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MODERN WAR AND THE VALIDITY OF TREATIES†

Richard Rank*

Judicial Decisions

1) *The United States*. As a result of the Second World War, many cases have arisen in the United States in which the effect of war on treaties has been an issue. The leading recent case is *Clark v. Allen*,¹⁵³ decided in 1947. This article will deal with this and subsequent decisions.¹⁵⁴

The *Clark* case involved the effect of war on the Treaty of December 8, 1923 between the United States and Germany,¹⁵⁵ which granted certain reciprocal inheritance rights to American and German nationals as to property situated in the other's country. Alvina Wagner, a California resident, died in 1942 leaving a will bequeathing her real and personal property to relatives who were residents and nationals of Germany. American heirs-at-law of the decedent claimed the estate, urging that the 1923 treaty had been rendered inoperative by the war, and that the German legatees were ineligible under the California statute,¹⁵⁶ which permits non-resident aliens to inherit only if a reciprocal right is given to Americans.

In 1943 the Alien Property Custodian, pursuant to the Trading with the Enemy Act,¹⁵⁷ vested in himself for the use of the United States, all interest of the German legatees in the estate, and filed suit against the executor of the will and the American heirs-at-law for judgment declaring ownership of the estate in him.

The district court rendered judgment in favor of the Custodian.¹⁵⁸

† This is the second of two installments. The first appeared in the Spring, 1953, issue of the QUARTERLY.

* See Contributors' section, Masthead, p. 541, for biographical data.

¹⁵³ 331 U.S. 503 (1947); Notes, 47 COL. L. REV. 318 (1947); 7 LAW. GUILD REV. 270 (1947); 32 MINN. L. REV. 407 (1948); 23 NOTRE DAME LAW. 266 (1948); 21 SO. CALIF. L. REV. 106 (1947).

¹⁵⁴ For the period before the *Clark* case see Lenoir, *The Effect of War on Bilateral Treaties*, 34 GEO. L. J. 129, 151 (1946).

¹⁵⁵ 44 STAT. 2133, 2135, Art. IV (1923).

¹⁵⁶ CAL. PROB. CODE ANN. §§ 259-592 (Deering 1944), as amended, by CAL. STAT. 1945 c. 1160 §§ 1-3.

¹⁵⁷ 40 STAT. 411 (1919), 50 U.S.C.A.P. § 1, *et seq.* (1948), as amended, by the First War Powers Act of 1941, 55 STAT. 839 (1941) 50 U.S.C.A.P. § 616 (Supp. 1946).

¹⁵⁸ *Crowley v. Allen*, 52 F. Supp. 850 (N.D. Cal. 1943) holding the California statute unconstitutional, as improper state regulation of foreign affairs.

The Circuit Court of Appeals reversed,¹⁵⁹ holding that the 1923 treaty had been abrogated by the war and by the provisions of the Trading with the Enemy Act so that the German legatees had no interest that the Alien Property Custodian could seize. The court noted that similar inheritance provisions in the 1828 treaty with Prussia had been considered abrogated after World War I.

The United States Supreme Court reversed the circuit court and held that Article IV of the Treaty of 1923 was still in force. The Court declared that it started from the premise that the outbreak of war does *not* necessarily suspend or abrogate treaty provisions. It also remarked that there was no reliable evidence of the intention of the parties outside the words of the treaty. From this we may perhaps infer that it would consider the intention of the parties at the time of concluding the treaty controlling, were it ascertainable. In the absence of any indication of an intention that the treaty was to become inoperative in whole or in part on the outbreak of war, the Court used the test of *compatibility with national policy*¹⁶⁰ to determine the validity of the treaty.

The Court lists three standards of compatibility which are worth examining in detail. First, "there may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make it clear that it should not be enforced." *Karnuth v. United States*¹⁶¹ is cited as the authority for this standard. The standard of incompatibility due to the very *nature* of a treaty provision is a valid one in so far as it attempts to take into account the intention of the parties, as, *e.g.*, in purely political treaties. It seems, however, that the provision in the *Karnuth* case was not of this type. The *Karnuth* case is unique among Supreme Court decisions in its holding that war abrogates treaty provisions of certain types¹⁶² and in it the Court was actually trying to give effect to a subsequent immigration

¹⁵⁹ *Allen v. Markham*, 156 F.2d 653 (9th Cir. 1946).

¹⁶⁰ *Techt v. Hughes*, 229 N.Y. 222, 243, 128 N.E. 185, 192 (1920): "Their [the court's] part it is . . . to determine whether . . . the provision [of a treaty] is *inconsistent with the policy or safety of the nation in the emergency of war*, and hence presumably intended to be limited to times of peace. I find nothing *incompatible with the policy of the government*, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty. . . . It follows that, even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare." (Italics supplied.)

¹⁶¹ 279 U.S. 231 (1928).

¹⁶² The identical provisions of the Jay Treaty, Art. 3 was held not abrogated by the War of 1812 in so far as it permitted free passage of American Indians over the Canadian border. *United States ex rel. Goodwin v. Karnuth*, 74 F.Supp. 660 (1947).

statute, without calling it inconsistent with the treaty. It is submitted that except in construing the intention of the parties the court should not look at the treaty provision on its face in relation to the state of war to see whether it is compatible with national policy, since national policy with respect to the conduct of a war is determined by the executive and legislative departments. The Court does not in fact apply this standard in the *Clark* case.

Second, national policy as formulated by the legislature is used as a test of compatibility. The Court in the *Clark* case examined the Trading with the Enemy Act and found that the provisions of the treaty dealing with the inheritance of real property¹⁶³ were entirely compatible with the Act. This was not true of the parts of Article IV dealing with liquidation of an inheritance and withdrawal of the proceeds, which the Court indicated it would consider abrogated because they were incompatible with national policy as expressed in the provisions of the Act prohibiting removal of money or property from the country for the use of German nationals. The Court, however, found no such hostility to *ownership* of property by enemy aliens in the terms of the Act. It rejected the contention that the power to vest alien property in an agency of the United States revealed such hostility on the grounds firstly, that the power to vest was discretionary, and secondly, because the power was not restricted to the property of alien *enemies*. It pointed out that there were many similar clauses in treaties with friendly nations, and said that it would not assume that Congress intended to abrogate these. The Court said, "if the power to vest is inconsistent with the right of inheritance of an alien enemy, it is difficult to see why it is any less so when other aliens are involved."¹⁶⁴

Third, the Court examines the views of the executive department, referring to a letter from the State Department to the Attorney General¹⁶⁵ supporting the legal view that the treaty of 1923 is not abrogated. The Court does not say what weight it gave to the views of the State Department, although the result conformed with the State Department's view.

In looking to the actions and views of the legislative and executive

¹⁶³ Although the realty provisions were held to cover the disposition and inheritance of real property by any national of either party to the treaty without regard to the nationality of the decedent, the Court held that the personalty provisions did not provide for inheritance by alien of the personal property of a deceased American citizen. For a criticism of this distinction, see Meekinson, *Treaty Provisions for the Inheritance of Personal Property*. 44 AM. J. INT'L L. 313 (1950).

¹⁶⁴ See 331 U.S. 503, 509 (1947).

¹⁶⁵ The letter, dated May 21, 1945, is printed in 30 U.S. Supreme Court, Briefs, pp. 24-31; 331 U.S. 503 (1947).

branches of the Government to determine compatibility with national policy, the Court used the *present intention* of the Government in deciding the validity of the treaty provision. This is to be contrasted with an attempt to find the intention of *both* parties *at the time of conclusion* of the treaty, which is the usual and correct method, and the method employed by the lower court, although that court reached the wrong result. The Supreme Court used the present intention standard because it assumed that war, rather than the Treaty of Versailles, had abrogated the Treaty of 1828 (a corresponding commercial treaty to the 1923 treaty), to which the Court drew an analogy. The Court excused itself for adopting the test of present intention on the ground that there was no reliable evidence of the intent of the parties at the time of conclusion of the treaty. However, it is believed that the Court was too cursory. The very fact that it was the Treaty of Versailles which abrogated the Treaty of 1828 and not war, leads to the inference that in the absence as yet of a similar peace treaty provision, the 1923 Treaty is not abrogated. Moreover, it may be significant that there were many similar treaties with various German States, and that the State Department probably intended to achieve a certain uniformity by renegotiation. Also, since the American view has been that treaties are not necessarily abrogated by war, it may be reasonable to assume that because of the absence of an express terminating provision in the 1923 Treaty the intention was that it remain intact in case of war.¹⁶⁶ Finally in the absence of any action by the political depart-

¹⁶⁶ The N. Y. Times of June 4, 1953, p. 1, col. 5, carries the information that on June 3, 1953, Chancellor Konrad Adenauer and Dr. James B. Conant, United States High Commissioner, signed an agreement on *reactivating* the 1923 Treaty of Friendship, Trade and Consular Rights for the purpose to re-establish an interim treaty basis for economic and consular relations between the United States and West Germany pending the completion of negotiations for a fundamental Treaty of Friendship, Commerce, and Navigation. It is further stated, that this *reactivization* of the 1923 Treaty represents the first move of the United States and West German Governments to normalize their relations on a legal basis independently of the Bonn "Peace Contract" with the Western Allies, which still remains to be ratified by other Allies, although ratified by the United States and Germany.

This news-item seems to contradict, at the first glance, the holdings of the United States courts in *Clark v. Allen* and other cases and with the conclusions reached at by the writer in upholding the validity of the 1923 Treaty with Germany, although it is not quite clear what is exactly meant by the word "reactivization". It seems however that there need not be any contradiction if by "reactivization" is meant the application of the 1923 Treaty in its entirety. In *Clark* case and in other cases, only the validity and applicability of Article IV of the 1923 Treaty was involved and nothing was mentioned of other provisions of that Treaty. The writer believes it reasonable to assume that the intention of the parties was that the other provisions also remained valid and intact in case of war, although they were not in fact applied. Now the 1923 Treaty was declared to be "reactivated" or applicable in

ments courts assume that the legal order created by a treaty remain valid. Although the method used by the Court in the *Clark* case leaves the way open to distortion of the original intention of the parties, the result was fortunately a sound one.

There has been no Supreme Court decision as to the validity of a treaty provision during time of war since the *Clark* case. There have, however, been state and lower federal court cases, some involving the same treaty provision as the *Clark* case and some dealing with the continued validity of other treaty provisions.

*In re Knutzen's Estate*¹⁶⁷ decedent, a resident of California, died intestate. A brother who also resided in California, and another brother and two sisters who were residents and nationals of Germany, survived him. The Alien Property Custodian issued an order declaring that the non-resident heirs were residents of Germany, an enemy country, and purporting to vest in himself their interest in the estate. The Court, following the precedent of the *Clark* case, which was decided during the pendency of the appeal of this case, held that the Treaty of 1923 with Germany, which permitted the German nationals to inherit, was in force and not abrogated or suspended by the outbreak of war.¹⁶⁸

The same treaty provision was said not to have been suspended or abrogated in *Blank v. Clark*,¹⁶⁹ although plaintiff was not permitted to take the property as a result of a power of attorney from the German heir. The Court held that although the treaty provision was still in force and the German heir could consequently inherit the real property, the transaction purporting to give plaintiff the power of attorney was prohibited by the Trading with the Enemy Act and General Ruling Number 11.¹⁷⁰

The effect of war on a provision of the Treaty of 1923 giving nationals of either state "freedom of access to the courts of justice of the other" was discussed in *Meier v. Schmidt*¹⁷¹ by the Supreme Court

its entirety. On the other hand, as we have seen already *supra* p. 353, n. 137 when dealing with the views of political departments, the view of the Bonn Government was that the 1923 Treaty was not in force any more because it was a commercial and political treaty. This also may have been an impetus to the United States Government to sign a new agreement.

¹⁶⁷ 31 Cal.2d 573, 191 P.2d 747 (1948).

¹⁶⁸ The right of the alien heirs under the treaty to succeed to personalty turned on the citizenship of the decedent under the holding of the *Clark* case, note 163 *supra*. The record was silent as to this fact.

¹⁶⁹ 79 F.Supp. 373 (E.D. Pa. 1948).

¹⁷⁰ 8 Fed. Rec. 12, 287, 31 CFR 1310, App. A (Supp. 1943).

¹⁷¹ 150 Neb. 383, 34 N.W.2d 400 (1948), *rehearing denied*, 150 Neb. 647, 35 N.W.2d 500 (1948).

of Nebraska. This was a suit on a promissory note brought by a German national in 1939. The action lay dormant until 1947 when the defendant died. Plaintiff sought to revive the action against the executor, who pleaded that plaintiff had no rights under the treaty since the war had abrogated it. The Court found an incompatibility between a provision of the Trading with the Enemy Act, and hence with Congressional policy, and this treaty provision. It held that the Trading with the Enemy Act barred a non-resident enemy alien from prosecuting an action in the court of the state, even though instituted before hostilities. However, it approved the action of the trial court in retaining jurisdiction until the termination of the war between the United States and Germany, saying that the treaty provisions may "be disregarded only to the extent and for the time required by the necessities of war, or when they conflict with policies established by the Chief Executive or the Congress."¹⁷²

In the case *In re Meyer's Estate*¹⁷³ the effect of the First World War on the Convention of 1827 between the United States and the Free Hanseatic Republics¹⁷⁴ was discussed. Bertha Meyer, a German national, died in Germany in 1924, leaving personal property in California consisting of certain shares of stock. Her heirs included American citizens resident in California and German nationals residing in Germany. During the Second World War the Alien Property Custodian vested the shares of the German heirs as enemy property. The American heirs claimed that the above treaty was abrogated by the outbreak of World War I and they were therefore entitled to all the property. The Court held that the Treaty of 1827 entitled the German heirs to inherit the property regardless of certain California statutes,¹⁷⁵ and that this treaty was in force and effect at the time of decedent's death in 1924, and was not abrogated by the First World War.

The Court then discussed whether the provisions of the Treaty of Berlin of 1921, between the United States and Germany,¹⁷⁶ under which the United States received the benefits of certain parts of the Treaty of Versailles, including Article 289, abrogated the above Treaty of 1827. Article 289 provided that each Allied or Associated Power was to notify Germany of the bilateral treaties which it wished to

¹⁷² *Id.* at 387, citing the *Techt* and *Clark* cases.

¹⁷³ 107 Cal.App. 2d 799, 238 P.2d 597 (1951).

¹⁷⁴ 8 STAT. 366 (1855).

¹⁷⁵ Sections 672 and 1404 of the Civil Code, in force at the time of the decedent's death in 1924. The court held that these sections were suspended during the life of the Treaty.

¹⁷⁶ 42 STAT. 1939, 1942 (1921).

revive with Germany, and that "only those bilateral treaties and conventions which have been the subject of such a notification shall be revived between the Allied and Associated Powers and Germany. All others are and shall remain abrogated." The United States made no notification with respect to any of the provisions of the Treaty of 1827.¹⁷⁷ The Court, however, interpreted Article 289 as inapplicable to this treaty, saying:

We are of the opinion, in accord with the Supreme Court of Kansas,¹⁷⁸ that Article 289 is to be interpreted as not applying to any treaty . . . which was not abrogated by the war, since *there was no occasion to revive a treaty . . . which had been continuously in force*, and that it was not the intention by the clause "all others are and shall remain abrogated", to absolutely wipe out all former treaties between the United States and the German states. The language of Article 289 is equivocal and uncertain. *It is not lightly to be supposed that it was the intention to . . . abrogate a provision which was not incompatible with war. . . .* In the absence of express words to that effect, it is difficult to infer that it was the purpose of the contracting parties to withdraw the privilege of individuals to inherit, which was not incompatible with hostilities, and which the war had not disturbed.¹⁷⁹

The question of the interpretation of Article 289 is an important one since many of the contemporary peace treaties embody the identical provision.¹⁸⁰ The interpretation of the Court in the *Meyer* case, though a laudable attempt to uphold the treaty, is not in my opinion sound. The Court did not have the parties consult the political department to aid it in construction, as was done in the *Clark* case. Though interpretation is a matter for the courts, the views of the political department are important if effect is to be given to the intent of the parties. This is particularly true where the interpretation involves, as it does here, the question of whether the parties acting in a *political* capacity have terminated a treaty obligation. If the parties had clearly expressed their wish to terminate all treaty provisions in Article 289, the court would be bound by this, as it would by any other means which the political department would use to terminate a treaty provision.¹⁸¹ The word of the political department would not be binding

¹⁷⁷ 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 387-390 (1943).

¹⁷⁸ Citing *State ex rel. Miner v. Reardon*, 120 Kan. 614, 245 Pac. 158 (1926).

¹⁷⁹ At pp. 603-604. Italics supplied.

¹⁸⁰ Article 44 of the Treaty of Peace with Italy, 61 STAT. 1386 (1947); Article 8 [Bulgaria, 61 STAT. 1956 (1947)]; Article 10 [Hungary, 61 STAT. 2115 (1947)]; Article 10 [Rumania, 61 STAT. 1803 (1947)]; Article 12 [Finland, DEPT. OF STATE PUB. 2743, European Series 21 (1947)]; and Article 7 of the Treaty of Peace with Japan of 1951 [U.S. CODE CONG. and ADMIN. SERVICE, 82nd Cong., 1st Sess., 2730 (1951)].

¹⁸¹ See pt. III, *Views of Political Departments*, 38 CORNELL L.Q. 321, 341 *et seq.* (1953).

in this case because Article 289 is ambiguous, transforming the problem into one of construction, and hence ultimately in the province of the judiciary. However, from the nature of what the Court is trying to ascertain, the view of the political department is even more significant in this case than usual.

The court is correct in describing the effects of the abrogative interpretation as far-reaching, but contrary to the opinion of the court, it is believed that this total abrogation is just what was intended. *All* treaties not in conformity with the new order established by the peace treaty were to be abrogated in the absence of notification; the peace treaty itself was the vehicle of abrogation. This interpretation is supported by the language in other parts of Article 289; paragraph eight reads:

The above regulations apply to *all* bilateral treaties or conventions *existing* between all the Allied and Associated Powers . . . and Germany. . . .

This is also the interpretation followed by the State Department.¹⁸² Moreover, the vigorous protest by Germany¹⁸³ against the provision of Article 289 is more easily understood in the light of this interpretation with its extensive abrogative effects. Finally, the language of the corresponding provision in the new Japanese Peace Treaty¹⁸⁴ seems to lend some credibility to the complete abrogation interpretation. The language seems less equivocal in calling for complete abrogation:

Each of the Allied Powers . . . will notify Japan which of its *prewar* bilateral treaties . . . with Japan it wishes to continue in force or re-

¹⁸² "This Government did not give notice within the period referred to in Article 289 as extended by paragraph 5 of Article 2 of the Treaty between the United States and Germany of August last, of its intention to revive the Treaty of 1828 between the United States and Prussia, and this Treaty, therefore, is not regarded by the Department as now in force". A letter written by the Department of State, March 21, 1923, cited in *Goos v. Brocks*, 117 Neb. 750, 755-756, 223 N.W.13 (1929). For a similar letter written by the Department of State on August 6, 1923, see 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 388 (1943). On May 8, 1922, Secretary of State Hughes instructed the American Ambassador to Berlin as follows: "Of treaties made with German Empire or independent German States the *United States desires to revive only Patent Agreement* [of February 23, 1909]". FOREIGN RELATIONS, II 267 (1922). The same view was again reiterated by the Under-Secretary of State on November 29, 1926, as follows: "This Government considered the matter and it was not deemed advisable to give notice . . . of its intention to revive the Treaty of 1828 between the United States and Prussia. In the circumstances, the Department does not consider that the Treaty of 1828 was effective in 1924 . . .". 40 HARV. L. REV. 752 (1927). See also a well-written comment on Article 289 of the Treaty of Versailles by Lesser, *Treaty Provisions Dealing with the Status of Pre-war Bilateral Treaties*, 51 MICH. L. REV. 573-582 (1953).

¹⁸³ See THE TREATY OF VERSAILLES AND AFTER 565 (1947).

¹⁸⁴ U.S. CODE CONG. AND ADMIN. SERVICE, 82nd Cong., 1st Sess., Art. 7, 2733 (1951).

vive. . . . All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

It seems plausible to attribute this to more careful draftsmanship than to any change in policy, in the absence of other evidence. On this basis, it is concluded that the Court's interpretation of Article 289 is incorrect; it will be interesting to see interpretations of the new treaty provisions.

In the case *In re Braier's Estate*¹⁸⁵ the New York Court of Appeals assumed the continued effectiveness of the Treaty of Friendship, Commerce, and Consular Rights of June 24, 1925 with Hungary¹⁸⁶ (Article XXI) in holding that the deposit with the Treasurer of the City of New York under Section 269 of the Surrogate's Court Act did not contravene this Treaty. The Treaty of 1925 was terminated in 1952, but by Governmental action,¹⁸⁷ showing thus that the United States Government felt it necessary to take steps to terminate it despite the war with Hungary. The Treaty provisions were controlling in this case, however, since it was assumed by the court to have been in force when the case was decided by the surrogate.

The above decisions are all in line with the general American view that war does not abrogate treaties. There are, however, two cases which are exceptions to this general rule—*In re Schacht*¹⁸⁸ and *Ex parte Zenzo Arakawa*.¹⁸⁹

In the first case one Schacht entered the United States as a treaty trader. In 1945 or 1946 the Immigration Department ordered his deportation not on the ground that the treaty was no longer in force but because Schacht had entered different work. The district court upheld the Immigration Department's order on the ground that "Treaties with Germany were terminated when war began. They have not been renewed."¹⁹⁰ However, the Circuit Court of Appeals¹⁹¹ affirmed on a different ground—Schacht's failure to maintain his status as a treaty merchant.

¹⁸⁵ 111 N.E.2d 424 (1953). The Court said at 427, n.1:

Although the Treaty expired on July 5, 1952 . . . and is no longer in effect, we have assumed that its provisions are here controlling, since it was in force when the case was denied by the surrogate.

¹⁸⁶ Treaty Series 748, 44 STAT. 2441, 2459 (1927). The Treaty became effective October 4, 1926.

¹⁸⁷ On July 5, 1951, the United States Government gave the notice of termination of this Treaty to the Hungarian Government in accordance with the procedure prescribed in Article XXV of the same Treaty. The Treaty expired according to its provisions one year later, *i.e.*, on July 5, 1952. See 25 DEP'T OF STATE BULL. 95 (1951), and 26 *id.* at 946 (1952).

¹⁸⁸ 68 F.Supp. 216 (N.D. Tex. 1946).

¹⁸⁹ 79 F.Supp. 468 (E.D. Pa. 1947).

¹⁹⁰ At p. 217.

¹⁹¹ *Schacht v Young*, 164 F.2d 882 (5th Cir. 1947).

In *Ex parte Zenzo Arakawa*, the Treaty of Commerce and Navigation of 1911 between the United States and Japan¹⁹² was involved. Nationals of Japan held for removal as alien enemies sought *habeas corpus*. One of their arguments was that the Treaty of Commerce and Navigation of 1911¹⁹³ had impliedly amended the Alien Enemy Act with respect to them, preventing their being considered "alien enemies."¹⁹⁴ The petition was denied. The court held that the Treaty had been abrogated, saying:

Treaties vary widely in character and subject matter, and what effect war has on them depends in a large measure on *their character and subject matter*. Some are unaffected by war, some merely suspended, while others are totally abrogated.¹⁹⁵ It would seem that *treaties of commerce and navigation would fall into the second or last of the above categories*, because the carrying out of their terms would be incompatible with the existence of a state of war.¹⁹⁶ It is apparent from a provision in the treaty that it was the *intention* of the United States and the other party that the *treaty was not to be perpetual*, but was to continue only at the will of either of them. As a consequence no rights become vested as a result of the treaty. Whether the treaty had been terminated prior to the outbreak of war between the United States and Japan is not clear. However, it is apparent that if the treaty had not been previously terminated, *it was totally abrogated*, or at least suspended, when Japan struck at Pearl Harbor.¹⁹⁷

¹⁹² TREATY SERIES NO. 558, 37 STAT. 1504, Arts. I *et seq.*, XVII (1911).

¹⁹³ Article I of the Treaty provided that citizens and subjects of the contracting parties within the other's country "shall receive . . . the most constant protection and security for their persons and property, and shall enjoy in this respect that same rights and privileges as are or may be granted to native citizens or subjects . . ."

¹⁹⁴ Section 21 of the Alien Enemy Act.

¹⁹⁵ Citing *Karnuth v. United States*, 279 U.S. 231 (1928).

¹⁹⁶ Citing *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930).

¹⁹⁷ At p. 472. Italics supplied. It seems however that District Judge Ganey erred in saying that "whether the treaty had been terminated prior to the outbreak of war . . . is not clear." In fact the Treaty of 1911 with Japan *was not in force* any more at the outbreak of war between the United States and Japan. On July 26, 1939, the United States Government in view of new developments between the United States and Japan and wishing to conclude a new treaty which would better safeguard and promote American interests, and *acting in accordance with the procedure prescribed in Article XVII of the same Treaty*, gave a notice of termination of this treaty. See 1 DEP'T OF STATE BULL. 61 and 81 (1939). Therefore it seems that in this case it was not necessary at all to pass upon the issue whether the Treaty with Japan of 1911 was abrogated or suspended by the war, because the treaty expired according to its terms on January 26, 1940, *i.e.*, six months after the notice of termination. A new Treaty of Friendship, Commerce, and Navigation between the United States and Japan was signed on April 2, 1953, at Tokyo, which is not yet ratified. Pending the entry into force of the new Treaty general economic relations between the United States and Japan will continue to be governed by Article 12 of the Treaty of Peace of 1951 with Japan. As to the general provisions and principles of the new Treaty of Friendship see 28 DEP'T OF STATE BULL. 531 (1953).

The lower court decision in the *Schacht* case, and the *Arakawa* case are not in line with the general American rule in their holdings that the treaties were abrogated by war. The standard in both cases is compatibility with war, rather than with national policy, a standard discussed and criticized in connection with the *Clark* case. However, both cases involved deportation proceedings, and are similar in this way to the *Karnuth* case, which involved immigration. Thus the results in these cases are more easily explained. The other cases discussed above all involved private rather than public law, however. It seems safe to conclude, therefore, that the general American rule is the same as that enunciated by Justice Washington some one hundred and thirty years ago—that war does not automatically terminate treaties, especially those governing private rights.

2) *France*. French Courts, before and during World War I, generally followed the absolute abrogation doctrine, holding that all treaties, including those of a purely private law character, were abrogated by war.¹⁹⁸ In a few cases they made exceptions and held that treaties of a private character law were not abrogated, but only suspended.¹⁹⁹

During and after the Second World War, the French Courts did not consistently apply the general abrogation rule. The validity of multi-lateral treaties was upheld by the courts.

In the case *French National Railway Company v. Chavannes*,²⁰⁰

¹⁹⁸ *Le domain v. Meyrand*, JOURNAL DU PALAIS II 168 (1843); *Champeaux-Grammont v. Cardon*, RECUEIL GENERAL DES LOIS ET DES TRAITÉS, COLLECTION NOUVELLE 3, I, 377 (1811); *Featherstonhaugh v. Boffi*, decided by the Court of Cassation (Chambre criminelle), Dec. 23, 1854, SIREY I, 811 (1854); *Loewengard v. Public Prosecutor and Bouvier*, ANNUAL DIGEST Case No. 221 (1919-1922). See also JACOMET, LA GUERRE ET LES TRAITÉS 87 *et seq.* (1909); *Annulation des traités bilatéraux ou collectifs par la guerre*, REVUE DE DROIT INTERNATIONAL PRIVÉ ET DE DROIT PENAL INTERNATIONAL 5 *et seq.* (1915-1916).

¹⁹⁹ *E.g.*, decisions of the Court of Cassation of July 15, 1811, SIREY I, 301 (1811); and June 9, 1825, *id.* I, 402 (1826); *In re Zwickert*, decided by the Court of Appeal of Colmar on April 2, 1824, SIREY II, 341 (1824); *Isnard-Blanc v. Pezzales*, decided by the Court of Appeal of Aix, on December 8, 1858, SIREY II, 606 (1859). On July 29, 1925, the Court of Colmar in deciding a case between a Czechoslovak commercial company as plaintiff and a French defendant, which turned on the question whether Article 17 of the Hague Convention on Civil Procedure regarding dispensation from the guarantee of *judicatum solvi* could be successfully invoked by the plaintiff held that "this convention, so far as concerns relationships between French and Austro-Hungarian nationals, must be considered suspended by the war and only capable of being restored to force by a formal clause of a new treaty effective in respect of recently created relationships." *Etablissement Coullerez v. Maison Stein*, Cour d'Appel de Colmar, July 29, 1925, JOURNAL DU DROIT INTERNATIONAL 604 (1925); *Société des anciens établissements Wenger v. C.F.P.L.M.*, RECUEIL GENERAL DES LOIS ET DES ARRETS II, 112 (1922).

²⁰⁰ Court of Appeal of Aix, February 9, 1943, SEMAINE JURIDIQUE Part 2, 2417 (1943), with a note by Bastid; ZEITSCHRIFT FÜR DEN INTERNATIONALEN EISENBAHNVERKEHR, published

liability for the loss of an international consignment of goods was involved. Contrary to the provisions of the Convention of Rome on the Transport of Goods by Rail of November 23, 1933 (a multilateral convention²⁰¹), a French statute (July 27, 1940) purported to relieve the French National Railway Company (S.N.C.F.) from all responsibility for loss or damage to packages which had occurred during the summer of 1940, when the German invasion had disorganized French internal transport. The S.N.C.F. pleaded exemption from liability by virtue of the above mentioned statute. The Court of Appeal of Aix, however, applied the Rome Convention despite the occurrence of war and held the S.N.C.F. liable, saying:

The Convention of Rome is an international treaty which binds the States parties to it until such times as they withdraw therefrom in the form and after the giving of the notice provided by the Treaty itself, and no one of the High Contracting Parties can withdraw therefrom of its own accord.

The Court in this case did not discuss the effect of war on the Convention at all and applied the Convention despite the conflicting statute, following the French legal doctrine of the *acte contraire*, according to which the obligations of a treaty cease to be binding only by virtue of a new treaty contrary to the former.²⁰²

In another French case²⁰³ goods were sent on May 20, 1944, from Rauxel in Germany to Petit-Croix in France with an international bill of lading, according to which the goods were to be delivered on June 20, 1944, at the latest. However, they were not delivered until July 6, 1944. The consignee brought an action for damages against the S.N.C.F., which defended itself on the ground that the occupying German authorities had detained the goods, arguing that this was an act of *force majeure*. The Commercial Court of Seine held²⁰⁴ S.N.C.F. liable applying Article 11 of the Rome Convention of 1933. Again no reference was made to the effect of war on the Convention, but its continued validity was treated as a matter of course.

The Hague Multilateral Convention on Civil Procedure of 1905²⁰⁵ was involved in *Compagnie des Assurance Maritime, Aérienne et Terrestres*

by the Zentralamt in Bern, 326 (1943); ANNUAL DIGEST Case 87 (1943-1945), with a note on p. 266.

²⁰¹ 6 HUDSON, INTERNATIONAL LEGISLATION 527 (1937).

²⁰² See CHAILEY, LA NATURE JURIDIQUE DES TRAITÉS INTERNATIONAUX SELON LE DROIT CONTEMPORAIN 109 *et seq.* (1932).

²⁰³ Reported in 19 TRANSPORT 5631 (1947).

²⁰⁴ On December 6, 1946.

²⁰⁵ 2 MARTENS, N.R.G. 3rd ser., 243 (1909).

v. Scagni.²⁰⁶ Scagni, an Italian subject who was expelled from France in 1939 (before France and Italy were at war), claimed an indemnity to cover fire damage from the C.A.M.A.T. The defendant company demanded that security of 100,000 francs be paid into court. The court of first instance rejected this demand and applied Article 17 of the Hague Convention, which provides that subjects of signatory states should not be required to pay *cautio judicatum solvi* in the courts of another signatory. On appeal the Court of Appeal of Ager reversed and held that Scagni had to pay the *cautio judicatum solvi*. The Court interpreted the treaty as not covering aliens expelled, because of their subversive conduct.

All of the above cases deal with *multilateral* treaties and treat them as valid. The treatment of *bilateral* treaties varies. Territorial and commercial treaties are unanimously held abrogated, while decisions on private law treaties have not been consistent.

Feldman Publishing Company and Antin (ex parte) v. Rigaud,²⁰⁷ decided by the Court of Appeal of Paris on March 20, 1944, deserves special attention because it is on the border line of the effect of war and the effect of rupture of diplomatic relations on treaties. Feldman Publishing Company was incorporated in France, but, as a subsidiary of Bertram Feldman Publishing Co. of London, was deemed to be an enemy company by virtue of the "control" principle. Under the Anglo-French Convention of February 28, 1882, and the Agreements of May 21-25, 1929, the Company claimed from its landlord a reduction of rent on its business premises in Paris. On March 13, 1942, the Tribunal of the Seine had held that the Feldman Company was *not* entitled to take advantage of the treaties on the ground that the *rupture of diplomatic relations*, which had taken place on July 4, between France (Vichy Government) and Great Britain after the Mers-el-Kébir (Oran) incident, had put an end to treaties existing at that date between the two States. The Company appealed. The Court of Appeal reversed, saying:

The Convention of February 28, 1882, and the Agreements of May 21-25, 1929, remain in force; the breach of diplomatic relations cannot amount to a declaration of war, and France is not *de jure* at war with Great Britain. The claim for reduction of rent therefore succeeds.

²⁰⁶ 36 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 294 (1947); ANNUAL DIGEST Case No. 99 (1946).

²⁰⁷ GAZETTE DU PALAIS May 9, 1944; DALLOZ 24 (1945), with a note by Basdevant; REVUE CRITIQUE DE DROIT INTERNATIONAL 51 *et seq.* (1946), with a note by Batiffol; ANNUAL DIGEST Case No. 92 (1943-1945).

The court's implication seems to be that a declaration of war would abrogate these treaties.

The greatest number of cases deal with the validity of the Convention on Establishment between France and Italy, signed in Rome on June 3, 1930,²⁰⁸ which accords to Italian citizens, resident in France, the same treatment as French nationals in matters concerning private rights, without any requirement of reciprocity. Especially in lower courts, the judges were not enthusiastic about giving Italians the same rights as Frenchmen once war had broken out, and they therefore held that this Convention was abrogated by the outbreak of war between France and Italy.

In the case *S. v. P.*²⁰⁹ the plaintiff, S., an Italian national, applied for an order granting him the right to remain in premises rented from P., a French national. S. invoked the relevant decrees of 1939-1940, confirmed by the Law of May 26, 1943. The Court, holding that the Law of May 26, 1943 did not apply to S., rejected the application and said:

The treaties of peace concluded in 1919 and 1920 implicitly admitted that the war which began in 1914 had *terminated* the various treaties previously concluded between the belligerent States. This must be deemed to be the case to-day, in a situation which is similar, despite the existence of the armistice. S. has not established that the Armistice Convention includes the clause providing for either reciprocity or exemption on which he relied.

In a similar case *C. v. B.*,²¹⁰ an Italian tenant farmer, under notice to quit from his French landlord C., applied for an order giving him an extension of his lease for an additional year. The Court, rejecting B.'s application, said that regarding the Franco-Italian relations after the armistice, it was clear that *all treaties*, including the Treaty of Establishment of 1930, had been *abrogated or suspended* between France and Italy.

These two decisions appear to be in conformity with the traditional French jurisprudence before the war of 1914. But they were decisions of inferior courts, and could not long survive. Soon the French Courts adopted a more liberal view which lasted for five years.

In the case *I. v. I.*,²¹¹ an Italian tenant farmer, under notice to quit

²⁰⁸ JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE January 30, 1935.

²⁰⁹ Decided by the Tribunal de Paix of Marseilles (5th Canton), on October 26, 1943, GAZETTE DU PALAIS, PROVISIONAL SUPPLEMENT 170 (1943).

²¹⁰ Decided by the Tribunal civile de Toulouse, on November 18, 1943, GAZETTE DU PALAIS Dec. 14, 1943.

²¹¹ Decided by the Tribunal civile de Marseilles, on October 26, 1943, GAZETTE DU

from his French landlord, applied for an order to prevent his eviction, invoking Article 2 of the Treaty of Establishment of 1930. The landlord objected that the Treaty had lapsed on the outbreak of war, but the Court granted the tenant security of tenure for a year, adding:

The outbreak of war between two nations has the effect of extinguishing or suspending the execution of treaties made between the belligerents being treaties of a political nature or treaties which were the direct cause of the war or which are incompatible with a state of hostilities.

On the other hand, *those treaties remain in force which relate to the enjoyment of private rights* existing before the outbreak of hostilities. In particular treaties dealing with contracts relating to debts or pecuniary obligations, the transfer of movable or immovable property, mortgages, leases, and tenancy agreements, especially if they were entered into force before the declaration of war, remain in full force. (*Italics added.*)

*Bussi v. Menetti*²¹² is a leading case in which the Supreme Court of France—the Court of Cassation (Chambre sociale)—definitely quits the abrogation doctrine. Menetti, a French national, living at Avignon and the owner of a house of which Bussi, an Italian, was the tenant, had given the latter notice to quit on November 4, 1938, on the ground that, for reasons of health, he wanted to live in the house himself. In a judgment dated December 6, 1941, the Tribunal de Paix of the Northern Canton of Avignon had declared the notice to quit valid, on the ground that the state of war which was declared on June 10, 1940 had terminated all treaties between France and Italy and in particular the Treaty of Establishment of June 3, 1930. Bussi appealed; the Court of Cassation reversed and said:

Treaties concluded between the States subsequently becoming belligerents are not necessarily suspended by the declaration of war between the contracting parties. . . In particular, treaties of a purely private law nature, which do not involve any intercourse between the enemy Powers and which have no connection with the conduct of hostilities, such as the Convention relating to leases, are not, by the mere fact of war, suspended in their effects.

Exactly the same result was reached by the Court of Cassation (Chambre sociale) in *Poet v. Deleuil*²¹³ some months later, allowing

PALAIS, PROVINCIAL SUPPLEMENT 169, Nov. 1943. See also an earlier lower court decision, *Mapie v. Capello*, Tribunal civil de Caen, decided on April 9, 1941, the court holding to the same effect, GAZETTE DU PALAIS May 29, 1941.

²¹² Decided on November 5, 1943, RECUEIL PERIODIQUE ET CRITIQUE DE JURISPRUDENCE, DE LEGISLATION ET DE DOCTRINE 84 (1944), with a note by Basdevant; RECUEIL GENERAL DES LOIS ET DES ARRÊTS I 98 (1945); GAZETTE DU PALAIS, PROVISIONAL SUPPLEMENT 168 (1943); ANNUAL DIGEST Case No. 103 (1943-1945).

²¹³ Decision on April 21, 1944, GAZETTE DU PALAIS June 9, 1944; RECUEIL GENERAL DES ARRÊTS I 98 (1945).

an appeal by an Italian tenant from an order of the Tribunal de Paix of Marseilles giving possession of premises to a French landlord. This holding was reaffirmed by the Chambre sociale of the Court of Cassation in four later cases dealing with the validity of the same Convention concerning with civil and rural leases and commercial property, namely, *Hutard v. Margerit* (July 25, 1946), *Juidi v. Fassin* (March 21, 1947), *Pinna v. Crépillon* (May 20, 1947), and *Amadio v. Diduant* (February 13, 1948).²¹⁴

The holding of the Court of Cassation in *Bussi v. Menetti* was followed by a lower court, Tribunal civil de Grasse, in *Rosso v. Marro*.²¹⁵ Rosso and his wife, Italian nationals, who had since 1938 been tenants of certain business premises at Cannet (Alpes-Maritimes), had applied to their landlord Marro for the renewal of their lease as from August 1, 1944. Marro refused. The Court held for Rosso, by saying that the Court of Cassation had repudiated the doctrine which it held during the past century, and now holds that treaties of a purely private law nature are not suspended because of war, citing *Bussi v. Menetti*.

It would appear that these liberal holdings of the French courts in this immediate post-war period are in accordance with American decisions for the continued existence of treaties relating to private rights. They are in harmony with the progressive development of international law. According to the holdings of American courts such treaties are not incompatible with the conduct of war, and the French courts have adopted the same test of incompatibility as the American courts when deciding the validity of the Franco-Italian Convention of 1930.

There are also two Tunisian cases following the same liberal pattern and dealing with the validity of a similar treaty, *viz.* the Treaty of 1896 between France and Italy concerning Italian nationals in Tunis. The Court of Tunis²¹⁶ deciding as to the right of an Italian proprietor to reassume rights of ownership over commercial property, refused to follow the French traditional view to the effect that the Franco-Italian Convention of 1896 was abrogated by the war, and said in its judgment of February 22, 1944:

If the result of a state of war is to nullify the treaties and conventions existing between belligerent States, it is nevertheless clear in principle that stipulations in these treaties and conventions which do not concern the rights and duties of States but the interests of private persons, their

²¹⁴ All reported in GAZETTE DU PALAIS, *passim*.

²¹⁵ Decided on January 18, 1945, GAZETTE DU PALAIS February 27, 1945; SEMAINE JURIDIQUE 2941 (1946), with a note by Benoist.

²¹⁶ Reported in 2 INT. L. Q. 573 (1948).

status, nationality, and rules relating to the acquisition of property and to exercise of trade and commerce . . . *continue to exist unless the national law contains express provisions to the contrary.*²¹⁷

It would seem that the Tunis Court was quite right in refusing to consider the Convention of 1896 abrogated because of war, without a governmental declaration to this effect. Such a declaration came a little later. On June 22, 1944, the Provisional Government of the Republic in Algiers issued an Ordinance²¹⁸ in which the Franco-Italian Treaty of 1896 was formally declared to have lapsed on the day of the outbreak of war between France and Italy. But then the Tribunal de Sfax of Tunis, in the case *Arbib v. Procureur de la République*,²¹⁹ held that the Convention of 1896 was still applicable in regard to Italians in Tunis as "the common law." The facts in this case were as follows: The petitioner, one Arbib, was tried before a Court Martial at Algiers for desertion. He attempted to prove that he was an Italian national. The French Resident General in Tunis asked the Court of Sfax to declare that the petitioner, born in Tunis of an Italian father, had Italian nationality in virtue of the Treaty of 1896 between France and Italy, which provided that Italians were not subject to the *jus soli*. The Court held that the petitioner was an Italian national, and that his enlistment in the Free French Forces could not modify his nationality. It would seem that the Courts in Tunis considered the *test of compatibility with the national policy* as expressed in national laws as an important and decisive factor for the continued validity of a convention concerning private rights, and not the outbreak of war.

On February 10, 1948, without any clear reasons being given, the liberal attitude of the French courts changed and the former view favoring complete abrogation of bilateral treaties between belligerents was re-espoused. On that date, on appeal from a decision of the Court of Aix in the case of *Artel v. Seymond*,²²⁰ the Court of Cassation (Chambre civile)²²¹ held that "the existence of a state of war renders *null and*

²¹⁷ *Ibid.* Italics added.

²¹⁸ Referred to in a note in ANNUAL DIGEST 3 (1946).

²¹⁹ Decided on December 10, 1946, 36 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 427 (1947); ANNUAL DIGEST Case No. 3 (1946).

²²⁰ 77 JOURNAL DU DROIT INTERNATIONAL 123 (1950); RECUEIL GENERAL DES LOIS ET DES ARRÊTS I 49 (1949), with a note by Niboyet. For critical remarks on this case see La Pradelle, *The Effect of War on Private Law Treaties*, 2 INT'L L. Q. 555 (1948); Scelle, *De l'influence de l'état de guerre sur le Droit conventionnel (à propos d'un récent arrêt de Cassation)*, 77 JOURNAL DU DROIT INTERNATIONAL 26 et seq. (1950).

²²¹ The Chambre Civile is different from the Chambre Sociale, being two divisions of the Court of Cassation. It should here perhaps be noted that the Chambre sociale in the case *Amadio v. Diduant*, decided on February 13, 1948, held exactly to the opposite.

void all reciprocal obligations assumed by the High Contracting Parties in a treaty concluded on matters of private law affecting relationships in times of peace." Reasons for this sudden change of view are not given and are difficult to understand, because exactly the same treaty provisions and the same nationals (Italians) were involved without any apparent change in circumstances.

In a subsequent leading case *Lovera v. Rinaldi*,²²² the Civil Department of the Court of Cassation sitting in Plenary Assembly (Assemblée plénière civile), on June 22, 1949, finally settled the conflicting views of the French Supreme Court departments and *established the old rule of absolute abrogation as the sole legal doctrine of France*. In this case an Italian tenant on November 23, 1946, sought a renewal of his lease of certain property in France. He claimed the benefit of the Ordinance of October 17, 1945, regarding leases. Although this Ordinance denied aliens its benefits, the Italian tenant contended that he was entitled to them by virtue of the Convention of Establishment of June 3, 1930 which determined he was a non-alien. The Court of Cassation held for the defendant, saying in part:

The state of war between Italy and France was incompatible with the maintenance of the obligations which the Convention of 1930 imposed on France regarding the settlement of Italians in our territory; . . . the Armistice, which had suspended hostilities, left this state of war in existence; [and] that at the date when the plaintiff brought his request the said Convention had not been revived.

These two holdings of the French Court of Cassation have since been followed in all cases.²²³ We could therefore conclude by saying that the present French judicial doctrine considers the effect of war as *ipso facto* abrogating *all* treaties, even those containing private rights. This trend is to be regretted, because it seems to be "ill founded in law and contrary to the evolutionary trend of international law".²²⁴

3) *Holland*. Generally the Dutch decisions hold that war suspends multilateral conventions as between belligerent States but leaves them in full force between nonbelligerents. I have not been able to discover

²²² 77 JOURNAL DU DROIT INTERNATIONAL 125 *et seq.* (1950); RECUEIL GENERAL DES LOIS ET DES ARRÊTS 49 (1949), and 161 (1950), with a note by Niboyet defending the decision. Scelle, *supra* note 220, at 26 says that this case is not in conformity with the French Constitution.

²²³ See, *e.g.*, Andreoli v. Clément, November 10, 1949; De Dal Agnol v. Bègue, November 10, 1949; Boufferon v. Pelotto, December 9, 1949; and the cases Lancini v. Villeneuve; Carotti v. Manzoni; Frare v. Cabalie; and Grouchi v. Berroyer, all decided on December 17, 1949; see 77 JOURNAL DU DROIT INTERNATIONAL 129 (1950).

²²⁴ Scelle, *supra* note 220, at 29.

any Dutch case with regard to the effect of war on a bilateral treaty. It seems however, that the Dutch Courts would follow the practice of French courts and favor abrogation. In the *Hecht* case,²²⁵ decided by the Supreme Court of Holland on April 3, 1941, the petitioner Eugen Hecht, a German national, invoked the Hague Convention on Civil Procedure of July 17, 1905, to which both Germany and Holland were parties. Hecht sought leave to sue as a poor person, but according to the Dutch Code of Civil Procedure²²⁶ a foreigner may sue as a poor person only by virtue of an express treaty provision to this effect. On appeal the Court dismissed the case. It said:

It is true that the Netherlands and the German Reich are both parties to the Convention on Civil Procedure, Article 20 of which provides for the admission of the subjects of each of the contracting parties to the privilege of poor persons' procedure in the Courts of any other of those parties on an equal footing with nationals. However, as a consequence of the outbreak of war between the Netherlands and Germany, the said Convention *has ceased to operate* between them.

However, it must be remembered that Holland was still occupied by Germany at this time and the Dutch courts were not willing to extend the privileges of this Convention to enemy nationals. Nor is it quite clear whether the Court held for abrogation or only suspension of this Convention.

In the case *In re Anna K.*²²⁷ the same Hague Convention on Civil Procedure was involved. In this case a German woman had married a Dutch citizen on June 12, 1940, thus acquiring Dutch nationality. Under an Emergency Decree of November 17, 1945²²⁸ she lost her Dutch nationality and consequently became an enemy alien. In 1946 she applied for free legal aid to obtain a divorce. The District Court of Rotterdam on June 15, 1946, held that the application could not be granted, because owing to the state of war still subsisting between Holland and Germany, the Hague Convention on Civil Procedure, the basis on which such an application could be granted, must be considered to be *suspended* as between the two countries.

The same multilateral convention on Civil Procedure, as between Holland and Luxemburg, was under consideration in the case *Huby Frères of Echternach v. Racké.*²²⁹ The plaintiff, a national of Luxem-

²²⁵ NEDERLANDSCHE JURISPRUDENCE No. 23 (1942); ANNUAL DIGEST Case No. 133 (Supp. Vol. 1919-1942).

²²⁶ Article 885, ¶ 2.

²²⁷ NEDERLANDSCHE JURISPRUDENTIE No. 695 (1946).

²²⁸ OFFICIAL JOURNAL No. F.278 (1945).

²²⁹ NEDERLANDSCHE JURISPRUDENTIE No. 148 (1942); ANNUAL DIGEST Case No. 123 (Supp. Vol. 1919-1942).

burg, instituted proceedings against a Dutch national, who demanded that the plaintiff furnish security for costs. The latter objected and invoked the Hague Convention on Civil Procedure. At the time when the action was brought Luxemburg was occupied by Germany, who had announced the annexation of Luxemburg. The defendant relied on this fact and maintained that the Convention was no longer applicable. The Cantonal Court of Utrecht, on September 8, 1941, held for the plaintiffs. The Court said that since the Convention has not been denounced by either of the contracting parties, the fact that Luxemburg had been annexed by Germany did not change the rights and obligations resulting from the Convention for nationals of the two States, and therefore the nationals of Luxemburg still enjoyed in Holland the privileges conferred on them by the Convention and are free from giving any security for costs. This case should be compared with the prior *Hecht* case²³⁰ where exactly the same treaty benefits were withheld from the occupying Germans. Of course, it is also true that Luxemburg and Holland had not been at war, while Germany and Holland had. It was, nevertheless, a courageous stand to take during the occupation, especially since Germany had declared Luxemburg annexed.

In the case *Établissements Strauss v. Vraets Bros.*²³¹ the District Court of Utrecht held that the Hague Convention on Civil Procedure of 1905 was in force in relations between Holland and France and had not lost its validity because of war and the occupation of both countries. The Court said:

It is not known to the Court that the Convention has been denounced either by France or by the Netherlands. There is no reason for the supposition that the Convention has lost its validity as between France and the Netherlands in the prevailing circumstances in virtue of any unwritten rule of international law. There exists no state of war between the two countries.

With the last submission the Court seems to indicate its sympathy for the doctrine that war *ipso facto* abrogates treaties as between belligerents, but upholds the validity of the treaty as between friendly nations.

The validity of another Hague Convention, the Convention of 1902 concerning Marriage,²³² was discussed in *Gehrmann and Maatje van der Have v. Registrar.*²³³ The Registrar had refused to marry the

²³⁰ See p. 529 *supra*.

²³¹ Decided on May 20, 1942, NEDERLANDSCHE JURISPRUDENTIE No. 796 (1942); ANNUAL DIGEST Case No. 119 (Supp. Vol. 1919-1942).

²³² 31 MARTENS, N.R.G. 2nd ser., 706 (1906).

²³³ Decided on February 5, 1947, by the District Court of Middelburg, NEDERLANDSCHE JURISPRUDENTIE No. 26 (1948); ANNUAL DIGEST Case No. 83 (1947).

claimants on the ground that an *Ehefähigkeitszeugnis*, a certificate from the Berlin Standesamt, was required by the bridegroom and had not been supplied. A certificate of that character was required by virtue of the Hague Convention concerning Marriage. The claimants asked the Court to declare that they could be married. The District Court of Middelburg held that the claimants could be legally married, because the war between Holland and Germany had *suspended* the operation of the said Convention, and the authorities of the Netherlands were not bound by any treaty provisions in judging whether the bridegroom had fulfilled the requirements of national law for his marriage. In this case, the court said, those requirements were fulfilled.

In a later case,²³⁴ decided in 1948, the Supreme Court of the Netherlands held the Hague Conventions regarding Marriage and Divorce *valid and applicable* in relations between Holland and Germany though the two countries were still legally in war. The Supreme Court of the Netherlands is the highest Dutch authority in matters of treaty interpretations.²³⁵ Therefore, it is hoped that its latest decision, indicating a more liberal construction of the effect of war on treaties, will be an authority for later decisions upholding the validity of other treaties concerning private rights. Although there is no express indication in the cases dealing with the validity of treaties between Holland and Germany whether the court gives any decisive importance to the acts of the political department of the Dutch Government, one is led to infer this from the cases dealing with the validity of Dutch treaties with Luxemburg and France.

4) *Germany*. As in the case of French decisions, German decisions concerning the effect of war on treaties are not remarkable for their consistency. During World War I the courts were split in their decisions²³⁶ and this split seems to be continuing at present. There have

²³⁴ Decision on April 2, 1948, NEDERLANDSCHE JURISPRUDENTIE No. 442 (1948).

²³⁵ Grund, *Prozessführung und Urteilsvollstreckung im Ausland*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 323, 325 (1951).

²³⁶ Upholding the validity of treaties see German Patentamt, October 26, 1914, 44 JURISTISCHE WOCHENSCHRIFT (hereinafter JW) 145 (1915); Reichsgericht, October 26, 1914, I. Zivilsenat, ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (hereinafter RGZ) 85, 375; Oberlandesgericht (hereinafter OLG) Hamburg, July 14, 1917, DEUTSCHE JURISTENZEITUNG 907 (1917); Landgericht (hereinafter LG) Berlin, November 6, 1914, MARKENSCHUTZ UND WETTBEWERB 156 (1915); LG Leipzig, March 20, 1915, 44 JW 418 (1915); LG Leipzig, May 29, 1915, 44 JW 732 (1915); OLG Königsberg, August 23, 1916, 21 DJZ 1003 (1916); OLG Hamm, May 12, 1915, 44 JW 802 (1915). *Contra*: Kammergericht, January 28, 1915, 44 JW 802 (1915); OLG Dresden, October 2, 1917, SÄCHSISCHES ARCHIV FÜR RECHTSPFLEGE 149 (1918); LG Köln, October 16, 1914, 44 JW 110 (1915); OLG Hamburg, June 11, 1915, KOSTERSBELLEMENS, LES CONVENTIONS DE LA HAYE DE 1902 59 1905 SUR LE DROIT INTERNATIONAL PRIVÉ 1173 (1921); Kammergericht, February 26, 1915, 20 DJZ 616 (1915).

been no leading German cases on the effect of war on treaties since the second World War. Multilateral treaties have been applied by German courts without, however, any discussion of the effect of war.

In *S. P. v. M.*²³⁷ an action was brought in 1942 in Germany by a Dutch citizen claiming exclusive use of an internationally registered trade mark under the Paris Convention for the Protection of Industrial Property of 1883.²³⁸ The German *Reichsgericht* upheld his exclusive rights under the Convention, thus impliedly recognizing the continued validity of the Convention as between Holland and Germany in spite of war.

The exclusive use of an international trade mark was again upheld by the German *Reichsgericht* in *Naamlooze Vennootschap C. A. W. E. Zeepfabriek "De vergulde Hand" v. D. - Werke M. & W.*²³⁹ The Court applied the above mentioned Paris Convention of 1883 and the Madrid Agreement concerning Arrangements in regard to Indications of Origin and the Registration of Trade Marks of 1891,²⁴⁰ once more tacitly assuming the continued validity of the agreements.

Decisions in respect to multilateral treaties where the parties are not belligerents have been consistent, however. In this situation, the validity of the treaty has been upheld despite the outbreak of war between the other parties to the treaty, as illustrated in a recent *Oberlandesgericht Frankfurt a. M.* decision.²⁴¹ Here the Hague Convention on Civil Procedure of 1905²⁴² as between the German and Swiss parties was involved and upheld.

The general view of German courts seems to be that *bilateral* treaties, even those concerning private rights, are abrogated by war.²⁴³ A recent unreported decision of *Oberlandesgericht of Munich*²⁴⁴ followed this rule. In it, the Convention concerning the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1937²⁴⁵

²³⁷ Decided on June 29, 1942, by the Second Civil Senate of the *Reichsgericht*, 169 RGZ 240 (1942).

²³⁸ 8 MARTENS, N.R.G. 3rd ser., 760 (1917); 74 LEAGUE OF NATIONS TREATY SERIES 289; 3 HUDSON, INTERNATIONAL LEGISLATION 1761 (1931).

²³⁹ 170 RGZ 302 (1943), decided on January 28, 1943, by the Second Civil Senate of the *Reichsgericht*.

²⁴⁰ 22 MARTENS, N.R.G. 2nd ser., 208 (1895).

²⁴¹ Decided on March 27, 1950, reported in 4 NEUE JURISTISCHE WOCHENSCHRIFT 38 (1951).

²⁴² 2 MARTENS, N.R.G. 3rd ser., 243 (1910).

²⁴³ See 4 NEUE JURISTISCHE WOCHENSCHRIFT 831 (1951).

²⁴⁴ OLG München, decision of July 9, 1952, mentioned in 7 JURISTENZEITUNG 682, 683 (1952).

²⁴⁵ RGBl. H, 145 (1937); GAZETTA UFFICIALE, No. 44, February 22, 1937.

between Germany and Italy was held not to have been in force since 1943 when Germany and Italy had been at war. But the situation with respect to bilateral treaties is extremely confused. German text-writers²⁴⁶ have maintained that all bilateral treaties between belligerents are abrogated. The present view of the German Government, however, as we have seen,²⁴⁷ is that treaties concerning private rights are not abrogated.

Peace Treaties of World War II

It has become customary to insert provisions in peace treaties concerning the validity of pre-war treaties between the former enemies in order to provide certainty as to whether they are to continue in force or not after the war has ended. There are, however, a few recent exceptions to this customary rule. For instance, the Peace Treaty of Moscow of March 13, 1940, between Finland and Soviet Russia, does not contain any provisions concerning treaties. Neither does the Convention on Relations between the Three Powers and the Federal Republic of Germany, signed at Bonn on May 26, 1952, a "provisional" peace treaty popularly called the "Peace Contract", contain any references to treaties, although probably for the reason that this has been reserved for the final peace treaty.²⁴⁸ All other peace treaties of World War II, however, contain references to treaties.

1) *Multilateral Treaties.* In the Peace Treaties ending the first World War elaborate provisions with regard to multilateral treaties were included,²⁴⁹ but in the Peace Treaties of 1947 with Italy,²⁵⁰ Ru-

²⁴⁶ RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 24 *et seq.* (1949); BAUMBACH-LAUTERBACH, *ZIVILPROZESSORDNUNG* (1950), Einleitung IV, p. 23.

²⁴⁷ See p. 352 *supra*.

²⁴⁸ There exists a German Peace Treaty proposal concerning Industrial Property, adopted by the International Chamber of Commerce at its XIth Congress at Montreux in June 1947, but this proposal is unsatisfactory as far as the prewar treaties are concerned, because it follows the terms of the Treaty of Versailles (Article 286), which was renounced at the Paris Peace Conference of 1946. See DRAFT PROVISIONS RELATING TO PATENTS, DESIGNS, TRADE MARKS, COPYRIGHT AND OTHER INDUSTRIAL PROPERTY RIGHTS, International Chamber of Commerce, Brochure No. 118 (1947). At present United States and German experts are re-examining eighteen to twenty pre-World War II bilateral treaties and between forty and fifty multilateral treaties involving the two countries with a view to determining those that should be reactivated, amended, or discarded. *N.Y. Times*, June 4, 1953, p. 1, col. 5. When this work has been completed relations between the United States and West Germany will be regulated by a network of legal agreements, regardless of the fate of the Bonn "Peace Contract" or the final peace treaty.

²⁴⁹ See *e.g.* Article 282 *et seq.* of the Treaty of Versailles; Article 217 *et seq.*, of the Treaty of Trianon, Article 269 *et seq.* of the Treaty of Sevres, Article 167 *et seq.* of the

mania,²⁵¹ Bulgaria,²⁵² Hungary,²⁵³ and Finland,²⁵⁴ and with Japan of 1951.²⁵⁵ Only bilateral treaties are dealt with, nothing being mentioned about multilateral treaties, which were thus put on a different basis. This procedure was mainly due to the great number of multilateral treaties in existence, to which the former enemies, who did not participate in the peace conference of 1946, were parties together with the neutral powers, and to the difficulty which would have arisen in trying to include detailed provisions about all these treaties. Therefore it was decided to say nothing about them in the Peace Treaties, leaving the matter to rest on the basic rules of international law governing them.²⁵⁶

This is the principal difference between the Peace Treaties of the two World Wars. At the Paris Conference of 1946 the view was taken that multilateral treaties, and particularly those of a technical and non-political character, were in principle not affected by the outbreak of war as far as their existence and continued validity was concerned. They were at most suspended in their operation for the period of the hostilities, and upon the restoration of peace they automatically revived without the necessity of any special provision to that effect.²⁵⁷ This is

Treaty of Neuilly, and Article 234 *et seq.* of the Treaty of Saint-Germain. See also comments on the Treaty of Versailles: *THE TREATY OF VERSAILLES AND AFTER. ANNOTATION OF THE TEXT OF THE TREATY*, DEP'T OF STATE PUB. 2724, pp. 565-580 (1947).

²⁵⁰ 61 STAT. 1386 (1948).

²⁵¹ 61 STAT. 1803 (1948).

²⁵² 61 STAT. 1956 (1948).

²⁵³ 61 STAT. 2115 (1948).

²⁵⁴ DEP'T OF STATE PUB. 2743, European Series 21 (1947). The Finnish Peace Treaty is not signed by the United States, because there was no war with Finland.

²⁵⁵ U.S. CODE CONG. AND ADMIN. SERVICE, 82d Cong., 1st Sess., 2730 (1951); see also CONFERENCE FOR THE CONCLUSION AND SIGNATURE OF THE TREATY OF PEACE WITH JAPAN, RECORD OF PROCEEDINGS, DEP'T OF STATE PUB. 4392 (1951). The Treaty of Peace with Japan was ratified by the United States on April 15, 1952, and entered into force on April 28, 1952, at 9:30 a.m., eastern daylight saving time, according to the provisions of Article 23 of the Peace Treaty. See 26 DEP'T OF STATE BULL. 658 and 687 (1952).

²⁵⁶ Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, 73 RCADI 259-308 (1948-II). See also MAKING THE PEACE TREATIES, DEP'T OF STATE PUB. 2774, European Series 24 (1941-1947); COMMENTARY ON THE TREATIES OF PEACE WITH ITALY, RUMANIA, BULGARIA, HUNGARY, AND FINLAND, Misc. No. 2 (1947), Cmd. 7026; TREATIES OF PEACE WITH ITALY, RUMANIA, BULGARIA AND HUNGARY, *Hearings before the Committee on Foreign Relations*, U.S. SENATE, 80th Cong., 1st Sess., EXECUTIVES F, G, H, and I.

²⁵⁷ See 3 DOCUMENTS OF THE PARIS PEACE CONFERENCE (C.P.) J.R., 6th Meeting, 348 (1947), which contain the proceedings of the Legal and Drafting Commission, which drew up the Peace Treaties of 1947, saying, in part, as follows: "The question of multilateral treaties was discussed when the text of Article 37 was drawn up. The authors of the draft of this Article . . . agreed that, according to the opinion at present prevailing in international law, the *communis opinio*, multilateral treaties are only suspended

a most satisfactory development and it is gratifying to note that modern principles regarding multilateral pre-war treaties have been adopted and applied in respect to the Peace Treaties of 1947 and 1951 (with Japan).

Perhaps one more remark is necessary in regard to the Declaration referring to multilateral treaties, made unilaterally by Japan in signing the Peace Treaty. The declaration²⁵⁸ is as follows:

1. Except as otherwise provided in the said Treaty of Peace, Japan recognizes the full force of all presently effective multilateral international instruments to which Japan was a party on September 1, 1939, and declares that it will, on the first coming into force of the said Treaty, resume all its rights and obligations under those instruments. Where, however, participation in any instrument involves membership in an international organization of which Japan ceased to be a member on or after September 1, 1939, the provisions of the present paragraph shall be dependent on Japan's readmission to membership in the organization concerned.
2. It is the intention of the Japanese Government formally to accede to the following international instruments within the shortest practicable time, not to exceed one year from the first coming into force of the Treaty of Peace: . . . [Thereafter follows an enumeration of various multilateral treaties, altogether nine in number].

In view of the practice adopted and followed at the Peace Conference of Paris of 1946 it is doubtful whether the present Declaration of the Japanese Government was at all necessary from the legal point of view. According to the modern legal view, Japan would without such a declaration, have been bound after the cessation of hostilities by all Multilateral Treaties to which she was a party before the outbreak of the war. Therefore this Declaration seems to have only a *declaratory* value, not changing legally the principles adopted at the Paris Peace Conference of 1946.

2) *Bilateral Treaties*. The Peace Treaties of 1947 with Italy, Rumania, Bulgaria, Hungary and Finland all contain *mutatis mutandis*, a similar provision²⁵⁹ concerning prewar bilateral treaties and therefore it might be appropriate to cite, as representative of them all, Article 44 of the Treaty with Italy which reads as follows:

1. Each Allied or Associated Power will notify Italy, within a period by war. It is therefore unnecessary to deal with the re-establishment of such Treaties in the Peace Treaty".

²⁵⁸ U.S. CODE CONG. AND ADMIN. SERVICE 2742 *et seq.* (1951). For a critical comment on this Declaration see Brandon and Leriche, *Suspension of Rights and Obligations under Multilateral Conventions Between Opposing Belligerents on Account of War*, 46 AM. J. INT'L L. 532 (1952).

²⁵⁹ Article 8 of the Peace Treaty with Bulgaria, Article 10 (Hungary), Article 10 (Rumania), and Article 12 (Finland).

of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy *it desires* to keep in force or revive. *Any provisions not in conformity with the present Treaty shall, however, be deleted from the above mentioned treaties.*

2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

3. *All such treaties not so notified shall be regarded as abrogated.*

Article 7 of the Treaty of Peace with Japan of 1951 follows the same idea expressed in Article 44, differing, however, in wording:

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify Japan which of its prewar bilateral treaties or conventions with Japan *it wishes to continue in force* or revive, and any treaties or conventions so notified shall continue in force or be revived subject only to such amendments as may be necessary to ensure *conformity with the present Treaty*. The treaties and conventions so notified shall be considered as having been continued in force or revived three months after the date of notification and shall be registered with the Secretariat of the United Nations. *All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.*

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

From the wording of these articles it seems apparent that the drafters had in mind the absolute abrogation doctrine with regard to prewar bilateral treaties with former enemy countries. It seems less clear, however, what the legal basis of abrogation is in this case. Is it war? Or is it the peace treaty itself? The wording and especially those parts italicized speak strongly for the latter. Only those bilateral treaties with the former enemy will *continue* in force or revive, which the victorious power *wishes*, and of which it notifies its defeated opponent. All other treaties which *it* does not wish to continue, and with respect to which it makes no notification, shall be abrogated. Applying in this way the absolute abrogation doctrine the drafters of the Peace Treaties of 1947 and 1951 have reserved completely free hands to their respective governments to denounce all their prewar treaty obligations. They are entirely free to keep in force or maintain only those bilateral treaties which are favorable to them, and those less favorable and containing onerous obligations, they have full right not to notify.²⁶⁰

²⁶⁰ On February 6, 1948, the Government of the United States notified the Italian Government, in accordance with the provisions of Article 44 of the Peace Treaty, of the

This procedure has already been singled out by Judge Cardozo, who dealing with the German and Austrian Peace Treaties of the First World War, noted in *Techt v. Hughes*²⁶¹ that these treaties "give the victorious powers the *privilege of choosing* the treaties which are to be kept in force or abrogated". This applies equally to the above cited articles of the Peace Treaties of 1947 and 1951.

There is some further evidence for the view that *it is not war but the treaty of peace which is the real basis of the abrogation*. Article 289 of the Treaty of Versailles confers the right to abrogate bilateral treaties on some Allied and Associated Powers²⁶² *even if they had not been at war* with Germany but merely had broken off diplomatic relations.²⁶³ Although this provision has been left out of the peace treaties of World War II dealing with the validation of the pre-war treaties generally, it has been inserted into other Articles of these treaties dealing with economic relations.²⁶⁴

following pre-war bilateral treaties which it desired to keep in force or revive, namely, treaties concerning arbitration (1928), air navigation (1931), advancement of peace (1914), consular matters (1878), debt-funding (1925), extradition (1868), the traffic in narcotic drugs (1928), the reciprocal recognition of certificates of inspection of vessels (1931), passport visa fees (1929), postal communications (1877 and 1929), relief from double income tax on shipping profits (1926), and reciprocal protection of trade marks (1882). The Bulgarian Government was notified as to eleven, the Hungarian Government twelve, and Rumanian Government thirteen prewar bilateral conventions of similar kind. See for details 5 UNITED STATES TREATY DEVELOPMENTS, APPENDIX III (A) (1950). On April 22, 1953, the Department of State notified the Japanese Government, in accordance with the provisions of Article 7 of the Japanese Peace Treaty, of the following treaties, which the United States Government desires to keep in force or revive: extradition (1886 and 1906), narcotic drugs (1928 and 1929), postal (1885, 1888, 1889, 1904 and 1938), property-leaseholds (1937), smuggling of intoxicating liquors (1930), and reciprocal exemption from taxation (1926). These treaties shall be considered as having been continued in force or revived three months after the official notification, *i.e.* July 22, 1953. See DEP'T OF STATE PRESS RELEASE No. 211, April 24, 1953, 28 DEP'T OF STATE BULL. 721 (1953), No. 725.

For a list of treaties from the United Kingdom Government notifying the Governments of Italy, Bulgaria, Finland, Rumania and Hungary, see 2 INT'L L.Q. 535-538 (1948). This list covers, *e.g.*, concerning Italy, the following pre-existing treaties: extradition (1873), estates of deceased seamen (1877), relief of distressed seamen (1880), parcel post (concerning Malta, 1896), coastal trade (1904), war graves (1922), money orders (1925), parcel post (1930), mutual recognition of passenger ship certificates and emigrant ship regulations (1929), legal proceedings in civil and commercial matters (1930), reciprocal validation of certificates of airworthiness (1934), diplomatic bags (1938), and trade in medicinal products (1940).

²⁶¹ 229 N.Y. 222, 128 N.E. 185, 197 (1920).

²⁶² *E.g.*, Peru, Bolivia, Ecuador, and Uruguay.

²⁶³ See the comments on the Treaty of Versailles, TREATY OF VERSAILLES AND AFTER. ANNOTATION OF THE TEXT OF THE TREATY, DEPT. OF STATE PUB. 2724, pp. 575 *et seq.* (1947).

²⁶⁴ *E.g.*, Article 84 of the Italian Peace Treaty, which is giving the benefit of certain economic articles of the Peace Treaty to the countries who had merely broken off their diplomatic relations with Italy.

It is believed that bilateral treaties between belligerents, if they do not provide expressly to the contrary, in the same manner as the multi-lateral treaties, continue in existence during the whole period of war until the re-establishment of peace. Their operation automatically continues or revives if the victorious powers do not abrogate them by the provisions of peace treaties. The continued existence of bilateral treaties during the war has considerable practical importance in connection with claims and rights of individuals arising under these treaties, as we have seen from the discussion of the judicial decisions in the preceding section.

It is therefore submitted that the terminating factor of bilateral treaties in the second World War has *not* been *the war*, but the will or intention of the victorious powers as expressed in the peace treaties. In other words, bilateral treaties between the belligerents were terminated *ex nunc*, *i.e.*, from the time of conclusion of the peace treaty, and not *ex tunc*, *i.e.*, from the time of the outbreak of the war, and it has no retroactive effect. The parties of course could have provided for retroactivity, but this again would be a manifestation of intention and not a result of war.

CONCLUSION

The fact that modern war is increasingly cruel is no justification for wholly abandoning the legal basis of international society and the respect for human rights in time of war. The view which claims that war renders all treaties, even those concerning private rights, invalid, is in the sharpest conflict with the idea of stability, necessary for any legal order. It is true that suspension of treaties for the duration of war may be necessitated by legitimate requirements of national defense, but it does not require the annihilation of the whole system of treaty obligations. War may even lead to such fundamental changes in conditions as to warrant the invoking of *rebus sic stantibus* as to a particular treaty or treaties. But war in itself has no inherent power to abrogate a treaty automatically.

The question whether a treaty remains in force or not and whether it is applicable in time of war should be decided according to the intention of the parties at the time of the conclusion of the treaty, as expressed in the treaty itself, or, if not expressed, implied therefrom by a liberal construction. The intention at the time of conclusion and not the present intention should be controlling. The treaty remains in force until terminated in accordance with its own terms, or, if the provisions for that purpose are lacking, in accordance with the prin-

ciples of international law. International law allows no unilateral and deliberate denunciations without legal grounds.

Treaties create a legal order between States and the principal requisite for the existence of this order is stability. Wishing to protect the interests of their nationals, States have generally left treaties of private law character in force also in time of war. Where, however, peace treaties establish a new order, prewar treaties will be adapted and brought into conformity with the new order. This has been expressly provided for in all peace treaties.

New principles have become manifest in the Peace Treaties of World War II in the treatment of prewar multilateral treaties, which have been considered as still in force and therefore no specific stipulation concerning the validity of multilateral treaties has been inserted into these Peace Treaties. Bilateral prewar treaties on the other hand have been treated as abrogated in the absence of a specific notification—just as in the Peace Treaties of World War I. The legal basis of the abrogation of these treaties seems to be not war but the intention of the victorious parties expressed in the peace treaties. Whatever may be the weight of the political reasons which have prompted this policy, it is believed that such an *en bloc* unilateral revision by the victorious powers contains the germs for a later unilateral counter-revision on the opposite side, as has happened in the case of the Treaty of Versailles in the recent history and which ultimately led right into World War II.

The decisions of the United States courts are in accord with the progressive view upholding the validity of treaties in time of war, and only treaties incompatible with national policy are treated as suspended or abrogated. It seems safe to conclude, therefore, that the general American rule is the same liberal rule as enunciated by Justice Washington over one hundred and thirty years ago—that war does not automatically terminate treaties, especially those governing private rights; it means, in other words, a complete rejection of the “modern” doctrine of the “total” abrogative effect of modern wars on treaty relations.

Since the United States courts generally do not assume an active role and consult the political department of the government as to its views on compatibility with national policy, it is therefore extremely important for counsel to obtain information concerning this view and bring it before the court.

There seems to be a lack of uniform principles of international law governing the validity of treaties in time of war. This is partly

due to a certain unwillingness of States to insert express provisions in the treaties concerning this point, and there will probably be no general progress in this problem until a greater sense of security is reached between States than there exists today. States should then be willing to present their differences of opinion in matters of construction, revision, suspension, or termination of their treaties to an outside authority, as *e.g.*, the International Court of Justice, for an objective judgment. In any case there should be no retrogression to the old abrogation doctrine.