



KFG Working Paper Series • No. 32 • May 2019

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Julian Kulaga

**A Renaissance of the Doctrine of *Rebus Sic Stantibus*?**

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

## KFG Working Paper Series

Edited by Heike Krieger, Georg Nolte and Andreas Zimmermann

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Kulaga, Julian, A Renaissance of the Doctrine of *Rebus Sic Stantibus*?, KFG Working Paper Series, No. 32, Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?”, Berlin, May 2019.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

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**DFG** Deutsche  
Forschungsgemeinschaft

Online available at <https://doi.org/10.25932/publishup-43578>

## A Renaissance of the Doctrine of *Rebus Sic Stantibus*?

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### **Abstract:**

*Once the “popular plaything of Realpolitiker” the doctrine of rebus sic stantibus post the 1969 VCLT is often described as an objective rule by which, on grounds of equity and justice, a fundamental change of circumstances may be invoked as a ground for termination. Yet recent practice from States such as Ecuador, Russia, Denmark and the United Kingdom suggests that it is returning with a new livery. They point to an understanding based on vital States’ interests—a view popular among scholars such as Erich Kaufmann at the beginning of the last century.*

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## 1. Introduction

‘Circumstances alter cases’. Use of this famous proverb can be traced back as far as the 17<sup>th</sup> century writings of the English literary critic and historian Thomas Rymer.<sup>2</sup> Behind it lies the idea that what ought to be done in a given case may at times depend on the surrounding circumstances. Accordingly, when circumstances change a reassessment of the pursued approach, may be justified. It is an idea that has also found expression in international law. Article 62 of the Vienna Convention on the Law of Treaties (VCLT)<sup>3</sup>, which is considered to represent in many respects customary international law,<sup>4</sup> codifies a doctrine that allows for the termination or suspension of treaties on grounds of a fundamental change of circumstances: the doctrine of *rebus sic stantibus*. When drafting what would later become Article 62 VCLT, the International Law Commission (ILC) intended the doctrine of *rebus sic stantibus* to be “an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty.”<sup>5</sup> A change of circumstances pursuant to Article 62 VCLT must be (1) of circumstances existing at the time of the conclusion of the treaty, (2) fundamental, (3) not foreseen by the parties, (4) the existence of the circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty and (5) the effect of the change must be to radically transform the scope of obligations still to be performed under the treaty.<sup>6</sup>

In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice (ICJ) construed the doctrine in narrow terms. The negative and conditional wording of Article 62 VCLT was said to be a clear indication that the stability of treaty relations required that the plea of fundamental change of circumstances be applied only in exceptional cases.<sup>7</sup> This has led a commentator to profess that “it appears that the ICJ will treat the plea of fundamental change of circumstances in the most restrictive manner, according absolute priority to the stability of treaties, a principle which appears to trump the invocation of the doctrine of fundamental changes. [...] Until the present, it has remained only a theoretical possibility for treaty terminations.”<sup>8</sup> Others have expressed the view that “[i]n spite of its theoretical importance, [...] the practical relevance is minor”<sup>9</sup> and “its recognition is nonetheless highly limited and the principle thus remains one of

<sup>2</sup> J Speake, *Oxford Dictionary of Proverbs* (6 edn, Oxford University Press 2015) 52; T Rymer, *The Tragedies of the Last Age* (1677) 117 f.

<sup>3</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’).

<sup>4</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Jurisdiction of the Court: Judgment) [1973] ICJ Rep 3, 19 [36]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 38 [46]; 62 [99]; *Racke GmbH and Co v Hauptzollamt Mainz*, CJEU judgment, Case C-162/96 [1998] ECR I-13655 [54].

<sup>5</sup> ILC ‘Draft Articles on the Law of Treaties with commentaries’ (*Yearbook of the International Law Commission* 1966) vol. II, 258 [7].

<sup>6</sup> *Ibid.*, 258 [9].

<sup>7</sup> *Gabčíkovo-Nagymaros Project* (n 4) 65 [104].

<sup>8</sup> M Fitzmaurice, ‘Exceptional Circumstances and Treaty Commitments’ in DB Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 618.

<sup>9</sup> T Giegerich, ‘Article 62 – Fundamental Change of Circumstances’ in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties – A Commentary* (2nd edn, Springer 2018) 1146 f. [7].

restricted application and of implicit applicability”.<sup>10</sup> On that note, the doctrine of *rebus sic stantibus* has been described as “a car that has never left the garage”.<sup>11</sup>

Despite its alleged limited relevance in practice, the so-called ‘Brexit’, the withdrawal of the (UK) from the European Union (EU) and the European Atomic Energy Community, represents a case in point where circumstances are nevertheless adduced in order to alter legal relationships. For one thing, reference to a change of circumstances has been made in order to impact domestic law. Shortly after the referendum leading to the decision to withdraw, the Scottish First Minister proclaimed that it would constitute “a significant and material change in the circumstances that prevailed in 2014”, if Scotland was being taken out the EU against its will, warranting an afresh consideration of Scottish independence.<sup>12</sup> For another thing, it has been claimed that the change of circumstances resulting from Brexit would have repercussions on the UK’s legal relationships under international law. One example includes the Bilateral Investment Treaties (BITs) concluded between the EU and third States under international law. A working paper published by the World Bank has suggested that third States could consider the original rights and obligations set out in these BITs to be inadequate in the light of the new circumstances resulting from Brexit. Ultimately, they might wish to revise the terms of the treaties linking them to the UK by threatening to terminate the BITs on grounds of a fundamental change of circumstances.<sup>13</sup>

The legally most startling reference to the doctrine of fundamental change of circumstances, however, comes from the Attorney General (A-G), in the context of the envisaged EU withdrawal agreement that has been negotiated pursuant to Article 50 Treaty on the European Union.<sup>14</sup> According to the Protocol on Northern Ireland (Protocol), the withdrawal agreement sets out a backstop solution that is intended to protect the Good Friday Agreement of 10 April 1998. In essence, the backstop solution provides for Northern Ireland to remain in the EU’s single market, requiring the application and compliance with all relevant EU regulations and standards, until a subsequent agreement has been concluded which would ensure the absence of a hard border between the Republic of Ireland and Northern Ireland. Astonishingly, in a legal opinion for the Prime Minister, the A-G brought the possibility of invoking a fundamental change of circumstances as a means for terminating the Protocol up for discussion.<sup>15</sup> During the following debate in Parliament he reiterated this point,<sup>16</sup> adumbrating that “some fundamental political change in

<sup>10</sup> MN Shaw and C Fournet, ‘Article 62 Convention of 1969’ in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) vol 2, 1428 [33].

<sup>11</sup> M Milanovic, ‘Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances’ (EJIL: Talk!, 18 March 2019) <https://www.ejiltalk.org/brexit-the-northern-irish-backstop-and-fundamental-change-of-circumstances/>.

<sup>12</sup> First Minister Nicola Sturgeon’s statement to Parliament on publication of Scotland’s Place in Europe. 20 December 2016, <http://news.gov.scot/speeches-and-briefings/first-ministers-statement-on-scotlands-place-in-europe>.

<sup>13</sup> M Molinuevo, ‘Brexit - Trade Governance and Legal Implications for Third Countries’ (March 2017) World Bank Policy Research Working Paper 8010/2017, 14.

<sup>14</sup> Agreement on the Withdrawal of the United Kingdom Of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (‘Withdrawal Agreement’), 11 March 2019, 2019/C 66 1/01, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785114/11\\_March\\_WA\\_-\\_WEB\\_VERSION.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785114/11_March_WA_-_WEB_VERSION.PDF).

<sup>15</sup> Attorney General, G Cox, ‘Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement’ 12 March 2019, [19] [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785188/190312\\_-\\_Legal\\_Opinion\\_on\\_Joint\\_Instrument\\_and\\_Unilateral\\_Declaration\\_co.\\_\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785188/190312_-_Legal_Opinion_on_Joint_Instrument_and_Unilateral_Declaration_co.___2_.pdf).

<sup>16</sup> HC Deb 12 March 2019, vol 656, col 192-6.

Northern Ireland or some fundamental change of circumstance going to the essential basis of the agreement” could provide for a unilateral right to withdraw from the Protocol.<sup>17</sup> In a reply to a question, the A-G then proclaimed that:

“Let us be clear about these kinds of absolute interpretations of black-letter text. A sovereign state has the right to withdraw if a treaty is no longer compatible with its fundamental interests or, to put it a different way, if fundamental circumstances have changed. I would say that apart from that, of course this country could resile from its commitments, but it would be unwise and it would not be in the tradition of this country to do so.”<sup>18</sup>

Much has been said about the merits of this legal view. Especially the proposition that the UK could retrospectively rely on an unforeseen change of circumstances that has been conceived of from the time when the treaty was concluded has attracted criticism.<sup>19</sup> The doctrine of *rebus sic stantibus* demands that the fundamental change of circumstances has been unforeseen.<sup>20</sup> Even more striking, however, is the proposition that a change of policy in the domestic realm of one of the treaty parties, such as a “fundamental political change in Northern Ireland”, could, in its own rights, constitute a fundamental change of circumstances. Moreover, the way how the A-G identified the doctrine with “fundamental interests”, evokes memories of the so-called vital States’ interest theory on the doctrine of *rebus sic stantibus*, according to which “the changes of circumstances which must be regarded as fundamental or vital are those which imperil the existence or vital development of one of the parties”<sup>21</sup> Taken together, these two utterances suggest an interpretation of the doctrine that appears to understand it not so much as an objective rule of law based on equity and justice, but rather as a rule based on subjectively determined States’ interest.

But before the doctrine of *rebus sic stantibus* has been codified in the VCLT, such a subjective interpretations used to be a reason for concern. From a doctrinal perspective, the invocation of subjectively determined vital interests in connection with the *rebus sic stantibus* doctrine asserts “that the rule *pacta sunt servanda* does not apply to States with the same cogency as it applies to individuals, for the simple reason that they are States, and that their interests cannot be subjected to an obligation existing independent of their own will.”<sup>22</sup> The claim that treaties are only binding as long as they are convenient for the respective State made the doctrine of *rebus sic stantibus* the “popular plaything of *Realpolitiker* from Bismarck to De Gaulle, and beyond” and created the risk of opening a “Pandora’s box” that would compromise the sanctity of treaties.<sup>23</sup> It is for this subjective understanding that “[f]rom Spinoza to modern deniers of

<sup>17</sup> Ibid., col 199.

<sup>18</sup> HC Deb (n 16) col 198.

<sup>19</sup> D Anderson et al., ‘Legal opinion (No. 2) on outcome of negotiations on the EU-UK withdrawal agreement’ (*People’s Vote Campaign*, 16 March 2019) 6–8 [https://assets.nationbuilder.com/in/pages/15508/attachments/original/1552733478/PV\\_Opinion\\_\(No\\_\\_2\)\\_16\\_03\\_19\\_\(final\).pdf?1552733478](https://assets.nationbuilder.com/in/pages/15508/attachments/original/1552733478/PV_Opinion_(No__2)_16_03_19_(final).pdf?1552733478); Milanovic (n 11).

<sup>20</sup> *Gabčíkovo-Nagymaros Project* (n 4) 65 [104].

<sup>21</sup> *Fisheries Jurisdiction* (n 4) 20 [38].

<sup>22</sup> H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933) 278.

<sup>23</sup> J Klabbers, *International Law* (Cambridge University Press 2013) 64.

international law, the doctrine *rebus sic stantibus* has been appealed to not only as a consequence, but also as the very proof of the States' independence of law."<sup>24</sup>

Of course, it should be borne in mind that the A-G made his remarks in a domestic political context and that his oral statements were tailored to an audience that included legal laypersons. It is, therefore, important not to interpret too much into them or to overemphasize the choice of terminology. Still, it is not unlikely that relevant actors will act upon the legal advice. What is more, States seeking to terminate treaties, which are running against their respective interests, may regard the legal opinion as validation of their respective readings of the doctrine. This raises the question whether the A-G was ploughing a lonely furrow or whether also other relevant actors around the world share the view that a change of policy in the domestic realm or vital States' interests can constitute a fundamental change of circumstances. This question will be explored in four parts. The first part aims to offer a contextualization of the vital States' interest theory, as it had been understood before the VCLT was concluded (Part 2). The second part offers an overview of the stance Article 62 VCLT takes in respect to subjectively determined changes of policy in the domestic realm and vital States' interests (Part 3). The last main part will then enquire into recent invocations of the doctrine of *rebus sic stantibus*, with a particular focus on instances where a change of policy in the domestic realm, or where vital States' interests have been adduced (Part 4). The analysis will then be brought to an end by way of a conclusion (Part 5).

## 2. Contextualization of the Vital States' Interest Theory

Even since its earliest days, the doctrine of *rebus sic stantibus* has often been linked to vital States' interests. Hugo Grotius, for example, found the doctrine to be only applicable, if the performance of the treaty obligations led to the ruin of the State:

"Here also this should be added, that, if by any chance a contract should begin to lead not merely to some loss, but to the ruin of the state, so that the contract, if carried to conclusion, would have to be considered as unjust and illegal from the beginning, then it is possible not exactly to revoke it, but rather to declare that it is has no further binding force, as if made under a condition without which it could not have been made justly."<sup>25</sup>

During the end of the 19<sup>th</sup> century and the beginnings of the 20<sup>th</sup> century, academics and practitioners refined this theory. An influential view at that time combined the concept with a theory on fundamental rights of States. These fundamental rights were considered to be the only vital interests allowing for the termination of treaties. As a result, a State could abrogate from a treaty, if compliance with the obligations forced a State to sacrifice its inherent rights to vital development or self-preservation. This theory is usually attributed to the Austrian public international lawyer Georg Jellinek,<sup>26</sup> who described it in terms of a right of necessity in cases where the self-preservation of a State was imperilled.<sup>27</sup> Other renown proponents of this kind of understanding included Erich Kaufmann, who developed his theory in his 1911 dissertation *Das Wesen des Völkerrechts und die clausula rebus sic stantibus*<sup>28</sup>, and Lassa Oppenheim, as can be

<sup>24</sup> Lauterpacht (n 22) 279.

<sup>25</sup> H Grotius, *On the Law of War and Peace* (SC Neff tr, Cambridge University Press 2012) 229.

<sup>26</sup> A Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (Oxford University Press 1985) 15-21.

<sup>27</sup> G Jellinek, *Die Rechtliche Natur der Staatenverträge* (Hölder 1880) 62.

<sup>28</sup> E Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus* (2nd edn, Scientia 1964) 204.



seen in the first three editions of his famous textbook *International Law: A Treatise*.<sup>29</sup> The former Solicitor of the U.S. Department of State,<sup>30</sup> Lester H. Woolsey,<sup>31</sup> and the Chinese scholar Ching-lin Hsia<sup>32</sup> can also be counted among those who linked the doctrine to the vital development of States and the right to existence.<sup>33</sup> Therefore, it does not come as a surprise that in the *Fisheries Jurisdictions* case this understanding was presented as the traditional view:

“The invocation by Iceland of its ‘vital interests’, which were not made the subject of an express reservation to the acceptance of the jurisdictional obligation under the 1961 Exchange of Notes, must be interpreted, in the context of the assertion of changed circumstances, as an indication by Iceland of the reason why it regards as fundamental the changes which in its view have taken place in previously existing fishing techniques. This interpretation would correspond to the traditional view that the changes of circumstances which must be regarded as fundamental or vital are those which imperil the existence or vital development of one of the parties.”<sup>34</sup>

The danger of the vital interests theory becomes apparent, however, when taking Hersch Lauterpacht’s observations into account. In *The Function of Law in the International Community*, he found that “on those rare occasions on which treaties were broken under colour of the doctrine *rebus sic stantibus* it was obvious that no question of self-preservation arose unless, indeed, every change in the constellation of power enabling the State to disregard with impunity an onerous obligation be regarded as a material change of conditions implied in the treaty”.<sup>35</sup> What this statement demonstrates is two-fold. On the one hand, the vital interest theory, although stipulating a limit to the binding force of treaties, had the side effect of constraining the doctrine by formulating a high threshold that had barely been met in practice. As James Brierly pointed out, “an unforeseen change of such magnitude as to imperil the existence of one of the parties is so rare as to be negligible”.<sup>36</sup> But on the other hand, as long as States were not inhibited from determining on a subjective basis whether their vital interests were imperilled, the theory posed the risk of abusive assessments on part of the invoking States.<sup>37</sup> As a consequence, the binding character of international treaties could be negated in the domain of vital interests.<sup>38</sup>

<sup>29</sup> L Oppenheim, *International Law: A Treatise* (3rd edn, Longmans 1920), vol I, 689 f.

<sup>30</sup> The position is nowadays called “Legal Adviser of the Department of State” (Act of Congress of 23 February 1931, P.L. 71-715; 46 Stat. 1214).

<sup>31</sup> LH Woolsey, ‘The Unilateral Termination of Treaties’ (1926) 20(2) *The American Journal of International Law* 346-53, 349 f.

<sup>32</sup> C-l Hsia, ‘Treaty Relations between China and Great Britain’ (1924) 8 *Chinese Social & Political Science Review* 88-112, 107 f.

<sup>33</sup> Cf. also L Olivi, ‘D’un cas controversé de cessation de la force obligatoire des traits internationaux’ (1891) 23 *Revue de Droit International et de Législation Comparée* 590-609, 608; Federal Tribunal (Switzerland), Judgment of 17 February 1882, 8 BGE 44 – *Lucerne v Aargau*, 57 f.; F Despagnet, *Cours de droit international public* (4th edn, L Larose & L Tenina 1910) 708 f.

<sup>34</sup> *Fisheries Jurisdiction* (n 4) 20 [38].

<sup>35</sup> Lauterpacht (n 22) 278 f.

<sup>36</sup> JL Brierly, ‘Some Considerations on the Obsolescence of Treaties’ (1925) 11 *Transactions of the Grotius Society* 11-20, 17.

<sup>37</sup> CR Blaser, *Die clausula rebus sic stantibus im Völkerrecht* (Dike Verlag 2012) 68; JP Bullington, ‘International Treaties and the Clause ‘Rebus Sic Stantibus’ (1927) 76 *University of Pennsylvania Law Review* 153-77, 166; G Haraszti, ‘Treaties and the Fundamental Change of Circumstances’ (1975) 146 *Recueil des Cours Recueil des Cours de l’Académie de Droit International* 1-94, 50 f.

<sup>38</sup> R Kolb, *The Law of Treaties* (Edward Elgar 2017) 227.

Nonetheless, the invocation of subjectively determined vital interests remained a reality. In 1966, for example, France invoked a change of circumstances in order to justify its withdrawal from the North Atlantic Treaty Organization integrated commands.<sup>39</sup> In his letter to the then U.S. President Lyndon B. Johnson from 7 March 1966, Charles de Gaulle explained that “France considers the changes which have taken place or in process of occurring since 1949 in Europe, Asia, and elsewhere, as well as evolution of her own situation and her own forces no longer justify insofar as that concerns her the arrangements of a military nature adopted after the conclusion of the alliance.” Therefore, the French government proposed “to recover the entire exercise of her sovereignty over her territory, presently impaired by the permanent presence of allied military elements or by constant utilization which is made of her air space, to terminate her participation in ‘integrated’ commands and no longer to place her forces at the disposal of NATO.”<sup>40</sup> As a consequence, it announced that it would terminate the five bilateral treaties dealing with the integrated command<sup>41</sup> as they would no longer respond to present conditions.<sup>42</sup>

### 3. The Stance Expressed in the VCLT

#### a) Changes of Policy in the Domestic Realm

Three years earlier, while the ILC was still discussing the doctrine of *rebus sic stantibus*, Special Rapporteur Sir Humphrey Waldock proposed in his second report on the law of treaties to insert a paragraph stipulating that a change in the policies of the State claiming to terminate the treaty, or in its motives or attitude with respect to the treaty, could not constitute a fundamental change in the circumstances.<sup>43</sup> Other members of the ILC, however, “while not dissenting from the view that mere changes of policy on the part of a government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty” and “instanced a treaty of alliance as a possible case where a radical change of political alignment by the government of a country might make it unacceptable, from the point of view of both parties, to continue with the treaty.”<sup>44</sup> As a result, Article 62 VCLT does not contain a paragraph excluding explicitly the invocation of changes of policy.

Nevertheless, the ILC recognised the dangers of abusive attempts to terminate treaties on the basis merely of a change of policy.<sup>45</sup> The example of treaties of alliances, the majority adduced, suggests that in those exceptional cases where a change of policy is considered to be sufficient, the change must be accepted by all parties to the treaty. In addition, the change must not be

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<sup>39</sup> E Stein and D Cabreau, ‘Law and Peaceful Change in a Subsystem: Withdrawal of France from the North Atlantic Treaty Organization’ (1968) 62 *The American Journal of International Law* 577-640, 618.

<sup>40</sup> Letter From President de Gaulle to President Johnson, 7 March 1966, available at: <https://history.state.gov/historicaldocuments/frus1964-68v13/d137> accessed 30 November 2018.

<sup>41</sup> Chateauroux Depot Agreement of 27 February 1951; Air Bases Agreement of 4 October 4 1952; System of Communications Agreement of 8 December 1958; the United States Military Headquarters Agreement of 17 June 1953; Pipeline Agreement of 30 June 1953.

<sup>42</sup> Aide-Mémoire From the French Government to the U.S. Government, 11 March 1966, <https://history.state.gov/historicaldocuments/frus1964-68v13/d142#fn:1.5.6.2.394.38.2>.

<sup>43</sup> Special Rapporteur Sir Humphrey Waldock, ‘Second report on the law of treaties’ (Yearbook of the International Law Commission 1963) vol. II, 80, 84 f. [15].

<sup>44</sup> ILC, ‘Draft Articles on the Law of Treaties with commentaries’ (n 5) 259 [10].

<sup>45</sup> *Ibid.*

caused by the same party invoking the doctrine. A fundamental change of circumstances may not be invoked as a ground for terminating a treaty, if it is the result of a breach by the invoking State of obligations owed to the other party (Article 62 paragraph 2 (b) VCLT). These obligations include the performance of the treaty in good faith (Article 26 VCLT). Moreover, the doctrine of *rebus sic stantibus* cannot be interpreted in a way conflicting with the principle of State continuity and thus, a change of government or even in the system of government, will usually not qualify as a fundamental change of circumstances.<sup>46</sup> In this vein, Australia expressed the view during the negotiations of the Vienna Convention, that if “a change of political attitude made the treaty unacceptable to both parties, they should obviously agree to terminate it”, but “a change in government policy should in no event be invoked as a ground for unilaterally terminating a treaty.”<sup>47</sup>

### **b) Vital States' Interests**

When explaining the rationale behind the doctrine, the ILC acknowledged that as a result of a fundamental change of circumstances, stipulations of a treaty might come to place an undue burden on one of the parties. If international law was not to offer any legal means for terminating that treaty, then this could impose a serious strain on the relations between the States concerned, which might ultimately impel States to take action outside the law.<sup>48</sup> The ‘undue burden’-approach, which can be seen as a less radical version of the vital interest theory, has found expression in the requirement that the effect of the change must be to radically transform the scope of obligations still to be performed under the treaty.<sup>49</sup> But this requirement is not the sufficient criterion. It constitutes just one of the five requirements entailed Article 62 VCLT. The change must also be (1) of circumstances existing at the time of the conclusion of the treaty, (2) fundamental, (3) not foreseen by the parties and (4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty. The reference to the essential basis of the consent of the parties demonstrates that the ILC dismissed any theory that linked the *rebus sic stantibus* doctrine to any general changes quite outside the treaty.<sup>50</sup>

What is more, the ILC decided not to use the term “*rebus sic stantibus*” to avoid any doctrinal implications and instead, referred to it as the doctrine of “fundamental change of circumstances”.<sup>51</sup> The doctrine was supposed to be “an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty”.<sup>52</sup> This view, as it is enshrined now in Article 62 VCLT of 1969 and in the ILC commentaries, seems to represent the dominant view of today.<sup>53</sup>

<sup>46</sup> Shaw and Fournet (n 10) 1429 f.

<sup>47</sup> United Nations Conference on the Law of Treaties, ‘Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ (First Session, Vienna, 26 March-24 May 1968) (10 May 1968) 372 [23].

<sup>48</sup> ILC, ‘Draft Articles on the Law of Treaties with commentaries’ (n 5) 258 [6].

<sup>49</sup> OJ Lissitzyn, ‘Treaties and Changed Circumstances (*Rebus Sic Stantibus*)’ (1967) 61(4) *American Journal of International Law* 895-922, 913.

<sup>50</sup> *Ibid.*, 259 [10].

<sup>51</sup> *Ibid.*, 258 [7].

<sup>52</sup> *Ibid.*

<sup>53</sup> Haraszti (n 37) 47 f.; R Köbler, *Die „clausula rebus sic stantibus“ als allgemeiner Rechtsgrundsatz* (Mohr Siebeck 1991) 165; Kolb (n 38) 227 f.; H Pott, *Clausula rebus sic stantibus* (Peter Lang 1992) 43 f.; *Maritime*

As a result, the doctrine of *rebus sic stantibus* as codified in the VCLT, although taking the effect of the change of circumstances on the treaty parties into account, represents a rejection of the proposition that an imperilment of subjectively determined vital States' interests could by itself constitute a fundamental change of circumstances.

#### 4. Recent State Practice

The end of the Cold War and the consequential reorganisations in many political systems in Europe and other parts of the world redounded to a political climate, which induced a temporary concourse of invocations of fundamental changes. This short-lived phase can be exemplified by Hungary's suspension of two provisions of a treaty concluded with the so-called German Democratic Republic (GDR) in 1989, referring explicitly in its *note verbale* to Article 62 VCLT.<sup>54</sup> Another example includes the GDR's invocation of Article 62 VCLT in respect to a trade agreement with the Philippines. In this instance, the Philippines' accepted the claim that the abolition of the GDR had constituted a fundamental change of circumstances within the contemplation of the doctrine.<sup>55</sup> Some commentators consider the Finish President's promulgation, that the reference to Germany as a possible aggressor contained in the 1948 Treaty of Friendship, Co-operation and Mutual Assistance between Finland and the Soviet Union had become obsolete due to changes of circumstances, such as the relaxation of confrontation in Europe and the unification of Germany, to represent an invocation of Article 62 VCLT as well.<sup>56</sup>

The ICJ's *Gabčíkovo-Nagymaros Project* decision in 1997 put a provisional end to this phase. There the Court held that since the treaty in question provided for a joint investment programme, the prevalent political conditions and the economic system in the former Socialist States which had subsequently emerged into a market economy, were not so closely linked to the object and purpose of the treaty that they constituted an essential basis of the consent of the parties.<sup>57</sup> Thus, the ICJ appears to determine whether the circumstances constitute an essential basis for the conclusion of the treaty by reference to the extent that the respective circumstances are linked to the treaty's object and purpose.

Although not in contradiction as such, the requirement that the circumstances need to be linked to the object and purpose of the treaty and the requirement that their change has to be unforeseen, display a certain tension. On the one hand, there needs to be an objectively manifest connection between the circumstances and the object and purpose of the treaty, demonstrating that the circumstances were essential for the conclusion of the treaty. On the other hand, the connection ought not to be expressed in such way as to make the change of these circumstances foreseeable. This leaves only limited scope for the application of the doctrine.

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*Delimitation in the Area between Greenland and Jan Mayen* (Judgment) [1993] ICJ Rep 38, Separate Opinion by Judge Christopher Weeramantry, 217 [17].

<sup>54</sup> Cf. the references in *Streletz, Kessler and Krenz v. Germany* ECHR 2001-II 409, 419 [17], 449 [101].

<sup>55</sup> 'Opinion No. 196 Series 1990 - Effect of the unification of Germany on the trade agreement between the German Democratic Republic and the Republic of the Philippine' in K Akira, 'State Practice of Asian Countries in the Field of International Law' (1991) 1 *Asian Yearbook of International Law* 159-82, 177 f.

<sup>56</sup> In this way O Dörr, 'Codifying and Developing Meta-Rules: The ILC and the Law of Treaties' (2006) 49 *German Yearbook of International Law* 129-164, 153. For the statement of the Finish president, cf. 'Annex: Documents Relating to Germany's Unification' (1991) 51 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law (HJIL)* 494-528, 527 f.

<sup>57</sup> *Gabčíkovo-Nagymaros Project* (n 4) 64 [104].

Be that as it may, the ICJ's narrow construction of the requirements has not inhibited the assertion of fundamental changes of circumstances altogether. Outside of the judicial context, two interrelated strands of arguments have emerged.

### **a) Changes of Policy in the Domestic Realm**

The first kind of argument that has developed is the proposition that new constitutional arrangement in the domestic legal order could give rise to a fundamental change of circumstances allowing for the termination of treaties under international law.

#### **aa) Poland**

Four years after *Gabčíkovo-Nagymaros Project* decision, in 2001, Poland invoked its new Constitution from 1997 as a fundamental change of circumstances under Article 62 VCLT in respect to seven bilateral treaties on cultural and scientific cooperation<sup>58</sup> concluded with the Union of Soviet Socialist Republics, the Mongolian People's Republic, the Laotian Kampuchean People's Republic and Cuba.<sup>59</sup> According to the Polish Foreign Minister, Cambodia and Mongolia explicitly accepted the respective claims, while the Laotian People's Democratic Republic, the Russian Federation, Ukraine and the Republic of Belarus did not object.<sup>60</sup> The only exception was Cuba, which expressed the view that the treaty between itself and Poland had terminated for other reasons.<sup>61</sup>

#### **bb) Kenya**

Almost a decade later, the then Kenyan Minister of Energy expressed the view that the new Constitution had represented a fundamental change of circumstances, which warranted a withdrawal from the Statute of the International Criminal Court (ICC).<sup>62</sup> Similarly, in 2013, Kenya's National Assembly approved a motion, urging the government to withdraw from the ICC Statute as a change in the government was said to constitute a fundamental change of circumstances.<sup>63</sup> The motion has not succeeded yet, however, in convincing the government to leave the ICC. Its approval nevertheless suggests that legal arguments based on fundamental changes in the domestic realm

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<sup>58</sup> Agreement between the Polish People's Republic and the Union of Soviet Socialist Republics on Cultural and Scientific Cooperation of 14 December 1970; Agreement between the Government of the Polish People's Republic and the Government of the Mongolian People's Republic on Cultural and Scientific Cooperation of 18 February 1974; Agreement between the Government of the Polish People's Republic and the Government of the Laotian People's Democratic Republic on Cultural and Scientific Cooperation of 18 September 1979; Agreement between the Government of the Polish People's Republic and the Government of the Kampuchean People's Republic on Cultural and Scientific Cooperation of 6 August 1984; Agreement between the Government of the Polish People's Republic and the Government of the Republic of Cuba on Cultural, Educational and Scientific Cooperation of 17 June 1987.

<sup>59</sup> Minister Spraw Zagranicznych, W Bartoszewski, 'Oświadczenie Rządowe z dnia 30 maja 2001 r. o utracie mocy obowiązującej niektórych umów międzynarodowych' 143 *Dziennik Ustaw* 1602 <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20011431602/O/D20011602.pdf>.

<sup>60</sup> K Karski and T Kaminski, 'Effective Application of the Rule on Fundamental Change of Circumstances to Treaties Contravening the 1997 Polish Constitution' (2015) 17 *International Community Law Review* 68-94, 90-3.

<sup>61</sup> *Ibid.*

<sup>62</sup> Statement of the then Minister of Energy, Kiraitu Murungi, (*Kenya National Assembly Official Record (Hansard)* 22 December 2010) 68.

<sup>63</sup> CC Jalloh, 'Kenya Should Reconsider Proposed Withdrawal from the ICC' (*EJIL:Talk!*, 18 September 2013) <https://www.ejiltalk.org/kenya-should-reconsider-proposed-withdrawal-from-the-icc/>.

are being used as a political tool for providing credibility to a policy that seeks to abrogate from international legal obligations.

### cc) Ecuador

In 2010, the Constitutional Court of Ecuador found the BIT between Ecuador and Chile to be incompatible with the Ecuadorian constitution. Since the new Constitution was claimed to represent a fundamental change of circumstances, affecting the performance of the BIT, the Court called upon the National Assembly to approve the denunciation of said treaty.<sup>64</sup> A year later, a special committee of the National Assembly in charge of analysing the denunciations, affirmed this view.<sup>65</sup> Consequently, the National Assembly approved the termination of the BIT in 2017, reiterating that the 2008 Constitution represented a fundamental change of circumstance.<sup>66</sup> It should be noted, however, that in the end, the Ecuadorian President did not terminate the BITs by relying on Article 62 VCLT. When issuing his decree on 16 May 2017, he relied on a withdrawal clause in the investment treaty instead.<sup>67</sup> Hence, it is questionable whether the termination of the BIT can be considered to represent State practice.

Nevertheless, the President found it necessary to back his decision up by referring to the Constitutional Court judgment. In addition, his decree made reference to the report of the Commission for Comprehensive Audit of the Reciprocal Investment Treaties and the Investment International Arbitration System in Ecuador (CAITISA) which had been made public earlier that month. The CAITISA report proposed the termination of several BITs on the grounds that the Constitutional Court of Ecuador had found the said treaties to be incompatible with the new Ecuadorian Constitution, as these treaties contradicted Ecuador's *erga omnes* and human rights obligations under international law. This was claimed to represent an unforeseen and unpredictable event compared to the time when the BITs were concluded, which in turn amounted to a fundamental change of the legal circumstances. Some of the investment treaties were said to provide for objectives in their preambles, such as the development and welfare of the host State, which had not been met, or had been proven to produce detrimental effects. Therefore, in the Commission's view, maintaining these obligations meant sustaining commitments, which were ruinous for the Ecuadorian people and contrary to the objectives of the treaties.<sup>68</sup>

On that note, the President's indirect reference to the doctrine of *rebus sic stantibus* can be seen as an auxiliary political argument.

<sup>64</sup> Dictamen N.º 038-10-DTI-CC, CASO N.º 0010-TI, Corte Constitucional para el período de transición, Jueza Constitucional Ponente: Dra. Ruth Sení Pinoargote, Quito, D. M., 11 November 2010, 23-6 [http://portal.corteconstitucional.gob.ec/Raiz/2010/038-10-DTI-CC/REL\\_SENTENCIA\\_038-10-DTI-CC.pdf](http://portal.corteconstitucional.gob.ec/Raiz/2010/038-10-DTI-CC/REL_SENTENCIA_038-10-DTI-CC.pdf).

<sup>65</sup> Comisión Especializada Permanente No. 5 de Soberanía, Integración, Relaciones Internacionales y Seguridad Integral, 'Informe de Comisión sobre el pedido de aprobación de la denuncia del 'Convenio Entre el Gobierno de la República de Chile para la Promoción y Protección Recíprocas de Inversiones'', 25 May 2011, [https://www.asambleanacional.gob.ec/es/system/files/informe\\_comision\\_denuncia\\_convenio\\_ecuador\\_chile\\_promo\\_y\\_protec\\_inversiones\\_t.\\_68799\\_26-05-2011.pdf](https://www.asambleanacional.gob.ec/es/system/files/informe_comision_denuncia_convenio_ecuador_chile_promo_y_protec_inversiones_t._68799_26-05-2011.pdf).

<sup>66</sup> J Jaramillo and C Muriel-Bedoya, 'Ecuadorian BITs' Termination Revisited: Behind the Scenes' (*Kluwer Arbitration Blog*, 26 May 2017) <http://arbitrationblog.kluwerarbitration.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/>.

<sup>67</sup> Presidential Decree No. 1403, 16 May 2017, [https://minka.presidencia.gob.ec/portal/usuarios\\_externos.jsf](https://minka.presidencia.gob.ec/portal/usuarios_externos.jsf).

<sup>68</sup> Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje en Materia de Inversiones (CAITISA), 'Report', May 2017, 99 <http://www.caitisa.org/index.php/home/enlaces-de-interes>.

## **b) The Argument of Vital States' Interests**

From the argument raised in Ecuador that the new Constitution constituted a fundamental change of circumstances, it is only one step to an argument of vital States' interests based on fundamental States' rights. For some States the values and norms protected by the Constitution are vital. It is no wonder therefore, that the second line of reasoning intended to justify a fundamental change of circumstances, is the one of vital States' interests.

### **aa) United States of America**

Certain commentators interpret the United States' (US) termination of the Anti-Ballistic Missile Treaty (ABM-Treaty)<sup>69</sup> in 2001 as both, an invocation of the termination clause enshrined in Article XV (2) ABM-Treaty and an independent claim for a fundamental change of circumstances.<sup>70</sup> In the diplomatic note sent to the Russian Federation, Belarus, Kazakhstan and the Ukraine, the US argued that since a number of State and non-State entities had acquired weapons of mass destruction, extraordinary events related to the subject matter of the treaty had occurred which had jeopardized its supreme interests.<sup>71</sup> For this reason, it decided to withdraw pursuant to Article XV (2) ABM-Treaty. As the argument in the diplomatic note mirrors the language of said termination clause, and since in accordance with this provision the withdrawal was to take effect six months from the date of notice, it seems more convincing not to regard the termination of the ABM-Treaty as practice on Article 62 VCLT.<sup>72</sup> Nonetheless, the existence of Article XV (2) ABM-Treaty and its invocation demonstrate that when it comes to question of national security, every now and then States still seek to reserve a right to terminate a treaty when they are of the impression that the treaty might impede their vital interests.

### **bb) Russia**

In 2016, the Russian Federation suspended the Agreement Concerning the Management and Disposition of Plutonium<sup>73</sup> invoking "a fundamental change of circumstances, or more precisely, aggressive anti-Russia tendencies".<sup>74</sup> The Russian Foreign Minister elaborated on this justification by referring to several hostile steps the US had recently taken with respect to Russia, specifically, the introduction of large-scale economic and other sanctions, the expansion of NATO military

<sup>69</sup> Treaty on the limitation of anti-ballistic missile systems, (signed 26 May 1972, entered into force 3 October 1972), 944 UNTS 13 ('ABM-Treaty').

<sup>70</sup> Fitzmaurice (n 8) 620 f.

<sup>71</sup> Diplomatic Notes Sent to Russia, Belarus, Kazakhstan and the Ukraine on 13 December 2001, <https://www.state.gov/documents/organization/16692.pdf>.

<sup>72</sup> Similarly, S-I Lekkas and A Tzanakopoulos, 'Pacta sunt servanda versus flexibility in the suspension and termination of treaties' in CJ Tams, A Tzanakopoulos and A Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar Publishing 2014) 335, arguing that Article XV (2) ABM-Treaty constituted a clause within the meaning of Article 54 (a) VCLT, and its self-judging character made any reliance on the doctrine of *rebus sic stantibus* superfluous; Giegerich (n 9) 1153.

<sup>73</sup> Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation (signed at Moscow and Washington 29 August 2000 and 1 September 2000, entered into force 13 July 2011).

<sup>74</sup> K Daugirdas and JD Mortenson, 'Russia Suspends Bilateral Agreement with United States Disposal of Weapons-Grade Plutonium' (2017) 111(1) *American Journal of International Law* 181-8; Foreign Minister Sergey Lavrov's interview with Channel One's Vremya weekly news and analysis programme, broadcast on Sunday, 9 October 2016, [http://www.mid.ru/en/web/guest/meropriyatiya\\_s\\_uchastiem\\_ministra/-/asset\\_publisher/xK1BhB2bUjd3/content/id/2494612](http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/2494612).

infrastructure, with an increasing number of US troops in proximity to the border, discussions between the US and its allies on transitioning to a policy of containing their relations with Russia and threats of terrorist attacks in Russian cities.<sup>75</sup> From the perspective of international law, these hostile steps were claimed to constitute a fundamental change of circumstances compared to the time when the agreement was signed under the VCLT.<sup>76</sup> Regardless of whether or not one agrees with this description of facts, the argument proposed by the Russian Federation reveals an understanding of the *rebus sic stantibus* doctrine that is linked to national security interests which need to be preserved; in other words, the fundamental right of States to self-preservation which will be threatened, if the State party complies with the obligations of the treaty.

The US engaged with the argument of national security interests. Although regretting Russia's decision to suspend the treaty, it disputed the assessment of facts, as it would be in each side's national interest to continue the application of the treaty.<sup>77</sup>

### cc) Denmark

Another recent example of such a reading comes from Scandinavia. On 15 March 2017, the Danish Minister for Immigration introduced a bill into parliament, which provided for an emergency brake (*nødbremsen*) in times of high influx of asylum-seekers according to which Denmark would not be obliged to follow the procedures of the EU's Dublin regulation<sup>78,79</sup> Although an EU member State, Denmark enjoys a special position within the Dublin framework, as these regulations apply to Denmark on an intergovernmental basis under international law.<sup>80</sup> The bill was justified on the basis that under general international law, any treaty was being concluded under the condition that circumstances would not materially change so that the performance of the treaty obligations become seriously detrimental to a State party. In the case of unforeseen changes, which have the effect of making the fulfilment of the treaty obligations a serious threat to a State's existence or welfare, the treaty could be abrogated on the basis of general emergency principles. On that note,

<sup>75</sup> Comment by Foreign Minister Sergey Lavrov on the publication of the presidential executive order to suspend the Russia-US plutonium management and disposition agreement, 3 October 2016, [http://www.mid.ru/en/web/guest/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2485001](http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2485001).

<sup>76</sup> Ibid.

<sup>77</sup> U.S. Department of State Press Release, Daily Press Briefing (3 October 2016) <https://2009-2017.state.gov/r/pa/prs/dpb/2016/10/262717.htm>; White House Press Release, Press Briefing by Press Secretary Josh Earnest (5 October 2016) <https://obamawhitehouse.archives.gov/the-press-office/2016/10/05/press-briefing-press-secretary-josh-earnest-1052016>; K Daugirdas and JD Mortenson (n 74) 187 f.

<sup>78</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin-II) and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin-III).

<sup>79</sup> Forslag til Lov om ændring af udlændingeloven, Fremsat den 15. marts 2017 af udlændinge- og integrationsministeren (Inger Støjberg), [https://www.ft.dk/ripdf/samling/20161/lovforslag/l153/20161\\_l153\\_som\\_fremsat.pdf](https://www.ft.dk/ripdf/samling/20161/lovforslag/l153/20161_l153_som_fremsat.pdf).

<sup>80</sup> Cf. Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, 8 March 2006, Official Journal of the European Union L 66/37 f.



the Minister referred to the *clausula rebus sic stantibus* under international law.<sup>81</sup> The reference to threats to the existence and welfare of the State are explicit allusions to the fundamental rights of States to the vital development and self-preservation. Despite criticism of the United Nations Commissioner for Refugees,<sup>82</sup> the Danish Parliament passed the Act on 11 May 2017.<sup>83</sup>

## 5. Conclusion

Notwithstanding contrary statements in the literature, the doctrine of *rebus sic stantibus* has practical relevance even today. The motion in Kenya's National Assembly, the termination of the ABM-Treaty and the Ecuadorian President's decree show that the doctrine has recently been used as a political or auxiliary argument. Moreover, the cases of Poland, the judgment of the Ecuadorian Constitutional Court, the suspension of the Agreement Concerning the Management and Disposition of Plutonium, and Denmark's emergency law demonstrate that it is being invoked as a legal argument as well. In the judicial context, mentioning should also be made of the famous *Racke* decision of the European Court of Justice,<sup>84</sup> which has not been discussed in this contribution. What is more, also in States other than the UK, a tendency can be observed that points to an emerging inclination to invoke fundamental changes of circumstances. More cases are on the horizon. In September 2016, the Spokesperson for the Indian National Congress Party adverted to an invocation of Article 62 VCLT in relation to the Indus Water Treaty,<sup>85</sup> thereby suggesting that the treaty could be terminated on grounds of a fundamental change of circumstances.<sup>86</sup> In the Philippines, the chairperson of the Committee on Justice justified a potential reimposition of the death penalty in disregard of international human rights obligations by referring to the option of invoking the doctrine of *rebus sic stantibus*.<sup>87</sup> Even the UN Special Rapporteur on the rights of indigenous peoples, recently proposed that in "order to suspend or terminate an international investment agreement that affects indigenous peoples' rights, States could invoke Article 62 VCLT in relation to a fundamental change in circumstances, such as the recognition of indigenous peoples within their borders," as a complementary measure necessary to mitigate the impacts of international investment agreements.<sup>88</sup> To use the metaphor from the introduction, the car may still be in the garage, but the door is open and the key is in the ignition.

<sup>81</sup> Forslag til Lov om ændring af udlændingeloven (n 79) 7, section 2.4.1.

<sup>82</sup> UNHCR Regional Representation for Northern Europe, 'UNHCR Observations on the proposed amendments to the Danish Aliens legislation' 22 February 2017 <http://www.refworld.org/pdfid/58b02f384.pdf>.

<sup>83</sup> Lov om ændring af udlændingeloven (Mulighed for i en krisesituation at afvise asylansøgere ved grænsen), Vedtaget af Folketinget ved 3. Behandling, 11 May 2017 [https://www.ft.dk/ripdf/samling/20161/lovforslag/l153/20161\\_l153\\_som\\_vedtaget.pdf](https://www.ft.dk/ripdf/samling/20161/lovforslag/l153/20161_l153_som_vedtaget.pdf).

<sup>84</sup> *Racke GmbH and Co v Hauptzollamt Mainz*, CJEU judgment, Case C-162/96 [1998] ECR I-13655.

<sup>85</sup> Indus Water Treaty, (signed 19 September 1960, entered into 12 January 1961) 419 UNTS 125.

<sup>86</sup> Statement on 26 October 2016 <http://www.uniindia.com/news/india/indus-water-treaty-an-element-in-multi-pronged-multi-faceted-approach-against-pakistan-congress/636163.html> (last accessed 24 November 2018); cf. also S Chandra, 'Indus waters treaty merits revisit' (*Sunday Guardian*, 8 January 2017) <http://www.sundayguardianlive.com/opinion/7932-indus-waters-treaty-merits-revisit>; M Bisht, 'The World Bank's halting of the Indus Water Treaty is a blessing in disguise' (*Hindustan Times*, 17 December 2016) <https://www.hindustantimes.com/opinion/the-world-bank-s-halting-of-the-indus-water-treaty-is-a-blessing-in-disguise/story-RJmPXU7AGen9IEBS9RMwJL.html>.

<sup>87</sup> Congressional Record, 'Plenary Proceedings of the 17th Congress' (1st regular session of the House of Representatives, 14 February 2017), vol. 4, No. 70, 8 ff., <http://www.congress.gov/ph/legisdocs/congrec/17th/1st/17C1RS-VOL4REC70-20170214.pdf>.

<sup>88</sup> Report of the Special Rapporteur on the rights of indigenous peoples, Human Rights Council, Thirty-third session, Agenda item 3, UN Doc. A/HRC/33/42, 11 August 2016, 23 para 107.

As shown above, in some instances States have recently returned to interpreting the doctrine of *rebus sic stantibus* by reference to changes of policy in the domestic realm or their vital interests. These are kindred arguments. Certain States consider the values and norms enshrined in their constitutions to be their vital interests. Especially arguments based on a constitutional identity, that seek to pose limits to the binding force of international legal rules display a kinship to vital interests and States' rights.<sup>89</sup>

The reference to vital interests can be used in two ways: for the purpose of restricting the doctrine of *rebus sic stantibus* doctrine or for the purpose of hollowing out the requirements set out in Article 62 VCLT. During the United Nations Conference on the Law of Treaties, for example, the Byelorussian Soviet Socialist Republic, while not disputing the objective character and the requirements the ILC had identified, suggested to restrict the doctrine's field of application to situations "when a State found it completely impossible to perform a treaty, or where a treaty conflicted with its most vital interests".<sup>90</sup> Such an approach would have the effect of replacing the 'undue burden'-approach, expressed in the requirement the effect of the change must be to radically transform the obligations still to be performed, by the stricter requirement that the change must have the effect of imperilling the State's existence.

But if the invoking State could determine on a subjective basis whether its vital interests are imperilled, the subjective standard risks becoming also the dominant criterion, predetermining the assessment of whether a change of circumstances was fundamental and whether it constituted an essential basis for the conclusion of the treaty. As a result, a State could terminate a treaty whenever it considered the obligations to run counter to its purported interests. Such an approach risks hollowing out the other requirements stipulated in Article 62 VCLT, thereby making its application arbitrary. Yet the promise behind every treaty demands good faith performance: *Pacta sunt servanda*. A treaty is worth nothing, if it is not kept and if it cannot be relied on. Compromising the sanctity of treaties, compromises international law's ability to regulate the behaviour of the legal subjects as well. Allowing for purely subjective determinations as to whether a fundamental change of circumstances has occurred, would threaten to undermine the international rule of law. Besides this, a convincing policy rationale warranting a theory that permits the invoking State to determine on a subjective basis whether a change of circumstances affects its vital interests, is lacking as well. Back in 1944, James Brierly thought the subjective approach on the vital interests theory to have its roots "in the insecurity of the existing order, in the fact that every state has hitherto had to make its own defence the prime consideration of all its policies". But "if a world security order in which states had confidence could be established, ...the most difficult kind of vital interests would begin to lose their urgency".<sup>91</sup> If he is right about this, then the sophisticated collective security order established with the UN Charter system of international law provides for

<sup>89</sup> Cf. HP Aust, 'Fundamental Rights of States: Constitutional Law in Disguise' (2015) 4(3) *Cambridge Journal of International & Comparative Law* 521-546, 540-4, who found the German Constitutional Court's reference in its *Lisbon Treaty* decision (BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, [226-31], [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html;jsessionid=BDBF80F52AFF27BFD1125AEB3442744.2\\_cid383](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html;jsessionid=BDBF80F52AFF27BFD1125AEB3442744.2_cid383)) to the "right to self-determination of the German people in the form of Germany's sovereignty under international law" and the requirement of "independence from an external will precisely for its constitutional foundations" within its constitutional identity review of EU law to evoke connotations of Erich Kaufmann's theory on the doctrine of *rebus sic stantibus*.

<sup>90</sup> United Nations Conference on the Law of Treaties, 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (First Session, Vienna, 26 March-24 May 1968) (11 May 1968) 378 f. [5-7].

<sup>91</sup> J.L. Brierly, 'Vital Interests and the Law' (1944) 21 *British Yearbook of International Law* 51-7, 56.

another reason against reintroducing a subjective vital interests theory on the doctrine of *rebus sic stantibus* at this day and age.

It remains to be seen whether the revival of the doctrine of *rebus sic stantibus* in conjunction with the vital interests theory will catch on. If yes, States will have the final say on whether it will be used for the purpose of restricting the conditions set out in Article 62 VCLT or for the purpose undercutting the standards the ILC developed. The practice discussed in PART III does not give any clear indication yet for which purpose States have referred to their vital interests. In any case, it remains in the international community's vital interest to interpret the doctrine in a way that preserves international law's existence and does not imperil its vital development. For the sake of the international rule of law, it will be pivotal to refrain from entertaining an understanding, which leaves room for purely subjective determinations on the part of the invoking State. The legal advice given to decision makers can ensure that this will be the case.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.