

THE DOCTRINE "REBUS SIC STANTIBUS" AND THE 1972 ABM TREATY: A BRIEF REFLECTION

"...Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."¹

Maurice N. Andem*

Faculty of Law, University of Lapland, Rovaniemi, Finland

ABSTRACT

The 1972 ABM Treaty was concluded between the former Soviet Union and the United States during the Cold War Era. Its purpose was to prevent an arms race in outer space between the two super powers. It laid down the fundamentals for the further development of broad and mutually beneficial co-operation in various fields of mutual interest to the peoples of both countries and in the interest of mankind. In fact, it has been the nucleus of other strategic arms limitation agreements concluded between them.²

Towards the end of the year 2001, President George W. Bush, announced that the United States will no more comply with the provisions of the 1972 ABM Treaty, because of the changing circumstances. What are these circumstances? Will the collapse of the former Soviet Union, for example, be considered as one of the legal grounds for the denunciation of the Treaty *vis a vis* the doctrine "Rebus Sic Stantibus? Thus, the purpose of this paper is to reflect on the provisions of the Treaty and the Doctrine of "Rebus Sic Stantibus".

Introduction

As a law teacher, I have been pondering on what would have happened in our contemporary world, if human beings

(individuals) in all societies had failed to keep the promises made in their intercourse with one another, expressed in the form of agreements or contracts; and between sovereign states, as expressed in various international legal instruments, agreements, conventions, treaties, etc.

In traditional societies, individuals, in their mutual relationships and intercourse, were obligated to perform the promises made to one another. These promises were not in written form, but verbal. The principles of trust, honesty, integrity and good faith were very important in the development of their contractual relations among themselves. This can be seen in the history of the origin and development of various legal cultures and systems of the world - both in developed and developing societies. Furthermore, the development, progress and stability in families, as the primary foundation and unit in all human societies would have not been what they are today if our ancestors had failed to honour and respect their marital contractual obligations. This analogy is also applicable in international intercourse between states.

Roscoe Pound, for example, reflecting on the development of contract in the civil law and Anglo-American common law legal systems, correctly pointed out that:

"Wealth, in a commercial age, is made up largely of promises. An important part of everyone's substance consists of advantages which others have promised to provide for or to render to him; of demands to have the advantages promised, which he may assert not against the world at large but against particular individuals. Thus the individual claims to have performance of advantageous promises secured to him. He claims the satisfaction of expectations

Copyright © 2002 by Maurice N. Andem. Published by the American Institute of Aeronautics and Astronautics, Inc., with permission.

created by promises and agreements. If this claim is not secured friction and waste obviously result, and unless some countervailing interest must come into account which would be sacrificed in the process, it would seem that the individual interest in the promised advantages should be secured to the full extent of what has been assured to him by the deliberate promise of another.In an earlier chapter I suggested, as a jural postulate of civilized society, that in such a society men must be able to assume that those with whom they deal in general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. Hence in a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in good faith, a social interest in the stability of promises as a social and economic institution, becomes of the first importance. This social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promise, that is, his claim or demand to be assured in the expectation created, which has become part of his substance."³

We know that our contemporary civil societies would have been in absolute confusion, under-development and chaos, if all subjects of both national laws and international law had no binding legal duty to fulfil all their contractual obligations. This is due to the existence of universal moral values and ethical rules of behaviour which have been developed and perfected in various forms in all human societies over the past two thousand years. These rules have been codified into the corpus of domestic laws of all legal traditions and also in contemporary international law of nations - international law. Furthermore, we know that international treaties (conventions), as the primary source of international law, were concluded for the common good of the state parties and their nationals.

Like national or domestic laws, international treaties are governed by principles which have been codified in the 1969 Vienna Convention on the Law of Treaties.⁴ They have played and shall continue to play a major role in the consolidation and strengthening of the existing international relations between states and peoples of the world.

The 1972 ABM Treaty between the former Soviet Union and the United States was concluded thirty years ago in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties. Moreover, it should be borne in mind that the 1969 Vienna Convention contains provisions relating to the fundamental change of circumstances, which is expressed in the **Doctrine Rebus Sic Stantibus**.

It is interesting to note that I was a fourth-year law student when the late US President Richard Nixon visited Moscow in 1972. I am not convinced of the reasons given by President George W. Bush for denouncing the 1972 ABM Treaty.

Thus, the purpose of this paper is to reflect on the provisions of the 1972 ABM Treaty vis-a-vis the **Doctrine Rebus Sic Stantibus**. Considering that the relevance of the 1969 Vienna Convention on the Law of Treaties to the topic of my paper, it would be useful to examine some of its provisions.⁵

The 1969 Vienna Convention on the Law of Treaties

The Convention was signed in Vienna, on 23 May 1969 and entered into force on 27 January 1980. It consists of a Preamble, 85 articles, which are further divided into eight parts and an annex.

In the Preamble, the States Parties to the Convention, recognized the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems. They further expressed their belief that the codification and the progressive development of the law of treaties achieved in the Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations.

Article 1 stipulates that the Convention applies to treaties between States. The definition of the terms is given in the provisions of Article 2. Article 2 para. 1(a) stipulates that "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or more related instruments and whatever its particular designation. According to Article 6, every State possesses capacity to conclude treaties.

Article 11 provides that consent of a State to be bound by a treaty may be expressed

by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means so agreed. Articles 12 to 17 elaborate on these means of expressing the consent of a State to be bound by a treaty.

PART III, Section 1 of the Treaty contains two important articles which deal with the observance of treaties (Art. 26 and 27). Article 26 embodies the principle of **pacta sunt servanda**. According to the Black's Law Dictionary, Fifth Edition (1979), **pacta sunt servanda** means that agreements (and stipulations) of the parties (to a contract) must be observed. It stipulates: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Pursuant to the provision of Article 27, a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. It further provides that this rule is without prejudice to Article 46.⁶

This is an important principle in both private law and international law. Parties to any contracts are supposed to be sincere, trustworthy, honest and to act in good faith. The principle of good faith is one of the most important principles of international law and international relations between States and peoples of the world. It is quite evident that individuals cannot be engaged in any type of contractual relationship or intercourse without the application of the principle of good faith.

Professor Bing Cheng, in this respect, correctly pointed out that: "The law of treaties is closely bound to the principle of good faith, if indeed not based on it; for this principle governs treaties from the time of their formation to the time of their extinction."⁷

This principle is embodied in the provisions of Article 2(2) of the UN Charter. It has been elaborated further in the UN General Assembly resolution 2625 (XXV) of 24 October 1970, **DECLARATION on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations**. It stipulates: "Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations. Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law. Every State has a duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law. Where obligations arising under international agreements are in conflict with the obligations of the Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail."

Furthermore, it is interesting to note that the foregoing provisions are also embodied in the provisions of the **FINAL ACT OF THE 1975 HELSINKI CONFERENCE ON SECURITY AND CO-OPERATION**

IN EUROPE - thus consolidating the mandatory character of this principle. It stipulates that "The participating states will fulfil in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties. In exercising their sovereign rights, including the right to determine their laws and regulations, they will conform with their legal obligations under international law; they will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Co-operation in Europe. The participating States confirm that in the event of a conflict between the obligations of the members of the United Nations under the Charter of the United Nations and their obligations under any treaty or other international agreement, their obligations under the Charter will prevail, in accordance with Article 103 of the Charter of the United Nations."

As could be seen from the foregoing provisions, the principle of good faith (**pacta sunt servanda**) has been and will continue to be the life line or driving force in the progressive development and codification of international law, including the civil laws of nations. Furthermore, Professor Bing Cheng, in this respect correctly pointed out that, "**Pacta sunt servanda**, now an indisputable rule of international law, is but an expression of the principle of good faith which above all

signifies the keeping of faith, the pledged faith of nations as well as that of individuals. Without this rule, "international law as well as civil law would be a mere mockery."⁸

Article 62 of the 1969 Vienna Convention on the Law of Treaties contains provisions on "**Fundamental change of circumstances**" or the **Doctrine Rebus Sic Stantibus**. Before continuing with my reflection, it would be useful to define the meaning of "**Rebus Sic Stantibus**". According to Black's Law Dictionary, it is "A name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed."

Bearing in mind the above definition, let us see how this change is elaborated in the provisions of the said Article 62 of the 1969 Vienna Convention. It stipulates as follows:

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

(a) the existence of those circumstances constitute 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.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraph, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty

it may also invoke the change as a ground for suspending the operation of the treaty."

The Doctrine Rebus Sic Stantibus and the 1972 ABM Treaty

It can be seen that the foregoing provisions of Article 62 provide basic rules on fundamental change of circumstances. Thus, taking into consideration what has been discussed above, I will now continue with my brief reflection on the topic of my paper.

It will be recalled that the 1972 ABM Treaty between the former Soviet Union and the United States was concluded during the Cold War Era under Brezhnev's foreign policy of *détente*. It was an important and major rapprochement between the two super powers after the World War II. In the Preamble, for example, both State Parties declared their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions of strategic arms, nuclear disarmament, and general and complete disarmament. They further expressed their desire to contribute to the relaxation of international tension and the strengthening of trust between States.

At this juncture, it should be reiterated that the 1972 ABM Treaty has contributed a lot to strengthening the provisions of the 1967 Outer Space Treaty (OST), particularly in respect of the implementation of Articles I, II, III and IV. Due to lack of space, it is not my intention to examine again the provisions of OST and the ABM Treaty in

this paper. This has already been done in my previous papers.⁹

Bearing in mind the above definition on the **Doctrine Rebus Sic Stantibus** and the provisions of Article 62, the question is: what are these fundamental changes of circumstances that have contributed to the denunciation by US President George W. Bush of the 1972 ABM Treaty? Should the peace-loving states and peoples of the world consider the collapse of the former Soviet Union (now succeeded by Russia) as one of the legal grounds for this denunciation? Let us look at the position of the two Presidents during some of their joint press conferences.

In an answer to a question on the ABM Treaty posed by a reporter during a Press Conference by President Bush and President Vladimir Putin, the US President replied as follows:

"Well, I'm convinced that the treaty is outdated and we need to move beyond it. And we're having discussions along these lines. We had good discussions today; we had good discussions in Shanghai; we had good discussions in Slovenia; and we'll have good discussions in Crawford. This is obviously a subject that's got a lot of ramifications to it. I clearly heard what the President has had to say and his view of the ABM Treaty; he's heard what I've had to say. And we'll continue working it. But my position is, is that it is a piece of paper that's codified a relationship that no longer exists -- codified a hateful relationship. And now we've got a friendly relationship. And I think we need to have a new strategic frame work that reflects the new relationship, based upon trust and co-operation. But we we'll continue to work it."¹⁰

The reasons given above are not legally and logically sound as far as the provisions of the 1969 Vienna Convention on the Law of Treaties mentioned above are concerned.

Why should such an important international legal document which has a major role to play in the disarmament process be called "a piece of paper"? It should be pointed out that the 1972 ABM Treaty had contributed a lot to the normalisation of relations between East and West and to the maintenance of international security and peace. It was a great contribution by the two super powers to the efforts of the United Nations in the prevention of an arms race in outer space, the moon and other celestial bodies.

Furthermore, in an earlier Press Conference by the two Presidents in Slovenia on 16 June 2001, President Putin correctly emphasised the importance of the 1972 ABM Treaty in the following words:

"Now, as far as the issue of the antimissile defense, the official position of the Russian government is known. I don't think we need to spend time to yet again declare it. We proceed from the idea that the 1972 ABM Treaty is the cornerstone of the modern architecture of international security. We proceed from the premise that there are elements which unite us with our partners in the United States....Now, as far as the issues proliferation and nonproliferation, I have to say that in our opinion, this is a topic that's very, very closely tied to the ABM Treaty, because many other things are hooked onto this same string, and many threshold states, when it comes to the destruction of a previous accord, can only be happy and say, look, fantastic. Yesterday, we were the threshold, nobody agreed -- nobody took any account of us; now, today, recognize us. This is a problem we're going to have really think very hard about."¹¹

We do agree with the position of the Russian President Putin. He is very sincere and honest in reiterating the position of the former Soviet President Mikhail Gorbachev with respect to the 1972 ABM Treaty.¹² It should be noted the political changes in leadership have not affected the

official position of the Soviet/Russian government with regards to the performance of the 1972 ABM Treaty.

It is very sad to observe that since the beginning of the 21st Century a lot of events have taken place that have threatened the rule of law in international relations between states and peoples. The respect and sanctity of international agreements are being ignored and undermined by some states for one reason or the other. Proliferation of weapons of mass destruction is increasing daily, more than during the Cold War Era. Hatred, bitterness, fear, wars and lack of respect for human life and the environment could be seen in many parts of the world. The sad event of 11 September 2001 further illustrates the need for states to comply with their obligations arising from international treaties, particularly those arising under the provisions of the UN Charter.

No states or individuals responsible for the implementation of international agreements have the right to annul or denounce unilaterally their obligations without the consent of the other parties. Performance in good faith of all obligations arising from international treaties has been and will continue to be the core in the codification and progressive development of international law and in the consolidation and strengthening of international relations and co-operation between states and peoples of the world. Therefore, the doctrine *rebus sic stantibus* cannot be applied to international law because of its

negative impact on international law and relations. Professor Wolfgang Friedmann, in this respect, correctly pointed out that this form negative law-making is, of course, highly unsatisfactory. It creates uncertainty, and leaves a vacuum where there was at least something before.¹³ The missile defence system contravenes the provisions of the UN Charter, arms control and disarmament treaties, the 1967 Outer Space Treaty and the 1972 ABM Treaty.

Concluding Remarks and Observations

In the foregoing pages I have tried to reflect on the nature of international treaties, with special reference to the 1972 ABM Treaty between the former Soviet Union/Russia *vis a vis* the Doctrine of Rebus Sice Stantibus. In doing so, I have briefly examined some of the provisions of the 1969 Vienna Convention on the Law of Treaties. The nature of the principle of *pacta sunt servanda* was elaborated and discussed.

In this concluding part of my paper, may I seize this opportunity to point out that the disappearance of the former Soviet Union or the USSR from the political map of the world was a spiritual death, because the regime relied solely on its military might and power. In fact, the Russian government and people are beginning to recognize the importance and the truth in what the Divine WORD says: "**It is the spirit that quickeneth; the flesh profiteth nothing: the words that I speak unto you, they are spirit, and they are life**";¹⁴ and "**Not by might, nor by power, but my spirit, saith**

the LORD of host".¹⁵ I believe that the Almighty Creator will help them to regain that part of human existence which was neglected by the old regime. Consequently, He will give them a new dynamic role to play in international affairs and politics in the 21st century.

The Russian Federation is the successor State. The strategic and military infrastructures are still the same, irrespective of the socio-economic problems currently facing the Russian people. The post Cold War Russian government has not withdrawn from or denounced the ABM Treaty or any of the SALT and START Agreements, irrespective of some shortcomings in their interpretation and implementation by both parties.

It should be emphasized that the majority of states and peoples of the world want to live in peace and co-operate with one another in the 21st. century. The human race is already fed up with the hatred, bitterness, lack of neighbourly love and war which had caused a lot of sufferings and sorrows in the world throughout the 20th century. Therefore, it is now time for all the policy-makers and political leaders in the position of authority to listen and comply with the wishes and expectations of the peoples of the world. This is what I consider to be democracy.

The former UN Secretary-General Boutros Boutros-Ghali, in this respect, correctly emphasized that: " Democracy within the family of nations means the application of its principles within the world Organization itself. This requires the fullest consultation,

participation and engagement of all States, large and small, in the work of the Organization. All organs of the United Nations must be accorded, and play, their full and proper role so that trust of all nations and peoples will be retained and deserved. The principles of the Charter must be applied consistently, not selectively, for if the perception should be the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of that instrument. Democracy at all levels is essential to attain peace for a new era of prosperity and justice."¹⁶ This is very true!

Furthermore, it should be borne in mind that no amount of military build-up on our blue planet - earth or in outer space, moon and other celestial bodies cannot and will not bring peace to human race in the new millennium; but the virtue of loving our neighbours as ourselves in our daily intercourse with one another. Space science and technology in particular have brought states and peoples of all races, traditions and cultures much more closer. Outer space, as the province of mankind, must be zone of peace, harmony and co-operation. It was created perfect and good by the Almighty Creator of the universe. All states and peoples have the divine obligation to respect its sanctity and purity. We have to leave it in a good condition for the unborn generations to come.

Thus, the militarization of outer space, including the moon and other celestial bodies, should be considered as a serious terrorist act and crime against the human

race and the Divine Law, because "The earth is the LORD's, and the fullness thereof; the world and they that dwell therein (Ps. 24:1, 50:12)."

Finally, I would like to conclude with this quotation from one the world's leading Statesmen, President Abraham Lincoln: **"With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in: to bind up the nation's wounds; to care for him who shall have borne battle, and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves, and with all."**¹⁷

May the golden rule cited on the first page of this paper, be the guiding principle in the actions, words and deeds of all states and peoples of the world throughout the new millennium.

¹ Gospel of St. Mt. 7:12. This same principle is expressed in Lk 6:31 as follows: "And as ye would that men should do to you, do ye also to them likewise." See also Lv. 19:18; Mt. 22:37-40; Mk. 12:29-31.

² See, for example, DOCUMENTS OF THE USSR-USA SUMMIT TALKS, June 1973, Novosti Press Agency Publishing House, Moscow (1973); Warfare and Welfare. Integrating Security Policy Into Socio-Economic Policy, Tinbergen, Jan and Fischer, Dietrich, Wheatsheaf Books, Sussex (1987), pp. 116-138.

³ See, An Introduction to the Philosophy of Law, Yale University Press, Yale (1982), pp. 133-134.

⁴ For details, see, The Work of the International Law Commission, Fourth Edition, United Nations, New York (1988), pp. 260-286.

⁵ For more details on the Convention, see, for example, Brownlie, Ian, Principles of Public International Law, Third Edition, Clarendon Press,

Oxford (1979), pp. 600-632; Harris, D. J., CASES AND MATERIALS ON INTERNATIONAL LAW, Fifth Edition, Sweet & Maxwell, London (1998), pp. 765-858.

⁶ Art. 46 stipulates: "1. A State may not invoke that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

⁷ Cheng, Bing, GENERAL PRINCIPLES OF LAW as applied by INTERNATIONAL COURTS AND TRIBUNALS, Grotius Publications Limited, Cambridge (1987), p. 106.

⁸ Ibid., p. 113. For further comments on the principle, see, Ibid., pp. 106-119.

⁹ See, e.g., Andem, Maurice N., IISL-97-IISL.4.11 "Implementation of Article IV of the Outer Space Treaty of 1967 During the 21st. Century", in Proceedings, IISL 40th Coll. on the Law of Outer Space, Turin, Italy (1997); by same author, IISL-00-IISL.4.01 "Implementation of the 1967 Outer Space Treaty in the New Millennium: A Brief Reflection on the Implication of the Proposed Missile Defence Systems", in Proceedings, IISL 43rd Coll. on the Law of Outer Space, Rio de Janeiro, Brazil (2000).

¹⁰ For more detail, see <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-3.html>

¹¹ For more detail, see, <http://www.whitehouse.gov/news/releases/2001/06/print/20010618.html>

¹² For more detail, see, REYKJAVIK Documents and Materials, Novosti Press Agency Publishing House, Moscow (1987).

¹³ For more details, Friedmann, Wolfgang, The Changing Structure of International Law, Stevens & Sons, London (1964), 133-134.

¹⁴ John 6:63. See also, Ps. 119:97-112; II Tim. 3:16-17.

¹⁵ Zech. 4:6.

¹⁶ Boutros Boutros-Ghali, An Agenda for Peace: Preventive diplomacy, Peacemaking and Peace-keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 Jan. 1992, p. 47.

¹⁷ Second Inaugural Address, 4 March 1865, in THE OXFORD DICTIONARY OF QUOTATIONS, FOURTH EDITION, Edited by Partington, Angela, Oxford University Press, Oxford (1992), p. 422.