THE MILITARY BASES AND MUTUAL SECURITY AGREEMENTS IN THE LIGHTS OF THE DOCTRINES OF JUS COGENS AND REBUS SIC STANTIBUS

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Survival is the overriding law. As it is in internal law, it is clearly so in international law. What has long been the enduring opposition to the Military Bases Agreement has been reduced to the reality that more than amenities, courtesy and friendship, more than cooperation, and more than anything else, is survival.[1] What has before been a matter of obligation has become "a question of life and death to the Filipino people."[2] Paraphrasing a contemporary thinker, its continued existence is the supreme concern. To Judge Anizlloti, it is the *jus necessitatis* "that may excuse the non-observance of international obligations."[3]

This is not to ignore the law as embodied in a treaty; on the contrary, it is to state law of which a treaty is a mere exemplification.[4] A treaty is more than a solemn compact between nations, possessing essentially the same qualities as contracts between individuals, made more significant by the "weightier quality of the parties and the greater magnitude of the subject matter."[5] As law, it can only be limited by law.

There are those of course who point to political doctrines as the only remedy to problems such as this, which being essentially political, can be solved neither by law nor by the manipulation of legal doctrines.[6] There is in this position a reflection of the old Hegelian injunction that international law "ought always to be subordinate to the reasons of the state."[7] Without going too deeply into this problem however, it is evident that international law has come a long way since it was reduced to a mere conglomeration of principles of autolimitation.[8] There are of course the imperfections that make it far removed as yet, from national law with which it seeks ultimate

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1 Marcos, *A Matter of Survival* (Speech delivered before the U.P. Law Alumni Association, April 16, 1975), 71 O.G. 2420-31 (April 28, 1975).

2 *Ibid.*, at 2431.

3 Oscar Chinn Case, P.C.I.J. ser. AB, no. 63 at 113 (1934), as cited in CHENG, *infra*.

4 STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, par. 1 (a).

5 Fren.-Ven. M.C.C. (1902), Maninat Case, RALSTON'S REPORT 44 at 73 (1905).

6 BRIERLY, THE LAW OF NATIONS 336-7 (6th ed., 1963).

7 LLOYD, THE IDEA OF LAW 87 (1964).

8 *Ibid.*

parity. Nevertheless, it is an old realization, on the one hand, that even national law is not a "brooding omnipresence" effectively governing conduct, but a mere "flexible instrument of social order dependent on the values of the society which it seeks to regulate."[9] On the other hand, there is at least a pervading "positive morality" to which the foundation of international law is equated, on the basis of which all states in their external relations seek to justify their acts.[10] The "compulsive force of reciprocal advantage and fear of retaliation"[11] is not one that can easily be ignored. In confronting the problem of oppressive and self-defeating treaties, the Philippines can do no less. Its position must be founded upon law.

The Shifting Scene and the Philippine Response

Fresh lines for Philippine foreign policy have been recently drawn. There is a reiteration of the need to "ensure our security by strengthening our ties with our neighbors in Southeast Asia." A period of rapproachment with socialist states has been launched. Guarantees for common defense against external aggression remain. It has been determined that the first two policies will be continued with "undiminished vigor." But as to the third — "these guarantees of common defense with the United States, in the light of the developments in Indochina, require, in utmost concern and in the friendliest spirit, a sustained new study . . ."[12]

Already, there is a reference to the growing appreciation that "history has changed," to developments of a serious character, which are as grave as unexpected, leading to an urgent and intensive examination of the prospects of security, not only for the Philippines, but for all of Southeast Asia,[13] and to the disquieting realization that the problem has become one of survival.[14]

It is however to ignore totally the misjudgments and inadequacies of past policy makers, to attribute wholly this new-found concern to the apprehension of the new developments and circumstances. Much of the circumstances that have now been referred to, to assail the oppressiveness of the treaties could have been long ago apprehended by a more objective eye. But what is more important is that these circumstances, as so perceived, on the basis of which a redirected foreign policy has been contemplated, are the very circumstances upon which the treaties may be assailed. There is, it appears, a strong case for the termination of one of them. The changed circumstances constitute a ground for the application of the doctrine of *rebus sic stantibus*. At the same time, the changed circumstances may have

[9] FRIEDMANN, LAW IN A CHANGING SOCIETY 13 (1964).
[10] LLOYD, *op. cit.*, p. 187.
[11] BROWN, INTERNATIONAL REALITIES 21 (1917).
[12] Marcos, *op cit.*, *supra*, note 1 at 2421.
[13] *Ibid.*, at 2420.
[14] *Ibid.*, at 2431.

become such as to make the continued operation of the treaties contrary to a norm of the category of *jus cogens.*

As a matter of course, the application of these doctrines — well recognized in international law, requires an understanding of their character, as well as of the treaties they are sought to be invoked against, and of the circumstances attendant at the inception of the latter. The treaties have been made to appear as inseparable components of the same scheme. But the termination of one is not incompatible with the retention of the other. Indeed the demand for the improvement of the Mutual Defense Treaty so as to give life to what has been known, since its inception, as a paper tiger may be based on the very same grounds that the Military Bases Agreement ought to be terminated. There is no logical inconsistency, though very plausibly, the United States will not choose to be left with one without the other.

THE TREATIES

The Agreement Between the Republic of the Philippines and the United States of America Concerning Military Bases was signed in Manila on March 14, 1947. It came into force two weeks later by mutual agreement of the parties.[15] It was to last for ninety-nine years.[16] A 1966 Washington agreement reduced the lease of bases to twenty-five years, from the "date of the signature of the formal documents giving effect to the agreement reached."[17] By the terms of the Agreement, the Philippines granted to the United States the right "to retain the use, free of rent in the furtherance of the mutual interest of both countries," of certain lands listed in Annex A of the Agreement,[18] agreeing further "to permit the United States upon notice to the Philippines, to use such of those bases listed in Annex B, as the latter determines to be required by military necessity,"[19] and to enter into negotiations with the United States at the latter's request to permit the United States, to expand such bases, to exchange such bases with other bases, or relinquish rights to such bases as any of such exigencies as may be required by military necessity.[20]

The agreement is however more than a lease agreement, partaking as it does of the form of a security alliance.[21] It is premised upon the declared mutuality of interests as confirmed by the last war, "in matters relating to

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[15] GARCIA, U.S. MILITARY BASES AND PHILIPPINE-AMERICAN RELATIONS 103 (1968).

[16] Agreement between the Republic of the Philippines and the United States of America Concerning Military Bases, March 14, 1947 (March 26, 1947), 43 O.G. 1020 (March, 1947), Art. XXIX [herein-after referred to as the Military Bases Agreement].

[17] Rusk-Ramos Amendments, 1964; Ramos-Rusk Exchange of Note on Duration of Military Bases signed in Washington, 16 September 1966, 591 U.N.T.S. 354.

[18] Military Bases Agreement, Art. 1(I).

[19] Military Bases Agreement, Art. 1(2).

[20] Military Bases Agreement, Art. 1(3).

[21] *Supra*, note 15 at 34.

the defense of their respective territories," which mutuality demands recourse to the necessary measures to promote their mutual security and to defend their territories.[22] One such measure is "particularly" the grant of bases as provided in Article I. Another is cooperation in the common defense of the two countries through arrangements consonant with the procedures and objectives of the United Nations.[23] It is thus also "mutually agreed that the Armed Forces of the Philippines may serve in United States bases, and the Armed Forces of the United States may serve in the Philippine Military establishments, whenever such conditions appear beneficial as mutually determined by the armed forces of both countries."[24] The rest of the twenty-nine articles provide for such other matters respecting rights, shipping and navigation, exemptions from internal revenue, customs and other duties, jurisdiction, etc.

Forming part of the same defense scheme, the RP-US Mutual Defense Pact was concluded on August 30, 1957, and the Southeast Asia Collective Defense Treaty, on September 8, 1954.[25] In the Mutual Defense Pact, the Philippines and the United States declare "publicly and formally their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific area."[26] Article IV provides that each party recognizes that an armed attack in the Pacific area on either side of the parties would be dangerous to its own peace and safety, and declares that it would act to meet the common dangers in accordance with its constitutional processes.[27] Except for some slight modification, Article IV is reproduced in the Southeast Asia Collective Defense Treaty.[28] The latter however has been interpreted to operate and apply only in case of communist aggression,[29] and to preclude the dedication of "any major elements of the United States military establishment to form an army of defense in the area," it having been made clear to the signatories that reliance was to be placed primarily upon the deterrence resulting from American mobile striking power.[30]

While it is true that Article III of the Mutual Defense Pact leaves the implementation of the treaty to further consultation between the foreign

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[22] *Id.*
[23] *Id.*
[24] Military Bases Agreement, Art. II(1).
[25] Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, August 30, 1951, (August 27, 1952) 177 U.N.T.S. 133 (1953), 2 P.T.S. 13 (1968); Southeast Asia Collective Defense Treaty, September 8, 1954, (August 27, 1952) 209 U.N.T.S. 28 (1955).
[26] Mutual Defense Treaty, *Id.*
[27] Southeast Asia Collective Defense Treaty, *supra*, note 25.
[28] Southeast Asia Collective Defense Treaty, Art. IV, par. 1.
[29] ABAD SANTOS, CASES IN INTERNATIONAL LAW 255 (1966 ed.).
[30] Statement of John Foster Dulles, Secretary of State before the U.S. Senate Foreign Relations Committee, Nov. 11, 1954, *Ibid.* (Unnumbered publication: U.S. Government Printing Office, 1954).

ministers of both countries, the Pact has always been premised upon the prior Military Bases Agreement, which provides for the establishment of major elements of American forces within fixed bases. In a note to the then Foreign Affairs Secretary Garcia, made public on September 9, 1955, Secretary of State Dulles declared "in the most emphatic terms the United States will honor fully its commitment under the Mutual Defense Treaty. The United States will take all practicable measures to maintain the security of the Philippines against external attack. The United States intends to maintain and use its air and naval bases in the Philippines. These provide concrete evidence of the United States' ability and intention to take counter-measures."[31] This followed an official pronouncement of the Philippine government several months before, of a similar tenor.

> "The establishment and maintenance of military bases in the Philippines ... were agreed upon to secure the military defense of the two countries ... The expansion of military bases contemplated in paragraph 3 of Article I of the agreement is a step to be taken in meeting the requirements of military necessity and is a matter that involves and affects critically the defense of the country."[32]

The key concept upon which the provisions of the treaties were developed is self-defense. It is an aspect of the more enduring preoccupation of self-preservation, made inescapably compelling by the just concluded world war. The character of treaties reflect that of the specific problem which they were concluded to confront. So is it for all covenants. The test of the solution's propriety is the problem itself. An assessment of the historical context of the treaties, both past and contemporary, in the light of the two doctrines just referred to, namely *jus cogens* and *rebus sic stantibus,* is therefore proper.

The Doctrine of Jus Cogens

An early pronouncement of the doctrine of *jus cogens* was made in the Oscar Chinn case,[33] where Judge Schucking expressed in a dissenting opinion the possibility of creating a rule of *jus cogens,* "with the effect that any act adopted in contravention to such a rule will be automatically void."[34] The determination was there enunciated that no court would apply a convention "the terms of which were contrary to public morality." Tribunals, it was his position, should be guided by considerations of public policy.[35]

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[31] U.S. Embassy Diplomatic Note No. 0284, Malacañang Press Release No. 9-9-1, sheet 1.

[32] Secretary of Justice Opinion, No. 40 dated February 16, 1955.

[33] *Supra,* note 3.

[34] Pelg. v. G. B. Judgments, Orders, and Advisory Opinions, ser. A/A Fasc. 63, 149-150 (1934).

[35] *Id.*

Jus Cogens has long been equated with international public policy.[36] As contrasted with *jus dispositivum,* which refers to rules which yield to the will of the parties, the rules of *jus cogens* refer to those which are "absolute, ordering and prohibiting."[37] The Vienna Convention on the Law of Treaties, which as of December 31, 1975 has been signed by fifty-nine countries, but ratified only by twelve countries,[38] defines rules of *jus cogens* as peremptory norms of general international law. And by "peremptory norms" is meant norms of "general international law accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[39]

Its standing as a legal precept is not an unquestioned one. Only in four instances was the doctrine the subject of authoritative invocation of judicial pronouncements.[40] Two of them were favorably received in international tribunals, both however, through dissenting opinions.[41] The doctrinal validity thus accorded to the doctrine depended solely on the intrinsic persuasiveness of the dissenters, unsupported by the authoritativeness that only a judicious approval by the majority affords. The other two judgments were rendered by national tribunals.[42] One of them significantly, was rendered by an American tribunal sitting at Nuremberg. This court rejected as inexistent the contract alleged by the defense to have been concluded between Germany and the Vichy government, authorizing the use of prisoners of war in work having a direct relation to war operations — which was in violation of the Geneva Convention of 1929, and added that if there was such an agreement, "it was void under the law of nations."[43]

In a 1965 case, the German Federal Supreme Constitutional Court accepted the existence of peremptory rules of customary international law, although it limited their scope. It ruled that . . .

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[36] In the Case Concerning the Payment of Various Serbian Loans Issued In France, P.C.I.J. ser. A, no. 14 at 46 (1929); In the Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued In France, P.C.I.J. ser. A, no. 15 at 125 (1929).

[37] Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission,* 61 AM. J. INT'L. L. 948 (1967).

[38] Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions as of December 31, 1975, U.N. (1976); The Philippines signed on May 23, 1969, and ratified the treaty on Nov. 15, 1972. The United States signed the treaty on April 24, 1970, but has not yet ratified it.

[39] Vienna Convention on the Law of Treaties, Art. 53.

[40] *Supra,* note 37 at 949.

[41] The Wimbledon, P.C.I.J. ser. A, p. 37 D.O. by Anzilloti and Huber; (1923) Oscar Chinn Case, *supra,* note 3 as cited by CHENG, *infra.*

[42] *Supra,* note 37 at 950.

[43] U.S. v. Krupp and others, Trials before the Nuremberg Military Tribunals, *Ibid.*

> "Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community."[44]

The Doctrine of Jus Cogens is an International Legal Precept

The doctrine of *jus cogens* has its strongest support in the natural law school of international law. It is often expressed in the idea of a necessary law which all states are obliged to follow. Such was what Wolff and Vattel professed. Heffter presented the matter through the idea of physical and moral impossibility. By moral impossibility, he had in mind treaties, the object of which was contrary to the ethics of the world, *e.g.*, agreements defending slavery, or preventing the development of individual liberty, or encroaching into the rights of third states. Treaties whose subjects are of this category, are void.[45]

Supporters of the doctrine increased particularly after the second world war. Among the modern publicists are McNair, Balladore Palieri, Kelsen and Tunkin, and P. Guggenheim.[46]

Schwarzenberger disputes the existence of any *jus cogens* on the level of "unorganized international society," there being an absence "of any center of government with overwhelming physical force and courts with compulsory jurisdiction to formulate rules akin to those of public policy on the national level."[47] There is a significance in the observation of the International Law Commission, however, that though "some governments in their comments have expressed doubts as to the advisability of this article unless accompanied by a provision for independent adjudication, only one questioned the existence of rules of *jus cogens* on the international level."[48] It seems morever, that the opposition typified by Schwarzenberger[49] is directed not at the validity of the doctrine that treaties in violation of a peremptory norm are void, but at the difficulty of finding one such norm of a universal character. The difficulty

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[44] In the Matter of the Petition for Review of the Constitutionality of the Three Decisions of the Federal Supreme Tax Court by a corporation at Zurich (Switzerland), 18 *Decisions of the Federal Supreme Constitutional Court*, 441, April 7, 1965, 60 AM. J. INT'L. L. 513 (1966).

[45] Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L. L. 56 (1966).

[46] *Ibid.*, at 57.

[47] Schwarzenberger, *International Jus Cogens*, 43 TEX. L. REV. 455, 476 (1965).

[48] 2 YBBK. INT'L. L. COMM. 247 (1966).

[49] *Supra*, note 47 at 476.

is attributed to unorganized international society.[50] But all legal precepts of unquestioned application do operate in unorganized society. Is it to be concluded then that international law on the level of unorganized international society does not know of any legal precept? Indeed the opposition is directed at the existence of international law itself.

The Vienna Convention until such time that it matures into a binding treaty tends at least to be evidence of existing international law.[51] Among the realizations that supported its formulation was the conclusion that "the view that in the last analysis there is no rule of international law from which states cannot of their own free will contract out has become increasingly difficult to sustain."[52] The Charter's injunction against the use of force in itself exemplifies conspicuously a rule of *jus cogens*.[53] The Roman precept of *salus populi suprema lex esto*, often expressed in the right of self-preservation, and often invoked as a cause for the termination of treaties has "properly been regarded as one of the general principles of law recognized by civilized nations within the contemplation of Article 38 I(c) of the Statute of the World Court."[54] Finally, an authoritative application of the doctrine is found in the U.N. Charter itself.[55] Article 103 provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The statement bears repeating, that law is a flexible instrument of social order. Though commonly professed, it rarely receives a better exemplification than when a dissenting opinion, suppressed by the weight of the majority, by the change of events and realizations, and its intrinsic persuasiveness, gains the upperhand. Precepts in international law are no exception. With the conclusion of the International Law Commission as to the wide acceptance of the rule of *jus cogens*, the dissenting opinions of Anzilloti and Huber in the Wimbledon, and of Schucking in the Oscar Chinn Cases, should be conformably viewed.

The definition of the rule provided in Article 59 of the Vienna Convention is not free of ambiguity. Foremost of the difficulties that the Commission was confronted with in its formulation, was the absence of a single criterion, compounded by the fact that most of the general rules of international law are

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[50] Much of Schwarzenberger's comments have been refuted by Verdross in his article, *supra*, note 45.
[51] *Supra*, note 47 at 477.
[52] *Supra*, note 48.
[53] *Ibid.*
[54] CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 31 (1953).
[55] *Supra*, note 37 at 958.

not "peremptory" and thus can be contracted out.[56] Schwelb, condemning Article 59 as an abdication of legislative functions, notes its failure to determine which rules have the character of *jus cogens* and which do not.[57] But the failure was intended, the Commission having considered to leave the "full content of the rule to be worked out in state practice and in the jurisprudence of the international tribunals."[58] The direct result apparently was to leave the determination of the *jus cogens* character of a particular precept open to anybody. Upon what Schwarzenberger bewailed as the inadequacy of the formulation, rests its advantage. For "as most members tend to avoid international adjudication as much as possible, the unilateral invocation of *jus cogens* as a justification of non-compliance with a burdensome treaty, becomes a novel form of restricting the area of rules governing the principle of consent."[59]

There is however certainty in the conclusion that a treaty is not void just because it conflicts with a rule of general international law, nor because a prior treaty has prohibited its formulation, that rules of *jus cogens* are not immutable but subject to modification according to future developments, and that they are overriding, rendering illegal any act in conflict with them.[60] Of this category are "legal provisions which are firmly rooted in the legal conviction of the community of states which are indispensable for the existence of international laws as an international legal order and observance of which can be demanded by all members of the community of states."[61] It would be going too far however to admit the view that most rules of customary law are validly replaceable by treaty, being of the character of *jus dispositivum*.[62] For it is evident as Verdross observes that what has been termed as unorganized international society, has imposed limits upon the liberty of states to enter into treaties by making the general principles of law recognized by civilized nations as a subsidiary source of international law.[63] Clearly of this classification is what the International Court of Justice in the *Corfu Channel Case* referred to as the "elementary consideration of humanity," which are "even more exacting in peace than a war."[64] Consistent with the broad phraseology of the definition, it is not the "form of a general rule of international law but the particular nature of the subject matter with which it deals that may in the opinion of the Commission give it the character of *jus cogens*."[65]

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[56] *Supra*, note 48.
[57] *Supra*, note 37 at 963.
[58] *Ibid.*, at 964.
[59] *Supra*, note 47 at 455.
[60] *Supra*, note 48.
[61] Schwelb, *supra*, note 37 at 951 (quoting the German Federal Supreme Court; see note no. 42).
[62] *Ibid.*
[63] *Supra*, note 45 at 61.
[64] [1949] I.C.J. Rep. 77.
[65] *Supra*, note 48.

The Commission has expressed awareness of the existence of "best settled rules of *jus cogens* on which there is general agreement. Treaties violating human rights and the equality of states, as well as the principle of self-determination, are violative of *jus cogens*.[66]

Lord McNair attributes the character *jus cogens* to provisions of the Charter of a semi-legislative nature, which create legal rights and duties, and cites in support Article 103.[67] The significance of this view becomes apparent when we consider that "the most important provisions of the Charter are now considered to be peremptory norms of international law, binding members and non-members alike."[68] Fundamental among the rights of states, having the character of *jus cogens* are the rights of existence and self-preservation.[69] Of particular relevance is Schwarzenberger's injunction that *jus cogens* be examined in the light of the seven principles of international law, namely, sovereignty, self-defense, consent, recognition, good faith, international responsibility, freedom of the seas.[70] The are, according to him, principles of general international law. A search for rules of *jus cogens* should start with the rules governing these principles. He has professed the futility of any such search, a conclusion, however which the Commission is certain to reject.

The Right of Self-Preservation and Jus Cogens

Self-preservation is a rule of *jus cogens*.

> "The right of a state to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation."[71]

It is a right which all nations may invoke based as it is upon generally accepted usage, and which "cannot lose its *raison d' etre* simply because it may in some cases have been abused."[72]

Self-preservation is a state interest of an enduring and overriding character, and has been invoked before international tribunals.[73] The German-Venezuelan Mixed Claims (1903), has expressed it to be "the indispensable funda-

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[66] *Supra*, note 37 at 964.
[67] McNAIR, THE LAW OF TREATIES 217 (1961).
[68] *Ibid.* See also Schwelb, *supra*, note 37 at 960.
[69] Five rights are usually listed. BRIERLY, THE LAW OF NATIONS 50 (6th ed., 1963). But the proposition that the other rights of property and jurisdiction, and the right of diplomatic intercourse have the character of *jus cogens* also is a questionable one.
[70] 43 T.L.R. 457.
[71] The Wimbledon, *supra*, note 41.
[72] *Ibid.*
[73] *Supra*, note 54 at 30.

mental law of every civilized country of which international tribunals should take judicial notice."[74] It has its origin in the Roman injunction of *salus populi suprema lex,* already adverted to, which may be "properly regarded as one of the general principles of law recognized by civilized nations within the contemplation of Article 38 I(c) of the Statute."[75]

States have invoked it to override the rights and interests of nationals and aliens within their respective territories, and have on the basis of it, taken necessary measures to protect their existence against threats from the outside, even to the extent in exceptional cases, of disregarding the rights of other states to maintain their own existence.[76] Its basis has been aptly epitomized:

> "The law of necessity is a means of preserving social values. It is the great disparity in the importance of interests actually in conflict that alone justifies a reversal of the legal protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right. In every case, a comparison of the conflicting interests appears to be indispensable. At all events, it would appear that it can never be justifiable to endanger the existence of one state in order to preserve the existence of of another. As states are equal, the conflicting interests are thus also of equal importance."[77]

In the absolute absence of any means by which a state can comply with an international obligation without jeopardizing its existence, the doctrine of *jus necessitatis* justifies it in disregarding its obligations for the preservation of its existence. Judge Anzilloti in the *Oscar Chinn* case aptly presented it thus: "the plea of necessity . . . by definition implies the impossiblity of proceeding by any other method than one contrary to law."[78]

The principle found suitable application in the *Portendic Case* of 1843. When the French closed the African port of Portendic in 1835, despite a treaty securing to the British rights along the seacoasts, and notwithstanding moreover the verbal assurance of the French Minister of the Navy and the Colonies, that the port would not be closed by blockade, the French justified their acts in the declaration that it had acted under "the right of self-preservation, the most pressing of all, which in times of war suspends all those that may come into conflict with it."[79] To which the British Commissioners declared "that they were prepared to admit that there are extraordinary cases, no doubt,

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[74] *Ibid.*
[75] *Ibid.*, at 31.
[76] *Ibid.*, at 30.
[77] The Queen v. Dudley and Stephen (1884) 14 QBD 273, cited in CHENG at 74-5.
[78] *Supra,* note 3 at 114.
[79] *Supra,* note 54 at 30.

which ride over ordinary rights, and the necessity of self-preservation, as the French government in one of its papers properly observes, is one of these."[80]

Conformably, the dissenters in the *Wimbledon case* ruled, that notwithstanding Article 380 of the Treaty of Versailles,[81] Germany was "entitled when her neutrality and internal security were endangered, to adopt extraordinary measures temporarily affecting the application of the provision in order to protect her neutrality and to ensure her national defense."[82]

A clearer enunciation of this rule was made by the Arbitral Commission established under Article VII of the Jay Treaty of 1794. The British had directed the bringing into British ports of neutral vessels carrying provisions for the enemy, and accordingly, the Neptune, an American vessel bound for Bourdeaux, was captured by a British frigate. The British invoked necessity.[83] The following rules can be deduced from the determination there made:[84]

> "1) When the existence of a state is in peril, the necessity of self-preservation may be a good defense for certain acts which otherwise would be unlawful.
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> 2) This necessity supersedes all laws, dissolves the distinction of property and rights and justifies the seizure ... of that which belongs to others.
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> 3) This necessity must be absolute in that the very existence of the state is in peril.
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> 4) This necessity must be irresistible in that all legitimate means have been exhausted and proven to be of no avail.
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> 5) This necessity must be actual and not merely apprehended.
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> 6) The above rules correspond to those that have been elaborated upon by various other international tribunals, as regards the plea of necessity in relation to treaty obligations."

The principle of necessity has often been equated with the plea of impossibility of performance, whether objective or subjective. That subjective impossibility extinguishes international obligations has been admitted in principle by the Permanent Court of International Justice in the *Serbian and Brazilian Loan case*[85] and by the Permanent Court of Arbitration. The latter tribunal in the *Russian Indemnity case* of 1912 held that:

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[80] *Ibid.*

[81] Art. 380 provides that the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

[82] *Supra*, note 54 at 29-30.

[83] *Ibid.*, at 70.

[84] 4 MOORE: INTERNATIONAL ADJUDICATIONS, ANCIENT AND MODERN HISTORY AND DOCUMENTS, etc. Modern Ser. 372 (1929). See also CHENG at 71.

[85] P.C.I.J. A. 20/21 pp. 39-41, 120 as cited in CHENG at 72.

> "The exception of *vis major*, invoked as the first line of defense, may be pleaded in public international law as well as in private law; international law has to adapt itself to political necessities. The Imperial Russian Government expressly admits that the obligation of a state to carry out treaties may give way if the very existence of the state is endangered, if the observance of the international duty is ... self-destructive. But the concept of necessity, or *vis major*, considers considerably from that of national interest, and does not signify the mere existence of grave difficulties in the performance of an obligation."[86]

Very significant is the fact that according to the principle of *vis major*, as it is at present understood, it can be invoked so long as the circumstances are such that in good justice and in all equity, the performance cannot be exacted.[87]

The Right of Survival and the Right of Political Existence Distinguished

Self-preservation is beyond doubt a rule of *jus cogens*. It is all of the rights the most pressing, and has been invoked before international tribunals as superseding all laws. Treaties that conflict with it may be ignored. While so compared with the principle of impossibility of performance, it should not be totally equated with it. Impossibility is a class of itself. But where impossibility arises because performance can be complied with only at the risk of self-destruction, *jus cogens* as exemplified by the right of self-preservation, by its very exceptional character, may be invoked independently.

There is to be sure the proposition, long established, that rules of international customary law governing the concept of sovereignty do not constitute *jus cogens*.[88] Suggested precepts that sovereignty is inalienable, it is said, have basis only in natural law, not sanctioned by the law creating processes of international law.[89] To the Permanent Court of International Justice, the power to limit sovereignty is the very core of sovereignty itself. Every state is therefore free in international customary law "to alienate a part of the whole of its territory, transform itself into a dependent state, retain or give up its international personality, or, with other sovereign states, constitute itself into a new international entity."[90]

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[86] 1 H.C.R. 532 at 546 as cited in *Ibid.*
[87] *Ibid.*, at 72-3.
[88] *Supra*, note 47 at 458.
[89] *Ibid.*, at 458, note 19 citing Wimbledon, *supra*, note 41; Case of the European Commission of the Danube P.C.I.J. ser. B, no. 14 at 36 (1927); Case of the Exchange of Greek and Turkish Population P.C.I J. ser. B, no. 10 at 21 (1925).
[90] *Ibid.*

In a manner more susceptible of misinterpretation, it has been said that states "may even renounce their political existence."[91]

Whatever deductions that the elaboration of the propositions would reach, they do not go too far to reverse altogether what has been said of the *jus cogens* character of self-preservation. Political existence and status are never to be confounded with the condition of the community or nation. The doctrine of *jus necessitatis* has been invariably phrased in terms of the welfare of the community, survival of the nation, or in the terse expression of *salus populi suprema lex*, and not in the existence of the state as a juridical entity.

But this leaves untouched the more pertinent possibility. In the light of the formulation of *jus cogens* as a norm from which no derogation is permitted, may the right of survival be contracted out? If state A contracts with state B for the destruction of C, there is a clear case for the application of the rule. But what if A contracts with C for the latter's destruction, does C's right of self-preservation render the treaty void? Consent of course is presupposed, for in its absence, A's action will be a unilateral one condemnable as aggression. A question may be raised as to the consent of the community of which C as a state is a political manifestation. In the absence of such consent, the situation is no different from where two parties contract to destroy a third. But on the far-fetched assumption that there is such consent, then a return ought to be made to the doctrinal origin of *jus cogens*. The principle of *jus cogens* in international law is an extension of municipal *jus cogens*. They are analogous.[92] The universal opprobrium directed against genocide is basically no different from the condemnation of homicide in municipal law. A contract between A and B for the murder of the latter is a covenant equally reprehensible in international and municipal laws. For notwithstanding B's consent, A cannot enforce the contract without violating law such as those against humanity. Such a contract simply cannot be enforced. Legal convictions deeply rooted in humanity forbid it.[93] That a contract of this character would be concluded is of course inconceivable. What would possibly happen is that A would contract with B for a particular purpose. The circumstances might however develop such that the continued operation of the contract would work to B's destruction. B apparently cannot be said to have consented to its destruction. That anyway is forbidden. It may therefore abrogate the covenant on the ground that its overriding right, which supersedes all covenants, namely its survival, is threatened.

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[91] Supra, note 54 at 67.

[92] *Supra*, note 47 at 456.

[93] The matter of slavery presents a similar situation. Laws against slavery are unquestionably of the category of jus cogens. It is evident that a treaty by which a nation becomes enslaved is void. And it is equally evident that it would not be anyless so if the state of which that nations is the legal manifestation consented to it.

The Bases Agreement in the Light of Developments

The Military Bases Agreement was concluded to assure self-preservation. But that was the realization of the past, plausible at the treaty's inception. There has occured a fresh apprehension of circumstances, some of which, existent before, have been ignored. There has been to be sure an upsurge of new developments, grave as they are unexpected, from the point of view of the Philippine government, which can be a basis for invoking yet another doctrine, namely *rebus sic stantibus*, which will eventually be discussed. But new or old, the circumstances have shown the Agreement to be the very antithesis of the purpose for which it was concluded. It is now the very threat to its existence. There is of course the emphatic injunction that "in its attempt to self-preservation, the state should be guided by the principles of good faith and the dictates of humanity."[94] But as aptly put, "more than amenities, more than courtesy, more than friendship, more than cooperation, and above everything else, is survival."[95]

THE MILITARY BASES AGREEMENT IN THE LIGHT OF JUS COGENS

The Military Bases Agreement was entered into at a time when survival was a pressing preoccupation. Just a few years back, President Quezon had executed a turn-about from what until then had been a persistent opposition to the retention of the bases. The lesson of the war was to him such that "we can not escape the necessity of accepting it."[96] The anxieties and concern for survival borne of the just concluded war expressed themselves in the whereas of the agreement.

The Mutual Defense Pact was a reiteration. The agreement was however entered into at a time when the United States was enjoying overwhelming superiority in military power.[97] Military power as the final arbiter in conflict among nations[98] was at its uncontested disposition, and it has by the agreement indicated its willingness to use it to deter aggression against the Philippines.

The American commitment was an implementation of its basic political-military strategy of Communist containment enunciated in the 1947 Truman Doctrine, and effectively applied in the Greek-Turkish Assistance program.[99] The bases were conceived to be a part of the so-called forward strategy, exemplified by the maintenance of overseas forces, alliances and massive assistance programs. The nuclear superiority of the United States supported

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[94] *Supra*, note 54 at 99.
[95] Marcos, *op. cit., supra*, note 1.
[96] Osmeña, *Quezon and the American Military Bases in the Philippines*, PHIL. FREE PRESS, August 30, 1960, p. 57.
[97] Pastrana, *What to do with U.S. Bases*, reproduced in 32 PHIL. COLLEGIAN (Sept. 16, 1976).
[98] PADELFORD, THE DYNAMICS OF INTERNATIONAL RELATIONS 484 (2nd ed., 1972).
[99] *Ibid.*, at 404.

the corollary strategic policy of deterrence interpreted by John Foster Dulles in 1954 as massive retaliation at the times and places of American choosing.[100] As a policy, deterrence was at the time of unquestioned validity and effectivity. Russia could be destroyed by atomic bombs, but the United States could not. When an invulnerable United States was pitted against vulnerable Russia, deterrence against all-out war was high, and the all-out capability of the United States could discourage limited destruction.[101]

Forward bases in the Philippines thus assured containment, without imposing a direct liability of atomic destruction upon the host country. But the present is totally a different picture. The enormous development of nuclear weaponry in Russia has dispelled much of the credibility of the policy of deterrence, as well as any of "the lingering beliefs that general war remained a practical means of resolving disputes between major powers."[102]

The United States now equally vulnerable, the ability of its retaliatory force to deter an all-out war has become highly unstable. Against limited aggression, its deterrence is equally uncertain.[103] There is the futher realization that the development in nuclear weaponry has rendered the technological race more critical.

> "There is always the question that stabilized mutual deterrence if achieved, will continue. A technological breakthrough in missile defense, in megaton loaded satellites, or in some bizarre weapon system not necessarily in the nuclear family could critically upset the military balance."[104]

There seems to be no assurance, therefore, in Dean Rusk's observation that war has devoured itself because it can devour the world.[105] As aptly summed up:

> "Threats of massive retaliation such as the one which both Secretary of State John Foster Dulles and Premier Kruschev had so menacingly foisted upon the would-be aggressors, had failed to stop the Korean war, the loss of Northern Indochina, or the Suez affair; neither did they avert British and American landings in Lebanon and Jordan nor force their withdrawals therefrom, neither did they scare tiny North Vietnam to surrender or sweep this bellicose nation to the conference table. It is because fear of retaliation according to Quincy Wright in his "A Study of War" is a slender reed to lean upon."[106]

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100 *Ibid.*

101 "How Vulnerability Affects Deterrence", considered in relation to the factors of state of retaliatory force, outcome of all-out war, ability of the United States' retaliatory force to deter; adopted from KISSINGER'S THE NECESSITY FOR CHOICE (1961), reproduced in PADELFORD at 392.

102 *Ibid.*, at 387.

103 *Ibid.*, at 392.

104 *Ibid.*, at 393.

105 *Ibid.*, at 403.

106 Pastrana, *op. cit., supra*, note 97.

In the light of these developments, the United States stands to lose one-hundred and fifty million men and women during the first few hours of a nuclear attack.[107] Its bases abroad, though inevitably subject to immediate destruction upon the start of the attack, being in Recto's words, "sitting ducks," and to MacArthur, "dead ducks", have however acquired an added significance.[108] Townsend Hoopes in "Overseas Bases in America's Strategy", epitomizes it thus:

> "A wide dispersal of the United States air power around the Sino-Soviet perimeter, would by forcing the diffusion of the Soviet air-atomic effort, make it more difficult for the Soviets to calculate that they could destroy our retaliatory force by surprise attack."[109]

Hanson Baldwin, "trusted man in the United States military circles who has been writing in the New York Times on military subjects for twenty years," more pointedly exposed the real role of America's overseas, bases namely "to act as magnets for enemy attacks, thus dispersing or weakening his threats upon American cities and fixed installations."[110] For it should be obvious "that the enemy in the event of war and for strategic necessity has not only the absolute right but the imperative duty to destroy the bases instantly knowing full well that unless destroyed at once, they shall be used against him for his own destruction."[111]

On the part of the Philippines on the other hand, these developments should bring home the realization, that what has before been an effective guarantee against aggression, has become the very danger to its existence. No stronger case for the invocation of the right of self-preservation can be conceived of. As the agreement goes squarely against self-preservation, it should be ignored. Under international law, it is an agreement against a peremptory norm and must be disregarded. The right requires no more for its legitimate invocation than that:

> "1) the measures be taken for an essentially preventive or defensive purpose, though they may assume an offensive or punitive nature in their application.
>
> 2) the end is to prevent an imminent injury.
>
> 3) no otherwise unlawful measure should be resorted to unless all pacific and lawfully means prove to be futile.

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[107] Classified Rand Report; Kecsheneti, *Strategic Surrender and the Policy of Victory and Defeat*, cited in Claro M. Recto's speech, *They Shall Not Prevail*, delivered before the Philippine Chamber of Commerce, April 29, 1959.

[108] *Supra*, note 97.

[109] *Ibid.*

[110] New York Times Weekly Review, August 18, 1957, quoted by Claro M. Recto, CONSTANTINO (ED.) RECTOR READER 101 (1965).

[111] *Supra*, note 97.

4) the acts be guided by good faith.

5) there should be nothing unreasonable or excessive going beyond the needs of the case and out of proportion to the injury sought to be averted."[112]

The circumstances show compliance too clearly to require elaboration. The inevitability and the gravity of the consequences no doubt, should satisfy the "imminent injury" requirement, even if strictly construed. As to the fifth requirement, it has been established that fixed bases can easily and should be replaced either by similar fixed bases in uninhabited or sparsely populated American possessions in the Pacific, or by the more effective mobile "sea bases." The shift to highly mobile "sea bases" would serve the twin purpose of making the delivery systems less susceptible to destruction while at the same time forcing a wide diffusion of enemy air-atomic efforts.[113] At the same time, "by the redeployment of selected forces to certain back bases in the Pacific . . . we (the United States) can maintain an effective military presence within the general areas without the disadvantage of concentrating the forces conspicuously in countries where the present politial climate is impropitious."[114]

There is no doubt a great disparity in the importance of interests that the United States and the Philippines respectively seek to protect. A comparison becomes indispensable. The great disparity itself however, recalling the lesson of *Queen v. Dudley*, "justifies the reversal of the legal protection normally accorded to those interests so that a socially important interest shall not perish, for the sake of respect for an objectively minor right." There is no greater injustice than to endanger the existence of one state for another. To view it differently would be to ignore the corollary precept that as all states are equal, their conflicting interests are also of equal significance.[115]

THE DOCTRINE OF REBUS SIC STANTIBUS

Rebus sic stantibus is a frequently invoked precept to avoid oppresive and injurious treaties. Brierly however observes that "there seems to be no recorded case in which its application has been admitted by both parties to a controversy, or in which it has been applied by an international tribunal.[116] However, to the Permanent Court of International Justice, it is a reasonable doctrine that international law should recognize.[117]

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[112] CHENG, *supra*, note 54 at 99-100.

[113] Pastrana, *op. cit.*, *supra*, note 97, quoting HOOPES, AMERICAN BASES IN AMERICAN STRATEGY (Oct. 1958).

[114] *Ibid.*

[115] *Supra*, note 77.

[116] BRIERLY, LAW OF NATIONS 244 (4th ed., 1949).

[117] Free Zone Cases, P.C.I.J. ser. A, no. 24 p. 10 cited by BRIERLY, *ibid.*, at 336-7, 338 (6th ed., 1962).

The *Oscar Chinn case* of 1934 reiterated the now well known rule of *pacta sunt servanda,* that a party may not unilaterally "free itself from the engagement of a treaty or modify the stipulations thereof except by consent of the contracting parties through a friendly understanding . . . It is not for a treaty to adapt itself to conditions."[118]

A corollary postulate was expressed in the rule, that when a state assumes a treaty obligation, "those of of its rights which are directly in conflict with this obligation are, to that extent, restricted or renounced."[119] The purpose of these pronouncements was to reiterate further the need for stability in treaty relationships by protecting and affectuating shared expectations of the parties expressed in a treaty. But as it is with equal reason, conducive to stability not to apply a treaty when the parties did not expect it to be applied,[120] the rule of *rebus sic stantibus* should equally be an established one. It is thus expressed: "A treaty should not be applied in circumstances which are so different from those for which the parties sought to provide, that its application would be contrary to the parties' shared expectations."[121]

> "For a treaty is not breached if it is not applied in circumstances in which the parties did not intend or expect it to be applied. Indeed to exact performance contrary to the shared expectations not only would be regarded as inconsistent with good faith, but also would produce resentment which would undermine rather than promote stability."[122]

It would appear thus that the rule of *rebus sic stantibus* does not require an independent legal justification for its operation. It should be recognized for the very reason that *pacta sunt servanda* has been established.[123] Evidence of its acceptance in international law is considerable. That anyway is what the International Law Commission has professed, when it drafted the Law of Treaties.[124] Though it avoided the use of the term, it did retain its essential form.

Having at one time applied the doctrine, it would at least be doctrinally consistent for the United States not to deny efficacy to it now. The International Load Line Convention of 1930, a multilateral treaty, though it contained a termination clause, was declared suspended and inoperative "for the duration of the emergency," by President Roosevelt. Strikingly significant in the Acting Attorney General Biddle's Opinion is the affirmation "that it would

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118 Oscar Chinn Case, *supra,* note 3.
119 CHENG, *supra,* note 54 at 123.
120 Lissitzyn, *Treaties and Changed Circumstances,* 61 AM. J. INT'L. L. 896 (1967).
121 *Ibid.*
122 *Ibid.*
123 U.N. Charter, Art. 2(2).
124 *Supra,* note 48.

have been contrary to the shared intentions and expectations of the parties to regard the Convention as applicable in the circumstances" which existed at its conclusion.[125]

On the doctrine of *rebus sic stantibus,* the Harvard Research in International Law notes a number of conceptions of the doctrine.[126] Common to most concepts is the idea that "a treaty becomes legally void in case there occurs a change in the state of facts which existed at the time the parties entered into the agreement." A second concept "adopts as a test for determining whether a given change in the state of facts shall render the treaty no longer binding, not the intention of the parties, but a test of a quite different nature, (namely) that the changes shall be essential, fundamental or vital. A third concept "makes the test of whether or not a change in the state of facts causes termination of the treaty, the fact that the fulfilment of the treaty after the occurence of a change of facts would be so injurious to one of the parties, that such a party has a right under the law or right of necessity to terminate the treaty."

The Scope of the Doctrine, its Elements: Objectives and Subjectives

There seems to be a consensus that the doctrine is not an objective one, being a rule for carrying out the intention of the parties.[127] But the parties to the Vienna Convention appeared to have agreed to make it an objective one. It was eventually recognized however, that the final formulation was a ocmbination of objective and subjective elements.[128] The doctrine is now embodied in the Convention, and is thus expressed:[129]

> "Art. 62.1. A fundamental change of circumstances which has occured with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from a treaty unless:
>
> a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty ..."

As drafted, there is ambiguity in such phrases as "fundamental change", "not foreseen by the parties," and "radically to transform the scope of the

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125 *Supra,* note 120 at 908-10.
126 BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 218 (3rd ed., 1970).
127 Chesney Hill, quoted by Lissitzyn, *supra,* note 120 at 898.
128 *Supra,* note 48 at 156.
129 Vienna Convention on the Law of Treaties, Art. 62.

obligation," as to leave room for subjective application. It should be noted that the Commission's suggestion that the doctrine be applied only by the decision of an international tribunal, met strong opposition and was abandoned.[130]

The phrase "essential basis of consent" in relation to the phrase "fundamental change" has been interpreted not to require that the facts alleged to have changed be material conditions, it being sufficient that they were strong inducements to the party asking for abrogation.[131] "Not foreseen," it has been said can have several meanings.

> "Foreseeing an event may mean expecting it as inevitable, as probable, or as possible but not likely."[132]

It is significant to note that in several instances of state practice, a change of circumstances was invoked even if it was not unforeseen in the absolute sense.

> "The parties may have been aware of the possibility of change but for various reasons failed to provide for it expressly."[133]

Nor is its application limited to treaties containing no provision for termination, though for obvious reasons, it would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.[134] In several instances that it was invoked, the presence of a clause limiting its duration or providing for denunciation did not prevent it.[135]

It appears undisputed however that political changes such as those in the government's form or administration do not terminate treaties.[136] Whether a change in governmental policy constitutes a fundamental change of circumstances was the subject of Sir Humphrey Waldock's proposition. But his claim that it does not met strong opposition. In the end, the Commission "limited itself to saying that the definition of a fundamental change of circumstances should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change in policy."[137] The interesting eventuality would arise when a claim of changed circumstances based on a change of policy is shown not to be abusive. It would seem that the claim of *rebus sic stantibus* could be built upon it.

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130 Lissitzyn, *op. cit., supra*, note 120 at 916.
131 WHARTON'S COM. AM. LAW, sec. 161; BISHOP, *supra*, note 126 at 216.
132 *Supra*, note 120 at 915.
133 *Ibid.*
134 *Supra*, note 48 at 258-9.
135 *Supra*, note 120 at 911.
136 5 HACKSWORTH, INTERNATIONAL LAW 360 (1943); Harvard Research in International Law, Treaties, 29 AM. J. INT'L. L. Supp. 1044 (1935).
137 Professor Schwelb's comments on Lissitzyn's treaties, American Society of International Law at its 61st Annual Meeting, 206 (April, 1967).

THE MILITARY BASES AGREEMENT IN THE LIGHT OF REBUS SIC STANTIBUS

An implicit requirement in the presentation of the doctrine of *rebus sic stantibus*, as a rule of enforcing the shared intentions of the parties, is the difficult task of ascertaining the specific shared intentions and expectations of the parties. The difficulty is often aggravated by the eventuality of shared expectations being superseded by new shared expectations. In this case it is proper to give effect to the latter.[138] In the absence of indicators as to the intentions or expectations as to the new situations, the function of the interpreter is to decide "what would have been the expectations of the parties had they foreseen the new situation," having in mind the major purposes and objectives of the treaty, and facilitating rather than obstructing the attainment of these objectives.[139]

> "Treaties ought not to be interpreted exclusively according to their letter, but according to their spirit."[140]

Recalling once again the shared intentions of the parties to the Military Bases Agreement (again not considering for the time being the Mutual Defense Treaty, except to clarify the objectives of the Military Bases Agreement), the text speaks of the demands of the mutuality of interests, that the governments of the two countries take the necessary measures to promote their mutual security and to defend their territories and areas, particularly through a grant to the United States of bases. It would certainly have been inconceivable for the Philippines to commit itself to the defense of America unilaterally. Obviously, the mutuality of protection and commitment was the "strong inducement"[141] constituting the essential basis of its consent. Concluded as the treaty was at the time when survival was the pressing concern of the country, self-preservation was the underlying end. That this is so expresses itself in the commitment of the parties to declare publicly and formally their sense of unity and their common determination to defend themselves against external attack . . ." and to recognize "that an armed attack in the Pacific area on either of the parties would be dangerous to its own existence."[142]

The significance in the query of President Marcos, therefore, whether "the identity of interests which formed the basis of the Mutual Defense Treaty . . . still exists in so far as the United States is concerned,"[143] is that it implies the logical eventuality of scrapping the agreements should the answer be in the negative. The significance has particular application to the Military Bases

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138 *Supra*, note 120 at 896.
139 *Ibid.*
140 Rivier, quoted by the Arbitrator in the Timor Case, cited in CHENG, *supra*, note 54 at 115.
141 WHARTON'S COM. AM. LAW, sec. 161, cited in BISHOP, at 216.
142 Mutual Defense Treaty.
143 Marcos, *op. cit.*, *supra*, note 1 at 2422.

Agreement. There would then be squarely an application of the *rebus sic stantibus* doctrine.

The Philippines' official position has not gone far enough to demand the closure of the bases to be sure. But the circumstances are such that should it so demand, it could certainly rest it upon *rebus sic stantibus*. Such can be implied from the President's official pronouncement:

> "We must therefore, come equally to an understanding, if the bases are no longer needed by the United States, they can serve no useful purpose either for the Americans or for ... the Filipinos. On the contrary, they are a liability to both parties, a drain on American resources on the one hand, and on the other, a source of international tension in Asia, which can provoke unwanted aggression against the Philippines."[144]

America's need referred to above, upon which the President seems to premise the retention of the bases, obviously refers to the use of the bases as understood by the parties at the conclusion of the Agreement. It bears repeating here that the military bases form part and parcel of the so-called forward strategy of the doctrine of Communist containment, made evidently effective by the overwhelming superiority of the United States at that time. But with the development of an equally effective nuclear capability of Russia, the military bases in the event of nuclear war would suffer instant and certain destruction. The bases, thus rendered susceptible, can have no significance to the Philippines except as a liability. To the United States however, they acquired a new importance. Bases would compel the diffusion of Soviet nuclear effort, the consequences of which have been made sufficiently clear earlier. There is clearly no longer any mutuality of interests here.

The Philippine response is a confirmation. There has been made a pressing commitment through the ASEAN to the objective of establishing a Zone of Peace, Freedom, and Neutralism in Southeast Asia.[145] The ASEAN declaration of 1967 in Kuala Lumpur embodied the agreement among the members that "foreign bases in the region are temporary in character."

> "They exist in other words for a specific purpose in a specific period of our history. They are not meant to last in perpetuity or to linger beyond their period of mutual usefulness to the parties involved."[146]

In a more pointed assessment of changed circumstances, the President said:

> "What has happened in the last decade has been a profound change in the very matrix of international relations, and it has made antiquated the fundamental assumptions that went into the writing of the alliances

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[144] Marcos, *The Philippines in Asia*, 71 O.G. 3204 (May, 1975).
[145] *Ibid.*, at 3203.
[146] *Ibid.*

> that made Asia safe in the fifties. Vietnam is both the beginning of this drama of change and its climacteric. In the history of that war we can read the progressive decline of bilateral and Southeast Asian defenses on the part of the outside powers and the transformation of routes to peace."[147]

The Mutual Defence Treaty in the Light of Jus Cogens and Rebus Sic Stantibus

What has been said dealt in the main upon the Military Bases Agreement. The proposition earlier was made that there is no logical inconsistency in the position which demands the closure of the bases and the strengthening of the Mutual Defense Treaty at the same time. Such appears to have been the standing of many. Recto assailed the military bases as veritable magnets or decoys of military attacks and accordingly asserted the need of closing them. But at the same time he said:

> "For my part, I hold to my original thesis that we should require a formal binding quarantee, that in cases of an attack on the Philippines, the United States will automatically go to war in our defense. I hold furthermore that the best way to secure that guarantee, and indeed the only way compatible with our dignity as an independent nation, can be found not in submitting to a virtual protectorate, but in negotiating a treaty of alliance and mutual defense such as that which the United States has signed with the North Atlantic Nations.
>
> It should be obvious that this permanent security cannot be achieved by ambiguous declarations made by individual officials who are not permanently in office and who under the Constitution of the United States cannot in fact make any binding agreements to declare war in the name of their people."[148]

The drawback in this position appears to be in that the two agreements have always been considered as part of the same military defense scheme.[149] Moreover, the instant retaliation promised by several executive officials appears to have been conditioned upon the requirement that the aggression to be repelled be directed not only at the Philippines, but at the bases established here.

It is the assumption of the joint Eisenhower-Garcia communique of 1958 that "an armed attack against the Philippines will involve an attack against the United States' forces here; hence the conclusion that the attack will be repelled. But it can happen that the attack will not involve the (American)

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[147] Marcos, *The Road to Self-Reliance*, (Speech delivered during the AFP Traditional Testimonial Review, Camp Aguinaldo, September 10, 1975), 71 O.G. 6523, 6528 (Oct. 6, 1975).

[148] As quoted by Pastrana *op. cit., supra*, note 97.

[149] Mutual Defense Treaty and Military Bases Agreement.

forces here, in which case the United States can say with reason that on the basis of the joint communique, there is no obligation on its part to act."[150] It was so made clear in the Symington hearings.[151]

The drawback is not a doctrinal or legal one however, for the Mutual Defense Pact can stand without the Military Bases Agreement. The Southeast Asian Collective Defense Treaty did not condition the operation of Article IV (1) upon the stationing of American forces in the area. It was so made clear to the signatories that reliance was to be placed primarily upon the deterrence of American mobile striking power.[152] So much therefore for the indispensability of military bases in the Philippines. Accordingly the rejection of the Military Bases Agreement on the basis of *jus cogens* or *rebus sic stantibus* cannot leave the question of the Mutual Defense Treaty an academic one.

There seems to be no rule of international law which can be said to have been derogated from by the Mutual Defense Pact. Regional self-defense arrangements are clearly sanctioned by article fifty-one of the United Nations Charter. What has been said to be incompatible with the over-riding right of self-preservation can be invoked against it only with much difficulty. Ignoring for the time being the Military Bases Agreement, the Mutual Defense Pact merely provides that "in order more effectively to achieve the objective of the treaty, the parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.[153] Article IV, under which "each party recognized that an armed attack . . . on either of the parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processess,"[154] does not necessarily operate to make the Philippines an enemy of America's enemies. It certainly does not, recalling what has been said of the military bases, grant the absolute right and impose the imperative duty on the enemy to destroy the Philippines instantly, "knowing full well that unless destroyed at one, they shall be used against him for his own destruction."[155] What has been urgued against the Military Bases Agreement, indeed can not be raised against the Mutual Defense Pact.

A more difficult question is whether the mutuality of interests upon which the defense pact is also premised, still exists to warrant the application of the doctrine of *rebus sic stantibus*. As earlier shown in the case of the bases agreement, the developments that have occured namely, growth in the

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[150] Marcos, *op. cit., supra*, note 1.
[151] *Ibid.*
[152] Statement of John Foster Dulles, cited in PADELFORD, *supra*, note 98.
[153] Mutual Defense Treaty, Art. II.
[154] Mutual Defense Treaty.
[155] Pastrana, *op. cit., supra*, note 97.

capability of Russia to destroy America and her bases entirely, and the inevitable role of the bases to act as decoys for the American homeland, have made mutuality of interests inconceivable even in principle. This does not appear to be the case with the defense pact. It is difficult to sustain the view that the Philippines has committed herself to destruction by committing herself to consider that an attack against the Americans in the Pacific area "would be dangerous to its own peace and safety," and that it would "act to meet the common dangers in accordance with its constitutional processes." Nothing is required of the Philippines more than what it would do any way should Indonesia attack Malaysia or New Zealand. If it appears that American presidential commitments to provide massive retaliation have little value except as forms of psychological reassurances, "since it is clear that they can not by presidential fiat, diminish or expand the contents of the treaty without congressional consent,"[156] it is not because mutuality of interests has disappeared. On the contrary, it merely indicates the application of the "constitutional processes" provided in the treaty, by which mutuality is to be served. If the outcome of American constitutional processes may turn out for the retrenchment of American power abroad, certainly, it can not be said that the United States has withheld what is had promised. Presidential commitments have not, after all been incorporated into the treaty. Failure to carry them out cannot be considered a breach of the treaty itself, much less will it operate to "transform radically the extent of the obligation still to be performed under the treaty,"[157] by the Philippines. What is important is that self-preservation is still equally the preoccupation now as it was at the treaty's inception and the treaty now as it did at its conclusion merely attempts a remedy. What is objectionable with the bases agreement is that while it professes in its text to provide a guarantee of defense, its effect is to impose the liability of destruction. The defense pact, if considered separately from the bases agreement does not.

The essential basis of the consent has not changed, nor has the extent of the obligations. There is no strong case for *rebus sic stantibus*. This seems to be the realization of the Philippine government, glaringly apparent in its policy of securing an improvement of the treaty by incorporating a commitment of instant retaliation, rather than scrapping it altogether.[158]

Conclusion

Foremost of the difficulties that any assessment of the military agreements will meet is establishing the status of the *jus cogens* and *rebus sic stantibus* doctrines as international legal precepts. The doctrines to be sure have been

[156] Marcos, *op. cit.*, *supra*, note 1.
[157] Vienna Convention on the Law of Treaties, Art. 62.
[158] Marcos, *op. cit.*, *supra*, note 1.

embodied in the Vienna Convention, and for this reason, at the least, they have often been invoked as evidence of international law. Moreover, being so far the most authoritative formulations that the international community has produced, its "provisions will exert a significant influence on doctrines and practice."[159] But as the convention has a long way to go before it becomes a binding one,[160] it is much too less authoritative, especially for those who though having ratified it, are unable to invoke it with the force that a binding treaty deserves.

The problem admits of two approaches. On the one hand, the principles of *jus cogens* and *rebus sic stantibus* may be invoked to justify legally what ultimately would be a political act. Politics in the state, says Brierly, "are not an exception to the rule of law; they are carried on within it; and international politics are not inherently incapable of being carried on within the international rule of law."[161]

States have tried and succeeded in terminating treaties unilaterally on the basis of *rebus sic stantibus*, though they were not equally successful in convincing others of the validity of their acts. But this cannot detract from the reality that they did succeed.[162] *Jus cogens*, it is reasonable to assume, in the light of what has been said of its acceptance, can with equal success be invoked. But where the doctrines are invoked with a judicial litigation in mind, the difficulty arises. And a large part of what has been said, was directed to meet it. It bears repeating what is true in any court, that legal positions cannot be built on old established doctrines alone. To ignore this would make stagnant law. Norms which are equally valid and accepted as binding, but lacking only in authoritative expression require precisely this, that cases be raised invoking them that they may be authoritatively declared. Cases are not built solely on the doctrines that have in the past been applied by the courts, but what in the light of the developments in ever growing law, it is reasonable to anticipate, courts will apply. A substantial part of all this of course will become unnecessary upon the entry into force of the Convention. But for states faced with the problem of survival, the assessment of national interests in the light of developments cannot await this eventuality. Either way, considering all that has been said, legal justification will not be wanting.

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[159] Article 84 of the Convention provides that it shall enter into force on the 30th day following the date of the deposit of the 35th instrument of ratification or accession.

[160] Lissitzyn, *op cit., supra*, note 120 at 895.

[161] Brierly, *The Rule of Law in International Society*, 7 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET, ACTA SCANDINAVICA JURIS GENTIUM 3, 15 (1936).

[162] Lissitzyn, *op. cit., supra*, note 120 at 911.