

## SANCTITY OF TREATIES

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Distinguished jurists and eminent internationalists have often discussed the question of the true meaning of the sanctity or inviolability of treaties, without being able to come to a definite understanding, their ideas having not yet crystalized into any concrete form, giving satisfaction both to the legal science and the practical exigencies of bodies politic.

In reviewing the practice of the people of ancient times, we see that faith to covenants was in some way their watchword, religious rites being the cardinal feature of their conclusion, although they may, at times, have deviated from the strict observance of their treaty obligations.

Notwithstanding the narrowness of views of the "chosen people of Israel" in their dealings with alien nations, and, to use the words of a distinguished philosopher jurist,<sup>1</sup> "the little harmony existing between international compacts and the Mosaic spirit," such instruments were, nevertheless, frequently used by the Jews in their intercourse with foreign nations,<sup>2</sup> their faithful execution being, as it is asserted, a distinct feature of the character of that race.<sup>3</sup>

However, it seems that the Jewish law forbade the conclusion of treaties with the heathen nations. As in all the nations of the ancient world, war was a general, and peace an exceptional condition; so with the Hellenic peoples, the existence of a treaty with foreigners was considered by them as being a preliminary necessity for having friendly intercourse with such alien nations.<sup>4</sup> And as they attached great importance to the fulfilment of their obligations towards foreign nations, they impressed on international compacts the character of sacredness, by invoking the divine wrath upon those who would violate such covenants. On the

<sup>1</sup> See Laurent, *Etudes sur l'Histoire de l'humanité*, Vol. I, p. 395.

<sup>2</sup> See Grotius, *Le Droit de la Guerre et de la Paix*, Lib. II, Ch. XV, 9. 1. ed. P. Fodéré, Vol. II, p. 250.

<sup>3</sup> See J. L. Saalschutz, *Das Mosaische Recht*, ed. 1853, p. 654.

<sup>4</sup> Laurent op. cit. I, p. 46.

"Ὅστε τὰ πλεῖστα τοῦ βίου καὶ Ἑλλησι

καὶ τοῖς βαρβάρουσ διὰ συνθηκῶν εἶναι.

Isocrates adv. Callim, S. 27, quoted by Laurent op. cit. 46, Note 3.

other hand the deposition of such instruments in a temple and the annual oaths for their faithful execution, showed the high regard that the Hellenic people had for treaties.<sup>5</sup>

As it is attested by the ancient writers, it was the general practice of the people of antiquity to consider a solemn oath as the most important, if not the most effectual, sanction for the faithful fulfilment of promises.<sup>6</sup>

The conception of international relations of the early Romans did not differ much from that of the Greeks. War being the natural condition also with them, peace therefore could only be secured by a treaty. But as such compacts were considered as being merely truces, they expired, during the Regal period, after the death of the King.<sup>7</sup>

As in private contracts, so in international compacts, sacramental forms were absolutely necessary for their validity, religious rites being, besides, an integral part of such formalities. The impressive ceremonies performed for the faithful execution of treaties, such as the invocation to Jupiter and the imprecations for the punishment of the violators of such agreements, the solemn oath taken by the King in the early days of Rome and later by the Consuls; the deposit of the instruments in the sacred temple of Jupiter at the Capitol, notwithstanding the assertion to

<sup>5</sup> Laurent op. cit. Vol. II, p. 145. Herod. IX, 7; Thucyd., V, 18 and 23. Polyb. XXVII, 16, 3, quoted by Laurent, op. cit. p. 145, notes 2 and 3.

<sup>6</sup> See Grotius, op. cit. II, p. 187, *et seq.* Also Geffken in Holtzendorf's *Handbuch der Volkerrecht*, Vol. III, p. 85, *et seq.* Also Fustel de Coulanges, *La Cité Antique*, p. 245. Solon, after framing the laws and constitution of Athens, departed from the city, but not before the Senate and the Archons took the oath that they would not modify the new legislation for ten years.

See Grote, Part II, Vol. III, Ch. XI.

"There is a son of the oath," said the Pythoness, "a child without name, without hands and feet. He, however, pursues with swiftness until it catches a whole house and destroys them." Herod., Lib. VI, quoted by Grotius II, p. 189.

"Ορκου δὲ προστεθέντος ἐπιμελεστέρα

Τυχὴ κατέστη· δισσὰ γὰρ φυλάσσεται

Φίλων τε μέψιν, κρείς θεοῦ ἀμαρτανειν.

Sophocles, λειψ. Ἴπποδαμ. παρὰ Στοβαίου

quoted by N. I. Saripolos, in τὰ τῶν ἔθνων ἐν εἰρήνῃ καὶ ἐν πολέμῳ Νόμιμα, p. 211, note B

<sup>7</sup> See Laurent op. cit. Vol. III, p. 12, *et seq.*

the contrary,<sup>8</sup> must have had a powerful influence on the minds of the Roman people.<sup>9</sup>

According to the Roman belief, a violation of a treaty by their authorities exposed the whole people to the divine anger.<sup>10</sup> Even during the Empire a solemn oath was still a distinctive feature of that epoch supposed to insure the fulfilment of promises made in treaties,<sup>11</sup> the gods being considered even in the days of Nero as protectors of treaties.<sup>12</sup>

Notwithstanding all these religious solemnities and the "divine sanction," for the observance of treaties, the Romans were not less accused than the Greeks or Carthaginians for violating their pledges whenever it suited their interests. A Thessalian trick, or Cretan perfidy, or to act as the Parians,<sup>13</sup> were not less known expressions than Punic or Roman faith.<sup>14</sup>

As is well known, besides the solemn oaths, the ancient nations considered the taking of hostages as an additional security for the faithful execution of their treaty obligations.

Nor are these securities left to oblivion. As a matter of fact, they were frequently in usage in the middle ages and even at a much later epoch such proceedings were not considered as being obsolete and out of date.<sup>15</sup> And up to comparatively recent times, the Christian nations of Europe looked upon oaths taken solemnly on the altar of a church as one of the best securities for the faith-

<sup>8</sup> See Montesquieu, *Esprit des lois*, XXI, 11, quoted by Laurent, Vol. III, p. 24.

<sup>9</sup> See Laurent, op. cit. III, p. 23. See also F. de Coulanges, op. cit. pp. 246, 247.

<sup>10</sup> See Grotius, Lib. II, Ch. XV, 3, 1, ed. Fodéré II, p. 239. Also Geffeken in Holtz., op. cit. III, p. 116. Sir Travers Twiss, *The Law of Nations*, p. 231, ed. 1861. Walker, *History of the Law of Nations*, p. 47. Even during the Empire a solemn oath was still a distinctive feature of that epoch, supposed to insure the fulfilment of promises made in treaties; the gods being considered, even in the days of Nero, as protectors of treaties.

<sup>11</sup> See Rivier, *Principes du Droit des Gens*, Vol. II, p. 94.

<sup>12</sup> See Walker, op. cit. p. 61. Mohammed also attached great importance to a solemn oath. "Perform," he said, "your covenant in God . . . and violate not your oaths." Coran, Ch. XVI, 93. "Take not your oaths between you deceitfully, lest your foot slip, after it has been steadfastly fixed." *Ib.*, Ch. XVI, 96.

<sup>13</sup> Laurent op. cit. II, p. 146, 147.

<sup>14</sup> Laurent, op. cit. III, p. 24.

<sup>15</sup> See Grotius, op. cit. Lib. III, Ch. XX, 42. ed. Fodéré. Vol. III, pp. 416-417.

ful performance of international compacts.<sup>16</sup> Vattel, whose writings shed so much light on the principles of the law of nations,<sup>17</sup> unlike Grotius, and other writers of the time of the illustrious Dutch jurist<sup>18</sup>—champions in forcible language that the principle of the oath is not an obligation in the legal sense, and that consequently it cannot alter the nature of a treaty; and that, therefore, the death of the person who took the oath cannot impair the validity of that instrument. *In fine*, that if a treaty is null and void the oath cannot make it valid.<sup>19</sup>

Besides solemn oaths, the kissing of the cross, submission to ecclesiastical censure, ex-communication by the Pope, and various other means of insuring the faith of treaties, seem to have been quite favored for many centuries; in mediæval Europe, some of them being even used in much later times.<sup>20</sup> The custom of taking hostages is even preserved in modern times, and is used by the civilized nations in their dealings with barbarous tribes of people, rather as a means of intimidation than a real security for the faithful performance of the promises made by such tribes.<sup>21</sup> It is not unusual to bind such people, however, by solemn oaths.<sup>22</sup> The appearance of the Mohammedan conquerors, such as the Arabs in the East, the Moors in Spain, and the Turks in the

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<sup>16</sup> Bluntschli, *Le Droit International Codifié*, ed. Lardy, art. 425, Note 1. See also Pradier Fodéré, *Traité de Droit International public*, Vol. II, p. 1157. The latest example of that character is that of the treaty of alliance concluded between France and Switzerland, when the plenipotentiaries of both parties took an oath in a cathedral for the faithful execution of their agreements. Cf. P. Fodéré, II, No. 1157.

<sup>17</sup> See Vattel, *Le Droit des Gens*, ed. P. Fodéré, Vol. II, Sec. 225, *et seq.*

<sup>18</sup> See Grotius, *op. cit.* II, Ch. XIII, 1 ed. P. Fodéré, p. 186.

<sup>19</sup> See instances of interpositions to treaty obligations by various Popes, by the right claimed by the Holy See to absolve sovereigns from their oaths. The most remarkable example is that of a papal bull declaring as null and void certain articles of the famous treaty of Westphalia of 1648. For details see Vattel, *op. cit.* II, S. 223, 224, ed. Fodéré, pp. 224, 225. It seems that even now the theory of the Vatican in regard to the concordats concluded between the Papal See and foreign powers, is that the Church has the right to abrogate such agreements if they subsequently appear to be contrary to her interests. Rivier draws from that view the just conclusion that the other contracting parties have the same right. (Rivier, *op. cit.* II, p. 134.)

<sup>20</sup> See G. F. de Martens, *Precis de Droit des Gens Moderns*, L. II, Ch. 63. Also P. Fodéré, *op. cit.* II, 1156.

<sup>21</sup> See P. Fodéré, *op. cit.* II, No. 1060.

<sup>22</sup> See Bluntschli, *op. cit.* art. 425, Note 1.

Byzantine Empire, and the frequent disregard generally of their agreements with "infidels" (as it seems in contravention to the express command of their prophet) was not more reprehensible than the doctrine laid down by Christian casuists, that treaties concluded by Christian nations with the disciples of the "Arabian impostor," may be violated with impunity.<sup>23</sup>

Grotius, taking part in the controversy of his time in respect to the propriety of concluding treaties with nations who did not profess the true religion, exhausted all his known learning and acumen in order to prove that the difference of religion could not, by right, be an impediment to entering into compacts with non-Christians, asserting that the right of concluding treaties was founded on natural law; he also refuted the argument of some theologians by showing that neither the Mosaic law nor the Christian faith prohibited the disciples of Moses or of Christ from entering into agreements with people of any other faith.<sup>24</sup>

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<sup>23</sup> "Perform the covenant," it is said in the Koran, "which ye shall have made with them (the idolators) until they shall be elapsed." See Koran, Ch. IX, 4. Mohammed in his letter to Prince John of Ayla, by which he summoned the latter either to accept the new faith or to pay tribute, promised him, in case of compliance with his demand, to defend the Christian prince against all his foes; he, however, made an exception for any further demand which could have been made "by the Lord or his apostle," namely Mohammed, which, in plain words, means that the prophet was not bound to continue the promised protection, if he had ever the fancy to change his mind. The tendency of the Mohammedans to violate their covenants with non-Moslems could be seen even during the life of the Arabian Prophet himself. Thus, when Abdalla criticised the leader Obada for not keeping faith with some of the Jewish tribes in Arabia, Mohammed's general replied, "Hearts have changed, Islam hath blotted all treaties out." See Muir, *Life of Mohammed*, p. 235. See also an instance of a violation of a treaty by the prophet himself. Muir, *Ib.* p. 177. In consequence of the representations made by the Foreign Powers in regard to the infractions of the capitulations by the provincial authorities in Turkey, the Grand Vizier issued a circular to the Governors in the Empire instructing them to abstain from any violation of the rights enjoyed by foreigners through the capitulations. "The Ottoman government," said the circular, "finds it natural to respect the treaties, and pending their abrogation, with the consent of the interested parties, of various articles of those treaties which are contrary to European public law and restrictive of Ottoman sovereignty, wishes to give an evidence of its loyalty to keep its engagements in the present as it did in the past." (See *Levant Herald*, of Constantinople, February 17, 1910.) One might ask the Grand Vizier whether it is the faith to treaties which prompted him to issue this circular, or paramount force and the desire to win the good will of the powers in order to attain the end in view.

<sup>24</sup> See Grotius *Lib. II, Ch. XV, 8, et seq.* ed. Fodéré II, p. 249, *et seq.*

Vattel, indorsing the view of Grotius, namely, that treaties are regulated by natural law, says that all nations enter into compacts, not as Christians or Mohammedans, but as human beings; and that it is necessary for their common salvation to be able to conclude treaties, and that, with safety.<sup>25</sup>

On the other hand, referring to the contention of some Catholic writers that faith should not be kept with heretics, he calls it "a monstrous maxim."<sup>26</sup>

But as all such would-be securities for the faithful execution of treaties, consisting of oaths, hostages, excommunications and the like measures are entirely obsolete, the contracting parties now generally rely on their mutual good faith for the carrying out of their obligations undertaken by international compacts.

Now, can a state, after concluding a treaty, in due form, abrogate it *ex parte* without the consent of the other contracting party or parties to it? Would not such a proceeding be contrary both to morality and to the principles of the law of nations? In short, is the sanctity or the inviolability of treaties merely an abstract theory or are there any rules to which the nations are morally bound to look for guidance whenever the voidability or not of their contracts arises?

*In fine*, is a state under the obligation to abide by the provisions of a treaty it concluded either willingly or unwillingly, or can there be any palliation or justification for the non-performance of an international agreement in certain contingencies?

Such are the questions which have taxed for centuries the minds of many learned jurists and abstract moralists.

It is easier to ask than to answer such abstruse questions on account of the conflict of views existing between legal moralists

<sup>25</sup> Vattel, *Le Droit Des Gens*, ed. P. Fodéré, Lib. II, Ch. XII, Sec. 162, p. 151.

<sup>26</sup> See Vattel *op. cit.* II, Ch. XV, S. 230, p. 229. See also Geffeken, in *Holly*, *op. cit.* III, p. 121. It seems that it was current belief in the middle ages that treaties concluded with the Mohammedans were not binding upon the Christian nations. Some Roman Catholic authors contend besides that the same rule was applicable to "heretics." See Bluntschli *op. cit.* Art. 416, Note. See also Geffeken in *Holly*, *op. cit.* III, p. 116. As a contrast to the above, one may mention the preamble of a treaty dated 1747 between Nadir, Shah of Persia and the Sultan Mahmoud of Turkey in which it was said, "Glory be to God, who, among other things, has rooted out all hatred and enmity from the bosoms of these nations and has commanded them to keep their treaties inviolable." Quoted by Sir R. Phillimore, *Commentaries Upon International Law*, Vol. II, p. 66, ed. 1871.

and practical jurists; the former viewing with alarm the possible fragility of international compacts, whilst the latter, guided more by utility than by abstract morality, countenancing, in some exceptional cases, the violation of the given word.

In order to understand this famous controversy it should be remembered that, in regard to their duration, treaties are divided into those which are "of perpetual character" and which are known in international law by the name of transitory<sup>27</sup> or treaties of disposition,<sup>28</sup> such as compacts for the recognition of the independence or status of a state, the cession or exchange of territory, the delineation of boundaries, those creating federal unions, and in some cases engagements regulating more private rights; and those called treaties proper, which, without being of a permanent character, imply that they shall be binding either during the time fixed for their duration or as long as they are not abrogated or denounced by the contracting party or parties. Such are the treaties of amity and friendship; those of commerce and navigation and numerous other conventions of a varied character.

Whilst transitory treaties being considered as of a permanent character, at least, as far as human things may be permanent—subsist even independently of a declaration of war between the contracting parties; the treaties proper, on the contrary, are in such a case held as being *ipso facto* abrogated—though the tendency of the advanced school of modern writers is in favor of their retention, or, at least, their suspension during the hostilities, and revival after the conclusion of peace without the necessity of entering into new agreements.

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<sup>27</sup> See Vattel op. cit. Lib. II, Ch. XII, S. 153, ed. P. Fodéré, p. 138. Also G. F. de Martens. *Précis de droit des gens modernes de l'Europe*. Lib. I, Ch. II, S. 58. P Fodéré op. cit. II. Nos. 865, 906, 911.

<sup>28</sup> See Rivier op. cit. II, p. . . . Also Westlake, Vol. I, pp. 60, 283. They have been called transitory because it seems they have in view an object specified definitely and are accomplished by a single and not by repeated acts. See Vattel, *Ib.* II, Ch. XII, S. 153, p. 138, *et seq.* Or, "because their effect passes over (*transit*) into and forms a part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact." Westlake, *International Law*, Part I, p. 61. Westlake criticises with justice the term transitory, because it suggests, as he says, "a fleeting character for documents of which the operation is really the most important." He therefore approved the term of dispositive treaties. C. Westlake, *Ib.* p. 61.

Leaving, therefore, aside the transitory treaties, the inviolability of which seems not to be generally questioned,<sup>29</sup> on account of their character of permanency *per se*, so to speak, let us examine the case of a treaty proper, concluded for an indefinite period, in which there exists no clause by which the parties have reserved to themselves the right to abrogate at any time such instrument without mutual consent.

The question is whether treaties of that character can be abrogated without the mutual consent of the contracting parties.

There seem to be three leading opinions on this subject. Some writers hold that treaties cannot under any circumstances be abrogated without the consent of all the contracting parties; others, after admitting the doctrine of the sanctity of international compacts, seem to favor the view that a change of circumstances not foreseen at the time of the conclusion, may justify a State in not considering itself bound to abide by the provisions of such compact; and finally there are some jurists who contend that when a treaty hinders seriously the development and progress of the people of a country it may be renounced even against the will of the other contracting party or parties.

The number of jurists of the first class, namely, those who still cling to the theory of Bynkershock,<sup>30</sup> that international compacts should not under any circumstances be violated or renounced without the consent of both contracting parties, is very limited.

The question is certainly not new, and as Grotius informs us, it had occupied also the minds of the jurists of his time. "It is customary," he says, "to discuss as to whether promises contain in themselves this implied condition: if things remain in their actual state." He adds, "this is to be denied, unless it is quite clear that the actual state of things was included in that sole reason to which we referred."<sup>31</sup>

Vattel, the great champion of the sanctity of treaties, after declaring that the peace, the happiness and the safety of the human race depend upon the "fulfilment of a given promise,"

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<sup>29</sup> See however, contrary views of P. Fodéré op. cit. II, No. 911. Also Piédelièvre. *Précis de Droit International Public*, Vol. I, p. 316.

<sup>30</sup> See Bynkershock Lib. II, Ch. X. See summary of views on this point by Prof. Olivi in *Revue de Droit International et de Legislation comparée*. Vol. 23, p. 590, et seq.

<sup>31</sup> See Grotius Lib. II, XVI, 25, 2. ed. P. Fodéré, p. 301.

adds: "He who violates his treaties, violates . . . the law of nations, for he disregards the faith of treaties, which the law of nations declares sacred," and further, "infamy must ever be the portion of him who violates his faith."

According to Vattel all nations are justified in uniting for the purpose of repressing the State which "shows disregard for it (a treaty), which openly sports with it, which violates and tramples it under foot."<sup>32</sup> The distinguished Swiss author, after laying stress on the inviolability of treaties, examines the theory of the *conventio omnis intelligitur rebus sic stantibus*, namely that in every compact there is an implied condition that if the state of things, since the promise was made, changes, such compact may be set aside, says, "If it is evident that the consideration of the actual state of things was one of the reasons which occasioned the promise . . . (its fulfilment) depends upon preservation of things in the same condition." To borrow one of the examples given by Vattel, an elective prince, having no issue, promises to his ally to have him appointed as his successor. Subsequently he has a son born. "Who can doubt," he says, "that the promise has been nullified by that event?"<sup>33</sup> He, however, advises moderation in this application of this theory: "It would have been abusing shamefully," he says, "to take advantage of every change . . . for disengaging one's self from every promise."<sup>34</sup>

P. Fodéré, one of the most distinguished writers on the law of nations, after laying down the principle that a state is bound to respect its treaty stipulations no matter how injuriously they may affect its interests, contends that such respect can only last as long as the relations between the moral and the material forces of the states which concluded such treaties continue to exist." In short, that treaties are binding as long as the reasons by which the parties were induced to conclude them, have not disappeared.<sup>35</sup> Continuing his argument, he says that the implied condition of every treaty is that it shall be obligatory as long as the circumstances which were the reason for their conclusion have not changed. This author, however, admits that if in such a case a State de-

<sup>32</sup> See Vattel, *Le droit des Gens*. Lib. II, Ch. XV. pp. 218, 219, 220, 221, 222. See also Lib. II, Ch. XII. S. 163.

<sup>33</sup> *Ib.* Vattel Lib. II, Ch. XVII, p. 277, S. 296.

<sup>34</sup> *Ib.* Vattel. S. 296. p. 278.

<sup>35</sup> P. Fodéré. *op. cit.* II. pp. 1152, 1153.

nounces a treaty, she must indemnify the other contracting party for the damage caused by such act.<sup>36</sup>

Rivier, the eminent Swiss or Belgian author, after referring to the foundation of the obligatory character of treaties which he ascribes to the consent of nations growing out of mutual interest and necessity, says, "old or dead provisions (in a treaty) should not paralyze indefinitely the development of states, which are living organisms, liable to perish if they do not make any progress," and that "as there are no judges to whom states may appeal to set aside their compacts, they can do so, at times, *proprio motu*, by virtue of the initial right of self-preservation."<sup>37</sup>

Conversing further on the subject, he says that "as individuals cannot bind themselves during all their lives, so nations cannot deprive themselves of their liberty of action for all times."<sup>38</sup>

Rivier therefore indorses the doctrine of the *Rebus sic stantibus* with certain qualifications, namely, that in such cases the state wishing to denounce the treaty should prove the change of circumstances,<sup>39</sup> and approach the other contracting party in order to obtain its consent for the abrogation of the treaty by paying a suitable compensation.<sup>40</sup>

L. Gessner, indorsing the principle of denunciation in case of the substantial change of circumstances, admits that such theory has an "extremely elastic character."<sup>41</sup>

Pasquale Fiore, of the University of Naples, one of the leading Italian authors on International Law, in championing the principle of the sanctity of treaties, says, that international relations would have been impossible, had it not been considered an imperative duty for states to respect their compacts. After ascribing to morality and justice the foundation of the faithful execution of treaties,<sup>42</sup> he admits that there may be cases when political

<sup>36</sup> *Ib.* II, 905. See also No. 908 and 1200.

<sup>37</sup> See A. Rivier. *Principes du droit des gens*. Vol. II, pp. 38, 40.

<sup>38</sup> *Ib.* II, p. 128.

<sup>39</sup> *Ib.* II, p. 130.

<sup>40</sup> *Ib.* II, p. 129.

<sup>41</sup> Gessner in *Holtzendorf's Handbuch der Völkerrecht*, Vol. III, p. 80. See also Wheaton, *Elements of International Law*, ed. Laurence, p. 326. See also Wheaton, *Digest of International Law*, Vol. II, pp. 291, 235.

<sup>42</sup> See Pasquale Fiore *Trattato di Diritto Internazionale pubblico*, Vol. II, SS. 1040 and 1041.

wisdom and public necessity may force a State to violate the sacred principle of the respect due to treaties; namely, when the provisions of such a treaty injure seriously the interests of the people.<sup>43</sup>

He therefore disapproves the view of Bynkershoek that a State should fulfill its promise even if that would lead to the ruin of the people, and indorses the view of other writers, who hold that a change of circumstances may be a good justification for the denunciation of a treaty. Fiore is, however, of opinion that in all such cases a state wishing to abrogate its treaty obligations, should, before denouncing the treaty, make an effort to come to an understanding with the other contracting party and in case of disagreement, refer the solution of the question to an arbitral tribunal.<sup>44</sup>

Professor Olivi, of the University of Modena (Italy) is of opinion that a change of circumstances may justify the denunciation of a treaty, if such a change was expressly or tacitly foreseen by the contracting parties at the time of the agreement, or if an important change of that character renders the execution of the instrument impossible or, if executed, would endanger the life of a State, but he does not consider mere utility or injury to the interests of a nation as being sufficient to affect the forces of treaty obligations.<sup>45</sup>

Rolin-Jacquemyns, a writer of great merit and distinction, views with favor the theory of the *clausula rebus sic stantibus*, provided it is not abused. He holds that a change of circumstances which makes the execution of a treaty either morally or materially impossible, may justify an *ex parte* denunciation of it. Otherwise, he says, one would conclude that treaties are perpetual, which is, he adds, an absurdity.<sup>46</sup>

Hall, one of the best recent authors of international law, approves the view that "a contract ceases to be binding as soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is eventually altered," but he adds that "if an implied condition was originally consistent with the primary right of self-preservation it shall remain so." He,

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<sup>43</sup> Fiore *Ib.* S. 1054.

<sup>44</sup> Fiore *Ib.* 1055, 1056.

<sup>45</sup> See *Revue de Droit International et de Législation Comparée*. Vol. XXIII, p. 602.

<sup>46</sup> *Revue de droit International et de Legislation comparée*. Vol. XIX, p. 46.

however, holds that a treaty may become void if it endangers the life or is incompatible with the independence of a State, "provided that its injurious effects were not intended . . . at the time of its conclusion."<sup>47</sup>

Westlake, the eminent contemporary *internationalist*, treating the subject of "the obsolescence of treaties," as he calls it, refers to the theory of the "*rebus sic stantibus*," and without indorsing or rejecting it, admits that "although the right of denouncing a treaty is an imperfect one, still it cannot be condemned in  *toto*, and that it should be exercised with a grave sense of moral responsibility."<sup>48</sup>

Merignac, a leading contemporary authority on international law, after laying down the rule that in principle in "perpetual treaties" the consent of all contracting parties should be obtained for their abrogation, adds that treaties cannot be perpetual in the proper sense, and that therefore in all such instruments "of perpetual character" there is, he says, an implied condition of "*rebus sic stantibus*," because the public authorities cannot "bind indefinitely the future generations."<sup>49</sup>

According to the opinion of the eminent Russian author, F. de Martens, the obligatory character of treaties is founded on the "idea of international relations" and that as it is the interest which induces states to conclude them, it is the interest again that guarantees their execution." From these premises, the writer draws the conclusion that "international treaties have an obligatory character by reason of their conformity to the real needs of states and the exigencies of international relations." He therefore approves the policy of his country when in 1870 the Czar denounced certain provisions of the treaty of Paris of 1856, simply because they were, according to the Russian writer, in conflict with the fundamental rights of an independent state, such as Russia.<sup>50</sup> Martens, however, champions the maxim "*Pacta sunt servanda*," and says that treaties ought to be carried out faithfully. And, in order either to suspend, or postpone, indefinitely their execution, he is of opinion that the consent of all the con-

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<sup>47</sup> See Hall, *A Treatise on International Law*, p. 357. ed. 1904.

<sup>48</sup> See Westlake *International Law*, I, pp. 284, 285.

<sup>49</sup> Merignac, *Traité de droit public international*, Vol. I, p. 133. Also Ib. Vol. II, pp. 669, 670.

<sup>50</sup> See F. Martens' *Traité de Droit International*, Vol. I, pp. 512, 513, 514. Also p. 560.

tracting parties should be obtained, which looks as being in contradiction with his former view on the subject.<sup>51</sup> He besides approves the theory of the *rebus sic stantibus* and contends that the abuse of that doctrine does not prove that it should not be adopted, and that a state cannot reasonably, conclude a treaty, except in view of a political object and that if by reason of a change of circumstances, the object in view cannot be attained and the existence of the treaty becomes dangerous to a state, the effect of such instrument ceases to exist.<sup>52</sup>

Paternostro, of the University of Rome, in an able essay on the alleged right of Japan to put an end *ex parte* to the treaties by which some foreign powers had formerly acquired certain special privileges for their subjects, such as the right of having consular courts in the Japanese Empire, contended that a state cannot impose upon others a perpetual arrangement by which it would derive all the advantages, and to the detriment of the interests of the other state. Following that argument, the writer concludes that a treaty obligation "comes to an end when it compromises the normal and necessary conditions of the development of the state," when the provisions of such treaty have become incompatible with the necessary development of its political constitution on its municipal law; and lastly, when certain facts upon which the parties relied at the time of the conclusion of the instrument, have since undergone a modification.<sup>53</sup>

Sir Travers Twiss, the English jurist, who has contributed so much to the development of the law of nations by his writings, criticises the radical view of Paternostro, but he admits that when the provisions of a treaty in consequence of a change of circumstances, affect seriously the interests of a nation, it is the duty of the other contracting party to consent to a modification of it, provided such a change does not injure its interests.<sup>54</sup>

According to Sir Robert Phillimore, the learned English author, it is upon a scrupulous fidelity in the observation of treaties, not merely in their letter, but in their spirit, "that obviously depends, under God, the peace of the world." "*Pacta sunt servanda*," he adds, "is the pervading maxim of International as it was of

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<sup>51</sup> F. de Martens, *Ib.* pp. 545, 546.

<sup>52</sup> F. de Martens, *I*, *Ib.* p. 560.

<sup>53</sup> See *Revue de Droit International et de législation comparée*, Vol. XXIII, p. 189, *et seq.*

<sup>54</sup> See also *Revue de Droit International et de Législation Comparée*, Vol. XXV, p. 224.

Roman law." He however, does not seem to disapprove the principle of the "*rebus sic stantibus*."<sup>55</sup>

Von Liszt, the distinguished Professor of the University of Berlin, does not approve, in principle, the theory of the "*clausula rebus sic stantibus*." He contends that that doctrine may be applicable only to treaties which when concluded had in view certain fixed conditions, which conditions have subsequently undergone a modification. He is therefore of opinion that in such a case they may be denounced. For instance, he continues, if a treaty guaranteed the territory of a state and that state, after the conclusion of the treaty, increased her territory by acquiring extensive colonial possessions, the party that assumed such guaranty may be justified in disengaging itself from such treaty obligation on account of the increase of the duties imposed upon its government.<sup>56</sup>

Nys, one of the most distinguished contemporary writers on the law of nations, voices with apprehension the adoption, purely and simply, of the doctrine of the *clausula rebus sic stantibus*.<sup>57</sup>

Pinheiro-Ferreira, a well-known Portuguese jurist, commenting on the "perpetuity of treaties," is surprised to find that the principle of the perpetuity of international compacts meets with the approval of Vattel, because according to this commentator, any obligation of such character is "anti-judicial," and therefore, as he says, the future generations are justified in denouncing such agreements, if they do not find them to be just and equitable, provided they pay a suitable compensation to the other contracting party in case the latter suffers any damages in consequence of such act.<sup>58</sup>

The eminent Portuguese writer, in another chapter of Vattel, dealing with this subject, argues that as the individuals can set aside their contracts in case of an "enormous injury," so the states may consider themselves as not bound to carry out their treaty obligations, if the circumstances under whose influence they concluded such instruments, have undergone a change. Ferreira, however, urges that in such cases the State denouncing such

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<sup>55</sup> See Sir Robert Phillimore, *Commentaries upon International Law*, Vol. II, pp. 109, 110. ed. 1871.

<sup>56</sup> See F. Von Liszt, *Das Völkerrecht*, pp. 175, 176. ed. 1904.

<sup>57</sup> See Nys, *Le Droit International*, Vol. III, p. 49, *et seq.*

<sup>58</sup> See Vattel ed. P. Fodéré, p. 618, note 1.

treaty should, if necessary, pay suitable compensation to the other contracting<sup>59</sup> party or parties.

Hautefeuille, in the preliminary discourse of his excellent work on the rights of neutrals, referring to international compacts, admits their obligatory force, with certain qualifications. He lays down the rule that treaties by which a State was compelled to abandon only one of her essential and natural rights, such as that of independence—even if it is a partial law—are not binding upon the people of such State. He argues that natural rights are inalienable, and to use the language, he adds, of the civilians, they are *extra commercium*. In regard to perpetual treaties which have been concluded with the free will of both contracting parties, for the regulation of private interests, they exist, he continued, as long as the contracting parties desire the continuation of such treaty, and the agreement of perpetuity has no other effect than that of avoiding the necessity of renewing such treaties, in order to insure the continuation of the same relations. He very justly observes that unequal treaties, such as those imposing a cession of territories, or payment of a war indemnity and the like character, are always obligatory, and cannot be recalled after they have been executed.<sup>60</sup>

Bluntschli, the Swiss or German jurist, whose writings, besides other merits, show so much originality of conception, after laying down the rule, "that the respect of treaties is one of the necessary foundations of the political and international organizations of the world," adds that "if treaty promises were not kept" the law itself would crumble down in the midst of the tempests of conflicting opinions and interests;<sup>61</sup> he seems, however, to contradict himself when he says that a State may consider as null and void, treaties which are incompatible with its existence and development. He argues that the right derived from treaties should give way to the primordial and inalienable rights of existence and the necessary development of states.<sup>62</sup>

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<sup>59</sup> See Vattel *op. cit.* ed. Fodéré, II, p. 138, note 1. Also see Vattel *op. cit.* ed. Fodéré, II, pp. 188, 189, note.

<sup>60</sup> See Hautefeuille. *Des Droits et des Devoirs des Nations Neutres*. Vol. I, pp. 10, 11.

<sup>61</sup> See Bluntschli. *Le Droit International Codifié*. ed. Lardy, Art. 410.

<sup>62</sup> Bluntschli. *Ib.* Art. 415. Paternostro of the University of Rome seems to indorse the radical theory of Bluntschli. See R. D. I. *op. cit.* XXIII, p. 189, *et seq.*

Bluntschli further contends that the right of denunciation of a treaty may result from circumstances and that the nature of the public law requires the admission of the right to denounce a treaty in certain cases, even if that right was not specifically reserved in the provisions of the instrument. He justifies his theory by saying that the welfare of a nation may be compromised by a treaty, and that one generation cannot bind for all times future generations.<sup>63</sup>

Referring to the theory of the *clausula rebus sic stantibus*, Bluntschli admits that when the order of things which was the basis of the treaty is so changed by the lapse of time, that the execution of its provisions seems now to be contrary to the nature of things, the obligation to respect the treaty ceases to exist. He, however, disapproves the view of those writers who hold that the clause "*rebus sic stantibus*" is implied in every treaty and that if the circumstances change, the treaty ceases to be binding upon the contracting parties.<sup>64</sup>

Bluntschli's conclusion is that "treaties which have in view the destruction of a State are not binding, and cease to be obligatory as soon as their destructive character is shown."<sup>65</sup>

Heffter, another German writer of equal celebrity, seems also to have radical views on this subject: "A treaty cannot create rights," he says, "but with the mutual consent that it cannot continue to exist but with such consent"; consequently, "in case one of the parties changes its will, the other is entitled to ask the re-establishment of things in their former condition and also to damages for the losses sustained."<sup>66</sup> He indorses the theory of the right of denunciation of a treaty on account of change of circumstances, not foreseen at the time of the agreement. But he holds, that if such change affects only part of the treaty, such instrument can only be modified, but not abrogated.<sup>67</sup>

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<sup>63</sup> Ib. Art. 454.

<sup>64</sup> Ib. Art. 456.

<sup>65</sup> Ib. Art. 460.

<sup>66</sup> See Heffter. *Le Droit International de l'Europe*, traduit par Bergson, ed. Geffeken. p. 189.

<sup>67</sup> Heffter Ib. pp. 221, 222. Geffeken, his able commentator, however, dissents from that view and holds that a treaty binds the will of the contracting parties, and creates rights; that therefore it cannot be abrogated without assigning a special reason justifying such cancellation. Heffter Ib. p. 189, note 3, by Geffeken. Geffeken commenting on the theory of the *rebus sic stantibus*, says, that in order to justify a denunciation, it is necessary that one of the reasons, which at the time of the conclusion of the treaty, formed an implied condition of its obligatory force, should have

From the above extracts of various authorities on the law of nations, it is evident that the consensus of opinion is, with few exceptions, in favor of the right of an *ex parte* renunciation of a treaty, their disagreement being only in the nature of such cases.

With all the respect due to these distinguished expounders of the law of nations, it may still be proper to make a distinction between compacts which may have been imposed upon a nation by a treaty of peace or other means of compulsory character; conventions by which a State—without divesting itself of its right of sovereignty—leased to another part of its territory or grants the right of occupation and administration of part of its dominions; and those concluded without any compulsion whatsoever, but entered into with the free will of the contracting parties for the furtherance of their mutual interests, be they of a political, economical, social or other nature.

The violation of a treaty of peace or other instrument of compulsory nature would deprive the hitherto victorious state of the benefit of its victories, and it may be a dangerous doctrine to adopt; that a vanquished State is justified on the first opportunity in nullifying the stipulations of a treaty of peace or other instrument to which such party is compelled to agree, or the plea that the conditions imposed upon it by such a treaty are detrimental to its interests. On the other hand, to incorporate within one's dominions, without the consent of the Sovereign Power, a territory over which a State has only, in some way, the usufruct, namely, the right of occupation and administration, is purely an international spoliation.

But to revert to the first point, is a State, which by a treaty of peace or other compulsory means, has been deprived of part of its independence or accepted restrictions to its internal or external sovereignty, bound to respect for all time the provisions of such instrument? Some writers answer the question in the negative,<sup>68</sup> and the practice of nations shows that compacts of that character cannot bind aggrieved states or people perpetually, and there may be times when such nations may consider themselves as being disengaged from their obligations.

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undergone a material modification. He criticises the action of Russia in 1870, when she denounced some provisions of the Treaty of Paris of 1856 in regard to the Black Sea and the Russian coast. *Ib.* p. 222, note 5.

<sup>68</sup> See Hautefeuille *op. cit.* I, p. 10. See F. de Martens *op. cit.* I, p. 512, *et seq.* Also p. 560. Westlake says that such treaties are "doomed by their nature to obsolescence." See Westlake, *op. cit.* I, p. 285

Russia, in comparatively recent times, has on two different occasions challenged the doctrine of the sanctity of treaties by declaring as null and void certain treaty provisions which had been imposed upon her by the other contracting parties in a public instrument. As is well known, it was in 1870, when the Czar's Government repudiated some of the clauses of the treaty of Paris of 1856, which had imposed certain limitations on the Sovereign rights of Russia in the Black Sea and on the coast.

The diplomatic duel which followed that event between Lord Granville championing the inviolability of treaties and Prince Gortschaxoff viewing the matter in a different light, resulted in an academic victory for Great Britain, but is a real triumph for Russia.

In fact, in the Conference of London of 1871, the plenipotentiaries of the Powers who took part in that Conference, after recognizing that "it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement," acceded to the Russian demand by abrogating the provisions of the treaty which had been denounced by her.

John Stuart Mill, the well known English author, commenting on the action of Russia denouncing some of the provisions of the treaty (of Paris of 1856), said that "there are treaties which never will, and even which never ought to be permanently observed by those who have been obliged to submit to them; far less, therefore to be permanently enforced." He therefore advised nations "to conclude treaties only for a limited period of time." Nations, he added, cannot rightfully bind themselves or others beyond the period for which human foresight can be presumed to extend, thus aggravating the danger which to some extent always exists that the fulfilment of the obligations may, by change of circumstances, become either wrong or unwise.<sup>69</sup>

Lorimer, the Scotch philosopher jurist, referring to the conduct of Russia in this matter, said, "There can, I imagine, be no doubt that she was entitled to invite her co-signatories to meet with her for the consideration of such changes as she might suggest in the treaty of 1856, or even its repeal; and that in the conference when met, or apart from the conference if it refused to meet, she might have renounced the treaty either in whole or in part."

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<sup>69</sup> See J. S. Mill, *Fortnightly Review*, Dec. 1, 1870, p. 715, *et seq.*

And further, "all consent is necessarily conditional, and a change of circumstances swept away the conditions on which it rested."<sup>70</sup>

But the enunciation of the principle of the Conference of London did not deter again the Czar in 1881. From an Ukase by which he abrogated the clause of the treaty of Berlin of 1878 by which Russia agreed to make Batoum in the Black Sea a free port.

The contention of the Russian Government then was that Article 59 of the Treaty of Berlin was only declaratory and not, therefore, binding upon Russia, because it was declared in that article that the Emperor of Russia was intending to make Batoum a free port and that consequently there was no legal obligation.<sup>71</sup>

The conclusion which may be drawn from the above diplomatic incidents and the general principles of natural law, is that states which may have been compelled to enter into compacts abandoning even partially some of their Sovereign rights, may subsequently disengage themselves from such engagements, either with or without the consent of the contracting parties; and therefore the rule laid down in the protocol of the London Conference of 1871 in regard to this subject, cannot, strictly speaking, be applicable, in practice, to all public treaties.

Quite recently the world has witnessed instances of flagrant violation of international treaties, one of the delinquents being a co-signatory of the protocol of the London Conference of 1871, which proceeding has shaken again the public confidence in the value of compacts between nations.

In fact, on October 5, 1908, Bulgaria, then a semi-sovereign state, under the suzerainty of the Ottoman Sultan—and a "creature of the treaty of Berlin" (of 1878), to use the words of Mr. Asquith, the British Prime Minister—not only declared its independence, which might have been excused from the point of view of natural law, but also incorporated with its territory, Eastern Roumelia—which, although it was administered by the Prince of Bulgaria, continued to belong to Turkey by virtue of treaties—not to say anything of the appropriation at the same time of the Oriental railway, the property of a foreign corporation with a reversionary right to the Sublime Porte. All this was

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<sup>70</sup> See J. Lorimer, *The Institutes of the Law of Nations*, Vol. I, pp. 47, 48.

<sup>71</sup> See excellent article on this subject by Rolin-Jacquemyns in *Revue de Droit International et de Législation Comparée*, Vol. XIX, p. 37, *et seq.* See also Russian view in F. de Martens, *op. cit.* Vol. I, p. 484, *et seq.*

done without any offer of compensation to Turkey nor any tendency to seek the consent of the Sovereign Power by conciliatory means.

Prince Ferdinand's (now Czar of the Bulgarians) *coup d'Etat* would not have attracted so much attention but for the act, at the same time, of Emperor Francis Joseph, who, by a stroke of his pen, made Bosnia and Herzegovina—the occupation and administration of which provinces he had acquired by virtue of the treaty of Berlin of 1878—dependencies of the Dual Monarchy.

In fact, by a mere imperial proclamation,<sup>72</sup> these provinces over which the Sultan of Turkey had not divested himself of his sovereignty, as it appears by the treaties—became part of the dominions of the Hapsbourgs.

The Emperor was tempted, it seems, to take this unusual step “in order to raise Bosnia and Herzegovina to a higher level of political life by establishing for them constitutional institutions” and, in view of that benevolent intention, His Majesty deemed the creation “of a clear and unambiguous juridical position for the two lands” indispensable.<sup>73</sup>

This high-handed policy of Prince Ferdinand (now the Czar of the Bulgarians) and Emperor Joseph or rather of Baron Aerenthal, his foreign secretary, was bitterly assailed, with justice, in many countries, and particularly in Great Britain. “It is impossible,” said the British Premier, speaking in the House of Commons, “for this country, in the interest of the value of treaties, to recognize an alternation of them by an individual State without the consent of the other parties. We hold,” he added, “to that principle.”<sup>73</sup>

Nor was Sir Edward Gray, the Secretary of State, less emphatic in his denunciation of these acts. After indorsing the principle that no State has the right to alter the provisions of a treaty without the consent of the other contracting party, he said: “If it is to become the practice in foreign politics that any single Power or State can at will make abrupt violations of international treaties, you will undermine public confidence with all of us.”<sup>74</sup>

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<sup>72</sup> See *Times* (London), October 6 and 7, 1908.

<sup>73</sup> See *Ib. Times*, October 7 and 8, 1908.

<sup>73</sup> See *London Times*, October 12, 1908; also October 8, 1903. See also Guild Hall speech, *Ib. Times*, November 10, 1908.

<sup>74</sup> See *Ib. London Times*, October 8, 1908. See also statement of Lord Fitzmaurice (Under Secretary of Foreign Affairs), in House of Lords, and approval of policy by the Marquis of Lansdowne, Ex. Sec. of State. *Ib. Times*, October 12, 1908.

There is no doubt that in both these cases solemn treaty obligations were wantonly violated, and whilst, as above stated, the act of a declaration of independence by the people of Bulgaria may be justified for moral and sentimental reasons, the severance of Eastern Roumania from Turkish sovereignty without the offer of any compensation, and the seizure of the railways, in violation of the treaty rights of Turkey should be condemned.

In regard to Austria-Hungary, there seems to be hardly any ground of justification, and neither the sophistical explanations of Baron Aerenthal,<sup>75</sup> nor the legal arguments of a distinguished Austrian jurist<sup>76</sup> can palliate the effect produced on the civilized world, by the deliberate violation of solemn international compacts.

The subsequent arrangement, however, made by the two delinquent states, namely, Austria-Hungary and Bulgaria, with the aggrieved party, namely, Turkey, by which the former Powers agreed to pay pecuniary compensation to the *Porte* for the loss of her sovereign rights, atoned to a certain extent the unwarrantable acts of those states, and proved again to the civilized world that respect for the principles of the law of nations may be imposed upon "the members of the Society of Nations" by the mere pressure of public opinion.

As a matter of fact, Turkey was entirely powerless to assert her rights over these Powers, who committed the spoliation at her expense.

The rigidity, however, of the principle of the inviolability of treaties, cannot, with justice, apply to those instruments above referred to, which have been agreed to by the contracting parties for

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<sup>75</sup> See statement of Baron Aerenthal to the Delegations. *Ib. Times*, October 8, 1907. On October 10, 1910, namely, nearly two years after the *coup d'état*, Baron Aerenthal, addressing again the same delegations and referring to the annexation incident, tried to ease his conscience by making the following startling statement: "It was impossible," he said, "to speak of our having violated international law, since we have done nothing that was forbidden by an international treaty." But as Dr. Kramarzh in his answer to the Baron well observed, "When one has broken a treaty one must have the courage of one's own lawlessness and not seek threadbare juridical arguments to prove the contrary." See *Times*, October 20, 1910.

<sup>76</sup> See letter of Dr. Lammasch, Professor of International Law at the University of Vienna. *Ib. Times*, November 10, 1908. See also spirited reply of Prof. Holland upholding the British view. *Ib. Times*, November 13, 1908.

an indefinite period, with their own free will, in order to promote their mutual interests. If, therefore, after the lapse of a certain time, it is found that on account of the change of circumstances, not foreseen at the time of their conclusion, or independently of any such change, it is evident that the execution of the provisions of such treaties would materially affect the interests of a state or endanger its safety or security, in such extreme cases of paramount importance, it may fairly be admitted that a State is justified in denouncing such treaties or in proposing modifications compatible with the interests of the nation. But when a State is compelled by necessity to resort to such an extreme measure, it is just and right that it should pay to the other party or parties a reasonable compensation, in case any damages would result from such an *ex parte* abrogation of a treaty, especially if the aggrieved State, in view of the execution of such instrument, has already made arrangements, which seem to be now irrevocable.

Having reviewed the principle governing the inviolability of international compacts, let us now take a concrete example of a treaty proper, concluded for an indefinite period, in order to see whether an *ex parte* denunciation of it would have been justifiable, had one of the contracting parties to it resorted to that proceeding.

One of the best examples offered for our discussion, and nearer to us than any other, is the so-called Clayton-Bulwer treaty of 1850, concluded between the United States and Great Britain for the joint construction of a canal across Central America, joining the Atlantic with the Pacific Ocean. As is well known, the contracting parties agreed by that instrument, amongst other things, that neither of them should obtain or maintain for itself any exclusive control over the projected canal, and also that neither should "erect or maintain any fortifications commanding the canal, etc., etc., nor to colonize, assume or exercise any dominion over any part of Central America."

That compact was certainly not a transitory treaty, namely, one of "perpetual nature," but a treaty proper, not imposed upon either contracting party by a treaty of peace or otherwise, but concluded with the free will and entire liberty of action by both Powers, for the furtherance of their political and other interests. On the other hand, neither was its duration fixed, nor was there any provision by which either party reserved to itself the right of denunciation, as is provided in many treaties.

Now, supposing Great Britain had refused to conclude the last Hay-Pauncefote treaty, by which the United States Government practically takes the entire control of the Panama Canal, now under construction, the question would have been then as to whether the United States would have been justified in denouncing the Clayton-Bulwer treaty and making a separate arrangement with the Republic of Panama or other Central American country, for the construction of a canal contrary both to the letter and spirit of the Clayton-Bulwer treaty.

The question may be answered in the affirmative, if the circumstances—not foreseen at the time of the conclusion of that treaty—have so changed, as to make it now imperative upon the United States to disengage itself from its obligations imposed by the Clayton-Bulwer treaty, on account of such modification, or even according to the view of certain writers, simply because the existence of such a treaty affected materially its interests and was a serious hindrance to its national development.

It seems that the reasons which had actuated at that time the conclusion of the Clayton-Bulwer treaty (which was even indirectly a partial relinquishment of the Monroe doctrine, at least in the sense that that doctrine is now understood to mean) were, first: the lack of capital in the United States, and, second, the intention of dispossessing Great Britain altogether from Central America, where she claimed to have certain rights of protectorate.<sup>77</sup>

Leaving aside the contested point as to whether Great Britain had or had not, by that treaty, relinquished her claims in Central America, and examining the question as to whether there has been, since the conclusion of that instrument, any material change of circumstances, we find, first, a change in the financial situation of the United States, which was at the time one of the reasons that deterred this country from venturing alone in that huge enterprise,<sup>78</sup> and second, which is much more important, the acquisition

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<sup>77</sup> As a matter of fact, Great Britain, even after the conclusion of that treaty, claimed that she had not relinquished any actual, but only future rights in Central America, and that the United States Secretary of State had accepted that interpretation at the time of the exchange of the ratification of that treaty. This, however, did not bind the United States, because that arrangement or interpretation was not submitted to the Senate.

<sup>78</sup> See Wheaton's *Digest*, op. cit. II, pp. 210, 212, 223.

of the insular possessions in the Pacific, which, coupled with the growth of a great Power, namely, of Japan, in the Far East, makes it imperative upon the United States to devise new means for the protection of the insular possession and even of the Pacific coast. It is evident that this can only be done by the junction of the Atlantic with the Pacific Ocean, in order to move speedily the fleet from one ocean to another.

As a further safeguard, it will be, no doubt, necessary for the United States to have the exclusive control and fortification of the projected canal, excluding any joint protection, and other limitations as it was provided in the Clayton-Bulwer treaty. Hence, the absolute necessity of the abrogation of the Clayton-Bulwer treaty.

It is therefore clear that the U. S. Government, in view of the above reasons, would have been justified in denouncing that instrument even without the consent of Great Britain.

Still, this doctrine of the right of denunciation of an international agreement against the will of the other contracting party or parties, ought not to be so abused as to render any treaty null and void for any trifling reason, or according to the whim of the governing body of a nation, so as to shake the confidence of the people for all international arrangements.

As President Arthur well observed in his message to Congress on April 18, 1881, . . . "a nation is justified in repudiating its treaty obligations only when they are in conflict with great paramount interests" and that "even then all possible reasonable means for modifying or changing those obligations by mutual agreement should be exhausted before resorting to the supreme right of refusal to comply with them."

Still, it is an error to assume that an instrument of the character of the Clayton-Bulwer treaty or other treaty of a like nature is unassailable for all generations and all centuries to come, especially if it does not attain the object for which it was concluded after the expiration of a reasonable time.

To admit such a theory, may be not to understand, but to misunderstand the true meaning of the inviolability and sanctity of treaties.

*Boston, Mass.*

*Theodore P. Ion.*