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### Recommended Citation

Richard Rank, *Modern War and the Validity of Treaties*, 38 Cornell L. Rev. 321 (1953)  
Available at: <http://scholarship.law.cornell.edu/clr/vol38/iss3/2>

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# MODERN WAR AND THE VALIDITY OF TREATIES†

## A COMPARATIVE STUDY

Richard Rank\*

There has of late been a recrudescence of the old doctrine that war ipso facto terminates all treaty obligations between belligerents. This view, which is still adhered to by some European courts,<sup>1</sup> was rejected by the United States over one hundred thirty years ago.<sup>2</sup> The problem of the status of prewar treaties is particularly important now. Although eight years have gone by since the cessation of World War II hostilities, major peace treaties are still lacking.<sup>3</sup> Yet, questions involving the private rights of individuals under prewar treaties are arising and must be solved.<sup>4</sup> For this reason, and because of the doubts being sown by the reappearance of the absolute abrogation doctrine, the principles governing the effect of war upon treaties seem to deserve examination.

### I. INTRODUCTION: THE SCOPE OF THE PROBLEM

The fact that modern war is *total* war is the basis upon which recent writers have concluded that absolute abrogation of treaty obligations must result. Thus, the attorney for respondents in *Clark v. Allen* said:

. . . the last World War was *total* war, and it must be realistically acknowledged that it penetrated every field of human conduct and activity. We cannot ignore the very real effect it had on treaties entered into during a time of peace.<sup>5</sup> (Italics added.)

And further:

The clear and avowed objective of the United States in entering the recent war was the *complete destruction* of the German State, *with no distinction made as to its government and people. . . . This was a war to the death.*<sup>6</sup> (Italics added.)

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† The first of two installments the second of which will appear in the summer issue of Volume 38.

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<sup>1</sup> E.g., French and some German courts. See the second installment of this article.

<sup>2</sup> *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464 (U.S. 1820).

<sup>3</sup> Though peace treaties have been signed with Italy, Rumania, Hungary, Bulgaria and Finland in 1947, and with Japan in 1951, see the second installment of this article, there is as yet no peace treaty with Germany and Austria.

<sup>4</sup> These include questions as to the ownership of property, right to bring an action, inheritance, trade marks, copyrights, judicial assistance, etc.

<sup>5</sup> Brief of Attorney General of California as *amicus curiae*, p. 9, 331 U.S. 503 (1947).

<sup>6</sup> Brief for respondents, p. 9, 16, 331 U.S. 503 (1947).

From this premise it is reasoned that treaties concluded during time of peace cannot remain valid. The same idea was recently expressed in a law review comment that characterized the American judicial doctrine (which has generally upheld the validity of treaties during war) as a generous one that

. . . does not seem to take into consideration the modern nature of war and . . . also seems to forget that modern wars are as much supported by the civilian population as by the armed forces.<sup>7</sup>

Apparently, the author of that comment considers it inconceivable that one country should wish to confer the advantages of peace upon the other in time of war, even those advantages concerning private rights. According to this view, the slate is clean at the end of the war, and the victorious powers are free to impose a new network of treaty obligations.

Pushed to its logical conclusion, the theory of absolute abrogation would require that even treaties intended to come into force only during war be annulled by a state of war. As Mr. Justice Washington said in rejecting the absolute abrogation doctrine, "If such were the law . . . [it] would be so monstrous as to supersede all reasoning."<sup>8</sup> I submit that total war does not necessarily conflict with the preservation of treaties between belligerents. A war is a war, and there is no legal difference between one war and another. What is meant by total war is greater intensity in warfare and the use of more developed means of destruction. It does not and should not necessarily mean obliteration of all legal relations between belligerents.<sup>9</sup>

There are, furthermore, strong practical reasons for rejecting the absolute abrogation doctrine, especially when the broad scope that modern war often attains is kept in mind. International society could not exist without a legal basis, that is without treaties and agreements to protect and regulate the intercourse of nations. There are roughly fifteen thousand treaties in existence,<sup>10</sup> regulating a vast area of human

<sup>7</sup> 51 MICH. L. REV. 566 (1953).

<sup>8</sup> *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 494 (U.S. 1820).

<sup>9</sup> See RANK, *EINWIRKUNG DES KRIEGES AUF DIE NICHTPOLITISCHEN STAATSVERTRÄGE* 15 *et seq.* (Uppsala 1949); Scheuner, *Die völkerrechtlichen Auswirkungen des modernen Wirtschaftskrieges*, 104 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 237 *et seq.* (1944); Jessup, *International Law and Totalitarian War*, 35 AM. J. INT'L L. 329 *et seq.* (1941).

<sup>10</sup> It is difficult to give the exact number of existing treaties, but in 1939 there were roughly 13,000 (see RANK, *op. cit. supra* note 9, at 21). There are at present 2,554 treaties registered with the United Nations (information from Mr. W. W. Cox, of the Treaty Division of the United Nations, dated Feb. 26, 1953).

activity. Among them are treaties regulating international transport by rail, sea and air—to make the transfer of goods from one country to another safe, simple, and speedy. The Universal Postal Union has various conventions to aid the dispatch of letters, money, newspapers, and packages, from one country to another. There are treaties regulating inheritance, commerce, shipping, fishing, bird migration, radio broadcasting, international telecommunications, health and sanitation, double taxation and finances, exchange of official publications, purchase of rice, sugar and wheat surpluses. There are treaties prohibiting traffic in narcotics, establishing weather stations, protecting copyrights, providing for the extradition of criminals, relief assistance, exchange of agricultural workers, issuance of passports and visas, constituting of international organizations like the International Labor Organization and the International Institute of Agriculture. These are just a few examples to illustrate the vast scope of human activity regulated by treaties. It seems unfortunate, therefore, to adopt a practice, which, as the war spreads, requires the automatic nullification of a larger and larger segment of the pre-existing treaty network. It would, at the very least, be an enormous and complex task to negotiate anew on every aspect of this enormous area, comparable in some ways to attempting to replace an area governed by common law completely by statute, or to completely replacing one of the civil codes.

Even if the difficulty of negotiating new treaties to cover all these subjects were overcome, a legal vacuum would be left, not only during the period of hostilities, but even after hostilities cease, until the proposed new agreements were negotiated and had come into effect.<sup>11</sup>

These treaties, which are designed primarily to regulate the conduct of the signatory powers for the benefit of their nationals and residents individually, are commonly known as “lawmaking” or nonpolitical treaties. It is sometimes argued that all treaties have essentially a “political character”,<sup>12</sup> because every act is political that involves relations between states. Whatever may be the exact meaning of “political” in this connection, there are some treaties of the type which Sir Arnold D. McNair designates as “purely political.”<sup>13</sup> These are treaties which embody some political arrangement such as an alliance, a guar-

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<sup>11</sup> Thus, problems like the one in the *Clark* case would be incapable of settlement, and even when peace treaties were negotiated, it would be necessary that they apply retroactively.

<sup>12</sup> BARANDON, *DAS SYSTEM DER POLITISCHEN STAATSVERTRÄGE* 3 (1937); WACHE, *SYSTEM DER PAKTE. DIE POLITISCHEN VERTRÄGE DER NACHKRIEGSZEIT* 11 (1938).

<sup>13</sup> MCNAIR, *THE LAW OF TREATIES* 548 (1938).

antee, or an undertaking to remain neutral, to arbitrate or assist. The existence, power, and greatness of a state is central in these treaties.

However important purely political treaties may be from the point of view of the state, they are far less numerous than nonpolitical treaties, and they do not generally present difficult problems concerning their validity in time of war; the parties usually agree, expressly or impliedly, that these treaties will be terminated. They also do not present a problem to the practising lawyer because individual rights rarely arise under them, as they do, for example, under an inheritance treaty.

Nor do treaties that are specifically concluded to regulate the conduct of hostilities,<sup>14</sup> and that come into force only during war, present any problem of theoretical interest. The conclusion that war results in their automatic abrogation would be logically absurd, and it seems that no state has ever advanced this theory. When states have violated these treaties, they have used other reasons to excuse themselves, but not the argument that these treaties are not in effect because of the outbreak of the war.<sup>15</sup> The Geneva Convention of 1949<sup>16</sup> specifically provides that a denunciation declared by a party at war shall not take effect until peace has been concluded.

Treaties concluded between belligerents during time of war are as valid as those concluded to regulate the conduct of war, since the parties by contracting during a war manifest an intention to create rights and obligations between themselves.<sup>17</sup>

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<sup>14</sup> For example, the Hague Conventions of 1899 and 1907, MALLOY, *TREATIES, CONVENTIONS, ETC. BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS* 2017, 2220 (1910). *Accord*, the Case Rieger, French Court of Cassation, July 29, 1948, DALLOZ HEBDOMADAIRE 1, 193; *In re Friess and Ronnenberger*, French Court of Cassation (Chambre Criminelle), April 17, 1947, [1947] DALLOZ HEBDOMADAIRE 333. See also MONACO, *Les Conventions entre belligérents*, 75 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL (hereinafter RCADI) 273 (1949-H).

<sup>15</sup> See a German case *The Naphtha Shipper*, Prize Court of Hamburg, October 14, 1939, 6 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 569 (1943), where the court used an alleged denunciation by Great Britain to justify its refusal to apply the Sixth Hague Convention of 1925.

<sup>16</sup> Article 142, U.S. GEN. FOREIGN POL. SER. No. 34 (Dep't State 1949); REVUE INTERNATIONALE DE LA CROIX-ROUGE (1949).

<sup>17</sup> Examples of this type of convention are agreements concluded during World War II between the United States and Germany for direct repatriation and hospitalization in a neutral country of prisoners of war for health reasons, signed at Washington, March 4 and 30, 1942, 56 STAT. 1507 (1942); Agreement between Great Britain and Germany on repatriation of severely wounded prisoners (see RANK, *op. cit. supra* note 9, at 16); another concerning provision of prisoners of war with postal packages (see *Postal and Counter Work During War-Time*, L'UNION POSTALE 162 (1946)); and an agreement between Germany and France on reciprocal protection of copyrights (see RANK, *op. cit. supra* note 9, at 16).

The discussion which follows is mainly limited to the "lawmaking" treaties in time of war and after. It will deal first with the fundamental principles manifested in treaty provisions, and, then, examine recent developments in the application of those principles by the political departments of governments, in the new peace treaties, and by the courts.

## II. TREATY PROVISIONS: THE BASIC DOCTRINES

### *The Doctrine of Intention*

Since treaties are by nature agreements between sovereign nations,<sup>18</sup> and since consent is the central and most important basis for the conclusion of treaties, the *intention* of the parties is logically of paramount importance in deciding whether a treaty is terminated either in war-time or in peacetime. This approach has long been recognized in this country and in England. In *Allen v. Markham*<sup>19</sup> the United States circuit court of appeals said:

. . . the question of whether or not . . . the treaty remains in effect during the war *depends upon the intent of the high contracting parties* as expressed in the treaty. . . .<sup>20</sup> (Italics added.)

In an English case, *Marryat v. Wilson*,<sup>21</sup> Chief Justice Eyre said:

We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words and from the context, *the true intent and meaning of the contracting parties*, whether they are A. and B., or happen to be two independent states.<sup>22</sup>

On the European continent, the importance of the intention of the parties has not been generally recognized, except by the Swiss courts.

1) *Express intention that the treaty remain in force between the parties during the war between them*: If the language of the treaty clearly expresses the intention that the treaty is to remain in force in case of war between the parties, the treaty must be regarded as in force, whether it is political or nonpolitical. This position has a very long standing in history.

<sup>18</sup> *Rainey v. United States*, 232 U. S. 310 (1913); *Charlton v. Kelly*, 229 U.S. 447 (1913); *Altman v. United States*, 224 U.S. 583 (1912); *United States v. Rauscher*, 119 U.S. 407 (1886); *Whitney v. Robertson*, 114 U.S. 583 (1880); *Frederickson v. Louisiana*, 23 How. 445 (U.S. 1859); *Cherokee Nation v. Georgia*, 5 Pet. 1 (U.S. 1831); *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920), *cert. denied*, 254 U.S. 643 (1920); *The "Wimbledon"*, P.C.I.J., Ser. A, No. 1, 21 (1923).

<sup>19</sup> 156 F.2d 653 (9th Cir. 1946), *aff'd in part, rev'd in part*, 331 U.S. 503 (1947).

<sup>20</sup> *Id.* at 661.

<sup>21</sup> 1 Bos. & P. 430, 126 Eng. Rep. 993 (1799).

<sup>22</sup> *Id.* at 439, 126 Eng. Rep. at 997.

The Treaty of Saint Germain of 1679<sup>23</sup> contained a provision whereby the parties agreed that the treaties of Westphalia were to remain in full force even during war. Though the absolute abrogation doctrine was prevalent at this time, the treaties of Westphalia remained in force during the entire century which followed, because of the express stipulation of the parties.

Article II of the Treaty of Paris of 1763 provided that ". . . the treaties of Westphalia of 1648 and . . . [sixteen other treaties which are listed] *which subsisted between the High Contracting Parties before the war are . . . confirmed* in all their points. . . ."<sup>24</sup> (Italics added.)

In 1799 in the Treaty of Amity and Commerce the parties (the United States and Prussia) expressed their intent in Article XXIV as follows:

And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article . . . and during [the state of war] . . . they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations.<sup>25</sup>

Article XXVII stipulated that the treaty was to remain in force for ten years, providing however:

. . . if the expiration of that term should happen during the course of a war between them, then the articles before provided for the regulation of their conduct during such a war, shall continue in force until the conclusion of the treaty, which shall restore peace.

This treaty, which expired by its own terms in 1810, was revived in part by Article XII of the Treaty of May 1, 1828.<sup>26</sup> The latter, at least in part, has been passed upon and held unaffected by World War I between the United States and Germany.<sup>27</sup> It was superseded by a new treaty in 1923,<sup>28</sup> which also has been held to have survived World War II.<sup>29</sup>

The Convention Instituting the Statute of Navigation of the Elbe,<sup>30</sup>

<sup>23</sup> Article 4, 7 DUMONT, CORPS DIPLOMATIQUE ET UNIVERSEL DE DROIT DES GENS 408 (1731).

<sup>24</sup> 1 MARTENS, RECUEIL DES TRAITÉS 33 (1791).

<sup>25</sup> 8 STAT. 162 (1855); 2 MALLOY, TREATIES, CONVENTIONS etc. 1486 (1910).

<sup>26</sup> *Treaty of Commerce and Navigation between the United States and Prussia*, 2 MALLOY, TREATIES, CONVENTIONS etc. 1946, 1499 (1910).

<sup>27</sup> *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930); *Kansas v. Reardon*, 120 Kan. 614, 245 Pac. 158 (1926); *Goos v. Brocks*, 117 Neb. 750, 223 N.W. 13 (1929).

<sup>28</sup> *Treaty of Friendship, Commerce and Consular Rights with Germany*, signed December 8, 1923, and proclaimed October 14, 1925, 44 STAT. 2132 (1927).

<sup>29</sup> *Clark v. Allen*, 331 U.S. 503 (1947).

<sup>30</sup> 26 L.N.T.S. 219, 241 (1924).

concluded between Germany, Belgium, Great Britain, France, Italy and Czechoslovakia, signed at Dresden in 1922, provided for the application of the convention in time of war "to the fullest extent compatible with the rights and duties of belligerents and neutrals." (Article 49).

Article III of the Convention Relative to the Establishment and Maintenance of a Lighthouse on Cape Spartel of 1865<sup>31</sup> contained an express provision for respecting the neutrality of the lighthouse and continuance of payment for its upkeep, even if hostilities broke out between the parties.

The same intention of the parties that the treaty remain in force during time of war is stipulated for in various treaties governing the free navigation of rivers.<sup>32</sup> In these treaties, an exception is made concerning articles of contraband, which are not permitted free passage.

A very good example which shows that it is the parties themselves and not war which abrogates treaties is the Anglo-Portuguese Treaty of 1386,<sup>33</sup> which is still in force. Article XI provides that a serious and unauthorized violation of the Treaty (an open war on the other party) shall entitle the injured party either to denounce the treaty, or without doing so, to take steps to obtain redress. Thus, the treaty remains in force according to its terms, despite a war, and is abrogated only by action of one of the parties, if the party decides to denounce.

Perhaps the most striking example for our case is the *Russo-Dutch Loan Case* of 1854. By a convention between Great Britain, the Netherlands and Russia made in 1815,<sup>34</sup> the two former powers agreed to assume responsibility for equal parts, of both capital and interest, of a certain Russian loan raised on the Dutch market, and accordingly to make certain payments to Russia. Great Britain received as consideration four colonies (Cape of Good Hope, Demerara, Essequibo, and Berbice). Article IV provided that the payments by the Netherlands and Britain "shall not be interrupted in the event (which God forbid) of a War breaking out between the three High Contracting

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<sup>31</sup> 55 BRITISH AND FOREIGN STATE PAPERS 16, 18 (1870). 20 MARTENS, N.R.G., 1st Ser., 350.

<sup>32</sup> *E.g.*, General Act of Berlin of February 26, 1885, concerning Navigation of the Congo (Article 25) and the Niger (Article 33), 76 BRITISH AND FOREIGN STATE PAPERS 4, 17 and 19 (1892), 10 MARTENS, N.R.G., 2d Ser., 414; Treaty of St. José de Flores of July 10, 1853 with reference to free navigation of the River Plate, 10 MARTENS, N.R.G., 2d Ser., 294; Treaty of Amity, Commerce and Navigation, signed at Paraná on March 7, 1856; see further Winiarski, *Principes généraux du droit fluvial international*, 45 RCADI 183 (1933-III); Accioly, *Freedom of River Navigation in Time of War*, 19 IOWA L. REV. 231, 234 (1933-1934).

<sup>33</sup> 1 BRITISH AND FOREIGN STATE PAPERS 468 (1841).

<sup>34</sup> 2 BRITISH AND FOREIGN STATE PAPERS 378 (1841).

Parties; the Government of the Emperor of All the Russias being actually bound to its Creditors by a similar agreement." During the Crimean War the British Government, despite parliamentary opposition, and despite the war, continued her payments under the agreement.<sup>35</sup>

The following conclusions seem to be suggested by these examples. War, in the first place, is no more than a circumstance which, in certain cases, justifies the denunciation of treaties. The determination of when such justification exists is a question of international law. War in itself possesses no inherent characteristic that requires an automatic and generally abrogative effect on treaties. Treaties remain in force unless they are denounced or are terminated pursuant to an express or implied provision in the treaty itself. Those treaties that provide that a party may denounce it if war breaks out indicate that it is the parties themselves and not war, as such, that terminates treaties.

It is of course possible that a state may espouse the principle that war ipso facto terminates treaty obligations, as we shall see France has, for example. But again it is important to realize that this result follows from the decisions of the political department of the government and is not compelled by any peculiar feature of the nature of war. And furthermore, whether such a decision is justified will in many instances be determined by an international tribunal. We are free, therefore, to examine the proposition that war abrogates all treaties upon its merits as a principle under which international relations should operate and to accept or reject it on that basis alone. It is the purpose of this study to show that if the theory of absolute abrogation were adopted or if it should be generally recognized as a principle of international law it would unnecessarily jeopardize the complicated and sensitive machinery of international relations to the general detriment of the society of nations.

2) *Express intention that the treaty be abrogated or suspended during the war*: Just as in the case in which the expressed intention of the parties is that the treaty remain in force, the intention that the treaty be abrogated or suspended should be followed where it is clearly expressed. In this case, also, it is not war, but the intention of the parties that abrogates the treaty.

The Convention Relating to the Regulation of Aerial Navigation of 1919,<sup>36</sup> the Convention on International Civil Aviation of 1944,<sup>37</sup>

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<sup>35</sup> McNAIR, *THE LAW OF TREATIES* 530 (1938).

<sup>36</sup> 11 L.N.T.S. 174, 197 (1922); 13 MARTENS, N.R.G., 3d Ser., 61.

<sup>37</sup> T.I.A.S. 1591, pp. 31 (1947).

and the Commercial Aviation Convention between the United States of America and other American Republics<sup>38</sup> contain provisions of this type.

Various conventions limiting the hours of work, such as the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week of 1919,<sup>39</sup> the Convention Limiting Hours of Work in Commerce and Offices of 1930,<sup>40</sup> and the Convention Limiting Hours of Work in Coal Mines of 1931,<sup>41</sup> have provisions suspending their operation in time of war, or other emergency endangering national safety.

Conventions governing freedom of transit are among those having these provisions. Thus, Article 8 of the Statute on Freedom of Transit,<sup>42</sup> concluded at Barcelona in 1921, and Article 15 of the Statute on the Regime of Navigable Waterways of International Concern,<sup>43</sup> concluded at the same time, provide that:

This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit.

Article 7 of the Statute on the Regime of Navigable Waterways of International Concern provides for a provisional suspension during an emergency other than war. In the Convention Ensuring the Freedom of Transit and Navigation of the Straits between the Mediterranean Sea and the Black Sea,<sup>44</sup> concluded at Lausanne, July 24, 1923, there is a provision that Greece and Turkey have the right to suspend their obligations under the treaty, and it is provided expressly that the obligations are reestablished as of the conclusion of peace.

Suspension in case of war has also been provided for in the Treaty Limiting Naval Armament, signed at Washington in 1922.<sup>45</sup> This treaty provides for a meeting to consider modifications, on the cessation of hostilities.

In conclusion, it is submitted that the insertion of suspension or

<sup>38</sup> T.I.A.S. 840 (1931).

<sup>39</sup> Article 14, 1 HUDSON, *INTERNATIONAL LEGISLATION* 392, 402 (1931).

<sup>40</sup> Article 9, 5 *id.* at 626, 631 (1936).

<sup>41</sup> Article 16, 5 *id.* at 1029, 1036 (1936). This provision does not mention war, only an emergency endangering national safety, but its application to war may be inferred.

<sup>42</sup> 7 L.N.T.S. 13, 29 ((1922); 18 MARTENS, N.R.G., 3d Ser., 618.

<sup>43</sup> 7 L.N.T.S. 37, 61 (1922); 18 MARTENS, N.R.G., 3d Ser., 709. For more details see CORTHÉSY, *ÉTUDE DE LA CONVENTION DE BARCELONE SUR LE RÉGIME DES VOIES NAVIGABLES D'INTÉRÊT INTERNATIONAL* (1927).

<sup>44</sup> Article 9 of the Annex, 117 BRITISH AND FOREIGN STATE PAPERS 592, 598 (1926).

<sup>45</sup> Article 22, 3 MALLOY, *TREATIES, CONVENTIONS, etc.* 3100, 3114-15 (1923).

abrogation provisions is a further indication that war does not of itself terminate treaty obligations. These provisions would be unnecessary if this were the case.

3) *Ascertaining the intention of the parties when it is not clearly expressed.* Although there are many treaties in which the parties expressly indicate their intention whether the treaty is to remain valid or not during time of war, most treaties do not have express provisions. The parties have either regarded specific provisions on this point unnecessary, or have simply forgotten to consider the point. It is in these cases, that the real difficulty arises. What is, or perhaps more correctly speaking, what *was* the intention of the parties? Did they intend the treaty to remain in force during a war between them, or did they intend suspension, or even abrogation?

It is generally accepted that it is for the courts to interpret treaties.<sup>46</sup> As the determination of the intent of the parties is of primary importance in contract law, and the intent of the legislature in interpretation of statutes, so the principal guide of the courts in the interpretation of treaties is the intention of the parties.<sup>47</sup>

It is the duty of the court to resort to all available means to discover the intention of the parties. In *Allen v. Markham*,<sup>48</sup> the United States Circuit Court of Appeals laid down the rule that the interpretation must be customary:

However, basically the question of whether or not Article IV of the

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<sup>46</sup> *United States v. Domestic Fuel Corp.*, 71 F.2d 424 (Ct. Cust. & Pat. App. 1934); *The Francis Louise*, 1 F.2d 1004 (D. Mass. 1924), *appeal dismissed sub nom.* *United States v. Backman*, 270 U.S. 666 (1926); *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930); *Frasca v. City Coal Co.*, 97 Conn. 212, 116 Atl. 189 (1922); *San Lorenzo Title & Improv. Co. v. Caples*, 48 S.W.2d 329 (Tex. Civ. App. 1932). For the scientific literature in regard to treaty interpretation see JOKL, *DE L'INTERPRÉTATION DES TRAITÉS NORMATIFS PAR LA DOCTRINE ET LA JURISPRUDENCE INTERNATIONALES* (1936); Castberg, *La Méthodologie du Droit Internationale Public*, 43 RCADI 326 (1933-I); Ehrlich, *L'interprétation des Traités*, 24 RCADI 5 (1928-IV); Kelsen, *Zur Theorie der Interpretation*, *REVUE INTERNATIONALE* 9 (1932-1933); Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 97 (1929); CHANG, *THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS* (1933); Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y. B. INT'L L. 48 (1949); HARV. RESEARCH, *LAW OF TREATIES* 937-997 (1935).

<sup>47</sup> *Clark v. Allen*, 331 U.S. 503 (1947); *Valentine v. United States*, 299 U.S. 5 (1936); *Todok v. Union State Bank*, 281 U.S. 449 (1930); *Nielsen v. Johanson*, 279 U.S. 47 (1929); *Wright v. Henkel*, 190 U.S. 40 (1903); *In re Ross*, 140 U.S. 453 (1891); *Chew Heong v. United States*, 112 U.S. 536 (1884); *The Amiable Isabella*, 6 Wheat. 1 (U.S. 1821); *Ware v. Hylton*, 3 Dall. 199 (U.S. 1796); *In re Estate of Anderson*, 166 Iowa 617, 147 N.W. 1098 (1914), *aff'd sub. nom.* *Peterson v. Iowa*, 245 U.S. 170 (1917); *Bondi v. MacKay*, 87 Vt. 271, 89 Atl. 228 (1913).

<sup>48</sup> 156 F.2d 653 (C.C.A. 9th, 1946), *aff'd in part, rev'd in part*, 331 U.S. 503 (1947).

treaty remains in effect during the war *depends upon the intent* of the high contracting parties as expressed in the treaty, or *as implied therefrom by the customary interpretation* of such agreements by nations generally. It is important therefore to consider the relation of the United States and Germany *at the time the Treaty of 1925 was negotiated*, and when ratified and confirmed in 1925, *as indicating their intent*.<sup>49</sup> (Italics added.)

Just what these rules of customary interpretation are, the court does not say, though it indicates one of them: the situation of the parties at the time the treaty was concluded.<sup>50</sup> There are, however, well established principles laid down by previous holdings.

First, when the language of the treaty clearly expresses the meaning of the parties, no other means of interpretation can be employed. Otherwise, the intent of the parties is to be gathered from the letter and the spirit of the treaty, taking into account the situation of the parties and the object of the provisions being interpreted.<sup>51</sup> Treaties protecting private rights are to be liberally construed. Mr. Justice Story said in an estate case decided in 1830:

If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal expositions be adopted?<sup>52</sup>

The Supreme Court of the United States has repeatedly said that treaties, in general, are to be interpreted liberally, so as to carry out the intention and purpose of the parties.<sup>53</sup>

In the *Clark* case,<sup>54</sup> the Court tried to find the intention of the parties as of the time the case was before it, and not at the time of the making of the treaty. Mr. Justice Douglas said:

*We have no reliable evidence of the intention* of the high contracting parties *outside the words of the present treaty*. The attitude and conduct under earlier treaties, reflecting as they did numerous contingencies and conditions, leave no sure guide to the construction of the present treaty.

<sup>49</sup> *Id.* at 661.

<sup>50</sup> *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943); *Todok v. Union State Bank*, 281 U.S. 449 (1930); *Sullivan v. Kidd*, 254 U.S. 433 (1921); *Bondi v. MacKay*, 87 Vt. 271, 89 Atl. 228 (1913); see also Hurst, *Effect of War on Treaties*, 2 BRR. Y. B. INT'L L. 37, 39 (1921-22).

<sup>51</sup> *Ware v. Hylton*, 3 Dall. 199 (U.S. 1796).

<sup>52</sup> *Shanks v. Dupont*, 3 Pet. 242, 249 (U.S. 1830).

<sup>53</sup> *Hauenstein v. Lynham*, 100 U.S. 483 (1880). See also *United States v. Pink*, 315 U.S. 203 (1942); *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940); *Todok v. Union State Bank*, 281 U.S. 449 (1930); *Nielsen v. Johanson*, 279 U.S. 47 (1929); *United States v. Payne*, 264 U.S. 446 (1924); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *United States v. Auguisola*, 1 Wall. 352 (U.S. 1863).

<sup>54</sup> 331 U.S. 503 (1947).

Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine . . . *whether the provision under which rights are asserted is incompatible with national policy in time of war.*<sup>55</sup> (Italics added.)

National policy with regard to treaties will be determined by the executive and political departments of the government.<sup>56</sup> It is interesting to note that Justice Douglas speaks of incompatibility with national policy, and not incompatibility with a state of war, as the true test of whether the treaty remains in force. This test, which is based on the *present* intent of the parties, is used because of the absence of other sources of interpretation.

In ascertaining the meaning of a treaty provision, United States courts have looked beyond the written words to the negotiations and diplomatic correspondence of the parties.<sup>57</sup> Especially as far as the practice of international tribunals is concerned,<sup>58</sup> it is a well established rule that so-called preparatory work, *travaux préparatoires*,<sup>59</sup> may be resorted to in order to find the intent of the parties. This material includes the negotiations preceding the conclusion of a treaty, the minutes of the plenary meetings and of committees of the conference which adopts a convention and the successive drafts of a treaty. For example, the minutes of the Barcelona Conference on Communication and Transit of 1921 show clearly the intent of the parties that the treaty provisions not be abrogated by war, but only suspended.<sup>60</sup> Although there is no case on record in which the preliminary negotiations and correspondence of the parties have been used to ascertain their in-

<sup>55</sup> *Id.* at 513.

<sup>56</sup> *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Charlton v. Kelly*, 229 U.S. 447 (1913).

<sup>57</sup> *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943); *Arizona v. California*, 292 U.S. 341 (1934); *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Nielsen v. Johanson*, 279 U.S. 47 (1929); *Jordan v. Tashiro*, 278 U.S. 123 (1928); *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N.E. 152 (1933).

<sup>58</sup> A good survey of this topic is contained in HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-42* (1943); See also LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1934); Wright, *The International Court of Justice and the Interpretation of Multilateral Treaties*, 41 AM. J. INT'L L. 445 (1947).

<sup>59</sup> Lauterpacht, *Les travaux préparatoires et l'interprétation des Traités*, 48 RCADI 713 (1934-II); SPENCER, *L'INTERPRÉTATION DES TRAITÉS PAR LES TRAVAUX PRÉPARATOIRES* (1934); Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV. 549 (1935).

<sup>60</sup> BARCELONA CONFERENCE ON COMMUNICATIONS AND TRANSIT, VERBATIM REPORT 106 (1921).

tent with regard to the effect of war on treaties, no reason appears why this material could not be examined for that purpose. The Permanent Court of International Justice was never called upon to decide a case involving the effect of war on treaties, and there has been no case on this point before the new court, the International Court of Justice.

### *The Doctrine of Legal Order*

1) *A treaty creates rights and imposes obligations:* In the preceding section I have tried to show that in determining the validity of a treaty during time of war, the controlling factor should be the intention of the parties, and that, when the intention of the parties is not expressed or ascertainable, the courts are called upon to discover by way of interpretation the hypothetical intention of the parties. In the latter case, however, there is a danger of subjectivity and therefore uncertainty regarding the final outcome. The judge is left wide and uncontrolled discretion—an entirely subjective criterion—to find the hypothetical intent of the parties. Or it may even happen that it is impossible for the court to find the intention of the parties, because they appear to have had conflicting intentions. It is clear therefore that, where express intention of the parties is lacking, some more objective criterion is needed for the judge to decide upon the validity of a treaty during a war.

A treaty when concluded, that is duly signed, ratified, declared, and registered, confers rights and imposes obligations on all parties concerned. In this sense a treaty is more than the mere expression of the intention of the parties.<sup>61</sup> It creates, so to speak, a legal order between the parties, which is in force independently of the individual wills of the parties concerned.<sup>62</sup> Chief Justice Jay, when speaking in

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<sup>61</sup> In the United States a treaty is more than a contract between nations. *Foster v. Neilson*, 2 Pet. 253 (U.S. 1829); *Commonwealth v. Hawes*, 13 Bush (Ky.) 697 (1878); *Little v. Watson*, 32 Maine 214 (1850); *Minnesota Canal, etc. Co. v. Pratt*, 101 Minn. 197, 112 N.W. 395 (1907). By force of the Constitution of the United States all treaties made shall be the supreme law of the land, the judges in every state shall be bound thereby, and they are superior to any state constitution or law. *Maiorano v. Baltimore and Ohio R.R.*, 213 U.S. 268 (1909); *De Lima v. Bidwell*, 182 U.S. 1 (1900); *In re Cooper*, 143 U.S. 472 (1892); *United States v. Rauscher*, 119 U.S. 407 (1886); *Hauenstein v. Lynhan*, 100 U.S. 483 (1880); *Ware v. Hylton*, 3 Dall. 199 (1796). Treaties are equivalent of an act of Congress. *The Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884); *Chew Heong v. United States*, 112 U.S. 536 (1884).

<sup>62</sup> According to the legal view of the United States a treaty may give rise to private rights which are of such a nature as to be enforceable by the courts for the benefit of private parties, and in such case the courts resort to the treaty for a rule of decision as they would to a statute, *Maiorano v. Baltimore and Ohio R.R.*, 213 U.S. 268 (1909);

*Jones v. Walker*<sup>63</sup> of the principles which govern and decide the validity of a treaty, said that "it rests *not on the volition* of the other, but on that *perfect obligation* which contracts authorize and not improperly impose on both the parties"<sup>64</sup> (Italics added). The same is true of internal law: as soon as a legal rule has come into being—whether it comes from the legislature or the courts or any other recognized source of law—it acquires a life of its own, and takes its place in a system of rules.

A treaty once concluded becomes a part of the international legal system and its validity during a war is dependent, if the parties have not expressed their intention to the contrary, upon the validity of the international legal system generally. The order created by a treaty between belligerents is not obliterated by war, not even by "total" war. This order is violated by a war, but there is no reason to assume that the whole system of treaties will be abolished. I submit that the idea of Montesquieu, that in war nations are under an obligation to do as little harm as possible to each other just as in peace they are obliged to do the greatest good,<sup>65</sup> should also be applied to modern "total" wars. This liberal view was the basis for a codification of existing rules on the subject by the Institute of International Law, and was expressed by the *Rapporteur* in his report as follows:

The rule that treaties continue in force appears as the corollary of the modern conception of war which, itself an increasingly exceptional phenomenon, must be limited in its effects. The international order in which the belligerents were living is not swept aside. It is only provisionally modified in the small measure necessary to the achievement of the war aim, that is to say the victory of the stronger. Outside these limits ordinary legality continues to exist, together with rules deriving from custom and with those, increasingly numerous, laid down by treaties. To retain the old principle of the abrogation of treaties as the necessary effect of war, would be to run counter to the tendencies of our time.<sup>66</sup>

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United States v. Rauscher, 119 U.S. 407 (1886); The Head Money Cases (*Edye v. Robertson*), 112 U.S. 580 (1884); *Teti v. Consol. Coal Co.*, 217 Fed. 443 (S.D.N.Y. 1914); *Erickson v. Carlson*, 95 Neb. 182, 145 N.W. 352 (1914); *Trott v. State*, 41 N.D. 614, 171 N.W. 827 (1919); *In re Estate of Arduino*, 9 Ohio N.P.N.S. 369 (1909); *Bondi v. MacKay*, 87 Vt. 271, 89 Atl. 228 (1913). In *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 195 P.2d 1 (1948), the court held that the Commercial Treaty with Japan of 1911, although abrogated, was still valid as municipal law.

<sup>63</sup> 13 F.Cas. 1059, No. 7, 507 (Va. Cir.). The reporter gives no date. Jay was Chief Justice from 1789 to 1795.

<sup>64</sup> *Id.* at 1062.

<sup>65</sup> "*Le droit des gens est naturellement fondé sur le principe que les nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il soit possible, sans nuire à leurs véritables intérêts*". 1 MONTESQUIEU, *ESPRIT DES LOIS* c. III.

<sup>66</sup> 24 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 200, 207 (1911). See also 25 *id.* 611 (1912).

It is in the interest of all parties concerned that the system which the treaty established, be maintained until the end of war, when a new system can be decided upon, which will take into consideration the intervening circumstances.

2) *No difference between bi- and multilateral treaties:* A distinction is frequently made by the political departments of governments and by some writers between bilateral and multilateral agreements in determining the effect of war on treaties. I question whether there exists a logical and legal difference between a multilateral and bilateral treaty that warrants the automatic abrogation of bilateral but not of multilateral treaties in time of war. Both bilateral and multilateral treaties create rights and impose obligations equally without any consideration regarding the number of signatories; both become a part of the existing international legal system. The only difference between them seems to be that a bilateral treaty creates a legal order with a narrower field of application, being limited only to two states, whereas a multilateral treaty has a much broader application. This difference, however, if it is the only one, seems insufficient to justify the holding that war dissolves bilateral but not multilateral treaties. It is therefore submitted that the number of signatories to a treaty has no effect on its legal nature or its continued existence during war, bilateral treaties having the same validity as multilateral ones.<sup>67</sup>

3) *A state of fact cannot terminate a legal order:* A legal order created by a treaty is of course subject to all the vicissitudes of a social upheaval and can thereby become inoperative during such periods but, once order is restored, if circumstances are otherwise unchanged, it will resume all its previous social, and therefore juridical, validity.<sup>68</sup> The doctrine that war automatically terminates treaties is from this point of view indefensible because a state of fact, *i.e.*, war, cannot terminate a legal order created by a treaty. A legal order can be terminated only by some legal act, that is, by the concurring wills of the parties concerned, which will be in the form of a new agreement.<sup>69</sup> To hold otherwise means the acceptance of the doctrine that "might is right", which is really the basis of the abrogation doctrine. But

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<sup>67</sup> In *Clark v. Allen*, 331 U.S. 503 (1947), a bilateral treaty creating a "legal order" between Germany and the United States in matters of commerce and consular rights, was held to be in force and effect during the whole period of war and even not "suspended" between Germany and United States because of war, having thus the same validity as, for instance, a multilateral postal or sanitary convention.

<sup>68</sup> Scelle, *De l'influence de l'état de guerre sur le droit conventionnel*, 77 JOURNAL DU DROIT INTERNATIONAL 26, 41 (1950).

<sup>69</sup> RANK, *op. cit. supra* note 9, at 68.

this doctrine is not sound. If war *ipso facto* abrogates treaties, why should it not also abrogate the customary law between belligerents, *i.e.*, the other main source of international law? International customary law, however, remains intact and is not wiped out by war.<sup>70</sup> Therefore, from the lawyer's point of view only the doctrine of the continued validity of the legal order is acceptable. The treaty remains in force if the intent of the parties to the contrary cannot be ascertained.

To sum up: the doctrine of legal order is essentially the doctrine of *pacta sunt servanda* and the doctrine of the *status quo*. It does not permit treaty denunciations without legal grounds, still less the presumption of automatic abrogative effect of war on treaties.

### *The Doctrine of Changed Conditions*

It is a common occurrence for wars, especially those that are widespread, to result in changes in the international legal order. The question has been raised, however,

. . . whether it is analytically helpful to consider "the effect of war on treaties" as a distinct legal problem. [I]t is not the existence of "war" as such, but rather the existence of any condition, such as hostilities, whether recognized as "war" or not, or any other grave emergency, that may within the design of the parties justify the suspension of the operation of a treaty provision.<sup>71</sup>

It is submitted that "the effect of war on treaties" is not a distinct legal problem from the point of view of the intention doctrine, because it is not war, or any other emergency situation which abrogates treaties, but the parties themselves. War may of course give the parties an impetus to disregard the treaty.

It might be both theoretically and practically better therefore to consider the problem of whether the changes brought about by a war (or any other grave emergency) in the existing *status quo* would automatically warrant the invocation of a doctrine known in international law as the doctrine of changed conditions or *rebus sic stantibus*.<sup>72</sup> Be-

<sup>70</sup> Speaking of the experiences of World War II, JESSUP, *A MODERN LAW OF NATIONS* 215 (1948), says that "it is erroneous to deduce . . . as is sometimes done, that the old distinction between civilians and military personnel has been abandoned. Women and children are not deliberately shot when an attacking force enters a town, as are members of the enemy armed forces who do not surrender." Those who are guilty of individual atrocities will be punished as war criminals.

<sup>71</sup> See Oliver J. Lissitzyn, Book Review, 45 *AM. J. INT'L L.* 205, 206 (1951).

<sup>72</sup> Probably the first modern formulation of the doctrine was given by 3 SPINOZA, *TRACTATUS THEOLOGICO-POLITICUS*, 14, as follows: *Nemo in futurum contrahit nisi positis praecedentibus circumstantiis. His enim mutatis totius status etiam mutatur ratio.* (No one makes a contract for the future except on the hypothesis of certain preceding

fore I venture an answer it might be helpful to briefly review this doctrine.

The doctrine of changed conditions is an attempt to formulate a legal principle<sup>73</sup> that will justify nonperformance of a treaty obligation if the conditions with relation to which the parties contracted have changed so materially and so unexpectedly as to create a situation in which the exaction of performance would be unreasonable.<sup>74</sup>

A recent invocation of this doctrine adopted the outbreak of war as the changed condition justifying nonperformance. During the second World War, but before the United States was a belligerent, President Franklin D. Roosevelt, in a proclamation of August 9, 1941,<sup>75</sup> invoked the doctrine of changed conditions, when he declared the International Load Line Convention of 1930,<sup>76</sup> to which the United States was a

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circumstances. But when these change, the reason underlying the whole position also changes; accordingly every contracting party retains the right to consult its own interests). Lauterpacht, *Spinoza and International Law*, 7 BRIT. Y.B. INT'L L. 89, 94 (1927); HILL, *THE DOCTRINE OF REBUS SIC STANTIBUS IN INTERNATIONAL LAW* (1934); Garner, *The Doctrine of Rebus Sic Stantibus and the Termination of Treaties*, 21 AM. J. INT'L L. 509 (1927); Fischer Williams, *The Permanence of Treaties*, 22 AM. J. INT'L L. 89 (1928); HARV. RESEARCH, *LAW OF TREATIES 1096 et seq.* (1935); Briggs, *Rebus Sic Stantibus Before the Security Council*, 43 AM. J. INT'L L. 762 *et seq.* (1949); UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS: *STUDY OF THE LEGAL VALIDITY OF THE UNDERTAKINGS CONCERNING MINORITIES*, E/CN.4/367, pp. 36 *et seq.* (1950).

<sup>73</sup> For the view that the doctrine of *rebus sic stantibus* has found its way to public international law from civil contracts by way of analogy see PFAFF, *DIE CLAUSEL REBUS SIC STANTIBUS IN DER DOKTRIN UND DER ÖSTERREICHISCHEN GESETZGEBUNG* (1898); BINDEWALD, *RECHTSGESCHICHTLICHE DARSTELLUNG DER CLAUSEL REBUS SIC STANTIBUS UND IHRE STELLUNG IM BÜRGERLICHEN GESETZBUCH* (1901); SCHLESINGER, *COMPARATIVE LAW CASES AND MATERIALS* 325n (1950).

<sup>74</sup> *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Hooper v. United States*, 22 Ct. Cl. 408 (1887).

<sup>75</sup> DEP'T STATE BULL. 114 (1941), 6 FED. REG. 3999 (1941). The Proclamation was revoked by the President on December 21, 1945, effective January 1, 1946, 59 STAT. 890 (1945); 10 FED. REG. 15365 (1945).

<sup>76</sup> 47 STAT. 2228 (1933). This Convention was signed in London, July 5, 1930, and proclaimed by the President on January 5, 1933. The Convention was concluded with the aim of promoting "safety of life and property at sea by establishing in common agreement uniform principles and rules with regard to the limits to which ships on international voyages may be loaded" (Preamble), and its Articles provide in considerable detail for the limits to which vessels of various categories may be loaded when engaged in international voyages. The Convention was signed and ratified by 36 States, of which ten were engaged in war at the date of the President's Proclamation, and sixteen of them were under military occupation. From these facts, a "change of conditions" was inferred by the Acting Attorney General. The American Republics, however, which were parties to the Convention, had previously assented to the suspension by the United States. 5 DEP'T STATE BULL. 114 (1941).

party, "suspended or inoperative . . . for the duration of the present emergency." The president's decision was based upon the advice of the Acting Attorney General that the International Load Line Convention was a peacetime agreement and therefore had ceased to be binding upon the United States, because the essential conditions upon which it was founded had changed after the outbreak of World War II.<sup>77</sup>

The action of the President was vigorously criticized by some writers,<sup>78</sup> while others<sup>79</sup> tried to find in it a case which could be factually referred to as an "effect of war on treaties". It seems clear, however, that the facts of the case did not justify the invocation of either doctrine.

War might lead to changes that would justify invoking the theory of changed conditions. These changes, however, must meet the same requirements as any other changes in conditions.

First, the change in conditions must be fundamental, that is to say, those conditions on which the very existence of the treaty was based must have disappeared.<sup>80</sup> The maxim, the reason of the law ceasing, the law itself ceases (*cessante ratione legis, cessat ipsa lex*) would be applicable by way of analogy: the reason of the treaty ceasing, the treaty itself ceases.

Second, the doctrine applies only to treaties of indefinite or perpetual duration that contain no express provision concerning the procedure by which they may be amended or abrogated.<sup>81</sup>

Third, the party wishing to invoke the doctrine to terminate the obligations of the treaty cannot denounce the treaty unilaterally,<sup>82</sup> but

<sup>77</sup> 40 Ops. ATTY GEN. No. 24 (1941).

<sup>78</sup> See Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 AM. J. INT'L L. 89, 90 (1942):

This surprising, and, indeed, reckless and unnecessary, espousal by the United States of a much questioned doctrine by which Germany, Italy, Japan, and Soviet Russia might equally well justify the suspension, termination, or even violation, of inconvenient treaties. . . .

<sup>79</sup> Lissitzyn, *supra* note 71, at 206.

<sup>80</sup> Williams, *supra* note 72, at 91:

That doctrine is not that one State has a unilateral right to declare itself not bound by a subsisting contract; it is that the treaty itself has gone, since an essential condition in which it was concluded has disappeared; and this results, either because on the treaty's true construction this is what the parties themselves have intended, or because the very nature of the case requires that the change of an essential condition should have this effect. The treaty in this event is, in fact, not voidable, but dead or "obsolete", if that word be preferred.

See also HARV. RESEARCH, LAW OF TREATIES 1096 (1935).

<sup>81</sup> See *Hooper v. United States*, 22 Ct. Cl. 408, 416 (1887).

<sup>82</sup> In 1870, Russia, alleging changed conditions, took advantage of the Franco-Prussian War of 1870 to denounce unilaterally the stipulations of the Treaty of Paris of 1856 restricting its rights in the Black Sea (3 HERTSLET, *THE MAP OF EUROPE BY TREATIES* 1892 (1875)). Great Britain protested. A conference was called in London in 1871 between

must seek the consent<sup>83</sup> of the other party or parties to its release.

Fourth, without this consent, the party must submit his case to a competent international authority in order to secure recognition of the validity of his claim.<sup>84</sup>

Subject to these very definite legal restrictions, it is submitted, the doctrine of changed conditions applies to the social changes brought about by war if a party to a treaty wishes to invoke it in order to free himself from a treaty obligation which has become obsolete.<sup>85</sup>

According to the absolute abrogation doctrine, the effect of war on treaties and the doctrine of changed conditions are logically distinct.

representatives of the signatories of the Treaty of Paris and the following DECLARATION RELATIVE TO THE INVOLABILITY OF TREATIES was agreed upon on January 17, 1871: "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." (Italics added). 61 BRITISH AND FOREIGN STATE PAPERS 1198 (1870-1871). When Germany unilaterally repudiated the Treaty of Versailles first, on March 10, 1935, repudiating her obligations under Part V (disarmament clauses), and then on March 7, 1936, her obligations under Article 43 (demilitarisation of the Rhineland), the Council of the League of Nations condemned the German unilateral repudiation and reiterated the principles expressed in the above cited London Declaration of 1871. LEAGUE OF NATIONS, OFFICIAL JOURNAL 551 (1935), *id.* 312 (1936).

<sup>83</sup> Article 10 of the Convention on Relations Between the Three Powers and the Federal Republic of Germany, signed at Bonn on May 26, 1952, provides that "the Three Powers and the Federal Republic . . . will, by mutual agreement, modify the present Convention . . . to the extent made necessary or advisable by the *fundamental change in the situation*". 82d Cong. 2d Sess., Senate Executives Q and R, 13 (1952).

Almost model treaties from the point of view of clarity of the intent of the parties in regard to the procedure to be followed in case of changed circumstances is the Economic Cooperation Agreements between the United States and the countries participating in the European Recovery Program, signed in 1948, See SUPPLEMENT TO THE FIRST REPORT TO CONGRESS OF THE ECONOMIC COOPERATION ADMINISTRATION (1948), containing the following provision:

If, during the life of this Agreement, either Government should consider there has been a fundamental change in the basic assumptions underlying this Agreement, it shall so notify the other Government in writing and the two Governments will thereupon consult with a view to agreeing upon the amendment, modification or termination of this Agreement. If, after three months from such notification, the two Governments have not agreed upon the action to be taken in the circumstances, either Government may give notice in writing to the other of intention to terminate this Agreement. Then . . . this Agreement shall terminate six months after the date of such notice of intention to terminate. . . .

See, e.g., ¶ 2, Art. II of the Agreement with Austria, SUPPLEMENT, *supra*, p. 30.

<sup>84</sup> HILL, *op. cit.* *supra* note 72, at 78; HARV. RESEARCH, LAW OF TREATIES 1096 (1935).

<sup>85</sup> U.N. ECONOMIC AND SOCIAL COUNCIL: STUDY OF THE LEGAL VALIDITY OF THE UNDERTAKINGS CONCERNING MINORITIES, E/CNA/367, pp. 9 and 71 (1950), comes to the conclusion that between 1939 and 1947 circumstances as a whole changed to such an extent that the whole system of Treaties concerning Minorities should be considered as *having ceased to exist*, and invokes the doctrine of *rebus sic stantibus*, but not war, as terminating minority treaties.

The former cuts off treaty obligations automatically on the declaration of war; under the latter theory, the treaty must meet the requirements set out above. The absolute abrogation doctrine, however, is not sound and acceptable as it encourages anarchy and defiance of international legal obligations even more than is required by modern warfare. The courts will not automatically<sup>86</sup> invoke *rebus sic stantibus* where war has led to changes. The *intent*<sup>87</sup> of the parties to invoke the doctrine, as expressed by their political departments, is important. This limitation is well established by the holdings of the courts.<sup>88</sup>

In *Clark v. Allen*,<sup>89</sup> the question of changed conditions in the status of one party to a treaty was raised by the attorney for respondents, who alleged that the treaty in issue had entirely ceased to exist. The court held, however, that the provisions of a treaty, which have otherwise *survived the outbreak of war* between the contracting parties may not be held by the courts to have been abrogated merely because "one of them has ceased to exist as an independent national or international community", where the political departments of the government have not so decided. Mr. Justice Douglas, speaking for the Court, said:

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<sup>86</sup> Swiss Bundesgericht in 1923: "Von einem *ipso jure* eintretenden Erlöschen der vertraglichen Verbindlichkeit kann nicht die Rede sein. . . . Der Staat, welcher von diesem Rechte Gebrauch machen will, muss seinem dahingehenden Willen in den Formen des Völkerrechts dem Vertragsgegner . . . eröffnen". 49 BUNDESGERICHTLICHE ENTSCHEIDUNGEN (hereinafter BGE) I, p. 149 (1923).

<sup>87</sup> HILL, *op. cit. supra* note 72, at 75: "The doctrine has been clearly based juridically upon the intention of the parties at the time of the conclusion of the treaty." In theory, this may be true. But in addition there must be an intent to invoke the doctrine at the time of denunciation. See notes 88-91 *infra*.

<sup>88</sup> A leading Swiss case on the subject is *Lepeschkin v. Gosweiler & Co.*, decided by the Bundesgericht in 1923, 49 BGE I, 149 (1923). Here the question was whether the Hague Convention on Civil Procedure of 1905 still remained in force as between France and Soviet Russia, because of the fundamental changes consequent upon the emergence of the Russian Communist State. The court held that neither France nor Soviet Russia had denounced the Convention, and that until the political authorities had denounced it the courts were bound to apply it. See also the Case of the Free Zones of Upper Savoy and the District of Gex, decided by the Permanent Court of International Justice in 1932, Ser. A/B, No. 46, p. 158; Ser. C, No. 19 (1), pp. 192-199; *Hooper v. United States*, 22 Ct. Cl. 408 (1887); German Reichsgericht in June 26, 1925, 54 JURISTISCHE WOCHENSCHRIFT 2476 (1925); *Canton of Thurgau v. Canton of St. Gallen*, the Swiss Bundesgericht in 1928, ANNUAL DIGEST, Case No. 289 (1927-1928).

<sup>89</sup> 331 U.S. 503 (1947). See also *In re Reih's Estate*, 102 Cal. App. 2d 206, 227 P.2d 564 (1951). The appellant urged in the latter case that the unconditional surrender of Germany May 8, 1945, and the military occupation which followed after that date, and the establishment of a Military Government for Germany effected an abrogation of all vested rights theretofore existing under German civil law, including the right of inheritance. The court held however that the alien legatees were entitled to take under the will.

. . . the question whether a state is in a position to perform its treaty obligations is essentially a political question. . . . *We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them.* The Allied Control Council has, indeed, assumed control of Germany's foreign affairs and treaty obligations—a policy and course of conduct by the political departments wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties.<sup>90</sup> (Italics added.)

An important Swiss case, the *Occupation of Germany Case (Zürich)*,<sup>91</sup> decided by the Court of Appeal of Zürich, December 1, 1945, also deals with the effect of the changed status of Germany, in connection with the application of the Hague Convention on Civil Procedure of 1905. The Court held that Germany, although occupied and without an independent government, had not ceased to exist as a State, and that consequently the Treaty with her was still in force.

The changes to which war might lead, such as the disappearance of a party state, may, of course, justify reliance on the doctrine of changed conditions. But in such a case the result of war, not the outbreak of war, is the decisive factor, and this can be logically described as a type of changed conditions and not as a separate doctrine.

International as well as Domestic Society ought to provide sufficient flexibility in its legal order to accommodate the requirements of social changes. Consequently, the doctrine of changed conditions is an essential component<sup>92</sup> in the international legal order, subject however to the important limitations and requirements indicated above.

### III. MOST RECENT DEVELOPMENTS IN THE PRACTICE OF STATES

#### *Views of Political Departments*

Generally speaking, the question of conclusion as well as termination or revision of treaties is primarily political and is the responsibility of the political department of a government, just as are the questions whether a State is justified in disregarding treaty obligations in time of war, or what remedy shall be invoked against a foreign State when

<sup>90</sup> 331 U.S. at 514.

<sup>91</sup> 42 SCHWEIZERISCHE JURISTENZEITUNG 89 (1946); ANNUAL DIGEST, Case No. 86 (1946); SCHLESINGER, *op. cit. supra* note 73, at 452 (1950); see also the case "Helvetia" v. Kuch and Frauenberger-Kuch, decided by the Swiss Bundesgericht, April 15, 1946, ANNUAL DIGEST, Case No. 85 (1946). The Court held that German political authority had not been extinguished, and that Swiss courts must apply a treaty as long as the Federal Council or the Federal Assembly have not denounced it, or have not declared in any other way that the treaty is no longer valid.

<sup>92</sup> JESSUP, A MODERN LAW OF NATIONS 150 (1948).

it has disregarded its treaty obligations. These are actions of the political departments in a political capacity. This view seems quite natural since the political departments represent the State in international intercourse and, therefore, are the proper organs to express the intention of a State regarding the validity of a treaty in time of war.

In the United States, the decision of the political department of the government regarding the continued existence of treaties or treaty provisions is generally considered binding on the courts,<sup>93</sup> for the courts play a more humble part when deciding the validity of a treaty in time of war.<sup>94</sup> This view is supported also in England,<sup>95</sup> Switzerland,<sup>96</sup> France,<sup>97</sup> and Germany.<sup>98</sup> In the United States, however, matters of construction are essentially a function of the courts,<sup>99</sup> though it has been suggested<sup>100</sup> in one case that the court address a request to the State Department for a definition of executive policy. The recent tendency in Great Britain has been to make just such an application to the political department, and "Such a certificate is normally con-

<sup>93</sup> *Charlton v. Kelly*, 229 U.S. 447 (1913); *Terlinden v. Ames*, 184 U.S. 270 (1902); *The Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920).

<sup>94</sup> *Techt v. Hughes*, note 93 *supra*.

<sup>95</sup> *Rex v. Bottrill*, [1947] 1 K.B. 41; McNAIR, *THE LAW OF TREATIES* at 530 *et seq.* (1938).

<sup>96</sup> *Lepeschkin v. Gosweiler & Co.*, Swiss Bundesgericht, 1923, 71 *JOURNAL DES TRIBUNAUX ET REVUE JUDICIAIRE* 582 (1923), 49 *BGE I*, 149 (1923); *Occupation of Germany Case (Zürich)*, Court of Appeal of Zürich, December 1, 1945, *ANNUAL DIGEST*, Case No. 86 (1946); "*Helvetia*" *v. Kuch and Frauenberger-Kuch*, Swiss Bundesgericht, April 15, 1946, *ANNUAL DIGEST* Case No. 85 (1946).

<sup>97</sup> The French Government alone is in a position to declare which treaties are to be abrogated, and this by an express indication of which particular treaty or which particular part in a given treaty is to stand or fall. Any attempt to lay upon the judge the responsibility for deciding which treaties are abrogated and which remain in force is futile according to French tradition. See CHAILLEY, *NATURE JURIDIQUE DES TRAITÉS INTERNATIONAUX SUIVANT LE DROIT CONTEMPORAINE* 113 (1932); LAPRADELLE-NIBOYET, *RÉPERTOIRE DE DROIT INTERNATIONAL, SUPPLEMENT*, No. 259 *et seq.* (1934); PAYOT, *LES INSTRUCTIONS DU GOUVERNEMENT LORS DE L'INTERPRÉTATION JUDICIAIRE DU DROIT INTERNATIONAL* (1950).

<sup>98</sup> "Only the Government decides as to the continued validity of treaties. This is binding on the courts." Translated from a letter to the author by a German Government official.

<sup>99</sup> *United States v. Domestic Fuel Corp.*, 71 F.2d 424 (Ct. Cust. & Pat. App. 1934); *The Frances Louise*, 1 F.2d 1004 (D.C. Cir. 1924), *appeal dismissed, sub nom.* *United States v. Backman*, 270 U.S. 666 (1926); *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930); *Frasca v. City Coal Co.*, 97 Conn. 212, 116 Atl. 189 (1922); *San Lorenzo Title & Improv. Co. v. Caples*, 48 S.W.2d 329 (Tex. Civ. App. 1932).

<sup>100</sup> *Clark, J.*, dissenting opinion, *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 253 (2d Cir. 1947).

clusive on matters both of fact and law. . . ."<sup>101</sup> The United States has not gone this far; in matters of construction, that is of law, the views of the political department, although they are entitled to great weight, are not conclusive.<sup>102</sup> And in the absence of a denunciation of a treaty by the political department, the courts will normally treat it as still in effect.<sup>103</sup>

1) *The United States*: The Department of State has not undertaken to establish a general rule concerning the operation of bilateral treaties in time of war. Practice of the Department has varied. At an earlier time,<sup>104</sup> and during the first World War,<sup>105</sup> it expressed the opinion that bilateral treaties did not remain in force. During the second World War the State Department took a more liberal view.<sup>106</sup> With respect to multilateral treaties the following letter of January 29, 1948, from the State Department Legal Adviser, Ernest A. Gross, to the author is reproduced in part:

With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realized that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in

<sup>101</sup> *Rex v. Bottrill*, [1947] 1 K.B. 41, 55.

<sup>102</sup> *The Yulu*, 71 F.2d 635 (5th Cir. 1934), *cert. denied*, 293 U.S. 589 (1934); *United States v. Reid*, 73 F.2d 153 (Cir. 1934), *cert. denied*, 299 U.S. 544 (1936); *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930). For earlier views and practice of State Department see 5 MOORE, *DIGEST OF INTERNATIONAL LAW* 383 *et seq.* (1906); 6 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 327 (1943); as to the practice of political departments of other states see Rühland, *Zur Theorie und Praxis des Einflusses des Kriegsbeginns auf Staatsverträge*, 32 NIEMEYERS ZEITSCHRIFT 74 (1924); JACOMET, *LA GUERRE ET LES TRAITÉS s.a.* [1909].

<sup>103</sup> *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920).

<sup>104</sup> 5 MOORE, *op. cit. supra* note 102, at 375 *et seq.* (1906); WHEATON, *INTERNATIONAL LAW* 240 *et seq.* (8th ed. Dana, 1864).

<sup>105</sup> Secretary of State Lansing in regard to the treaty provisions dealing with the inheritance of property in 1918, said: ". . . in view of the present state of war between the United States and Austria-Hungary and Germany, the Department does not regard these provisions as now in operation". 6 HACKWORTH, *op. cit. supra* note 102 at 327 (1943).

<sup>106</sup> Letter to the Attorney General from Acting Secretary of State, Joseph C. Grew, dated May 21, 1945, commenting on the Government's position in the Briefs for a writ of certiorari, pp. 24-31, *Clark v. Allen*, 331 U.S. 503 (1947): "The Department [of State] perceives no objection to the position . . . that Article IV of the Treaty . . . remains in effect despite the outbreak of war." See also note 152 *infra*.

the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.

It is considered by this Government that, with the coming into force on September 15, 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania. . . .

The State Department view with respect to the specific question of Austrian, as well as German, pre-war treaties is set forth in a letter to the writer by the Assistant for Treaty Affairs, Charles I. Bevans, Office of the Legal Adviser, dated June 8, 1953, which is in part as follows:

With regard to the status of prewar treaties between the United States and *Austria*, the Department of State has considered those treaties to be still in force between the two countries. This is predicated on the position the Department has taken that, although as a practical matter the United States was obliged to take certain administrative measures based upon the situation created by the *Anschluss*, the United States Government consistently avoided any step which might be considered to constitute *de jure* recognition of the annexation of Austria by Germany. Accordingly, this Government regards Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy State or a State at war with the United States during the Second World War.

With respect to *Germany* the Department has refrained from expressing an opinion in general as to the effect of World War II on the treaties in force between the United States and Germany at the time of the outbreak of a state of war between the two countries. The Department, however, has taken a position regarding the effect of the war on the provisions of certain of the prewar treaties. It has officially stated that in the absence of a specific decision by an appropriate court holding that the provisions regarding the right of entry embodied in Article I of the treaty of friendship, commerce and consular rights between the United States and Germany, signed at Washington December 8, 1923, are presently binding upon the parties to the treaty, or until a new treaty which includes right of entry provisions enters into force between the United States and the Federal Republic of Germany, the Department of State is not prepared to authorize the issuance of "treaty merchant" visas to German nationals in accordance with Section 3 (6) of the Immigration Act of 1924, as amended (8 U.S.C. 203).

On the other hand, the Department, even prior to the decision of the Supreme Court in the case of *Clark v. Allen*, expressed the view that there would seem to be no reason to regard Article IV of the treaty of 1923 with Germany as not continuing to be operative despite the outbreak

of war. The Department also considers that, whereas during the war the consular provisions of the 1923 treaty were inoperative as a practical matter so long as German consular officers were not functioning in the United States and American consular officers were not functioning in Germany, it is in accord with generally recognized principles to consider that upon the restoration of consular relations between the United States and the Federal Republic of Germany the consular provisions again became operative.

Prior to the action indicated below which has been taken with respect to the convention for the unification of certain rules relating to international transportation by air, signed at Warsaw October 12, 1929, the Department on several occasions stated that the Warsaw convention was applicable to German territory as the result of its ratification by Germany, that it was not abrogated by the war, although suspended in its practical operation during the time of actual hostilities, and that it has been in effect as regards Germany since the termination of hostilities.

Apart from passing upon the question of the effect of the war on the treaties in force between the United States and Germany at the time of the outbreak of the war, the Department at present is in the process of making a final determination as to which of the prewar treaties and agreements the United States Government desires be given effect between the United States and the Federal Republic of Germany in accordance with Directive No. 6 of the Allied High Commission entitled "Treaties Concluded by the Former German Reich," dated at Bonn March 19, 1951. . . .

As in the case of notifications given to Bulgaria, Hungary, Italy, Japan, and Rumania, in accordance with the provisions of the respective peace treaties, regarding prewar treaties with each of those countries which this Government wished to continue in force or revive, other agencies and departments of the Government are being consulted before notification is made concerning any of the prewar treaties between this Government and the former German Reich which it is desired to give effect between the United States and the Federal Republic of Germany.

Up to the present time, this Government has indicated, in accordance with the procedures set forth in Directive No. 6, its desire to have four prewar treaties placed in effect between the United States and the Federal Republic of Germany, namely, the convention respecting the limitation of the employment of force for the recovery of contract debts, signed at The Hague October 18, 1907; the convention establishing uniform rules with respect to assistance and salvage at sea, signed at Brussels September 23, 1910; the convention for the unification of certain rules relating to bills of lading, signed at Brussels August 25, 1924; and the convention for the unification of certain rules relating to international transportation by air, signed at Warsaw October 12, 1929. In each of the notices given in connection with those conventions, this Government has included a proviso that the notice "is without prejudice to the previous status of any portion of the convention which may have remained operative or may have again become operative at any time since the outbreak of hostilities between the United States and Germany."

The views expressed in these letters represent the prevailing modern legal practice and opinion. The parts referring to the treaties with Germany seem to be essentially in accord with the views of the German Government in Bonn, which will be dealt with subsequently.

2) *Great Britain*: According to the opinion of the British Government before the second World War, there is no inherent juristic impossibility either in the formation of treaty obligations between two opposing belligerents during war, or in the continuance during war of obligations formed before the war.<sup>107</sup> The British position on the issues raised by the second World War is expressed in a letter from the British Foreign Office to the author,<sup>108</sup> which is reproduced here in part:

I am replying . . . to your letter . . . in which you enquired about the legal status of Multilateral Treaties of a technical or non-political nature, and whether these treaties are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.

You will observe that, in the Peace Treaties with Italy, Finland, Roumania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to International Law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the International Air Navigation Convention of 1919 and various Postal and Telegraphic Conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions in so far as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.

As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice.

What the attitude of the British Government has been in regard to the bilateral treaties between belligerents during the second World War

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<sup>107</sup> McNAIR, *THE LAW OF TREATIES* 530 (1938).

<sup>108</sup> Letter from J. Mervyn Jones, British Foreign Office, dated January 7, 1948.

is not clear from this letter. According to earlier British practice they need not be abrogated or even suspended, as has been already observed in the *Russo-Dutch Loan* case.<sup>109</sup> The British view emphasizes the importance of the intention and admits no automatic abrogation of treaties by war.

3) *France*: The French official position, on the other hand, contrary to the British and American, seems to favor the absolute abrogation doctrine. Some evidence of this stand may be found in the French Government's declaration in regard to Japan: "Conventions with Japan were abrogated by the outbreak of war."<sup>110</sup> I regret not being able to present the official view of the French Government on the general question of the validity of treaties during the Second World War. I should like, however, to set forth the opinion of M. Chargueraud-Hartman, the former Director of Technical Agreements of the French Foreign Ministry, as expressed in a letter, dated December 29, 1947 to me:

The outbreak of war terminates all intercourse between the belligerents and therefore also all bilateral treaties with some exceptions, according to the French view. . . . The differentiation between political conventions and those regulating private rights is not justified, because in every treaty concluded between sovereign states there is always a political aspect present, despite the fact that the provision of such a treaty may contemplate only private rights. The party states are providing privileges for their nationals, which certainly is an act of political importance and which certainly is not intended to continue in time of war. . . .

The multilateral conventions however . . . remain in force during a war between the allied powers, as well as between the neutrals themselves and between neutrals and belligerents. On the other hand, hostilities suspend these conventions as between belligerents. Their suspension has, however, a temporary effect, and the conventions will be in operation again between the belligerents after the establishment of peace, if the peace treaties do not provide otherwise.<sup>111</sup>

The view expressed above concerning multilateral conventions is the prevailing one.

4) *Italy*. Italy has always favored the maintenance of treaties concerning private rights, despite the occurrence of war.<sup>112</sup> I should like to quote a letter from the Italian Ministry of Justice to the Max-Planck Institute for Foreign and Private International Law, dated November 28, 1950:<sup>113</sup>

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<sup>109</sup> See p. 327 *supra*.

<sup>110</sup> JOURNAL OFFICIEL, October 14, 1945.

<sup>111</sup> Translated from the French by the writer.

<sup>112</sup> 1 ANZILOTTI, COURS DE DROIT INTERNATIONAL 347 *et seq.* (1919).

<sup>113</sup> Cited in 7 JURISTENZEITUNG 682 (1952), translated by the present writer.

. . . it is in our jurisprudence a recognized principle that a state of war does not cause the extinction of treaties, except in cases of incompatibility, and therefore it is the view of this Department that the Italian-German Convention of 1937 [concerning the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded March 9, 1936]<sup>114</sup> after the falling away of hindrances caused by hostilities could be regarded as in force.

The same Italian attitude is found in Article 280 of the War Law of July 8, 1938,<sup>115</sup> which grants persons of enemy nationality in Italy, who are of full legal capacity, the right to bring and defend actions in Italian courts throughout the war. This practice is similar to the American or English position.<sup>116</sup>

There is no doubt that all treaties concerning private rights concluded between Germany and Italy before the outbreak of war between those two countries in 1943 were considered in force and applied accordingly by Italy after 1943.<sup>117</sup> Also in her relations with France, Italy upheld the validity of and continued to apply the Franco-Italian Commercial Agreement of April 14, 1938.<sup>118</sup>

5) *Finland*: Since her independence in 1918, Finland has been involved in two wars with the Soviet Union:<sup>119</sup> the first beginning on November 30, 1939, and the second in June, 1941. The account of the Finnish stand concerning the effect of these two wars on the validity of treaties with the Soviet Union is based on a Finnish Foreign Office *promemoria*.<sup>120</sup>

a. *Bilateral Treaties*: All political treaties between Finland and the Soviet Union were regarded as abrogated at the outbreak of the war; as, for example, Peace Treaty of Tartu of 1920; Treaty Regarding the

<sup>114</sup> REICHSGESETZBLATT (hereinafter RGBl. II, 145 (1937)); GAZETTA UFFICIALE No. 44, Feb. 22, 1937.

<sup>115</sup> GAZETTA UFFICIALE No. 211, Sept. 9, 1938.

<sup>116</sup> Trading with the Enemy Act § 7(b), 40 STAT. 416 (1919), 50 U.S.C.A. App. § 7(b) (1951); Trading with the Enemy Act, 1939, 2 & 3 GEO. 6, c. 189; Petition of Bernheimer et al., 130 F.2d 396 (3d Cir. 1942); see also Franck C. Sterck and Carl J. Schuck, *The Right of Resident Alien Enemies to Sue*, 30 GEO. L.J. 421 (1941-42); George Gordon Battle, *Enemy Litigants in Our Courts*, 28 VA. L. REV. 429 (1941-42).

<sup>117</sup> See Neumeyer, *Über die Fortgeltung deutsch-italienischer Staatsverträge privatrechtlichen Inhalts*, 7 JURISTENZEITUNG 682, 683 (1952); Altenberg, *Sicherheitsleistungen von italienischen Klägern im Zivilprozess*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 831 (1951).

<sup>118</sup> See La Pradelle, *The Effect of War on Private Treaties*, 2 INT'L L.Q. 556, 575 (1948).

<sup>119</sup> Great Britain declared war on Finland for political reasons on December 6, 1941, but there was never any actual warfare between these two States. Multilateral treaties between Great Britain and Finland were applied by Finland as much as possible in the prevailing war conditions.

<sup>120</sup> Unpublished, written in the Finnish language, prepared by the Legal Adviser to the Finnish Foreign Office, and kindly placed at the disposal of the writer.

Guaranty of Boundary Peace of June 1, 1922; Finnish-Soviet Non-aggression Pact of 1932, together with an Additional Treaty Providing for Arbitration.

The same position, regarding non-political treaties, was taken on the basis of the doctrine of changed conditions. The term *rebus sic stantibus* is not used, but the tenor of the memorandum seems to amount to substantially the same thing. Accordingly the following treaties were held abrogated: Convention concerning the Shipment of Goods of Sept. 6, 1940; Postal and telecommunication conventions; Treaty on the Return of Public Records and Documents from the Soviet Russia of June 18, 1924; treaties regulating the activity of boundary guards at the Carelian Isthmus, those regulating fishing, catching of seals, floating of timber, traffic of vessels, on the Neva River, maintaining order outside territorial waters, and guarding against smuggling.

*b. Multilateral Treaties:* The Treaty Concerning the Demilitarization and Neutralization of Aaland Islands of 1921 was regarded as suspended on the grounds of Finland's safety, but was not held abrogated. Other multilateral treaties were also regarded as in force even if it was not possible to apply all of them during the war. However, multilateral treaties between Finland and the Baltic States were considered by Finland to be abrogated because of the occupation and annexation of these states by the Soviet Union. The abrogation in this case was due to the changed conditions and not to the war. Similarly, the Oslo Convention of May 28, 1937 between Finland, the other Scandinavian States, Holland and Belgium, was considered abrogated because of the occupation of most of the treaty states by Germany. According to the Finnish view, it must be decided individually for each multilateral treaty whether or not it is to remain in force in view of the changed conditions brought about by the war.

6) *Germany:* Two preliminary observations regarding Germany are necessary. First, Germany has not lost her international personality<sup>121</sup>

<sup>121</sup> For the legal status of Germany after the World War II see Rex v. Bottrill, *ex parte* Kuechenmeister, [1947] 1 K.B. 41; Occupation of Germany Case (Zürich), Swiss Court of Appeal of Zürich, Dec. 1, 1945, 42 SCHWEIZERISCHE JURISTENZEITUNG 89 (1946); "Helvetia" v. Kuch and Frauenberger-Kuch, Swiss Bundesgericht, April 15, 1946, ANNUAL DIGEST, Case No. 85 (1946); see also Jennings, *Government in Commission*, 23 BRIT. Y.B. INT'L L. 112 (1946); GREWE, EIN BESATZUNGSSTATUT FÜR DEUTSCHLAND. DIE RECHTSFORMEN DER BESETZUNG (1948); KAUFMANN, DEUTSCHLANDS RECHTSLAGE UNTER DER BESETZUNG (1948); Laun, *Der gegenwärtige Rechtszustand Deutschlands*, JAHRBUCH FÜR INTERNATIONALES UND ÖFFENTLICHES RECHT 9 *et seq.* (1948); LEWALD, GRUNDLAGEN DER NEUEN RECHTSORDNUNG DEUTSCHLANDS (1948); Sauser-Hall, *L'occupation de l'Allemagne par les Puissances Alliés*, 3 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 9-63 (1946). As for the status of Austria see, e.g., VEROSTA, DIE INTER-

and is therefore still a party to treaties concluded by the former German *Reich* Government. Second, only the German Federal Republic Government at Bonn<sup>122</sup> is entitled to speak in the name of the German State in treaty questions and entitled to express the intent of the German State, either in concluding new or applying old prewar agreements of the German *Reich* Government. According to the provisions of Article 1 of the Convention on Relations Between the Three Powers and the Federal Republic of Germany, signed at Bonn on May 26, 1952,<sup>123</sup> the Allied occupation of West Germany will be ended and the Federal Republic shall have "full authority over its internal and external affairs", with the exception of rights which the Three Powers retain for themselves relating to the stationing of their armed forces in Germany. These reservations, it is understood, do not however limit in any way the "full authority" of the Bonn Government over its treaty rights.

The present legal status in matters of the reapplication of German pre-war treaties is based on the Directive No. 6 of the Allied High Commission of March 19, 1951 concerning *Treaties Concluded by the Former German Reich*.<sup>124</sup> Based on this Directive, the Bonn Govern-

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NATIONALE STELLUNG ÖSTERREICHS 1938 BIS 1947 (1947). The State Department view is that Austria is a liberated country and not an ex-enemy state. Therefore the pre-war treaties with Austria are still in force. See the letter to the writer by Charles I. Bevans, Assistant for Treaty Affairs, Office of the Legal Adviser, dated June 8, 1953, and cited *supra* p. 344.

<sup>122</sup> Formed on September 21, 1949.

<sup>123</sup> 82d Cong., 2d Sess., Senate Executives Q & R, (1952); ratified by Bonn Bundestag (the German lower house), by 224 votes to 165, on March 19, 1953, *N.Y. Times*, March 20, 1953, p. 1, col. 4. This Convention had been ratified by Great Britain and the United States earlier (by the Senate on July 1, 1952, 27 DEP'T STATE BULL. 67 (1952)). The Convention has not yet entered into force. The state of war with Germany was terminated on October 19, 1951, Pub. L. No. 181, 82d Cong., 1st Sess. (Oct. 19, 1951).

<sup>124</sup> OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY No. 52, p. 846 (April 2, 1951). Directive No. 6 contains the following provisions:

1. Any communications received by the Allied High Commission from an interested Power, pursuant to the invitation extended by the three Allied Governments, proposing that a treaty or treaties of the former German Reich be given effect as between the Federal Republic and such interested Power, shall be transmitted by the Allied High Commission to the Federal Republic. The Federal Government may then communicate directly with such interested Power with reference to the treaty or treaties in question.

2. If the Federal Government desires that a treaty or treaties of the former German Reich be given effect as between the Federal Republic and the other party or parties thereto, it shall transmit a notice of this desire to the Allied High Commission. On the basis of this notice, the Allied High Commission will authorize the Federal Government to communicate directly with the interested Power with reference to the treaty or treaties in question.

3. When the Federal Government officially notifies the Allied High Commission that it and the other interested Power desires to give effect to all or part of a treaty of the former Reich, and, if necessary, are agreed on the effective date of that treaty, the Allied High Commission, unless it disapproves, shall, in a communication to the Federal Government, declare that the treaty is applicable to the Federal Re-

ment during 1951 and 1952 concluded several agreements with former enemy States on the reapplication of altogether 35 bilateral and 32 multi-lateral pre-war conventions.

There are, however, only few official statements by the Bonn Government itself expressing its views in regard to the validity of German pre-war treaties. It seems that the Bonn Government has adopted the so-called intermediate view.<sup>125</sup> According to this position, the outbreak of war has no generally applicable effect on treaties, but such effect varies with different types of treaties. Thus the intrinsic character (*Inhalt*) of a treaty, and the intent of the parties at the time of its conclusion are the decisive factors. This view is the prevailing modern one of writers<sup>126</sup> and American legal opinion,<sup>127</sup> and it is gratifying that it has been adopted and applied by the present German Government in its entirety.

Speaking in more concrete terms all pre-existing treaties are divided into different groups and the attitude of the German Government as to their validity under present conditions seems to be as follows:

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public and is binding upon it. This communication shall be deemed to authorize the Federal Government to publish the treaty concerned or make such other announcement as may be appropriate in the Official Gazette of the Federal Republic.

4. If reciprocity is the basis of a multilateral convention it will be binding only as between the Federal Republic and such of the other signatories as agree.

5. If there is any objection on the part of the Federal Republic to a request by an interested Power to put a treaty into operation, the Allied High Commission will not decide what action, if any, will be taken until after the expiry of six months from the receipt of the initial request of the interested Power.

<sup>125</sup> Private information received by the author from Dr. Ellinor von Puttkamer, Bonn, Department for Foreign Affairs. According to this information, the question of the validity of the German pre-war treaties has been considered in Germany as an important one. At the end of March, 1953, the "German Society for International Law" held a Conference at Bonn for the sole purpose of discussing this subject. The Proceedings of that Conference have not yet been published, but have been available to the author.

<sup>126</sup> TOBIN, *THE TERMINATION OF MULTIPARTITE TREATIES* (1933); RANK, *EINWIRKUNG DES KRIEGES AUF DIE NICHTPOLITISCHEN STAATSVERTRAEGE* (1949); Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions*, 34 GEO. L.J. 129-177 (1946); Orfield, *The Effect of War on Treaties*, 11 NEB. L. BULL. 276, 279 (1933); Scelle, *De l'influence de l'état de guerre sur le Droit conventionnel*, 77 JOURNAL DU DROIT INTERNATIONAL 26 et seq. (1950); La Pradelle, *The Effect of War on Private Law Treaties*, 2 INT'L L.Q. 556 et seq. (1948).

<sup>127</sup> Clark v. Allen, 331 U.S. 503 (1947); Karnuth v. United States, 279 U.S. 231 (1929); Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464 (U.S. 1823); Blank v. Clark, 79 F. Supp. 373 (E.D. Pa. 1948); The Sophie Rickmers, 45 F.2d 413 (S.D.N.Y. 1930); Hempel v. Weedon, 23 F.2d 949 (W.D. Wash. 1928); *In re Knutzen's Estate*, 31 Cal. 2d 573, 191 P.2d 747 (1948); *In re Meyer's Estate*, 107 Cal. App. 2d 799, 238 P.2d 597 (1951); *State ex rel. Miner v. Reardon*, 120 Kan. 614, 245 Pac. 158 (1926); *Meier v. Schmidt*, 150 Neb. 383, 34 N.W.2d 400, *rehearing denied*, 150 Neb. 647, 35 N.W.2d 500 (1948); *Goos v. Brocks*, 117 Neb. 750, 223 N.W. 13 (1929); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920), *cert. denied*, 254 U.S. 643 (1920).

First, treaties concluded to govern the conduct of hostilities are considered as in full force;<sup>128</sup>

Second, treaties concerning humanitarian rights and preservation of animal life and plants are equally considered as not abrogated by war;<sup>129</sup>

Third, the same principles apply to treaties concerning transit, transportation and communications;<sup>130</sup>

Fourth, all treaties concerning individual rights, including private international law treaties,<sup>131</sup> treaties concerning industrial and literary property rights,<sup>132</sup> judicial assistance,<sup>133</sup> insurance,<sup>134</sup> leases, pensions,

<sup>128</sup> *E.g.*, the Protocol of 1925 concerning the Use in War of Asphyxiating, Poisonous, and Other Gases, RGBl. II 174 (1929); The Geneva Conventions of 1929 concerning the Treatment of Sick and Wounded and of Prisoners of War, RGBl. II 207 (1934).

<sup>129</sup> *E.g.*, Paris Convention regarding Diphtheria Serum of 1930, RGBl. II 337 (1930); International Agreement for the Creation in Paris of an International Office for dealing with Contagious Diseases of Animals of 1924 and 1935, RGBl. II 318 (1924); Bilateral treaties, *e.g.*, German-Italian Convention on Commerce in Medicines, February 13, 1939, RGBl. II 219 (1939); German-Belgian Convention concerning the Fight against Hydrophobia in Boundary Areas, Sept. 9 and Oct. 23, 1910, RGBl. 1397 (1920); International Convention for Mutual Protection against Dengue Fever, Athens, July 25, 1934, RGBl. II 235 (1936), formally in effect as of May 1, 1952 between the Federal Republic and Egypt, Denmark, France, Algeria, Tunis, Morocco (French zone), Greece, Union of South Africa and Yugoslavia, BGBl. II 953 (1952).

<sup>130</sup> *E.g.*, Warsaw Convention for the Unification of Certain Rules regarding Air Transport, October 12, 1929, RGBl. II 1040 (1933), formally in effect with regard to Denmark, France, Greece, Great Britain and Northern Ireland, India, Yugoslavia, the Netherlands (BGBl. II 176 (1951)), Ceylon, Pakistan, the United States of America (BGBl. II 437 (1952)), and Canada (BGBl. II 972 (1952)); the Convention on Motor Traffic, April 24, 1926, RGBl. II 1233 (1930), formally in effect again as of May 1, 1952 between the Federal Republic of Germany and the following ex-enemy States: Egypt, Belgium, Denmark, France, India, Yugoslavia, Luxembourg, the Netherlands and Norway (BGBl. II 978 (1952)).

<sup>131</sup> *E.g.*, The Hague Convention Concerning Guardianship of Minors, June 12, 1902, RGBl. 240 (1904); The Hague Convention on Civil Procedure of July 17, 1905, RGBl. 409 (1909), formally in effect as of January 1, 1952 with Holland (BGBl. II 435 (1952)), with Belgium, September 1, 1952 (BGBl. II 728 (1952)), with Italy, October 1, 1952 (BGBl. II 986 (1952)).

<sup>132</sup> *E.g.*, The Berne Convention for the Protection of Works of Art and Literature, Sept. 9, 1886, revised in Rome, June 2, 1928, RGBl. II 890 (1933), formally in effect through exchange of notes between the Bonn Government and the Allied High Commission of February 6 and 7, 1950, BUNDESANZEIGER No. 144 (1950); Convention between the United States and Germany concerning Reciprocal Protection of Copyrights, January 15, 1892, RGBl. 473 (1892), formally in effect as of February 7, 1950, through exchange of notes of February 6 and June 20, 1950, BUNDESANZEIGER No. 144 (1950).

<sup>133</sup> Bilateral treaties as, *e.g.*, the German-Danish Convention regarding the authentication of Documents, June 17, 1936, RGBl. II, 213 (1936); German-Greek Convention on Reciprocal Judicial Assistance in Civil Matters, May 11, 1938, RGBl. II (1939), formally in effect as of February 1, 1952, through an exchange of notes of November 24, 1951, and January 28, 1952, RGBl. II 634 (1952).

and labour,<sup>135</sup> are considered not to be abrogated by war. It has been considered, however, necessary to conclude new treaties in the field of insurance, leases, and pensions in order to adapt these treaties to the change in conditions which has occurred meanwhile. Treaties concerning nationality, however, although belonging to the group of treaties protecting individual rights, have been considered to be abrogated by the war, because of the evident political character of these treaties, and the conclusion of the new treaties is therefore necessary.<sup>136</sup> To the fourth group of treaties also belong, according to the German view, consular conventions. Although these conventions essentially contain provisions for the protection of individual rights, they are regarded as abrogated, because of their intrinsic political character;<sup>137</sup>

The fifth category includes cultural cooperation treaties. Multilateral treaties of this kind have been regarded as in force,<sup>138</sup> but bilateral as abrogated.<sup>139</sup> Distinctions between multilateral and bilateral treaties

<sup>134</sup> *E.g.*, German-Belgian Convention concerning the Insurance of Farms Stretching over the Boundary Line, July 16, 1931, RGBl. II 1037 (1933).

<sup>135</sup> The Federal Republic Government has declared, BGBl. II 607 (1952), formally in effect as of June 12, 1951, the following conventions: Unemployment Convention, Nov. 28, 1919, RGBl. II 162 (1925); Childbirth Convention, Nov. 28, 1919, RGBl. II 497 (1927); Minimum Age (Sea) Convention, July 9, 1920, RGBl. II 383 (1929); Unemployment Indemnity (Shipwreck) Convention, July 9, 1920, RGBl. II 759 (1929); Placing of Seamen Convention, July 10, 1920, RGBl. II 166 (1925); Minimum Age (Trimmers and Stokers) Convention, Nov. 11, 1921, RGBl. II 383 (1929); Medical Examination of Young Persons (Sea) Convention, Nov. 11, 1921, RGBl. II 386 (1929); Right of Association (Agriculture) Convention, Nov. 12, 1921, RGBl. II 171 (1925); Workmen's Compensation (Agriculture) Convention, Nov. 12, 1921, RGBl. II 174 (1925); Workmen's Compensation (Occupational Diseases) Convention, June 10, 1925, RGBl. II 509 (1928); Repatriation of Seamen Convention, June 23, 1926, RGBl. II 12 (1930); Seamen's Articles of Agreement Convention, June 24, 1926, RGBl. II 987 (1930); Sickness Insurance (Industry, etc.) Convention, June 15, 1927, RGBl. II 887 (1927); Sickness Insurance (Agriculture) Convention, June 15, 1927, RGBl. II 889 (1927); Minimum Wage-Fixing Machinery Convention, June 16, 1928, RGBl. II 375 (1929); Marking of Weight (Packages Transported by Vessels) Convention, June 21, 1929, RGBl. II 940 (1933).

<sup>136</sup> *E.g.*, German-Bolivian Agreement concerning Free Election of Nationality, May 8, 1935, RGBl. II 498 (1935).

<sup>137</sup> *E.g.*, Treaty of Friendship, Commerce and Consular Rights between Germany and the United States, December 8, 1923, and its Revision, June 3, 1935, RGBl. II 743 (1935). It might be of interest to note here that the United States courts and also the Department of State have taken an opposite view and upheld the validity of this treaty or at least the provisions of Article IV thereof. See *Clark v. Allen*, 331 U.S. 503 (1947). The view of the State Department is set forth in a letter to the Attorney General from Acting Secretary of State, Joseph C. Grew, May 21, 1945, U.S. Supreme Court, Briefs, p. 24-31, *Clark v. Allen*, *supra*.

<sup>138</sup> *E.g.*, Paris Convention concerning International Exhibitions, November 22, 1928, RGBl. II 728 (1930).

<sup>139</sup> *E.g.*, German-Italian Convention on Cultural Cooperation, November 23, 1938, RGBl. II 755 (1939).

have been considered important because the multilateral treaties in this field are of general interest and regulate international intellectual cooperation in the fields of science, art, and religion. Bilateral German pre-war treaties, however, were more or less expressions of a certain ideology and propaganda, which did not fit into new conditions.

The sixth division is composed of treaties concerning international political organizations of general kind. Under this group of treaties fall, first, the Covenant of the League of Nations, which according to the German official view has been abrogated by the war; second, international arbitration treaties. If they have been in no way connected with the League of Nations they will be considered as still in force.<sup>140</sup> In the same way, the conventions regulating the system of free traffic on international waterways will be treated as still in force and not abrogated by the war.<sup>141</sup>

The seventh type covered are commercial conventions. Multilateral conventions in this group are considered as still in force,<sup>142</sup> but all bilateral pre-existing German commercial conventions<sup>143</sup> are abrogated according to the present official view, with some few exceptions. These exceptions are, first, conventions concerning taxes, revenues, and finance,<sup>144</sup> which will be considered as still in force, but which require adaptation to changed conditions after the war and, second, conventions giving reciprocal privileges to the citizens of both countries to establish themselves on the other's territory, to buy and inherit property, and conduct affairs there,<sup>145</sup> and to carry on certain occupations—for example, fishing in territorial waters.<sup>146</sup>

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<sup>140</sup> *E.g.*, The Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, RGBL II 5 (1910).

<sup>141</sup> *E.g.*, the General Act of Berlin of Feb. 26, 1885, respecting Navigation of the Congo, RGBL 215 (1885).

<sup>142</sup> *E.g.*, International Sugar Convention, March 5, 1902, with Additional Protocol, RGBL 7 (1903).

<sup>143</sup> *E.g.*, German-Greek Convention concerning the Amendment of the Convention of Commerce and Shipping of March 24, 1928, October 1, 1938, RGBL 837 (1938); German-Dutch Convention concerning the Exchange of Goods, March 25, 1939, RGBL II 632 (1939).

<sup>144</sup> *E.g.*, German-Danish Convention regarding the Prevention of Double Taxation in the Fields of Income-tax, Corporation Tax, and Property Taxes, December 16, 1938, RGBL II 221 (1939); German-Italian Convention regarding the Prevention of Double Taxation and the Regulation of Other Matters concerning Direct Taxation, October 31, 1925, RGBL II 1145 (1925), in effect as of January 1, 1951, through exchange of notes on November 20, 1952, BGBL II 986 (1952).

<sup>145</sup> *E.g.*, the Soviet-German Convention on Establishment and General Legal Protection, October 12, 1925, RGBL II 6 (1926).

<sup>146</sup> *E.g.*, Convention between Germany, the Netherlands, and Switzerland regarding

In the eighth group are political treaties. All pre-existing treaties concerning alliances, guaranty, and diplomatic relations are considered by Germany as abrogated by war.<sup>147</sup> The same is true in regard to arbitration and conciliation treaties,<sup>148</sup> and of treaties for the limitation and reduction of armaments.<sup>149</sup> But the pre-existing peace treaties, to the extent that their provisions have already been executed, will not be considered as abrogated. Whether also the other parts of the peace treaties which are not yet executed still are in force, and, if so, to what extent, will be decided upon by the present German Government separately in any special case. The same is true of conventions in regard to special territories,<sup>150</sup> and of conventions regarding aliens and protection of minorities.<sup>151</sup>

One more observation in regard to the German view is necessary. Although, as already mentioned, Germany will regain "full authority" over her treaty rights according to the Bonn Convention of May 26, 1952, it is apparent that this Convention is not a final peace treaty. Furthermore, as will be discussed subsequently, the Bonn Convention does not contain any provisions concerning treaties. It is therefore expected that if a final peace treaty with Germany comes into existence at some future time, the views of the Bonn Government, as described above, will have to be reconciled with those held by the victorious powers. What these views are will be discussed in the following installment when dealing with the Peace Treaties of the Second World War.<sup>152</sup>

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the Regulation of the Salmon Fishing in the River-basin of the Rhine, June 30, 1885, RGBl. 192 (1886); Formally in effect as of January 1, 1952 between Germany and the Netherlands, BGBl. II 435 (1952).

<sup>147</sup> *E.g.*, The Three Powers Pact between Germany, Italy and Japan, September 27, 1940, RGBl. II 279 (1940).

<sup>148</sup> *E.g.*, German-Luxembourg Arbitration and Conciliation Agreement, Sept. 11, 1929, RGBl. II 83 (1931); German-Dutch Arbitration and Conciliation Agreement of May 20, 1926, RGBl. II 31 and 502 (1927), has been put in effect again as of January 1, 1952, RGBl. II 435 (1952).

<sup>149</sup> *E.g.*, Protocol concerning the Modification of the Anglo-German Naval Agreement of 1937, June 30, 1938, RGBl. II 914 (1938).

<sup>150</sup> *E.g.*, German-Danish Convention on North Schleswig, April 10, 1922, RGBl. 141 (1922); Rome Convention concerning the Issues arising out of the Annexation of the Saar, Dec. 3, 1934, RGBl. II 126 (1935).

<sup>151</sup> *E.g.*, Agreement between Germany and the Republic of Columbia on Compulsory Military Service, May 11, 1939, RGBl. II 263 (1941).

<sup>152</sup> So far as the United States Government is concerned the official view of the Department of State does not seem to differ materially from the position taken by the Bonn Government. See the letter to the writer by Charles I. Bevans, Assistant for Treaty Affairs, Office of the Legal Adviser, dated June 8, 1953, and cited *supra* p. 344.