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DOCTRINE OF REBUS SIC STANTIBUS AND LAW OF INTERNATIONAL TREATY

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Abstract

Rebus Sic Stantibus doctrine becomes a dispute as a result from reckless application of States, started from the period towards 1914, to escape from burdensome treaties, and it continued to the period between the First and the Second World War. Rebus Sic Stantibus principle has been applied by many countries and it has been accepted by the majority of international law experts as part of international law. Even though there was a debate about the doctrine application. The first commentary said by applying negative form would make the fundamental change of circumstances principle. On the other hand, it is not the duty of legislation to define the scope of the fundamental change of circumstances principle, and this duty is granted to law. In the end it depends on the consideration of interested government body in terminating international treaties.

Keywords: *Rebus Sic Stantibus Doctrine, International Treaties, International Law Commission*

I. INTRODUCTION

Generally, treaty will prevail if the circumstances around it are relatively stable and do not go through significant change in accordance with what is promised. The parties of the treaty, in this condition, do not automatically have reasons to get away unilaterally from the agreement. Doctrine of *Rebus Sic Stantibus* provides opportunities for one of the treaty parties to step outside of the treaty unilaterally. The doctrine of *Rebus Sic Stantibus* teaches that if fundamental change of circumstances happens, this matter therefore can be a legal basis to terminate a treaty. If interested parties in a treaty have similar perception that an underlying change has occurred and made it impossible to embody the treaty, consequently both parties can dispose the issue in an amicable manner. If similar perception is not reached because in actuality one of the parties wants to escape from the treaty using *Rebus Sic Stantibus* doctrine, legal dispute will be inevitable.

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If a dispute happens in the milieu of national law, the settlement is enforceable in two ways. First, legislative body may enact legislation or in other form of regulation that formulate fundamental change of circumstances with distinct limitations. Disputing parties may refer to those regulations as a legal basis for dispute settlement. Second, if a dispute cannot be settled, the Judge of the Court will release a binding decision for both disputing parties as a dispute resolution.

In the milieu of international law, the circumstances are different. International community does not have a Central Government or a Legislative Body who may enact regulation that is generally accepted or a Court that requires State as international law actor to abide by the Jurisdiction of the Court. Dispute settlement from a treaty is fully delegated to the State parties of the treaty. Nations dissatisfied with the s*tatus quo* continue to regard it as a welcome device for escaping from burdensome treaties, while others fear it as a threat to stability and to their interests.[1]

The problem resulting from the right of State to cease or restrict its obligation in a treaty caused by a fundamental change of circumstances is an old and the most difficult issue to be solved by the law of international treaty.[2] Before Vienna Convention on International Treaty 1969 is in force, international law can merely provide a vague and unsatisfactory answer in regards to the restriction of fundamental change of circumstances.[3] International law authors have attempted to refer to national positive law to provide legal basis for the notion of fundamental change of circumstances, and it is said that as a general rule of positive law that all established international contracts also contain implicit requirements in addition to explicit requirements set out in a treaty, and both of those requirements are inseparable part of a treaty. According

[1] Oliver J. Lissitzyn, Treaties and Change Circumstances (Rebus Sic Stantibus) The American Journal of International Law AJIL, Vol. 61, 1967, p. 895.

[2] Charles G. Fenwick, International Law, Third Edition, New York, 1948, p. 453-454: "The most difficult problem presented by international treaties, and the one in respect to which the fundamental principle of the faith of treaties has been put to its crucial test, as the question whether a state as release from its treaties obligation by reasons of an essential change of the circumstance under which is concluded on this point international law gives but a vague and unsatisfactory answer.

[3] *Ibid.*

to Roman law, each contract or treaty leads to the addition of *Rebus Sic Stantibus* provision.[4]

A firm scope will be harder to obtain, if the problem is ceded to the international law experts' opinions that vary in defining the meaning of *Rebus Sic Stantibus* or ceded to the State parties to the treaty because the divergence of interest will put restriction to *Rebus Sic Stantibus* in correspondence with their own interest. This condition may only be amended through International Legislative body that stands on the interest of States as members of international community. The efforts to unite all the perceptions on the definition of *Rebus Sic Stantibus* had been carried out by the International Law Commission in 1966, which had successfully formulated The Draft Articles on the Law of Treaties which contains several provisions relevant to the issue of *Rebus Sic Stantibus*, and article 59 explicitly seeks to delimit the scope of fundamental change of circumstances.[5]

The International Law Commission was established by the UN General Assembly in 1947 with a total of 15 members who are experts in international law, and appointed on the basis of expertise in international law, and should not be the representative of their own country. Several times, the General Assembly has added the number of members in the International Law Commission. The duty of the Commission is to make codification or to foster the advancement of international law. Work of the International Law Commission, which is the prolongation body of the UN General Assembly, is expected to have a great bearing to either the doctrine of *Rebus Sic Stantibus* or the implementation of the doctrine.

II. DOCTRINE OF REBUS SIC STANTIBUS

As discussed previously, a treaty that implicitly includes provision of *Rebus Sic Stantibus* doctrine will imperil security or continuity of the treaty. This *Rebus Sic Stantibus* doctrine becomes a dispute as a result from reckless application of States, started from the period towards 1914, to escape from burdensome treaties, and it continued to the

[4] *Ibid.*

[5] Oliver Y. Lissitzyn, *Op. Cit.,* p. 895.

period between the First and the Second World War. The examples on the application of *Rebus Sic Stantibus* doctrine are:

"The decision of the China Government to terminate its so called" unequal "treaties with sovereign Powers – there are said to be some sixteen of them is defended, in the main, or a right, resulting from the rules of Rebus Sic Stantibus, what it's often said is tacitly annexed to every covenant". Referring specifically, to the notification by the government of China to Belgium on October 27, 1926, of the intentions of the former government to terminate its treaty of November 2, 1865, with Belgium, a Chinese scholar says: "China abrogates the treaty on the recognized principle of Rebus Sic Stantibus, that is, the tacit condition recognized by International law as attending to all treaties that they shall cease to be obligation so far as the state of facts upon which they were founded has substantially changed".[6]

Rebus Sic Stantibus principle has been applied by Austria – Hungary in 1908 as a justification for annexation of Bosnia and Herzegovina based on the Treaty of Berlin 1878 and the Convention of Constantinople which granted rights to Austria – Hungary to occupy or run the government. Also on the basis of this principle, Switzerland laid claim to plea for the 1909 treaty with Germany and Italy in regards to the rail road of Saint Gothard and in respect of this, Germany had granted its approval. The application of *Rebus Sic Stantibus* principle by States in the European region continued after the First World War ended.[7]

The application of the *Rebus Sic Stantibus* doctrine came to an end in April 1924. Russian government, at that time, was at the opinion of that the treaty between Russia and other European powers, despite it needed to be ceased to be current, were not automatically expired although since the signing of the treaty there was a variance in international situation and affected the continuity of the validity of the treaty. Before judgment was taken to terminate the treaty, the validity of those treaties had to be seen, in the first instance, from the *Rebus Sic Stantibus* point of view. The rapidly ongoing change of circumstances in international community may induce the possibility of demand from interested

[6] J.W. Garner, The Doctrine of Rebus Sic Stantibus and the Termination of Treaties, *The American Journal of International Law Vol* 61 (1967), p. 509.
[7] *Ibid*., p. 509-510.

party to amend provision laid down in a treaty, even to terminate the validity of a treaty which is attributed to the conditions in the treaty that have prevailed for long are no longer suitable for the current condition, therefore such treaty is no longer operational.[8]

The drafters of the League of Nations Convention had anticipated the possibility of any fundamental change in the world that have bearing to the condition in the treaty. Article 19 of the League of Nations Convention stipulated that the members of the League of Nations were given the authority to investigate and assessed international treaties that are still valid, with due observance of international situation that may imperil international peace. However, this General Assembly authority merely presented suggestion but did not have the authority to amend provision of the treaty unilaterally. During the life of the League of Nations, there was no recommendation from the General Assembly that was accepted by interested States. For instance, in 1921, Bolivia laid claim to the League of Nations to amend the treaty provision with Chile that was concluded in 1904. According to Bolivia, 1904 treaty by Chile was forced unilaterally to be valid for Bolivia. Suggestion from the General Assembly to amend the provision in order that Bolivia could get access to traverse the Chilean region to the high seas was rejected by Chile.[9]

Regarding the status of *Rebus Sic Stantibus* in international law, there are no common grounds among the international law experts. Most of them consider that despite there is no concession, at least *Rebus Sic Stantibus* as a principle has been acknowledged as a general rule of international law and as a government policy of a State. All of them agree that the main principle of international treaty is *Pacta Sunt Servanda*, a treaty is binding for the parties of the treaty. On the other hand, the presence of a condition, where one of the parties may get away unilaterally from the treaty without being deemed as a violation of law, should be contemplated. The international law experts acknowledge that there has to be a special situation where parties, at least possessing a moral right if it cannot be said as right according to law, may ask for an amendment for a treaty provision, or perhaps supersede a treaty

[8] *Ibid*.
[9] *Ibid.*, p. 513.

with a completely new treaty, or termination of a treaty, on the ground of considerations that are in conformity with equity and justice. Hereinafter, it must be laid out what circumstances that gives the authority to unilaterally amend, supersede or terminate a treaty; in fact it is not easy to resolve firmly. To render the condition that pinpoint the occurrence of a change of circumstances, international law authors use a variety of terms that are not even.[10]

”Writers on International Law are accustomed to say that if there has been a ”total”, ”vital”, ”essential”, or ”substantial” change of circumstances since the treaty was entered into, the dissatisfied party may demand to be released from further performance of its obligations”.[11]

There is an international law expert who interprets the *Rebus Sic Stantibus* principle as follows:

> *”All cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at unreasonable sacrificed”.*[12]

In reality, all the reasons or interpretations to the *Rebus Sic Stantibus* principle are none other than providing a chance for the party who are dissatisfied with the validity of the treaty to be able to revise, supersede, or terminate the treaty.

To avoid any dispute, the party who intends to amend the condition laid down in the treaty, therefore, should approach and give explanation to the other party regarding the importance of amending or superseding the treaty, or terminating the treaty, and ask for consideration from the other party to get an approval. If it succeeds, the dispute in related to the treaty which may imperil the world peace can be avoided. If the positions of the parties in the treaty are more or less equal, perceived from the economic power, military or politics, thus the possibility to settle the dispute in a peaceful settlement is higher.

It will be a different case in a treaty between two unequal powers where the stronger party will compel its will in the treaty to the weaker party; therefore it will give rise to an unequal treaty. During the con-

[10] J.W. Garner, *Op.Cit*., p. 511.
[11] *Ibid*.
[12] *Ibid*., p. 512.

tinuance of the treaty, the weaker party will always feel inflicted on the obligation while the stronger party gains profit. In this case, the one who gives rise to the loss of the weaker party is an incriminating condition from the treaty itself. If there is a fundamental change of circumstances, perhaps the burden of obligation that has to be borne by the weaker party will be far greater. Therefore, the weaker party may ask to terminate the treaty on the ground of this additional burden which is impossible to be fulfilled. Resistance by the stronger party for this request means a violation to the equal position and sovereignty principle between States.

The development of interstates relation in the 20th century has made a good progress, because there has been a condition where States' power is restricted to compel its will with force as an implementation of its foreign politics. Before 1914, States' freedom to act unilaterally was yet restricted. Each State must be aware that other State perhaps finds a reason to settle the dispute with force as in military confrontation, therefore weaker party would be more inflicted on fulfilling all the provisions in the treaty according to the stronger party's demand. Stronger party could also demand amendment of the treaty provision with force. Using those two means, which may lead to war, amendment of treaty can be realized for the benefit of the stronger party.

To impair the tendency of the stronger party to compel its will, *Rebus Sic Stantibus* principle must be related to the claim to obtain justice and legal certainty. Legal certainty is the main value in every legal system, and it is able to deter any violation of law. The relation among legal actors needs a behavior that can be trusted in the scope of the validity of law. The stability of a treaty has to be established by the treaty actors. On the other hand, sometimes in special circumstances, an amendment needs to be conducted. In this case, prior approval from the parties is needed in order to uphold the value of fairness.

In the constraint of treaty, provision of *Pacta Sunt Servanda* is a manifestation of the idea that the tie resulting from a treaty cannot be terminated, while the idea of *Rebus Sic Stantibus* is a violation of the tie resulting from a treaty and it provides opportunity for change towards the obligation required in the treaty. International law as a simple law order highly relies on the treaty as a tie of association from international

community that has no central government. Therefore it can be understand that simple law order tends to consider binding power of a treaty as an absolute matter.[13]

The basic idea of *Rebus Sic Stantibus* is that treaty is a free will of the treaty parties, and not related to legal system where there are higher legal norms that prevail for the treaty, although it is not explicitly mentioned as a provision in a treaty. In the national positive legal system, the effectiveness of the wills of the parties is restricted with a subjective element such as a treaty has to be conducted in good faith, no infringement of public orders. Element of justice and feasibility must be noticed in the implementation of a treaty. Generally accepted legal norms in a higher position which also prevail for the implementation of each treaty only occurs in advance legal systems.

In the simple law order, other than relying on the binding power of treaty, a value out of the wills of the parties in order that the treaty will remain effective, as in considering that treaty has a "sacred value". Therefore all the difference of opinion in regards to the treaty is settled through argumentation, not compelled with force anymore. In the preamble of the League of Nations Convention, it is mentioned about "a scrupulous respect for all treaty objections" as a means "to promote international cooperation and to achieve international peace and security". As a comparison between the UN Charter and the League of Nations Convention, United Nations has a different opinion. The UN Charter does not deem a treaty as a sacred matter, in the preamble of the charter it is stated that the members of the United Nations are determined "to establish conditions under which justice and respect for the obligation arising from treaties and other sources of international law can be maintained".

Society is aware that the feeling of respect for a treaty can only be achieved with several requirements. One of them is that a treaty cannot fulfill its obligation if the burden of obligation is too burdensome; normally, that obligation is impossible to be fulfilled. Treaty will lose respect if demand from the stronger party exceeds the reasonable basis, retaining the validity of the treaty is not in conformity with justice. If in

[13] Prof. Mr. B.V.A. Rőling, De Clausula "Rebus Sic Stantibus" in het Volkenrecht, Rechtsgeleerde Magazijn, Themis, Tjeenk Willink Zwolle 1973-5/2, p. 580-581.

the reality the reasonable basis is retained, therefore in actuality there is no need to polarize between *Pacta Sunt Servanda* and *Rebus Sic Stantibus* because they both complete each other.

Treaty is binding as long as the circumstances do not change. If there is a change of circumstances, there should be a possibility to terminate the treaty. Article 19 of the League of Nations Convention is not explicitly reiterated in the UN Charter. However, it does not mean that the United Nations cannot intervene. The General Assembly or Security Council is given its own role to participate in the settlement of dispute about treaty, including dispute about change of circumstances.

Not all international law experts doubt the position of the *Rebus Sic Stantibus* doctrine in international law. H. Lauterpacht said that *Rebus Sic Stantibus* is a legal principle and not merely a positive moral rule. He argued that:

> *"The application of the Doctrin Rebus Sic Stantibus in its jurisdiction aspect is essentially is a legal matters. The circumstances that it involves, the consideration of facts does not of course, deprive of its characters."*[14]

Article 36 of the Charter of the Permanent Court of International Justice stated that the Court has the power to investigate and decide, "any question of International Law," and it does not mean that the Court is not authorized to investigate every time a fact that may trigger an international dispute occurs. The problem for the Court is that whether the Doctrine of *Rebus Sic Stantibus* can be applied in that fact. For the Court, there is no proper reason to interpret "any question of international law" theoretically, for instance, whether the Doctrine of *Rebus Sic Stantibus* is part of International Law.[15]

The next chapter will discuss the territorial dispute in the Upper Savoy and the District of GEX between France and Switzerland where the legal consideration implicates the possibility to apply the Doctrine of *Rebus Sic Stantibus.*[16]

[14] H. Lauterpacht, The Function of Law in the International Community, Oxford at the Clarendon Press, p. 280.
[15] *Ibid*, p. 280-281.
[16] L.C. Green, International Law through the Cases, Frederich A. Prager, New York, 1959, p. 764-777.

III. THE CASE OF "THE FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX"

France and Switzerland agreed to file territorial dispute in the Free Zones of Upper Savoy and the District of GEX between both countries to the Permanent Court of International Justice which is accommodated in "The France-Swiss Special Agreement of 30 October 1924" which was ratified by the French Parliament in 1928. This case was later presented to the Permanent Court on 19 August 1926 and the final judgment from the Court was given on 6 December 1930.

This dispute occurred after the Second World War ended which was marked by the signing of the Treaty of Versailles between the Allies and Germany on 28 June 1919, imposed unilaterally to the Government of Germany.

Towards the effectuation of the Special Agreement, on 5 to 18 May 1919, there was an exchange of diplomatic notes between Switzerland and France which enclosed article 435 of the Treaty of Versailles. In its diplomatic note, French unilaterally stated that because there was a change of circumstances, marked by the end of the First World War, therefore the treaty which was concluded in 1815 which established the Neutral Zone of Upper Savoy and the Duty-Free Zone in the District of GEX were no longer consistent to the current condition, and the impact has wiped the status of Neutral Zone while the Duty-Free Zone to be settled through negotiation. On the other hand, the role of the Permanent Court, in addition to assess the validity of unilateral act of France according to international law, was also loaded with the issue of ratification of Special Agreement according to the Swiss Constitution, referendum is needed following the ratification by the Swiss Parliament. The outcome of the referendum from the Swiss people rejected the possibility of the change of juridical position of Free Zones, and did not accept the unilateral act by France.[17]

The initial juridical issue that had to be answered by the Court was whether article 435 paragraph 2 had revoked or included provision to may revoke the regime of Free Zone that had been long established,

[17] DR. J.H.W. Verzyl, The Jurisprudence of the World Court, A case by case commentary Volume I, The Permanent Court of International Justice (1922-1940) A.W. Sijthoff-Leyden, 1965, p. 228-229.

and determined a proper timeline for both parties to settle the issue in a peaceful manner. The Court judgment regarding this issue was later communicated to the interested parties. Apparently, outside the Court, the disputing parties also conducted a series of negotiations to settle the difference of opinion in the Free Zone. The outcome of the negotiation as a consideration was presented to the Court. In this instance, the Court explicitly overruled the outcome of the negotiation and did not give approval of discreet negotiations, with the consideration pursuant to the spirit or provision of the Charter of the Permanent Court, referring to article 54 paragraph 3 (The deliberations of the court shall take place in private and remain secret) and article 58 (The Judgment ….. shall be read in open court, due notice having been given to the agents), in conclusion, the Court could not disregard the provision of the Charter despite there was a joint proposal from the disputing parties. The firm gesture of the Court is no doubt that in days to come States would not be courageous to ask for confirmation from the Court in regards to a judgment resulting from a private negotiation outside the Court.[18]

On the other hand, the Court was under an obligation to set a timeline for both States to settle their dispute. However, the determination of the timeline had no use if in the same time it did not provide legal opinion with respect to the issue filed by the disputing parties. Eight out of twelve Judges of the Permanent Court who sit on the Council of Judges when the judgment was issued on 19 August 1929 (Anzilloti, Loder, De Bustamente, Altamira, Oda, Huber, Hughes and Wang) agreed on the definition of article 435 paragraph 2: based on their opinion, this article did not terminate the legal relation between France and Switzerland and did not exempt any obligation to Switzerland to receive nullification of the Free Zone as a basis to establish a new treaty with France. The legal opinion of the Judges concluded that unilateral act by France in 1923 was in conflict with law.[19]

In taking a decision, the Court avoided to examine the doctrine of *Rebus Sic Stantibus*, a controversial issue, as a theoretical foundation of the judgment. In regards to the issue of whether article 435 had terminated the existence of Neutral Zone and Free Zone was settled by

[18] *Ibid*, p. 230.
[19] *Ibid*.

interpreting the treaty and the commentary of the juridical impact for both parties.

The Court considerations were as follows: both paragraph 1 and paragraph 2 of article 435 stated that old agreement which was accommodated in the 1815 treaty is "no longer consistent with the current condition". Article 435 paragraph 1 stipulates about termination of Neutral Zone, and this termination had been settled through an agreement between France and Switzerland. On the other hand, article 435 paragraph 2 which regulates about Free Zone still needs to be discussed through negotiations between both States. Both States agreed that either paragraph 1 or paragraph 2 do not automatically terminate the treaty, except if the treaty provision implicitly contains *Rebus Sic Stantibus* principle. The Court considered that article 435 could not be enforced for Switzerland, except if Switzerland had agreed of this article. Note of the Federal Council of Switzerland dated on 5 May 1919 explicitly stated that they did not agree with the termination of Free Zone system as desired by France.[20]

Four of the Court Judges presented dissenting opinions with regards to the application of the *Rebus Sic Stantibus* doctrine. The gist of the dissenting opinions from for minority Judges (Nyholm, Negulesco, Dreyfus, and Pessôa) is as follows:

> *"The gist of their they statement is the reference to the doctrine rebus sic stantibus, with which indeed deploy against the majority the strongest argument available to them under the circumstances. According to them, Article 435 evidently implies an application of the notorious principle that an international treaty remains in force no longer than the conditions in which, and with a view to which, it was originally concluded, continue to exist. The legal operation of that principle, however, is different for the zone of Gex and the Sardinian zone. Proceeding on their thesis that Switzerland has no indipendent rights with regard to the former zone, they state that the Powers of 1815 were fully entitled to put an end to the existence of that zone without the consent of Switzerland, because of the changed conditions."*[21]

[20] *Ibid*., p. 235.
[21] *Ibid*., p. 238.

On the other hand, it is regretted that the doctrine of *Rebus Sic Stantibus* by the four Judges with dissenting opinion was not discussed and the limits of the validity of a fundamental change of circumstances were not formulated.

To sum up, it can be said that there is no uniformity in the definition of the *Rebus Sic Stantibus* doctrine during the period before the First World War until the issuance of Permanent Court judgment in 1930 concerning the case of "the Free Zones of Upper Savoy and the District of GEX". In States practice towards the occurrence of the First World War in 1914, States unilaterally terminated a treaty using *Rebus Sic Stantibus* doctrine in order for escaping from burdensome treaties. During that time, *Rebus Sic Stantibus* doctrine was an implicit provision contained in the treaty. Practice of unilateral termination of a treaty was clearly ruining international law order. On the other hand, control for termination of treaty must be arranged and let the third party in, such as International Court, to provide legal certainty. However, Permanent Court in the previously discussed case precisely avoided the application of *Rebus Sic Stantibus* and settled the dispute through treaty interpretation as a basis for the Court judgment, without presenting any commentary on the validity of *Rebus Sic Stantibus* doctrine in international law.

Prof. J.L. Brierly referred to the Permanent Court judgment regarding the Free Zones and stated that:

> *In short, the clausula is a rule of construction which secures that a reasonable effect shall be given to the treaty rather than the unreasonable one which would result from a literal adherence to its expressed terms only. On this view the similarity between the doctrine of rebus sic stantibus and that of the 'implied term' in the English law of the frustation of contract is very close. Neither a treaty in international nor a contract in English law is dissolved merely by a change of circumstances; they are only dissolved if a term can fairly be read into them providing that in the event which has happened they are to be dissolved. Both doctrines attempt not to defeat but to fulfil the intention, or as the English cases call it the 'presumed intention', of the parties.*[22]

[22] J.L. Brierly, The Law of Nation, Sixth Edition, Oxford at the Clarendon Press, 1963, p. 336 – 337.

Prof. Brierly also stated that:

> *"As defined by the Permanent Court the doctrine of RebusSsic Stantibus is clearly a reasonable doctrine which it is right that international law should recognize. But as so defined it is a doctrine of limited scope which has little to do with the problem of obsolete or oppressive treaties, for which it is too often supposed to be the solution."*[23]

The issue of "oppressive" or "obsolete treaties obligation", both of them are important in international relation, however the more harming issue for the international relation order is oppressive treaties, particularly in regards to the boundary issue between states. Dispute settlement regarding States boundary is more to international relation than international law. Boundary treaties in international law are categorized as political treaties, and the dispute settlement is settled in a political manner, not by law.[24]

Prof. Philip C. Jessup also stated that the application of *Rebus Sic Stantibus* doctrine in political treaties will harm the harmony of power between States.

> *"For political treaties and for the invocation of political changes in the balance of power, the doctrine is pernicious. In such situations it would amount to the preposition that no peace treaty accepted by a defeated state remains valid after that state recovers sufficiently or the victors weaken sufficiently to make it politically possible for the defeated state to throw off the burden without danger of another defeat. No more unsettling legal principle could be imagined; but it would in fact, if accepted, reflect what has frequently occurred. For this very reason the doctrine Rebus Sic Stantibus has been discredited."*[25]

General opinions that are quite many from international law experts, all of them accept unilaterally termination of a treaty, the issue of fundamental change of circumstances must be approved by the interested

[23] *Ibid*., p. 338
[24] *Ibid*., p. 339
[25] Philip C. Jessup, A Modern Law of Nations, An Introduction, The Matmullar Company New York 1958, p. 150 – 151.

parties to the treaty. If one party does not agree that there has been a fundamental change, the treaty therefore will remain in force throughout the period set out in the treaty.[26]

IV. INTERNATIONAL LAW COMMISSION

International Law Commission (Commission) in carrying out its duties to make a codification of the law of international treaty realizes that *Rebus Sic Stantibus* doctrine, after the Second World War ended, has been accepted by the majority of international law experts as part of international law. However, international law experts also suggest that the application of *Rebus Sic Stantibus* doctrine is carried out with a strong caveat and the scope of its validity to be restricted, considering that international law does not have a compelling jurisdiction.

In the continuity of the validity of international law, change of circumstances often occurs and is easily stated that there has been a fundamental change of circumstances. In reality it does not cause the treaty to cease to be current. This change of circumstances is often used as a reason for escaping from burdensome treaties.

Several theories were presented to meet the juridical basis of *Rebus Sic Stantibus* doctrine, and three theories were chosen to be considered by the Commission, namely:

1. Under the theory the parties are presumed to have had in mind the continuance of certain circumstances of as the basis of their agreement and to have intended the treaty to be subject to an implied condition by which it is an essential change in those circumstances
2. Under the second theory, international law is considered to impose upon the parties to a treaty an objective rule of law prescribing that an essential change of circumstances entitles any of the parties to require the termination of the treaty.
3. Under the third theory, which is a mixture of the first two, the doctrine is considered to be an objective rule of law the operation of which is to import into the treaty, regardless of the intention of the

[26] Mr. J.P.A. Francois, Grondlijnen van Het Volkenrecht, Derde Druk, Zwolle 1967, p. 329.

parties, an implied condition that it will come to an end if there is an essential change of circumstances.[27]

The distinction that determines between the second and third theory is that legal provision will prevail by inserting implicit requirements to the treaty, therefore if there is a fundamental change, treaty will terminate automatically. Whereas according to the second theory, it merely grants rights to the parties to the treaty to terminate the treaty. However, if the termination of the treaty is not allowed to be carried out unilaterally if there is a fundamental change of circumstances, thus the distinction between both theories is not that different. The conclusion is that the third theory is not a supplementing of the second theory.

The Commission, therefore, rejected the third theory and took the second theory as a legal basis of *Rebus Sic Stantibus* doctrine, is objective law provision than an assumption of the augment of implicit requirement in the treaty. If fundamental change occurs and radically influences the treaty, the parties therefore may terminate the treaty according to the doctrine as an objective law provision based on equity and justice.

The Commission filed a proposal regarding the draft article for the amendment of fundamental change of circumstances to the General Assembly of the United Nations which is contained in the draft article 44 of 1963 and article 59 of 1966. The Commission was no longer using the term "*Rebus Sic Stantibus*" as the title of the draft article, because it is closely related to implicit provision of a treaty, and was superseded with the term "Fundamental Change of Circumstances" as the title of the draft article.

Article 59 Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occured with regard to those existing at the time of the conclusion of treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or with drawing from the treaty unless;
   a. The existence of the circumstances constituted an essential basis

[27] Yearbook of the International Commissions 1963 Volume II, p. 82-88.

of the consent of the parties to be bound by the treaty; and
   b. the effect of the change in radically to transform the scope of obligation still to be performed under the treaty;
2. A fundamental change of circumstances may not be invoked:
   a. as a ground for terminating or withdrawing from a treaty establishing a boundary;
   b. if the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty

The Commission gave commentary to the above draft article that the *Rebus Sic Stantibus* principle in States practice is rarely used, either directly by applying the *Rebus Sic Stantibus* principle (eo nomine) or by referring to the general law principle as a legal basis to terminate the treaty or to amend requirements or obligations cause by a fundamental change. Thorough examination on States practice at the time being is not able to be included in the Commission report. However there is a vast acceptance that fundamental change principle can be used as a justification to terminate or amend the substance of the treaty. On the other hand, there is a strong opinion that unilateral termination cannot be justified by alibi fundamental change of circumstances.[28]

The Commission does not recognize the view that *Rebus Sic Stantibus* doctrine can only be applied in perpetual treaties, and there are implicit requirements in perpetual treaties that if there is a fundamental change of circumstances, treaty will automatically come to an end. Long term treaties such as for ten, twenty one, or ninety years, including that change of circumstances will occur in this kind of treaty that radically influences the substance of the treaty. The great change of circumstances in this century may occur in ten or twenty years. According to the opinion by the Commission, if equity and justice principle are applied, essentially, there is no distinction between perpetual treaties and long term treaties. Moreover many modern international law authors consider that it is incorrect that *Rebus Sic Stantibus* doctrine can only be applied strictly to perpetual treaties, *Rebus Sic Stantibus*

[28] Yearbook of the International Commissions 1966 Vol II (Yearbook ILC 1966 II), p. 257.

doctrine is regarded as an objective rule of law, and therefore there is no more distinction between perpetual and limited treaties. For a brief term treaty, the application of the doctrine is clearly without any utility because termination of a treaty may be regulated upon notice by the interested parties.[29] However there is a comment from the international law perspective,

> *"Strictly speaking, there is no requirement in all cases that non performance be preceeded or accompanied by a formal notice to the other parties, although concern for order lines, prudence and courtesy made the giving of such notice generally desirable."*[30]

Between the draft article 59 and article 62 of Vienna Convention 1969 as the official article, there are only a few differences. The word "scope" in the article 59 paragraph (b) becomes "extent" in the article 62 paragraph (b). Objection towards the word "scope" in article 59 paragraph 1(b) is stated by an international law expert as follows:

> *"Particularly puzzling in the term 'scope'. The limitation would exclude most of the change invoke in the past or likely to be invoked in the future, unless the world scope is given the unatural meaning of 'burden'. This limitation is clearly not supported by logic of giving effect to the intention and expectation of the parties and has little support in practice".*[31]

The sentence in article 59 paragraph 2(a) is amended by article 62 paragraph 2(a), becomes: if the treaty establishes a boundary; or according to Commission,

> *"The expression 'treaty establishing a boundary' was a substituted for a 'treaty fixing a boundary' by the Commission in response to comments of Government, as being a broaden expression which would embrace treaties of cession as well as delimitation of treaties".*[32]

Article 62 of Vienna Convention adds one more paragraph which is paragraph 3:

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[29] Yearbook I.L.C. 1963 (II), p. 83-84.
[30] Oliver J.Lissitzyn, *Op. Cit*., p. 911.
[31] Oliver J.Lissitzyn, *Op. Cit*., p. 917.
[32] Yearbook I.L.C. 1966 (II), p. 259.

"If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstance as a ground for terminating it may also invoke the change as a ground for suspending the operations of a treaty"[33]

The augment of paragraph 3 came from a proposal by the delegation of Canada and Finland during the Vienna Conference which stated that if one of the party may terminate the treaty with regards to a fundamental change of circumstances, therefore party to the treaty may also propose based on that change to defer the effectuation of a treaty.[34]

In order that the principle contained in the article 62 paragraph 1 of the Vienna Convention 1969 can be applied in practice, it needs several requirements as follows:

1. The change must be of circumstances which existed at the time the treaty was concluded;
2. The change must be a fundamental one;
3. The change must be also be one not foreseen by the parties by the time of the conclusion of the treaty;
4. The existence of those circumstances must have constitution an essential based of the consent of the parties to be bound by the treaty; and
5. The effect of the change must be radically transform the scope of obligations still to be performed under the treaty.[35]

It should be emphasized that a claim to terminate a treaty based on fundamental change of circumstances should meet those five requirements invariably. Regulation in negative form will reject a claim that only meets half of those requirements. The Commission presented a final comment after completing its role regarding the formulation of article 59 of the Draft Article (which later became Article 62 of the Vienna Convention 1969) as follows:

[33] T.O. Elias, The Modern Law of Treaties, A.W. Sijthoff – Leiden 1994, p. 127.
[34] *Ibid*.
[35] T.O. Elias, *Op. Cit*., p. 125, Yearbook ILC 1966 (II), p. 259.

"It did not think that a principle valid in itself could or should be rejected because of a risk that a state acting in bad faith might seek to abuse the principle. The proper function of codification, it believed, was to minimize those risks by strictly defined and circumscribing the conditions under which recourse may be had to the principle; and has sought to do in the present article."[36]

V. CONCLUSION

Hitherto there is yet a conclusion that the fundamental change of circumstances principle as set out in the article 62 paragraph 1 of Vienna Convention can impair an abuse by applying negative form, because there is yet a dispute concerning the issue of fundamental change of circumstances in international forum. Notwithstanding the fact that the fundamental change of circumstances principle is yet discussed in a case and International Court has yet taken a stand, it needs to be cognized by the interested parties and to be taught in university. Not all States ratify Vienna Convention 1969, including Indonesia. However in the Indonesian Law No. 24 of 2000 (*Undang-undang Republik Indonesia Nomor 24 Tahun 2000*), dated on 23 October 2000, on International Treaties, in Chapter VI, about Termination of International Treaties in article 18 paragraph c, it is stated that termination of a treaty may occur when there is a fundamental change that influences the treaty execution. In the commentary of article 18, it is mentioned that an international treaty may cease when one of the points in this article has occurred. It is not the duty of legislation to define the scope of the fundamental change of circumstances principle, and this duty is granted to law. This writing is expected to be useful for the consideration of interested government body in terminating international treaties.

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