whether both international practice and theory of international law have used this institution and in what manner. Only thereafter conclusions may be drawn. It must be emphasized, however, that arrising difficulties would not be solved even if the treaty parties included such clausula expressis verbis in the treaty itself. The practical application and the effect of the clausula would be still a matter of interpretation and therefore full of uncertainties. To qualify the specific conditions in every actual case would be necessary.

The clausula rebus sic stantibus as the expression of the influence of fundamental change of circumstances has undergone a long development in history. It resulted in its practical appliance; the views of the learned authors influenced the practice at their times, whereby practical examples are available to only a small extent — on the contrary the practice made its influence on theoretical thinking that we have the occasion to study even nowadays.

It may be said that, in all probability, this doctrine owes its origin to Canonic law. Therefrom it was taken over into civil law and according to Nussbaum, it was Alberico Gentili who introduced it into international

law as a maxim "conventio omnis intelligitur rebus sic stantibus".[1]) An early invocation of it may be found in old British diplomatic practice, made by Queen Elisabeth against the Netherlands.

THE THEORY OF INTERNATIONAL LAW

The period from the 17th up to 19th century was characterized by a slow development of the ideas which this clausula implies. Many authors actually mention it in their works, but their standpoints are all but conform. Even if their attitude cannot be said to be negative, they are very deliberate and careful in formulating their theoretical views. There certainly was the idea in the background that none too liberal an interpretation or application of the clausula is desirable.

Grotius himself limits the application of this clausula to cases only, where the former state of things was without any doubt the only ground for the conclusion of the treaty.[2])

Vattel assumes that we should be very careful in applying this clausula. According to him it would be a shameful perversion to use any change that may happen, for withdrawal from existing obligations. If such procedure were accepted, no binding force could be accorded to any promise ever made. The state of things alone, which has formed the basis of the obligation and has been taken into account at the time of conclusion of the treaty, has to be respected. If it changes, the obligation should be abolished or suspended.[3])

Bynkershoek, on the contrary, denies the possibility of any onesided action taken in consequence of changed conditions.

Martens says that only a complete change of circumstances, which at the time of the treaty conclusion have the force of a condition, makes the treaty no longer binding; if the object of the treaty ceases to exist, the treaty looses its validity.[4])

Phillimore formulates its view as follows: "When the state of things which was essential to, and the moving cause of, the promise or engagement, had undergone a material change or has ceased, the foundation of the promise or engagement is gone, and their obligation has ceased. This proposition rests upon the principle that the condition of rebus sic stantibus is tacitly annexed to every covenant."[5])

The strong nationalism of the 19th century influenced many writers, the carefulness of which has been subsided by the "progressive" views supporting the idea of the omnipotent state. Heffter[6]) admits that it is

[1]) Nussbaum, Concise History of the Law of Nations, New York 1947, p. 78.
[2]) Grotius, De iure belli ac pacis libri tres, Amsterdam 1712, v. 2, chapt. 16, § 25.
[3]) Vattel, Le droit des gens, Londres 1758, v. 2, chapt. 17, § 296.
[4]) G. F. Martens, Précis du droit des gens moderne, Göttingen 1789, t. 2, p. 123.
[5]) Phillimore, International Law, 1879, t. 2, p. 109.
[6]) Heffter, Völkerrecht, Berlin 1888, chapt. 8.

possible to refuse a treaty which has become incompatible with the rights and welfare of the nation and with the development of the state. Treitschke goes much further when stating that no state is obliged to feel itself bound by treaties which pledge its future to another state. If the state, according to him, recognises that existing treaties do not correspond to actual political conditions, such state may ask the other one to finish with the treaty; if the latter does not agree, it may start war to find out whether the relative force of the parties has changed since the treaty was signed. This view needs no comment.

Hatchek[7]) assumes that all international treaties are concluded under condition of this clausula and are binding in so far as the interests and power relations have not changed. He bears in mind the situation where treaty provisions become incompatible with right of selfpreservation of any party to the treaty.

This new broad concept of principles of the said clausula was not supported by the theory of international law. On the contrary, the proclamation of Bismarck that clausula rebus sic stantibus is tacitly inherent to every treaty, has been criticised by Liszt.[8]) He has pointed out that this statement in its generalisation is incorrect and means a negation of international law. He does not agree that this view should be applied to treaties with a fixed term of validity. No contracting party is allowed to proceed in this way without risking even war. Neither do treaties, valid for tempora aeterna, give any ground to such behaviour of a state, unless anything else has been expressly settled. The state is right to withdraw in such cases only, where by the change of circumstances the obligations become so unbearable, that they can hardly be fulfilled at all. That is more a case of necessity or of the right to selfpreservation.

The beginning of our century was full of discussions about the significance and importance of this clausula in the sphere of international treaties. Monographies on this topic appear and the decline from the radical ideas of the 19th century may be noticed.

One of the most famous authors in international law, L. Oppenheim[9]) refers to the views of the majority of other authors and of the international practice in the community of states. According to him the principle of this clausula has been fully accepted and all agree that the treaties are concluded under the tacit condition of rebus sic stantibus. — Spiropoulos[10]) states that the solving of this problem may be sought in common will of contracting parties; if the parties at the time of conclusion of the treaty have taken any legal or real situation as condition sine qua non for the realisation of the treaty, the change of such a situation gives

[7]) Hatschek, Völkerrecht, Leipzig 1923, p. 238.
[8]) Liszt, Völkerrecht, Berlin 1925, p. 264.
[9]) Oppenheim—Lauterpacht, International Law, London 1958, t. I., § 539.
[10]) Spiropoulos, Traité théorique et pratique de droit international public, Paris 1933, p. 256.

them without any doubt the right to withdraw from such treaty obligation. — Le Fur[11]) is of the opinion that to treaties concluded for ever or without any limit of their duration, the clausula is inherent tacitly ipso jure. It must be, however, used carefully, honestly and not surprisingly. It might be taken generally for valid, as it is impossible to take over any obligations for an unlimited lenght of time. As the application of the clausula is rather dangerous, its justified use can be insured in one way only: in the event of some differences in interpretation the international judge or arbitrator should be asked to decide.

Not even nowadays has the question of legal and lawfull application of the clausula rebus sic stantibus ceased to be actual. Many writers are returning to this topic and try to bring new ideas into the matter.

O'Connell[12]) emphasizes that the clausula has its firm place in international law, even if not in so broad a conception as the former internationalists assumed. He takes it more for a ground to revision that to onesided termination. With the last mentioned procedure he agrees only under the condition that there can be decided in judicial procedure, whether the treaty has been terminated or not.

Rousseau[13]) takes for generally recognised in international practice that this clausula gives no right to terminate the treaty by one party only, but that the consent of all contracting parties is needed and if not achieved, the judicial or arbitral decision should be asked. He acknowledges at the same time that the international practice of nowadays makes use of the clausula in onesided steps of the contracting parties; he assumes, however, that this procedure in fact is only a sign of opportunistic politics of states and the revision of the treaty seems to him the only right way out of this situation.

Verdross[14]) emphasizes that the clausula rebus sic stantibus has been currently accepted in international relations even if no terms have been set up concerning its application. The reason for it is to be seen in general legal considerations and evaluations, as no concrete judicial practice has been settled yet. To apply this clausula is possible only when the circumstances after conclusion of the treaty have changed so radically that one cannot bona fide demand the parties to fulfill the treaty obligations. It must be taken into consideration that the parties would not have undertaken such obligations if such a change could have been presupposed. According to him, the clausula cannot be used in the case where the treaty has a provision on its own termination, e.g. the provision concerning the notice.

Guggenheim[15]) declares that this clausula is applicable at any rate,

[11]) Le Fur, Précis de droit international public, Paris 1937, § 436, 442.
[12]) O'Connell, International Law, London 1965, p. 296.
[13]) Rousseau, Droit international public, Paris 1953, p. 60.
[14]) Verdross, Völkerrecht, Wien 1960, p. 93—95.
[15]) Guggenheim, Traité de droit international, Genéve 1954, t. I., p. 118.

whether the treaty contains a provision concerning notice or not. He sees the main reason for the existence of this clausula in the situation that the stability of treaty relations must certainly be supported, but on the other hand there exists the historical experience that after some period of time the treaties cease to be applicable. This can be overcome only by the right of a party to withdraw; according to him, one condition must be, however, respected, as it is generally recognised — the changes which have arisen after the conclusion of the treaty, have not to be of little importance only.

Dahm[16]) accepts the idea of the clausula rebus sic stantibus as valid for international law and relations. He underlines the fact that the clausula might bring the termination of the treaty, especially in cases where the treaty obligations could be fulfilled, which fulfilment, however, would endanger the very existence of the state. The revolutionary changes in any state, according to him, do not lead to the automatic application of the clausula, as the identity of the state has not been influenced; only in the case that those changes interfere very deeply with the political system and social structure of the state, the revision of the old treaties or their termination may be demanded.

Kaplan—Katzenbach[17]) stresses that in extreme cases the pressure for strained unilateral termination may be irresistible. The doctrine rebus sic stantibus occasionally invoked holds that treaties do not endure when conditions have so changed as to frustrate their basic purpose.

Many other writers express their views to this point.[18]) In socialist countries they write about this question as follows:

[16]) Dahm, Völkerrecht, Stuttgart 1958, t. III., p. 149.

[17]) Kaplan—Katzenbach, The political functions of international law, New York 1961, p. 38.

[18]) Bertram, Die Aufhebung völkerrechtlicher Verträge, Leipzig 1915; Bonucci, La clausola rebus sic stantibus nel diritto internazionale, Perugia 1909; Fusco, La clausola rebus sic stantibus nel diritto internazionale, Napoli 1936; Goellner, La révision des traités sous le régime de la Société des Nations, Paris 1925, p. 24; Hill, The doctrine of rebus sic stantibus in international law, Missouri 1934; Houlard, La nature juridique des traités internationaux et son application aux théories de la nullité, de la caducité et de la révision des traités, Bordeaux 1936; Huang, The doctrine of rebus sic stantibus in international law, Shanghai 1935; Jacobi, Die Endigungsgründe völkerrechtlicher Verträge, Breslau 1908; Kaufmann, Das Wesen des Völkerrechts und die Clausula rebus sic stantibus, Tübingen 1911; Lauterpacht, The function of law in international community, Oxford 1933; Pouritch, De la clause rebus sic stantibus en droit international public, Paris 1918; Scalfati, La clausola rebus sic stantibus nel diritto internazionale, Napoli 1936; Schmidt, Über die völkerrechtliche Klausula rebus sic stantibus, Leipzig 1907; Bogaert, Revue générale de droit international public, 1966, p. 49; Garner, American Journal of International Law, 21, 1927, p. 509; Kiss, Annuaire français de droit international, 5, 1959, p. 784; Lissitzyn, American Journal of International Law, 61, 1967, p. 895; McNair, Recueil des Cours, 22, 1928, p. 459; Simeonoff, Revue de droit international de sciences diplomatiques et politiques, 27, 1949, p. 35; Ténékides, Revue générale de droit international public, 41, 1934, p. 273; Verplaetse, Revista española de derecho internacional, 4, 1951, p. 113; Wilson, American Journal of International Law, 29, 1935, p. 307.

Bartoš[19]) evaluates the present situation in international law and assumes that no party has the right to withdraw unilateraly from the treaty applying this clausula, but it has the right to demand the revision of the treaty in the usual form. If no agreement could be reached, the parties should ask an international arbitrator or court for decision.

Ehrlich[20]) emphasizes that the fundamental change of circumstances has the influence on the termination of the treaty, if the parties reach an agreement that they accept such condition either expressly or tacitly.

Klafkowski[21]) writes that clausula rebus sic stantibus is not a principle of international law, but a political postulatum used often for supression of valid treaties.

Outrata[22]) states that the treaty cease to be valid if the situation existing at the time of its conclusion has substantially changed; such situation had to have a decisive influence on the conclusion of the treaty and on its contents. The clausula rebus sic stantibus gives any party the right to terminate the treaty by unilateral declaration, if such intention of the treaty parties can be deduced from the treaty itself or could be presupposed.

Pěchota[23]) writes that a state that wants to resort to the rule concerning essential change of circumstances, should take all steps to obtain the consent of the other contracting party for terminating the treaty. The other contracting party has the obligation to recognize objective facts and not to insist on the fulfilment of the treaty obligations which have become contradictory due to changed circumstances. Only where a contracting party, that has been notified by the state proposing the termination of the treaty, rejects the proposal, the other party has the right to resort to the extreme means of unilaterally terminating the validity of an international treaty.

Koževnikov[24]) states that as a ground for application of clausula rebus sic stantibus only a fundamental and important change in international conditions can be accepted. Šuršalov underlines that the normal function of an international treaty, combined with the principle of unchangeable obligations, is expressed in international law by the clausula rebus sic stantibus. He supports the view that the treaty should be abolished by mutual negotiations; unilateral termination should be used only in case that the negotiations were impossible or unacceptable; the treaty may be terminated by the decisions of the International Court of Justice, if the parties consent to solve their dispute before the Court.

[19]) Bartoš, Medjunarodno javno pravo, Beograd 1958, t. III., p. 412.
[20]) Ehrlich, Prawo międzynarodowe, Warszawa 1958, p. 305.
[21]) Klafkowski, Prawo międzynarodowe publiczne, Warszawa 1964, p. 269.
[22]) Outrata, Mezinárodní právo veřejné, Praha 1960, p. 354.
[23]) Pěchota, Studie z mezinárodního práva, Praha 1965, v. 10, p. 21.
[24]) Koževnikov, Měždunarodnoe pravo, Moskva 1966, p. 362; Talalajev, Sovětskij ježegodnik měždunarodnogo prava, t. 1959, p. 157; Šuršalov, Osnovnyje voprosy teorii měždunarodnogo dogovora, Moskva 1959, p. 193, 208.

A negative approach to the application of the clausula may be found in Lauterpacht's work.[25]) He criticises Oppenheim and Kaufman for their views and expresses his own opinion that clausula rebus sic stantibus has never become a part of positive international law and forms more a principle of political approach to treaties. He emphasizes that the clausula became well-known not because of being often used in state practice, but because the jurists have applied it in their arguments concerning utmost demands for the independence of states. Its application seems to him to be very rare and even in cases where it has been invoked, it has not been accepted.

Frangulis[26]) lays emphasis on the agreement of all parties of the treaty and mentions the Protocol of London of 1871, the negotiations in Locarno in 1925 and the Havana convention on treaties of 1928, where according to him the unilateral withdrawal was taken for inadmissible.

From all points of view said above we may draw the conclusion that the authors are not uniform in their opinions, but their approach is not negative. It is true that the problem of defining the doctrine of clausula rebus sic stantibus has been mostly left in hands of writers of international law and that there is no definition upon which a majority of them would agree. Obviously the question of definition is of great importance in any attempt to determine whether or not States have adopted a rule of conduct known as the doctrine of rebus sic stantibus. The views of writers are important as they have mostly influenced the views of States to some extent and because they have thrown some light on the fundamental questions connected with the doctrine.

THE PRACTICE OF STATES

Several cases are recorded in the diplomatic history where the clausula rebus sic stantibus has been invoked in international relations. The very expression, however, has not been applied in all of them, but the corresponding reasons were given for so far that they can be used as supporting the doctrine of rebus sic stantibus.

The case, already mentioned, in which the Netherlands, against which Queen Elisabeth invoked this clausula, rejected it as unsound in law, is one of the oldest. The Queen's advisers put forward a classical exposition of the doctrine and the Netherlands, even if dissenting, relieved the Queen of the obligations "being afraid to anger so mighty a princess".[27])

As typical we may designate the following case: Russia notified in the note of 19/31 October 1870, signed by Gortschakoff, all other states-

[25]) Lauterpacht, Private Law sources and analogies of international law, London 1927, p. 167, 170.

[26]) Frangulis, Théorie et pratique des traités internationaux, Paris s. a., p. 120.

[27]) Zouche, Jus et judicium feciale, t. II., § 4, in Oppenheim—Lauterpacht, op. cit., t. I., § 539.

parties to the Paris Treaty of 30. 3. 1856 that owing to the change of circumstances and to several breaches of the treaty, Russia does not consider itself bound by some of its provisions, especially by those which limit its sovereign rights in the Black Sea. Articles 11, 13 and 14 of this treaty were concerned by this declaration. These articles provided for a regulation of neutralisation of the Black Sea and limited the number of war-ships therein; the same obligation concerned Turkey. Art. 14 stipulated expressly that the provisions of the treaty, in which Russia and Turkey are limited in disposition with armed forces in the Black Sea, can be modified or terminated only by agreement of all parties. Russia raised objections that the change had been caused by the new equipment of warships and by the existence of the Union of Danubian Principalities, accepted by the other Powers.[28])

Other parties to this treaty have found themselves in the situation that a unilateral withdrawl has taken place, and have raised their protests. On Germany's iniciative, a special conference was held in London in 1871 and in the agreement of 13. 3. 1871 several provisions of the Treaty of 1856 were newly formulated.

As Schwarzenberger[29]) puts it, the Powers had recognized the right of States to invoke the clausula rebus sic stantibus as a ground for termination of international treaty, but have denied to agree with the Russian concept that the treaty might be, in view of it, unilateraly declared to be no more valid. At the first session of this conference a declaration has been agreed upon, in which the representatives of Germany, Great Britain, Austria, Italy, Russia and Turkey proclaim, that there is a basic principle of international law that no Power is allowed either to get rid of its treaty obligations or to change the provisions of the treaty without the consent of all parties.

Another important case may be mentioned in connection with the Treaty of Berlin of 1878, by which the Turkish provinces of Bosna and Hercegovina were put under control of Austro-Hungarian Monarchy. The Government in Vienna notified in October 1908 other contracting parties that it felt unavoidable to change the art. 25 of this theaty and to get annexed these provinces to the Habsburgian Empire. As a motive of this issue, important political changes in Balcan penninsula and the revolutions of "Young Turks" in Ottoman Empire were indicated. This procedure attracted great attention. Lord Asquith, the Prime Minister of Great Britain, declared: "We cannot recognise for any Power or State the right to change the conditions of an international treaty without other contracting parties... If in international politics a custom should arise, that a single Power or a single State could make its own decision and change suddenly the relations in international treaties, the public confidence

[28]) Accioly, Tratado de derecho internacional publico, Madrid 1958, p. 676.

[29]) Schwarzenberger, A manual of International Law, London 1960, t. I., p. 201.

would be destroyed." After long diplomatic negotiations, the other states recognised the change of the mentioned article.[30])

In 1886 another similar case arose. Russia announced with regard to the freedom of the Port of Batoumi that this quality of the port is in contradiction to art. 59 of the Treaty of Berlin of 1878 and can be no more recognised. Great Britain protested.[31])

In 1881 negotiations were led between USA and Great Britain. The United States supposed that the Clayton—Bulwer Treaty concluded under other conditions, lost its validitiy owing to the change of circumstances. Great Britain protested and the United States accepted later its view.[32])

In 1914 Germany invoked the doctrine of necessity in order to justify the breach of the treaty of 1839, by which Belgium had been neutralised. This doctrine is, however, quite different from that known as rebus sic stantibus. They were both mentioned in this connection with the aim to give it the impression of legality.

Greece in 1915 refused to be bound in the future by the treaty of 1913, concluded with Serbia. Both parties promised each other a mutual help in case that any of them would become object of aggression by another Balcanic state. It is clear that to keep the obligation would mean for Greece to be drawn into the war of an unexpected extent. Fenwick supposes that the situation which developed in this case might be taken as a fundamental change of circumstances.[33])

The international life has brought about many other cases where clausula rebus sic stantibus was applied. Turkey issued declaration on 9. 9. 1914 that the capitulations of foreign states were abrogated as the privileges "were in complete opposition to the juridical rules of the country and to the principle of national sovereignty" and were an impediment to the progress and development of the Ottoman Empire. Representatives of Austro-Hungary, France, Germany, Great Britain, Italy and Russia protested in identic notes that the régime cannot be abolished in any part, a fortiori wholly, without consent of the contracting parties. In its reply, Turkey did not invoke the doctrine of rebus sic stantibus by name, but was in close connection with it in phrases concerning the impossibility of aeternal treaty provisions, the submission of treaties to the evolution of time, the lack of response to modern needs and the continuance of the régime as a threat to the existence of the State. At the Lausanne Conference in 1922 the doctrine of rebus sic stantibus was expressly invoked by Turkey in a memorandem before the Commission on the Régime of Foreigners: "Treaties whose duration is not fixed, imply the clause rebus sic stantibus, in virtue of which a change in circumstances, which have given rise to the conslusion of a treaty, may bring

[30]) Hoijer, Les traités internationaux, Paris 1928, t. I., p. 518.
[31]) Hatschek, Völkerrecht, Leipzig 1923, p. 238.
[32]) Dahm, Völkerrecht, Stuttgart 1961, t. III., p. 147.
[33]) Fenwick, International Law, London 1924, p. 348.

about its cancellation by one of the contracting parties, if it is not possible to cancel it by mutual agreement." Despagnet's work was mentioned in this connection; he writes that the denunciation of a treaty is legitimate, when observance of the treaty becomes dangerous for the existence of the State; when it becomes incompatible with international law; when the circumstances which have given rise to the treaty have changed and deprived the old agreement of its reason for existence. The other States insisted that their treaties could be terminated or modified only with their consent, but they neither affirmed nor denied expressly the principle of clausula rebus sic stantibus invoked by Turkey.[34])

Some writers have regarded the settlement as a tacit recognition of the doctrine of rebus sic stantibus. This would be difficult to prove. It was more a compromise upon numerous issues and the states agreed to revise their obligations for political reasons.

In 1917 the Soviet Government abrogated all secret treaties concluded or confirmed by the Russian Government between February and October 1917. This action was not apparently based upon the doctrine of rebus sic stantibus. At the conference at Genoa in 1922 the Soviet delegation, however, presented a memorial containing the following statement: "The revolution of 1917, having completely destroyed all the old relationships, economic, social and political, and having replaced the old social order (class divisions) by the new social order, the sovereignty of an insurgent people, turning over the power of the Russian State to a new social class, did by this fact break the succession of those civil obligations which were component elements of the economic relations of the social order now extinct." Soviet writers have usually interpreted this statement as an invocation of the doctrine of rebus sic stantibus based on the interpretation by which a social revolution that transfers the power of the state to a different class and results in a reorganisation of economic ties and the governing principles of domestic and foreign policies, liberates the people of the State from obligations assumed by the previous government.

In April 1924 the Soviet Government made a statement concerning its attitude towards treaties concluded by the preceding Russian governments. In this statement there has been declared that it never has come to a general abrogation of all treaties concluded by Russia under the old régime or under the provisional government. It hardly might follow that all these treaties were susceptible of being reconfirmed. There will be occasion to examine this question for each State and for each treaty separately from the point of view of the clause rebus sic stantibus.

The changes of circumstances as mentioned above, do not offer a very clear picture of the situation; they may concern rupture of diplomatic relations, the consequences of the events during and after the war etc.[35])

[34]) Hill, The doctrine of rebus sic stantibus in international law, Missouri Studies, t. IX., 3, p. 27–29.

[35]) Korovin, American Journal of International Law, 22, 1928, p. 762.

Norway abrogated in 1924 the treaty of 1907, wherein Germany, France, Great Britain and Russia had granted its integrity. The treaty contained provisions for eventual changes in the political orientation of the country. This motivation is worth mentioning; otherwise it must be noted that the other contracting parties have agreed to the termination of the treaty and moreover the treaty contained provisions in favour of Norway only, so that no obligations to the other parties were affected by giving it up.[36])

China used the argumentation of changed conditions to justify a request for revision of the treaty of 1865 with Belgium. It referred to many political, social and commercial changes that had taken place in both countries during the preceding sixty years, which made the revision desirable and essential in the interests of both parties. Belgium replied on April 27th, 1926 that it was willing to consider revision of the treaty when the political situation of revolution would permit it. China replied that the treaty would automatically cease to be applicable on October 27, 1926 and a new treaty should be negotiated; it further made a statement that this declaration was in conformity with the spirit of art. 19 of the Covenant of the League of Nations, which clearly recognised the fundamental principle of rebus sic stantibus governing international treaties that became inapplicable. On 3. 1. 1927 Belgium presented the case to the Permanent Court of International Justice. That raised not only no objections against the principle of clausula rebus sic stantibus, but recognised as a principle of law the obligation of a party to a treaty to negotiate for the revision of a treaty provided that the essential circumstances, in view of which the treaty has been concluded, have been modified. Belgium agreed that the circumstances had been modified in this case, that this principle had been confirmed in a certain measure by the Covenant and that the principle of rebus sic stantibus related according to the most generally accepted theory to a tacit clause contained in international conventions concluded without any limitation of duration. Although Belgium admits a rule of rebus sic stantibus, she condemns unilateral termination of a treaty as contrary to international law. Belgium, however, withdrew the case from the court before a judgment was actually rendered, as the dispute had been settled by the negotiations of a new treaty.[37])

A similar situation appeared as far as the treaty of 1896 between China and Japan was concerned. China wished that revision should be accomplished within 6 months, but indicated that if a new treaty would not be concluded within this period, she would be confronted with the necessity of determinating her attitude towards the existing treaties. China actually informed Japan on July 19th, 1928 that the treaty of 1896 had terminated. Japan declared that the action of China was an infringement

[36]) Hoijer, op. cit., t. I., p. 520.
[37]) Hill, op. cit., p. 33.

of the treaty inadmissible in the light of both treaty interpretation and international usages and was an act disregarding good faith, in which Japan could not acquiesce.[38])

The same reasons made China valid in relation to Portugal and Brasil regarding their treaty relations. Portugal stated that the changes of political, economic or commercial conditions were not of a nature entitling China to dissolve the treaty by unilateral withdrawal. The dispute was settled by the negotiation of a new treaty. Brasil protested that in the treaty were incorporated the forms of changing or terminating the treaty so that unilateral application of the clausula rebus sic stantibus could not be effective as the corresponding treaty conditions had not been applied.[39])

In 1927 Persia denounced her treaties with certain States which possessed consular jurisdiction and privileges in Persia. The treaties with France and Spain contained no provisions for denunciation. In notes to these two States Persia referred to the important changes having taken place in this country's situation and in public opinion. Persia asserted that in the case of treaties of unlimited duration, the right of the contracting parties to terminate them at any moment had to be recognised. Spain contended that the unilateral denunciation of a treaty, whose text specified that it had been concluded in perpetuity, was contrary to international law. The clausula rebus sic stantibus justifies unilateral denunciation of a treaty only in case of a radical change which renders the fulfilment of the provisions of the treaty impossible. Moreover, a member of the League of Nations should first invoke art. 19 of the Covenant.[40])

France in 1932 declared the agreement on debts concluded with the United States to be inapplicable, as it had been signed on the assumption that German reparations would be realised. France stated: "Considérant, qu'en vertu d'un principe reconnu du droit international public les traités et conventions doivent être exécutés sic rebus stantibus, que la circonstance déterminante du réglement intervenu en matiére de dettes entre la France et les Etats Unies était incontestablement le régime des paiements que la France était en droit d'attendre de l'Allemagne en vertu des traités existants. La Chambre des Députés déclare que les circonstances déterminantes ayant été intégralement modifiées . . . les accordes intervenus sur les dettes ont perdu leur force exécutoire."[41])

Poland in 1934 declared in the League of Nations that it did not feel itself bound by the minority treaty of 1919. Great Britain, France and Italy protested against this act as against an unilateral withdrawal. France stressed that it was not possible to grant one Power the right to act unilateraly as far as changes or even termination of treaties were concerned.

[38]) Hill, op. cit., p. 36.
[39]) Accioly, op. cit., p. 678.
[40]) Hill, op. cit., p. 36.
[41]) Verdross, Völkerrecht, Wien 1960, p. 156.

Germany in 1935 notified several states that it did not recognize the further validity of Chapter V of the Treaty of Versailles of 1919. Great Britain, Italy and France disagreed. France emphasized that there was a fundamental principle of international law according to which no power would get rid of treaty obligations or change its provisions unless in consent with other contracting parties by the way of amical negotiations. It further declared that it was ready not to accept any settlement based on unilateral decisions, causing breach of international treaties. France asked the Council of the League of Nations for decision; the latter accepted a resolution by which the act of the German Government was condemned; moreover, it was stressed that to respect all treaty obligations was a basic norm in international life and an important condition for preserving peace and that it was a fundamental principle of international law that no Power could free itself of treaty obligations or change its provisions unless in agreement with all the other parties to the treaty. France practically took over the text of the Protocol of London of 1871.[42])

The United States of America in 1941 used this doctrine to support the reasons for suspending — not for terminating — the International Load Line Convention of 1930. This treaty was, however, more of a commercial or economical character and had been concluded for use in peaceful conditions. US Attorney General expressed in this connection his view as follows: "It is a well established principle of international law rebus sic stantibus that a treaty ceases to be binding when the basic conditions upon which it was founded, have essentialy changed."[43])

From the more recent practice we may mention two instances raised in political organs of the UN. In 1947 Egypt announced the termination of the Anglo-Egyptian Treaty of 1936.[44]) As a reason for this act, changes in world relations were underlined having taken place since the treaty had entered into force. The arguments used were based upon the doctrine of clausula rebus sic stantibus, without mentioning it eo nomine. The case was dealt with by the Security Council, but no resolution was adopted. Several representatives, however, expressed their objections to an interpretation which would allow a purely unilateral denunciation of a treaty without some form of adjucation upon the merits of the claim.

UN Secretary General prepared a study of the legal validity of the undertakings relating to the protection of minorities placed under the guarantee of the League of Nations.[45]) In this study, worked out for the Economic and Social Council, he assumed the doctrine of rebus sic stantibus to be applicable in international law: "International law recognizes that in some cases an important change of the factual circumstances from those under which a treaty was concluded may cause that treaty to lapse.

[42]) Accioly, op. cit., p. 679.
[43]) American Journal of International Law, 36, 1942, p. 89.
[44]) Dahm, op. cit., t. III., p. 147.
[45]) UN Doc. E/CN.4/367, p. 37.

In such cases the clause rebus sic stantibus applies if invoked by the Governments. — But if international law recognizes the clause rebus sic stantibus, it only gives it a very limited scope and surrounds it with respective conditions, so much so that the application of the clause acquires an exceptional character." The Secretary General stated that the State invoking the clause should obtain the consent of the other contracting parties, and in the absence of such consent, should secure recognition of the validity of its claim by competent international organs of the UN or the ICJ. The general conclusion of the study was that the particular changes of circumstances with respect to each country concerned did not warrant the application of the doctrine; but that between 1939 and 1947 circumstances as a whole had changed to such an extent with regard to the system of the protection of minorities that the undertakings given by States during the League period should be considered as having ceased to exist. In the examination of this particular non-contentious problem the question of the consent of the interested parties was not taken into consideration.

The pratice of States has brought up several cases where this clause rebus sic stantibus was applied. It cannot be stated that in those cases termination of the treaty immediately followed and that the party against which it had been applied, tolerated such procedure without any remarks. The clausula once invoked often helped, however, to the revision of treaties that usually followed.

INTERNATIONAL COURTS

Not many cases can be found in the practice of international courts, from which the main significant points of this international institution can be deduced.

As an important example, the Russian Indemnity Case (1912) has very often been mentioned. The objection of vis major was raised in this case. To my opinion, it had no close connection with the clausula rebus sic stantibus; its relation to the impossibility of fulfilment seems to have been more acceptable.

In 1922 the Permanent Court of International Justice dealt with the case Nationality Decrees in Tunis and Marocco. France disagreed with the interpretation of Great Britain that the treaty of 1856, concluded between Great Britain and Marocco, was further valid and claimed that it had terminated. Lapradelle, presenting the argument of France before the Court, contended that the treaty had lapsed by virtue of the principle of rebus sic stantibus. He stated that perpetual treaties were always subject to extinction in consequence of the mentioned principle, thus excluding treaties of definite duration. He gave no formal definition of the principle; it may be deduced, however, that the changes of circumstances must be manifest and striking and such as to cause the provisions of the treaty to loose completely their raison d'être. Judge Negulesco,

in his dissenting opinion, stated that the Powers in some cases recognized the right to invoke the clausula rebus sic stantibus as a ground for the extinction of treaties, but at the same time rejected, e.g. Russia's claim to be able to denounce the treaty unilateraly. In fact, however, according to him, it is generally recognized that the signatories of an important political treaty, which changed the map of the world, may abrogate even tacitly the provisions of previous treaties not consistent with present conditions.[46])

In the Case Free Zones of Upper Savoy and the District Gex (1928) it was France again that invoked the doctrine of rebus sic stantibus as a ground for the termination of treaties. The dispute between France and Switzerland was submitted to the Permanent Court of International Justice, but the Court did not find it necessary to decide the questions relating to this doctrine. The standpoints of both parties are, however, very important, as they constitute the detailed consideration of the doctrine by States.[47])

France, in the first phase of the dispute, did not examine all the questions involved in the doctrine, but promoted following ideas: grave or radical changes of circumstances in view of which a treaty was concluded, ought to cause caducity of the treaty; the doctrine is an old rule of international law which permits a declaration of caducity of a treaty whose cause has disappeared; there can be no treaties liable to enforce certain rules after situations have changed to such an extent that the reason which caused the rules to be imposed, no longer exists.

Switzerland neither admitted nor denied expressly the clausula rebus sic stantibus as an existing rule of international law, but emphasized that there was a great controversy among writers on international law regarding the proper meaning and sphere of the application of the doctrine; the doctrine was unsupported by the practice of States; the doctrine did not apply to treaties creating territorial rights which survive all changes of circumstances; there did not exist any right of unilateral termination of the treaty by one party; the doctrine had to be invoked within a reasonable time after the change of circumstances upon which it relied.

In the second phase of the dispute, France invoked the doctrine of rebus sic stantibus as an independent ground for the termination of the treaties of 1815 and 1816. France defined the doctrine as follows: "It is admitted in international law that an essential change in the circumstances in view of which a treaty has been made, causes the caducity of this treaty when an act obligatory for the parties has been accomplished. This act may be either the agreement of the parties or a decision of a competent international judge. — It is a recognized rule of international law that the international obligations resulting from a treaty are rendered

[46]) Hill, op. cit., p. 30.
[47]) PCIJ, Ser. C, No. 17, 19, 58.

void by the change of circumstances, when this change has sufficiently important character. — It is admitted in international law that an essential change in circumstances in view of which a treaty has been made, causes the caducity of the obligations arising from this treaty, when an act binding in law upon the parties has been accomplished to this effect, i.e. an affirmation of this change." France referred to several precedents — the Black Sea incident, the case of Batoumi, the termination of neutralisation of Norway etc. — to prove that the doctrine defined in that way, had been accepted as a rule of international law. France, moreover, presented a number of facts in support of her view that there had been a radical change of circumstances having as consequence complete deviation of the free zones régime from that assigned to in 1815 and 1816 and reflexing the state of things entirely different from that which the parties had accepted when concluding the treaties.

Switzerland argued that France had not proved that the doctrine had the effect of giving right to caducity of a treaty, and stated that most writers who admitted the existence of the doctrine, emphasized the necessity of an agreement between the parties. Switzerland contested the importance of proofs brought up by international practice and stated: "When a State has an interest in making use of what one calls the clausula rebus sic stantibus, one invokes it usually without knowing any too exactly what precisely it is. On the other hand, when the other States have no interest in opposing it, they admit that the treaty ceases to have effect. However, whenever a State has an interest in opposing it, the State contests it. The State which has an interest in the treaty, raises against the principle by virtue of which treaties are concluded under the reservation that such and such circumstances unforseen by the treaty shall not occur, principle that no party to a treaty may release himself from the express engagements without the consent of the other party or parties — in other words the principle that treaties ought to be observed." Switzerland emphasized that whatever the definition of the doctrine, it does not apply to treaties establishing territorial rights and stated that it would be contrary to good faith for a State to invoke at a later date changes of circumstances which had occurred and become evident at a much earlier period.

In concluding this chapter, it must be, however, noted that international diplomatic and judicial practice has brought up many cases of treaty breaches and put them into the light of changed conditions, but without a solid ground. In the name of national interests of states, of their vital interests, of their basic needs, of their only possible development, the States refused to fulfil their obligations. They even obtained sometimes support from the theory of international law that took the risk of speaking about these conditions as about general principles.

The danger of applying this rule in unspecified or uncertain conditions has been underlined by many authors. The rule may be easily used as a pretext to free oneself from burdening treaty provisions. One can

assume that a really important change, justifying the rule to be invoked, can only exceptionally not be recognized by the party of the treaty as a ground for new negotiations influenced by a new state of things, with the aim to conclude a new treaty or to change the old one..

The right to withdraw from the treaty seems to be far from perfect; in any case, it needs for the application a better definition than that known at present or in recent times; the reason for it is not the negative approach of states to this problem, but the urgent need that this right should be realised only with the important feeling of moral and legal responsibility.

CODIFICATION

The Convention on Treaties of Havana of 1928, ratified by Brasil, the Dominican Republic, Nicaragua and Panama, has not expressly formulated the provision concerning the doctrine of rebus sic stantibus. The question whether the doctrine has been accepted or not, depends upon its interpretation only. Art. 14, para g) provides that the treaty ceases to be effective when it becomes incapable of execution. Bolivia interpreted that this provision extends to cases where the facts and circumstances which gave origin or served as basis to the treaty, have been fundamentally modified. — Art. 15, however, provides as follows: "The caducity of a treaty may also be declared ... on condition that the causes which originated it, have disappeared and when it may logically be deduced that they will not reappear in the future." This article counts further with the consent of the parties to the treaty termination in this case; for the event that an agreement should not be achieved, the appeal to arbitration is being recommended.[48])

The draft convention on treaties, proposed by the American Institute of International Law in 1925, has no provisions regarding the doctrine of clausula rebus sic stantibus.

The Harward Law School has dealt with the problem of application of this doctrine in art. 28 of its draft:[49])

"a) A treaty entered into with reference to the existence of a state of facts, the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

[48]) Hill, op. cit., p. 26.

[49]) American Journal of International Law, 29, 1935, Suppl. p. 1096.

c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitely until a decision to this effect has been rendered by the competent international tribunal or authority."

The Harward Law School actually demanded that competent international tribunal or authority should declare that a treaty had ceased to be binding. The Permanent Court of International Justice, arbitral tribunals and the Council of the League of Nations were considered to be such an authority. This declaration should have no effect upon stipulations prior performed and can be issued under certain conditions only, on which the parties have entered into the treaty with reference to the existence of a certain state of facts; the continued existence of this state of facts has been envisaged by the parties as a determining factor moving them to undertake the obligations stipulated; this state of facts has been essentially changed.

The UN International Law Commission could not ommit to deal with this problem in its work on the law of treaties; it has done so in all its drafts.

The second Waldock's draft in art. 22 stated that the change of circumstances affecting essentially the basis of a treaty, shall have influence on the validity of the treaty. He gives a definition of such conditions and requires a change to take place with respect to a fact or a state of facts which existed when the treaty was entered into; that parties assume the continued existence of these facts to be essential foundations of the obligations accepted by them in the treaty; that the effect of the change is such as to frustrate in substance the further realisation of the object and purpose of the treaty or to render the performance of the treaty obligations essentially different from what was originally undertaken. He lays at the same time emphasis on the fact that changes in the policies of States claiming to terminate the treaty or changes in its motives or attitude with respect to the treaty, do not constitute an essential change in the aforesaid sense. The state cannot, according to him, invoke the clausula if it has caused or substantially contributed to the change by its own acts or ommissions or if it has not invoked the change within a reasonable time after it first became perceptible. As a condition to this procedure he further sees that such change should be expressly or impliedly provided for in the treaty itself. Waldock disagreed that the clausula rebus sic stantibus should be applied to treaties containing stipulations which effect a transfer of territory, the settlement of a boundary or a grant of territorial rights; further to treaties the stipulations of which accompany a transfer of territory or a boundary settlement and are expressed to be an essential condition of them. Treaties which are the constituent instrument of international organization do not seem to him to be apt for application of this clausula at all.[50])

The International Law Commission (ILC) supports the view that the

[50]) UN Doc. A/CN.4/156.

existence of the principle of rebus sic stantibus in international law is admitted and that despite of the almost universal distrust of the theory and of the differences in opinions which exist in regard to some aspects of it, there is a good deal of evidence of its recognition in customary law. Moreover, it can be said that this doctrine has never been fully and expressly rejected. It is true, however, that the practical appliance is likely to be comparatively small. It must be pointed out that the majority of modern treaties are expressed to be of short duration or are entered into for recurrent terms of years with a right to break the treaty at the end of each term or are expressly or implicitly terminable upon notice. When a treaty is not subject to early termination in any of these ways, the parties may be ready to terminate an out-of-date treaty by mutual consent. But failing an agreement, one party may be left powerless under the treaty to obtain any relief from outmoded and burdensome provisions. It is in these cases that the doctrine of rebus sic stantibus should play its role in international relations and effect the termination of the treaty or induce as a lever a spirit of compromise in the other party. Despite of the strong reservations often expressed with regard to the doctrine of rebus sic stantibus, the evidence of its acceptance in international law is so considerable that it seems to indicate a general persuasion that an instrument of this kind is needed in the law of treaties.

This view just mentioned does not mean that the ILC was without any doubts and problems in the question of clausula rebus sic stantibus. It evaluated the differences in the theory of international law and the damages that might be caused by the applications of the clausula. It finally recognized that a definition is needed to regulate its use and that the draft could not do without it. It realised the fact that treaties keep their validity for a long time and that during this period their obligations may become an unuseful or unbearable burden for any party of the treaty. Thus, if another party persists on its right and opposes any change in the treaty, a serious tension may arise in the relations between states, if international law had no other legal remedy for terminating or changing the treaty but the agreement of all parties concerned. It seems to be more acceptable to fill this gap by a legal instrument, even by such an imperfect one as clausula rebus sic stantibus, than to leave the states free to seek a solution outside the sphere of law.

In the draft articles in 1963 the ILC prepared another text, quite different in words, but principally containing the same ideas as the previous one.[51]) Art. 44 reads as follows:

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

2. Where a fundamental change has occurred with regard to a fact or

[51]) Yearbook of the International Law Commission, 1963, v. II., art. 44.

situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

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

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

3. Paragraph 2 above does not apply:

a) to a treaty fixing a boundary; or

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

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

To this article commentaries were handed in by Australia, Canada, Denmark, Izrael, Jamaica, the Netherlands, Pakistan, Portugal, Sweden, Turkey, Great Britain, the USA. Australia proposed that para 3a should concern not only treaties fixing boundaries, but all treaties concerning territorial sovereignty. The same point of view has been expressed by Canada and the Netherlands. Denmark, Turkey and Great Britain recommended the obligatory competence of international arbitration or of international court for disputes arising out of the application of this article. Jamaica stated that circumstances which the parties could easily foresee, should be excluded. It wanted to emphasize the right of the new states to apply this clausula, especially for treaties obviously unjust. Palestine proposed that para 3 should not be applied in cases where the parties have settled the agreements quite deliberately and willfully. Great Britain stated that this article should not concern treaties which are noticeable and should not be applied where the change of circumstances is deduced from subjective political changes in state or government. A negative approach to this article has been expressed by the USA.

In the draft of 1966 the ILC formulated its ideas about clausula rebus sic stantibus in art. 59 as follows:[52])

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

b) the effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

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

a) as a ground for terminating or withdrawing from a treaty establishing a boundary;

[52]) UN Doc. A/6309.

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

The ILC reconfirmed its view that the fundamental change of circumstances should find its place in the codification draft on the law of treaties as a ground for termination of treaties. The ILC did not use the notion clausula rebus sic stantibus, wellknown in the theory of international law, but it did not intend to abandon the support of both, the theory and the practice as established in last decades. On the contrary, it emphasized that the past time had been characterized by a fiction that this clause is tacitly incorporated in all treaties. It refused this fiction, giving rise to subjective interpretation and misuse, and formulated the content of the clausula rebus sic stantibus as an objective legal rule which may be invoked by the parties under certain conditions.

The ILC did not support the idea that this clause should be applied to treaties with unlimited duration only. On the contrary, it stated that there is no difference between treaties concluded "for ever" and treaties of validity fixed for 10, 20 or more years. The present development in international relations shows how quickly the circumstances change in the life of the members of international community; it is, therefore, very useful that the validity of this rule should be extended on treaties valid for a certain period of time.

The ILC draft fixed conditions, under which the fundamental change of circumstances may be invoked. In order to maintain the exceptional character of this ground for terminating the treaty, it limited the free will of parties and underlined that no other changes had influence on the validity of treaties. The conditions affect the use of the clausula mentioned rather restrictively:

a) the circumstances that have existed at the time of the conclusion of the treaty, must be affected by the change,

b) the change must be fundamental,

c) the change must not be of kind that could be foreseen by the contracting parties,

d) the circumstances in question must have been so indispensable for the mutual consent of the parties that otherwise they would not have concluded the treaty at all,

e) the change in circumstances must radically influence the quality or affect the obligations that ought to be fulfilled yet according to the provisions of the treaty.

Besides the conditions just mentioned, para 2 excludes from the application of para 1 two more cases: First, para 1 does not concern treaties fixing boundaries; according to the ILC, this rule, instead of being an instrument of peaceful change, might otherwise become a source of dangerous frictions. It was also suggested that this rule was not fully in accordance with the principle of selfdetermination as envisaged in the UN Charter. The ILC, however, was of the opinion that this draft

article does not exclude the operations of the principle of selfdetermination in any case where the conditions for its legitimate application existed. Secondly, para 2 provides that a fundamental change may not be invoked if it has been brought about by a breach of treaty by the party invoking it or by that party's breach of other international obligations owed to the parties to the treaty. It is a matter of application of the principle nullus commodum capere de iniuria sua.

Nor may the breach of diplomatic relations be invoked as a change of circumstances. This fact in itself does not influence the treaty relations between contracting parties. It gives no ground for suspending the effect of treaties and the less so for terminating them. Corresponding provision may be found in art. 60 of the draft which rightly reflects the everyday practice of States.

Concluding our commentary to this article, we may say, that the ILC have duly evaluated all risks which may be brought with by art. 59 into international relations generally and into treaty relations especially. It has stated that all these risks are not greater than those included in the articles concerning duress, coercion or breach.

It would not be correct to deny the principle that in itself is right, only because it may be misused by a State acting mala fide. On the contrary, it is a properly prepared codification which reduces this risk to a minimum level if the limiting conditions, under which the clausula may only be applied, are precisely formulated.

At the diplomatic conference in Vienna in 1968 the above mentioned text was completed by another paragraph, concerning treaty suspension in consequence of changed circumstances.[53])

This suggestion made by Canada and Finland was accepted, the other proposals made by Japan, South Vietnam and USA were rejected and the text was agreed unanimously.

The refused demands concerned suggestions that another condition should be added. In para 1b not only obligations yet to be fulfilled might be mentioned, but as a condition, obligations should be also fixed signifying an important disadvantage for the party by which the change of circumstances has been invoked. In para 2 a the limitation should concern treaties confirming political obligations and treaties fixing a certain territorial status.

The final text, accepted at the Vienna Conference on the Law of Treaties on 22. May 1969 as the Vienna Convention on the Law of Treaties, brings, with the exception of a new number of the article in question, no substantial changes.[54]) Art. 59 is now art. 62 which reads as follows:

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and

[53]) UN Doc. A/CONF. 39/C. 1./L. 370/Add. 6.
[54]) UN Doc. A/CONF. 39/27.

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."

CONCLUSIONS

To make a conclusion from the aforesaid development of the clausula rebus sic stantibus in theory and practice of States means to give a short survey of the problems concerning the definition and application of this clausula.

1. The clausula rebus sic stantibus may be characterized as follows:

— not every change is of significance, but only important ones of decisive influence — the rise of an exceptional situation.

If a certain concrete situation is to be subordinated under the notion "important", it is only a matter of interpretation, e.g. the threat to independence and basic rights of the State, the threat to its development etc.

As non-fundamental change may be understood the breach of diplomatic relations, the change of the governmental system or of interstate legal order, current political, economical and social changes that are not exceptional in international life. No change, however disagreable, uncomfortable, burdening or bringing complications only, is fit to be a reliable ground for the application of this clausula;

— the circumstances had to be the very point decisive for the contracting parties, i.e. if they had existed, the parties would not have entered into the treaty at all. The circumstances, on the other hand, may be found outside the treaty, but in this case should influence it in so far that the foreseen consequences of such a change very deeply affect one or the other contracting party;

— the circumstances must have influence on the object of the treaty, on its motives, on its raison d'etre; in such cases, however, the clausula rebus sic stantibus will concern only obligations not yet fulfilled and not those which have already been realised;

— the clausula will be applied to treaties with unlimited or undestined validity; in recent times the applicability of the clausula has been supported even to longterm treaties with a precisely fixed time of the validity;

— the change of circumstances must not be caused or influenced or be given impulse to by the party invoking the clausula and demanding the termination of the treaty;

— only such changes matter which have not been and could not have been foressen by the parties at the time of the conclusion of the treaty; those changes in circumstances which the parties knew or foresaw at that time, could have been made a resolutory condition; if the parties have not proceeded in this way, they cannot be supposed to have intended to enclose the clausula tacitly into the treaty.

— the termination of the treaty in consequence of the clausula rebus sic stantibus should be applicable the moment, the change of circumstances has occurred. It does not come in force automatically ipso facto — even if also this opinion has its supporters —, but the change has to be invoked. Otherwise the other party would not know that the treaty has been cancelled, as it may evaluate the consequences of the change in quite a different way. The change has its effect on the validity of a treaty ex tunc, i.e. at the time when the change has taken place, and not ex nunc, i.e. at the time when it has been invoked;

— the application of clausula rebus sic stantibus in its basic form is a unilateral act. Otherwise, if the consent of the other party or parties were required, it would become only a nudum jus.

The notion rebus sic stantibus has sometimes covered changes forming other grounds for termination of treaties. Under the change of circumstances we may, of course, understand the extinction of the party itself or the beginning of war between the parties concerned. To my mind, these two cases should both be held apart, as it is obvious that the treaties are anyway terminated or at least suspended. On the other hand, it seems to be right to include into the application of the clausula rebus sic stantibus the fulfilling of treaty obligations in consequence of vis major. It is mostly a matter of an unforseeable act; to decide about its influence on the further validity of the treaty, the circumstances of vis major must be subject to a profound research.

2. The clausula rebus sic stantibus is a principle that may be taken for as

— the expression of the will of the treaty parties, even tacitly approved, or as

— a valid rule of international law which affects the treaties without regard to the original will of parties, i.e. as a resolutory condition in the treaty.

Against the first principle, objections are being raised that it is a matter of fiction and that mostly it would be difficult to decide, whether at the time of the conclusion of the treaty the existence of certain specific

qualities has been really made a condition which the parties have accepted as the exclusive basis for its validity. By fiction it is understood that the clausula rebus sic stantibus corresponds to the will of States tacitly expressed and is inherent to the treaty. To prove the existence of such a fiction is not easy, as the obligatory force of treaties has to be always kept in mind. It is only under the protection of interpretation that such an instrument, that may be found in contradiction to a fundamental norm of international law of pacta sunt servanda, is introduced into international relations.

Regarding the second principle, it may be said that the resolutory condition has no application within treaties, the validity of which, even if of long duration, has been expressly fixed. Moreover, the definition is too broad to make a solid basis for a condition like that.

Without any doubt, the clausula rebus sic stantibus accepted in international relations implies considerable danger to be misused; it may, moreover, support the intentions of any party to cover, on the hand of it, the breach of the treaty by the pretext of lawfullness.

On the other hand the existence of such an instrument in international law is quite necessary. The strictness of law acts very often against the law itself and international law is in need of its own corrective instrument that would be able to respect various situations coming forth in international life. It may be said, therefore, that clausula rebus sic stantibus is as important in international law as the principle of pacta sunt servanda. Its existence is fully justified at times when no objective judicial authority exists which could arbitrate between the parties against the will of one of them and when at the same time the treaty relations cannot be declared to be unchangeable.

In absence of an international tribunal capable of independent and objective decision making on demand of one party only, any interpretation, which is closely connected with the instrument of rebus sic stantibus, will be in danger of subjective opinions. This fact, however, is not an exception in international law. Similar elements of uncertainty may be found in many other branches of customary international law, the importance of which is not reduced by the possibility of subjective approach (e.g. the cases of indemnities in international law). Even if the methods of application and the consideration of concrete facts are not clear enough, it has in principle nothing to do with the question whether the clausula rebus sic stantibus is tacitly incorporated in the treaty. These doubts and vagueness, this subjective free interpretation, would exist even if the parties had agreed upon and included such clausula in the treaty expressly.

3. Most disputable and questionable seem to be the extent and quality of changes that can be considered sufficient to justify the application of the clausula rebus sic stantibus. The notions which are often quoted in this connection as substantial, fundamental, as of vital importance etc. are no reliable criteria; they merely show theoretically the position of

the pointer moving on the scale between pacta sunt servanda and clausula rebus sic stantibus. The quality of changes has not been defined yet, but the denial of overestimated demands in the 19th century has helped in some way to make it more clear.

By the change of circumstances the object of the treaty or its aim has necessarily to be affected. One of them, being concerned is sufficient to influence the treaty obligations if the character of the case it requires.

A situation may arise, in which one state undertakes an obligation to grant a loan to another state under usual conditions. If in the future the former suffers damages caused by an earthquake or by similar unpredictable disaster so as to be unable to fulfil its obligations made in quite different circumstances, it may invoke the doctrine of rebus sic stantibus, as the change of circumstances concerns very deeply the object of the treaty. Another situation may arise, when such a loan has been promised in a treaty in support of the existing political régime. If the régime has changed later on, the state formerly offering the loan will invoke the change of circumstances and will refuse to carry on the loan, as the aim of the treaty cannot be realised any more.

We may say that this so called effective theory of treaty interpretation underlines that every treaty has certain objective aims and purposes which the parties have followed from the beginning or which have developed later. The extinction of such purposes or aims have its influence on the further validity of the treaty.

The question may be put whether the importance of the change is decisive enough to justify the use of this clausula. Both parties will certainly evaluate the situation from their own points of view. If they do not come to an agreement, which will signify that an objective standpoint has not been found, the disagreement must be solved by peaceful remedies known in international law as in other international disputes.

4. As a ground for the existence of the clausula rebus sic stantibus in international law, the state of necessity is often mentioned. It deserves a special attitude. Such opinion, that the clausula may be used only if the State gets itself into the state of necessity, is not right. It is not the only occasion when the clausula may be applied. That depends actually on the fact, whether the State would conclude such a treaty, even if it had known about the existence of such circumstances. The application of the clausula is not justifiable by consequences, however burdening these may be. On the other hand, even a really fundamental change of circumstances need not influence the State in an unbearable manner. The coordination of both these reasons appear, therefore, as a most important element in the application of the clausula rebus sic stantibus. We should regard as decisive all such circumstances which existed at the time of the conclusion of the treaty and not only the consequences which may have been caused by the change.

If we ask whether the clausula rebus sic stantibus is inherent to all treaties, our answer must be negative. Treaties containing formulations

concerning notice, régime of revision etc. or treaties with shortterm validity have provisions that correspond in their very meaning to the conditions which have brought the clausula into life. These provisions permit to demand the treaty to be changed and if not, to invoke the termination of obligations concerned by the change. This is not performed as a unilateral act in its full sense of the word, nevertheless the consequences of changed conditions are thus respected in the mutual treaty relations.

The notion rebus sic stantibus as a legal instrument is not a phenomenon of international legal sphere only, but is known to many other legal orders. It offers, therefore, enough of legal views, even coming out of another legal sphere. Such analogy at hand will not be without influence when evaluating and comparing concrete cases in international relations.

Two more elements must be mentioned: Clausula rebus sic stantibus causes mostly the termination of bilateral treaties. As to multilateral treaties, it is difficult to imagine that a situation would arise in which the condition of the application of the clausula would be fulfilled in relation to all other parties and among them simultaneously. The change of circumstances should be invoked within a reasonable time, otherwise it could be taken for granted that the party agrees with the change of circumstances without affecting the fulfillment of the treaty and that it would not invoke this doctrine.

Such changes of circumstances as caused by the activity or inactivity of the party invoking the change, or even by its breach of the treaty, cannot be regarded as a ground for termination of treaties.

5. The survey of above mentioned problems enables us to arrive at the conclusion that the effect of clausula rebus sic stantibus is due to the evaluation of new circumstances in international life; only such changes matter which could not have been foreseen by the parties to the treaty. The parties are not supposed to agree with the effect of the changes on international treaties as a consequence of their tacit consent, but their right is recognised to require the change or termination of the legal situation that no more corresponds to the object and aim of the treaty, with which the treaty has been concluded. The principle of cessante ratione cessat lex ipsa is followed. The application of this doctrine should not result in automatic termination of the treaty, but in its revision achieved by amical negotiations. Only in cases leaving no other possibility, the termination of the treaty should be effected by unilateral decision.

The admissibility of the unilateral procedure, supported by many writers on international law, finds its reflection in international practice as well. From the London Protocol of 1871 it can be deduced that the states have right to withdraw from a treaty only by mutual agreement with the other party or parties. This would mean, however, that neither instruments of international law, generally recognized, could be used, as e.g. unilateral termination of the treaty in consequence of its breach by the other party. This is not the case practised in the valid international law. The real

sense of this Protocol seems to be the right of States to get the changes in circumstances respected under the condition that they have negotiated first with the other parties and have tried to achieve a mutual consent.

To bind the application of clausula rebus sic stantibus to the consent of other parties would mean to abandon this instrument of international law entirely, there would be no need of it at all. The States as treaty-parties may any time change their mutual relations by agreement. To use the clausula only for pointing out the reason for starting the negotiations is neither necessary nor having any legal significance.

Almost all modern jurists admit the existence in international law of the principle which is commonly spoken of as the doctrine of rebus sic stantibus. Just as many systems of municipal law recognize that apart from the impossibility of performance, contracts may become inapplicable through a fundamental change of circumstances, so also treaties may become inapplicable for the same reason. Many jurists want to confine the scope of the doctrine within narrow limits and to regulate the conditions under which it may be invoked because of the risks to the security of treaties. They do not forget, however, that the circumstances of international life are always changing and the changes render the treaty inapplicable.

As we have already mentioned, it seems to be a fiction to deduce from the treaty the tacitly inherent will and intentions of the parties to terminate the treaty in consequence of changed circumstaces. Fiction, however, does not seem to be very apt for determining the legal basis of this instrument. More acceptable would be the reflection of the present international practice, supporting the birth of customary rule in this sense. It follows that henceforth the clausula rebus sic stantibus can be no more regarded as a fiction, but as a norm of international law having its source in the very practice of States, and moreover in the Vienna Convention on the Law of Treaties. This codification will bring more clarity into the given problem; the application, however, will still be in bad need of a sensitive interpretation of such a norm.

VLADIMÍR PAUL

Klausule "rebus sic stantibus" v mezinárodních smlouvách

RÉSUMÉ

Otázka, zda se stát může zprostit svých závazků ze smlouvy z důvodu podstatné změny okolností, není novým problémem. Dotýká se přímo podstaty smluvních vztahů — aplikace obecně uznané zásady mezinárodního práva o pacta sunt servanda a důvěry států v stabilitu mezinárodních smluvních vztahů. Je to otázka velmi choulostivá, protože důvody pro aplikaci klausule rebus sic stantibus stojí ve stejném a vyrovnaném šiku proti důvodům, které hovoří pro ní. Stanoviska k vlivu podstatné změny okolností na uzavřenou smlouvu si prodělala dlouhý historický vývoj. To je ovšem na prospěch odpovědi, jaká je náplň klausule rebus sic stantibus, protože názory teoretiků ovlivňovaly praxi své doby, o níž již nemáme třeba ani

dokladů a naopak její praktická aplikace nutně pronikala do teoretických úvah, které se dochovaly.

V období 17. až 19. století reaguje na existenci klausule rebus sic stantibus řada autorů, ale jejich přístup není jednoznačný. Jsou velmi rozvážní a obezřetní ve svých formulacích zřejmě s úmyslem v pozadí, aby nebyla dána volnost příliš liberálnímu výkladu a příliš překotnému používání. V rozvoji nacionalismu 19. století byla jejich obezřetnost nahrazena „pokrokovými" názory, podporujícími panující ideu státní politiky a připravenými hájit zrušitelnost nepohodlných smluv. Také začátek našeho století byl ve znamení výměny názorů na tuto otázku a objevují se i monografie na toto téma. Dochází však současně k odklonu od radikálních názorů 19. století. Stále uznávaná kapacita L. Oppenheim se ve svém známém díle dovolává názorů většiny autorů a praxe vlád, členů mezinárodního společenství, které podle něho uznávají tuto zásadu a vesměs souhlasí, že všechny smlouvy jsou uzavřeny za mlčky přijaté podmínky rebus sic stantibus.

Nelze sice dobře říci, že by názory autorů byly jednotné, ale vcelku jejich postoj není negativní. Přesto jsou velmi důležité, protože ovlivnily do jisté míry názory mezinárodní praxe a v teoretických úvahách vrhly světlo na některé základní problémy.

Také diplomatická historie zaznamenala řadu případů, kdy byla klausule rebus sic stantibus aplikována v mezinárodních vztazích. Nepoužila sice někdy výslovně tohoto termínu, ale použila k němu náležející argumentace, byť i pod jiným pojmem. Významným aktem byl Londýnský protokol z r. 1871, v němž zástupci Německa, Velké Británie, Rakouska, Itálie, Ruska a Turecka uznávají, že je základním principem mezinárodního práva, že žádná mocnost se nemůže zprostit závazků ze smlouvy ani změnit její ustanovení, leda se souhlasem smluvních stran cestou přátelského jednání. Státy zde nepopřely existenci klausule rebus sic stantibus, i když by bylo možno vyvozovat — a tyto závěry byly někdy činěny — že státy mohou odstoupit od smlouvy jen v dohodě s druhou smluvní stranou či stranami. To by však znamenalo, že by nebyl použitelný ani jiný obecně uznaný jednostranný důvod zániku mezinárodní smlouvy, např. porušení smlouvy druhou stranou, čemuž tak není. Lze proto spíše mít za to, že smyslem protokolu bylo zdůraznit, že stát není oprávněn prohlásit smlouvu z titulu změny okolností za neplatnou, aniž o tom předem vyrozuměl druhou stranu a snažil se dosáhnout dohody. Mezi jiné významné případy lze počítat sovětské prohlášení v Janově r. 1922, jednání Číny s Belgií a Japonskem v letech 1928—1929 o zrušení smluv, či případ Svobodné zóny v Horním Savojsku a distriktu Gex, projednávaný v letech 1929 až 1932 před Stálým dvorem mezinárodní spravedlnosti v Haagu.

Mezinárodní soudní a diplomatická praxe rovněž nepopřela existenci zásady rebus sic stantibus, nýbrž spíše naopak s ní počítala, i když nevynesla na povrch jasné zásady pro její aplikaci. Nelze říci, že by vázala její použití na dohodu stran, což by prakticky znamenalo vymazat tento pojem z mezinárodního práva, protože by jej nebylo třeba; dohodou mohou strany změnit své vztahy kdykoli a použít jej jen jako označení důvodu k vyvolání jednání by nebylo ani potřebné, ani by nemělo právního významu. Právo odstoupit od smlouvy z důvodu klausule rebus sic stantibus se jeví proto z pohledu soudní a diplomatické praxe jako nedokonalé. Vyžaduje tedy pro praktickou potřebu budoucnosti v každém případě lepší formulaci, než kterou lze vyvodit z mezinárodního práva současné i minulé doby. Nejde přitom o to, že by takové právo smluvní strany bylo zavrhováno, ale jde o to, aby bylo vykonáváno se závažným pocitem morální a právní odpovědnosti.

V tom směru vykonala velký kus práce Komise OSN pro mezinárodní právo při přípravě mezinárodní úmluvy o smlouvách. Vliv klausule rebus sic stantibus je definován prakticky ve všech jejích návrzích. Vycházela přitom ze stanoviska, že existuje dosti důkazů o uznání její existence v mezinárodním právu obyčejovém, i když se objevují o ní rozdílné názory a projevuje se někdy i nedůvěra k ní v teorii či praxi v některých aspektech. Přihlížela k tomu, že klauzule nebyla nikdy výslovně odmítnuta či zavržena, ale neznamená to, že neměla určité pochybnosti. Hodnotila

rozpory, které se projevovaly a projevují ve vědě mezinárodního práva stejně jako nebezpečí, která z ní vyplývají pro smluvní jistotu. Přesto však uznala, že je třeba ji pečlivě usměrnit a definovat a pak ji zahrnout do kodifikačního návrhu. Důvodem byla i skutečnost, že smlouvy zůstávají v platnosti po dlouhou dobu a jejich závazky se mohou v průběhu této etapy stát neúčelnými, stát zbytečným břemenem pro některou ze smluvních stran. Jestliže pak druhá smluvní strana setrvává na svém právu a staví se proti jakékoli změně, může dojít k vážnému napětí mezi státy, jestliže mezinárodní právo nemá žádný legální prostředek pro skončení nebo změnu smlouvy vyjma dohody stran. Zdá se být vhodnějším vyplnit tuto mezeru právní institucí i tak nedokonalou, jako je doložka rebus sic stantibus, než ponechat nespokojeným státům hledat řešení mimo oblast práva.

Komise ve svých návrzích potvrdila, že podstatná změna okolností má své místo v kodifikačním návrhu mezinárodní úmluvy o právu smluv jako důvod zániku mezinárodní smlouvy a tento její názor podpořila i většina států, které přijaly její návrh a pojaly jej do úmluvy, kterou vypracovaly a odsouhlasily v letech 1968 a 1969 ve Vídni. O podstatné změně okolností pojednává čl. 62 této úmluvy a v něm se zakotvil institut klausule rebus sic stantibus.

Komise sice tohoto termínu vcelku vžitého v teorii mezinárodního práva nepoužila, ale tím neměla v úmyslu opustit podporu teorie i praxe, jež byla v uplynulých desítiletích tomuto institutu poskytována. Komise naopak zdůraznila, že jedním z hledisek, která byla v minulosti prezentována, byla fikce, že tato klauzule je mlčky obsažena ve všech smlouvách. Tuto funkci, umožňující subjektivní výklad a zneužití, komise odmítla a formulovala obsah institutu rebus sic stantibus jako objektivní právní pravidla, jehož se strany mohou dovolat za určitých okolností při zachování práva a spravedlnosti.

Text navržený komisí stanovil podmínky, za nichž je možno se dovolat podstatné změny okolností jako důvodu pro zánik mezinárodní smlouvy, resp. pro odstoupení od smlouvy. Aby zdůraznil výjimečnou povahu tohoto důvodu, vytypoval je negativně jako výjimku z pravidla, že změna okolností jinak nemá vliv na existující smlouvy. Podmínky obsahují řadu limitujících činitelů: musí jít o změnu okolností, které existovaly v době uzavření smlouvy; musí jít o podstatnou změnu; musí jít o změnu, kterou strany nepředvídaly; předmětné okolnosti musí být tak nezbytným podkladem pro souhlas stran se smlouvou, že by ji strany jinak bývaly ani neuzavřely; změna v okolnostech musí zásadně ovlivnit rozsah či dopad závazků, které mají být ještě podle smlouvy splněny. Z dalších omezení je třeba uvést, že ustanovení příslušného článku vylučuje možnost zániku mezinárodní smlouvy, resp. odstoupení od ní, jestliže jde o smlouvu o stanovení hranic; v opačném případě by podle názoru komise hrozilo nebezpečí mezinárodních roztržek, místo aby definování pravidla o doložce rebus sic stantibus působilo jako nástroj změn, prováděných mírovou cestou. Dále byly vyloučeny situace, kdy strana, která sama způsobila změnu okolností porušením smlouvy nebo jiného ustanovení mezinárodního práva, by se chtěla takové změny dovolávat.

Komise OSN pro mezinárodní právo tedy zhodnotila rizika, která může vnést ustanovení, tak často diskutované, do mezinárodních vztahů. Usoudila však, že tato rizika nejsou o nic větší než ta, která jsou obsažena v článcích o porušení smlouvy nebo následné nemožnosti plnění či vzniku normy jus cogens. Nepokládala za správné zavrhnout zásadu, která sama o sobě je správná, jen z toho důvodu, že by jí mohlo být zneužito státem jednajícím mala fide. Naopak právě řádnou kodifikací se snižuje toto riziko na minimum, jestliže jsou dobře definovány omezující podmínky, za nichž je možno výlučně takovou zásadu aplikovat.

Z toho, co jsme uvedli, je možno usoudit, že působení doložky rebus sic stantibus nastává jako důsledek hodnocení okolností v mezinárodním životě, a to okolností, které nastaly nepředpokládaně, které nebyly a snad ani nemohly být předvídány smluvními stranami. Stranám se nesubsumuje projev vůle souhlasu se změnou smlouvy v důsledku změny okolností, ale uznává se jejich oprávnění v souladu s obyčejem v mezinárodním právu požadovat změnu či zrušení právního stavu, který

neodpovídá již účelu nebo cíli, k němuž byla smlouva uzavřena, podle zásady cessante ratione cessat lex ipsa. Aplikace této zásady by neměla vést k automatickému zániku smlouvy, nýbrž k její revizi, provedené přátelským jednáním smluvních stran. Teprve není-li jiného východiska, měla by vést k jednostrannému projevu vůle, jež by měl za následek zánik mezinárodní smlouvy.

Dovozovat ze smlouvy vůli a úmysly stran mlčky v ní obsažené se jeví fikcí. Nelze však dobře popřít, že se s takovou fikcí zřejmě skutečně v praxi počítalo. Přesto nebude vhodné činit ji právním základem tohoto institutu, nýbrž jím bude v současné době spíše výraz mezinárodní praxe, projevující se ve vzniku obyčejové normy mezinárodního práva. Nebude proto nutné nadále ji považovat za fiktivní vztah mezi stranami, ale za normu zvykového práva, pramenící ze skutečné praxe států. Připravená kodifikace — Vídeňská úmluva o právu smluv z r. 1969 — v tomto směru podstatně vyjasní tuto otázku právního základu tohoto institutu, i když aplikace i nadále bude vyžadovat citlivého přístupu k interpretaci.