CLAUSULA REBUS SIC STANTIBUS IN INTERNATIONAL LAW

If International Law were to insist too rigidly on the binding force of treaties, it would merely "defeat its own purpose by encouraging their violation." The neutralisation of the Black Sea (1856) and the Austrian annexation of Bosnia and Herzegovina and the declaration of Bulgarian independence (1908) are instances of the inadvisability of making rigid treaties which contain in themselves elements of their own violation.

The attitude of International Law to oppressive or obsolete treaty obligations is attempted to be solved by many text-book writers through the doctrine of the *"Clausula rebus sic stantibus."* Though a doctrine of text-writers, it has been used in argument to justify the repudiation of treaty obligations.

Professor Brierly pointedly observes that "There seems to be no recorded case in which the application of the *clausula* has been admitted by both parties to a controversy or in which it has received judicial recognition from an international tribunal."

The doctrine itself takes different forms in different writers. In municipal law it is called the principle of *frustration.* Lord Sumner held in *Hirji Mulji et al* v. *Cheong Yue Steamship Co. Ltd.*,[1] that the principle of frustration of the adventure applies to a time charter. Mr. Justice Russell describes the doctrine in *In re Badische Co., In re Bayer Co. etc.*[2] thus:—

> "The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or the circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any expressed term of the contract."

Lord Sumner has well stated that "the legal effect does not depend on their intention or their opinion or even knowledge as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure".

But in International Law, can anything be done to determine when "circumstances have so far changed" that a treaty can no

[1] [1926] A.C. 497 at 509.
[2] [1921] 2 Ch. 331 at 379.

longer be fairly deemed to be operative? When such a change has come, how to settle "whether it is the duty of High Contracting Parties to denounce or to propose to amend the treaty?"[3]

Three instances are also cited by Professor Bryce. In the Treaty of Paris (1856) Russia had promised to maintain no navy in the Black Sea. In 1871, she announced that she would no longer respect this provision at the time of war between France and Germany. Further, a clause in the Treaty of Berlin (1878) bound Russia not to fortify the harbour of Batum on the Black Sea. But in 1886, Russia declared that she would disregard this provision. The comment of Bryce is that "both these treaty obligations had been imposed upon Russia at a time when the forces arrayed against her were too strong to be resisted. She accepted them willingly under a sort of duress!" Again, Count Von Auhrenthol, the foreign minister of Austria-Hungary, declared his intention to annex Bosnia "which had been assigned to Austria under the Treaty of Berlin," to be occupied by her without prejudice to the sovereignty of Turkey.

Art. XIX of the League Covenant empowers the Assembly "to advise the reconsideration by the members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

This article is now being increasingly pressed into service. Lord Reading said recently that the modus of Germany to revise the Treaty of Versailles lay through resorting to this article rather than to walk grimly out of the League. In a letter published in the *Transactions of the Grotius Society*,[4] Lord Robert Cecil writes as from the Foreign Office under date January 6th, 1930 that "as regards the legal meaning of the text of Art. XIX, there is in my opinion nothing to imply that any special class of treaties is excluded (e.g. The Territorial Settlements of the Peace Treaties of 1919)".

Dr. Lauterpacht also holds that "the Permanent Court will be competent to deal with the purely legal aspect of the *clausula*, viz., with those cases in which a State will claim the right to be relieved from an obligation on account of supervening impossibility of performance or of frustration of the object of the treaty as a result of the fulfilment of an express or implied condition." He further argues that the Court will be in a position to entertain requests of this kind notwithstanding the

[3] Bryce "International Relations" p. 168.
[4] Transactions of the Grotius Society, Vol. XVIII, page 166.

fact that the *clausula* even in its purely legal aspect is neither a customary nor a conventional rule of International Law. For, International Law applicable by the Court does not consist solely and exclusively of rules recognised by States. The "general principles of law recognised by civilized nations" are according to Art. 38 (3) of the Hague Statute applicable as binding rules of international law "when there are no conventional or customary rules at hand". With great respect to Dr. Lauterpacht, this argument though clear is far-fetched.

This doctrine has been considered by the German Court in *The Free Hansa City of Bremen* v. *Prussia* (on June 29th, 1925). The Court is reported to have held in the case that "international law, recognises to a large extent the possibility of the termination of treaties in accordance with the principle of *Rebus sic stantibus*[5]; but it negatived the applicability of the principle in the particular case.

This doctrine being differently interpreted, it is necessary to reiterate that the doctrine is essentially *unjuridical;* as Professor Brierly tersely puts it, even if political motives sometimes lead to a treaty being treated as a "scrap of paper", international lawyers need not invent "a pseudo-legal principle" to justify such acts. Power to bring the case for the avoidance of a treaty before the Permanent Court of Justice, it is submitted, will be necessary in order to have the Permanent Court seized of suitable cases.

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[5] Cited in "Chapters on Current International Law and League of Nations" p. 111, by Sir John Fischer Williams.