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INTERNATIONAL LAW-EFFECT OF WAR ON BILATERAL TREATIES-COMPARATIVE STUDY

J. G. Castel
University of Michigan Law School

INTERNATIONAL LAW—EFFECT OF WAR ON BILATERAL TREATIES—COMPARATIVE STUDY—The effect of war upon existing bilateral treaties of belligerents is one of the unsettled problems of international law. The problem is to determine whether a bilateral treaty (between nations at peace) which does not provide for the eventuality of war, will be suspended or annulled by a subsequent war between them. The idea that war is a complete destruction of the international intercourse which was represented by the treaty logically would lead to the conclusion that the treaty ends ipso facto when war comes. But this is too hasty a conclusion; international practice proves that some treaties are only suspended, some abrogated, while others remain in force.[1]

[1] For general information on the subject see: ANZILOTTI, COURS DE DROIT INTERNATIONAL (Gidel's translation) vol. I, pp. 447-456 (Paris, 1929); M. BUONVINO, GLI EFFETTI DELLA GUERRI SULLA VALIDITA DEI TRATTATI (Aquila, 1912); A. VON BURGSDORFF, DIES KRIEGSERKLARUNG UND IHRE WIRKUNGEN UNTER BESONDERER BERUCKSICHTIGUNG DER OFFENTLICH-RECHTLICHEN UND PRIVATRECHTLICHEN VERTRAGE (Düsseldorf, 1914); Cavagliegi, "Regles Générales du Droit de la Paix," Hague Academy, RECUEIL DE COURS, vol. 26, pp. 531-534 (1929); FIORE, INTERNATIONAL LAW (Borchard's translation, 1918) ¶845; 5 HACKWORTH, DIGEST OF INTERNATIONAL

The authors are not in agreement. The older writers like Vattel,[2] Martens[3] or Mably,[4] said that treaties ended when war broke out,[5] but modern authorities have rejected these sweeping statements. Some have held that in case nothing is said about war in the treaty itself,[6] the effect of hostilities upon the treaty provisions depends upon the interpretation of the intention of the parties.[7] Others, such as Mr. Politis, declared that international law neither maintains nor annuls treaties regardless of the effect produced, but only establishes standards so that the provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected.[8]

Following the doctrine enunciated by Vattel and others,[9] the practice of the eighteenth century[10] was to consider that all kinds of treaties were annulled by war. At the beginning of the nineteenth century the United States Supreme Court handed down the famous case of *Society for the Propagation of the Gospel v. New Haven.*[11]

LAW §513 (1943); HALL, INTERNATIONAL LAW, 8th ed., c. X, p. 453 (1927); Sir Cecil Hurst, "The Effect of War on Treaties," 2 BRITISH YEARBOOK OF INTERNATIONAL LAW 37-47 (1921-22); R. JACOMET, LA GUERRE ET LES TRAITES (thése, Poitiers, 1909); J. R. Keely, "The Effect of the End of War on Pre-War Treaties Between the Belligerents," TRANSACTIONS OF THE GROTIUS SOCIETY, 1927, pp. 7-17; McNAIR, THE LAW OF TREATIES 530-552 (1938); 5 MOORE, DIGEST OF INTERNATIONAL LAW 383 (1906); 2 OPPENHEIM, INTERNATIONAL LAW, 6th ed., §99, pp. 253-255 (1944); Orfield, "The Effect of War on Treaties," 11 NEB. LAW BUL. 276 (1933); PHILLIMORE, INTERNATIONAL LAW, 3d ed., vol. 2, p. 30 and vol. 3, p. 792 (1882); N. Politis, "Effets de la guerre sur obligations internationales et les contrats privés," ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 1910, p. 251 et seq., 1911, p. 200 et seq., 1912, p. 611 et seq.; ROUSSEAU, TRAITE DE DROIT INTERNATIONAL PUBLIC, t. I, p. 554 et seq. (1944); SCELLE, COURS DE DROIT INTERNATIONAL PUBLIC, pp. 659-660 (1948).

[2] VATTEL, LE DROIT DES GENS, 1758, Book II, c. XII, ¶153 and ¶192.

[3] G. F. DE MARTENS, PRECIS DU DROIT DES GENS MODERNE DE L'EUROPE, 4th ed., ¶58 (1820).

[4] MABLY, DROIT PUBLIC DE L'EUROPE, vol. 1, p. 206 (1748).

[5] See also a Spanish decree of April 24, 1898, declaring in its First Article that all treaties between the United States and Spain were abrogated by war. REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC, 1898, p. 762, in note; GACETA DE MADRID, April 24, 1898.

[6] Rapisardi-Mirabelli, "Theorie générale des Unions Internationales," Hague Academy, RECUEIL DE COURS, vol. 7, p. 384 (1925).

[7] Hurst, note 1 supra; 2 HYDE, INTERNATIONAL LAW, 2d ed., p. 1546 et seq., ¶¶547 to 551 (1945); McNair, "La temination et la dissolution des traités," Hague Academy, RECUEIL DE COURS, vol. 22, 511-512 (1928).

[8] N. Politis, "Effets de la guerre sur les obligations internationales et les contrats privés," (Report to the Institute of International Law), ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 1910, p. 521 et seq., 1911, p. 200 et seq., 1912, p. 611 et seq.; see also for an early writer, BLUNTSCHLI, DAS MODERN VOLKERRECHT DER CIVILISIRTEN STATEN, 3d ed., ¶538, p. 302 and ¶718, p. 402 (1878).

[9] See notes 2, 3, 4 supra.

[10] McNair, "La Termination et la Dissolution des Traités," Hague Academy, RECUEIL DE COURS, vol. 22, p. 529 (1928) and the LAW OF TREATIES 533 (1938). See Featherstonbaugh v. Boffi, (1854) Sirey (hereinafter cited as S.) 1854.1.811.

[11] 8 Wheat. (21 U.S.) 464 (1823).

In the course of its opinion the Court said: "We think . . . that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."[12] This was the first expression of the idea that the duties of a treaty which are not necessarily suspended by war subsist in their full force. The decision in the above case exercised a great influence at the time, and some decisions along the same line were handed down in France[13] and England.[14] It also greatly affected a theory which gained wide influence almost a century later when Mr. Politis[15] expounded with great force the American idea in a report presented in 1911 to the International Law Institute. In the international field, the Permanent Court of Arbitration applied the same idea in a very important decision.[16]

Nevertheless, most of the courts in Europe during World War I and World War II held that war annulled treaties of whatever kind except those dealing with conditions during hostilities. War was considered as a revolutionary crisis which put in question the entire positive law. In other words, these courts viewed war as an extreme method of revision of the legal, social, and political world, and therefore it is easy to understand that on a logical basis treaties regulating these matters could not remain in force.[17] On the other hand, the American court decisions always maintained the necessity of distinguishing between treaties incompatible with the state of war, which were abrogated, and treaties which are not incompatible and therefore were kept in full force.[18]

[12] Id. at 494.

[13] Aix, 8 Dec. 1858 (Isnard Blanc v. Pezzales) S. 1859.2.606.

[14] BISHOP, INTERNATIONAL LAW, c. VII, p. 64 (1951); Sutton v. Sutton, 1 Russ. & My. 663, 39 Eng. Rep. 255 (1830).

[15] See note 8 supra.

[16] The North Atlantic Coast Fisheries case, September 7, 1910, J. B. Scott, The Hague Court Reports, p. 141 (1916); see also J. Basdevant, "L'affaire des pêcheries des côtes septentrionales de l'Atlantique," 19, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 421 especially at 423-425 (1912).

[17] Lyon, 13 Oct. 1921, JOURNAL DU DROIT INTERNATIONAL, 391 (1923); Cass. (It.) 26 Jan., 1929, RIVISTA DI DIRITTO INTERNAZIONALE, vol. 21, pp. 418-420 (1929); Germany, May 23, 1925, ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN, 1926, vol. 111, p. 40, and ZEITSCHRIFT FUR INTERNATIONALES RECHT 408 (1926).

[18] Carneal v. Banks, 10 Wheat. (23 U.S.) 181 (1825); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920), cert. den. 254 U.S. 643. The Sophie Rickmers, (D.C. N.Y. 1930) 45 F. (2d) 413, commented upon 29 MICH. L. REV. 947 (1931); State ex rel. Miner v. Reardon, 120 Kan. 614, 245 P. 158 (1926); Goos v. Brocks, 117 Neb. 750, 223

The confusion among the courts in France was great. Influenced by the American line of decisions, some French courts decided that whether the stipulations of a treaty or the treaty as a whole is annulled by the war depended upon their intrinsic character.[19] The bulk of the decisions, however, came after the declaration of war by Italy on France in 1940. They dealt with the question of whether the "Convention on Establishment of Italians in France" (a convention giving gratuitously and without a requirement of reciprocity to Italian citizens resident in France the same treatment as French citizens were entitled to in matters concerning the enjoyment of private rights) was abrogated by war.[20]

Some courts held that the convention was not terminated by war and other courts held that it was. This difference of opinion had to be settled because of the great importance of the question involved. Unfortunately, on appeal to the Court of Cassation, the Supreme Court of France, the accidents of procedure brought it before two of the several chambers.[21] Here the confusion increased. The "Chambre Sociale"[22] held that conventions and treaties relating to purely private law, which require for their enforcement no contact between the two enemy powers and which did not involve the conduct of hostilities, were maintained in full force. The basis for this point of view was the fact that the rights of alien enemies, as provided in the Convention, could not affect the fortunes of war; and even if they did, it would depend upon the government to see that the beneficiaries of the Convention committed no hostile act. This decision was, therefore, in strict accord with the American doctrine.[23] But on the other hand, the

N.W. 13 (1929); Hempel v. Weedin, (D.C. Wash. 1928) 23 F. (2d) 949; Clark v. Allen, 331 U.S. 503 (1947); In re Meyer's Estate, (Cal. 1951) 238 P. (2d) 597, 46 AM. J. INT. L. 573 (1952).

19 Aix, 8 Dec. 1858, (Isnard Blanc v. Pezzales) S. 1859.2.606. Note that in Germany, if a treaty has been abrogated by war, its provisions still remain in force in the body of the domestic law; 26 Oct. 1914, ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (neue Folge), vol. 85, p. 374 (1915).

20 Convention of June 3, 1930, between France and Italy, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE, 20 Jan. 1935.

21 Inferior court decisions—for the abrogation of the treaty; Justice de Paix, Marseille, 5th canton, 26 Oct. 1943, Gazette du Palais, supplement provisoire, Nov. 1943, p. 170; Trib. civ. Toulouse, référés, 18 Nov. 1943, Gazette du Palais, 14 Dec. 1943. For the maintenance in force of the treaty: Trib. Civ. Caen, 9 April 1941, Gazette du Palais, 29 May 1941; Trib. Civ. Marseille, 26 Oct. 1943, Gazette du Palais, Supplement provisoire, Nov. 1943, p. 169. The Court of Cassation, the Supreme Court of France, is divided for practical purposes into chambers which specialize in the different branches of the law.

22 Bussi v. Menetti, 5 Nov. 1943, Dalloz Critique, 1944, p. 84 and notes; Basdevant, Dalloz Analytique, 1944, p. 109, S. 1945.1.98.

23 In re Meyer's Estate, (Cal. 1951) 238 P. (2d) 597, 46 AM. J. INT. L. 573 (1952).

"Chambre Civile" dealing with the same question and the same convention, reached the opposite result, holding that war annuls treaties and conventions, even those concerning private rights. This decision was based upon the ground that these treaties and conventions were entered into in consideration of peacetime intercourse. The declaration of war by Italy was held to be incompatible with the maintenance of obligations contracted by the French Government in view of a legal status favorable to peacetime relations only.[24]

These opposing views expressed by the two most important chambers of the Court of Cassation had to be clarified in order to determine the matter definitely. In 1949 the Court, all chambers sitting together, decided again upon the question of the effect of war upon treaties in the famous decision of *Lovera v. Rinaldi*,[25] which was also a case involving the Franco-Italian Convention. The decision agreed with the judgment of the "Chambre Civile," and the Court again held that war abrogated treaties and conventions relating to any subject matter, because these conventions and treaties were concluded only in the light of peacetime relations. Therefore, it is now clear that in France war abrogates any kind of treaty, except presumably those which are concluded especially in anticipation of possible war or expressly providing that the conditions remain in existence during war. One could say that *Lovera v. Rinaldi*[26] is in accord with those American decisions which hold that treaties of amity fall, as the Convention was designed to promote relations of harmony between the two nations. On the other hand, it was a convention which had the same character as the treaties which provide for the giving to citizens and subjects of one of the high contracting parties the powers to remain and to hold and transmit land in the territory of the other,[27] and furthermore the decision spoke of conventions and treaties "du droit privé . . .," i.e., relating to private rights.

[24] Cass. Civ., 10 Feb. 1948, Dalloz 1948.1.193; S. 1948.1.49, note by J. P. Niboyet.

[25] Cass., 22 June 1949, S. 1949.1.161, note by J. P. Niboyet. When the Court of Cassation sits with all its Chambers together, this indicates that a very important decision will be rendered which will fix definitively the law on a particular point. The case may be stated briefly as follows: After the war an Italian tenant sought through the appropriate French court a renewal of a lease of land, claiming the benefit of certain French legislation concerning renewal of leases. This legislation was not designed to apply to resident aliens, but the Italian tenant contended that he was entitled to its application by virtue of the Franco-Italian convention of 1930; this was denied by the Court. For a report of the case, see 43 AM. J. INT. L. 819 (1949).

[26] S. 1949.1.161.

[27] Clark v. Allen, 331 U.S. 503 (1947); In re Meyer's Estate, (Cal. 1951) 238 P. (2d) 597; State ex rel. Miner v. Reardon, 120 Kan. 614, 245 P. 158 (1926); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920) cert. den. 254 U.S. 643.

The reasoning of the Court was that treaties relating to private rights as well as public matters are limited to times of peace, because they cannot be otherwise interpreted. It is impossible to imagine that two countries which are fighting each other can be considered as willing to assure their respective nationals the advantages of peacetime relations. Also in view of the fact that modern wars are "total wars," it would be impossible for belligerents to observe their obligations.[28] Therefore, here is a decision in complete opposition to the American position.

If the question comes before the International Court of Justice, it is likely that it would be decided in the manner followed by the French courts. In the first place, there is no international law rule on the subject which can be invoked against such a solution. Moreover, since the entry into force of the peace treaty with Italy, this latter treaty became the only source of law available to resolve the issue. Article 44 of the peace treaty seems to approve the principle that war puts an end to bilateral treaties and that only those treaties are maintained or put back into force which have been the subject of notification by the French Government to the Italian Government; no such notification had been given here.[29] But even over this point American courts have evidenced disagreement. In *In re Meyer's Estate*[30] the Cali-

[28] Treaties, however, may stipulate whether they are to remain in force or be suspended or terminated by the outbreak of war between the parties. See BISHOP, INTERNATIONAL LAW, c. VII, p. 70 (1951); also art. 35 of draft convention on treaties, 29 AM. J. INT. L., Supp. 1183 (1935). See also in this connection M. Brandon and A. Leriche, "Suspension of Rights and Obligations under Multilateral Conventions between Opposing Belligerents on Account of War," 46 AM. J. INT. L. 532 (1952).

[29] "1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty which of its prewar 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." February 10, 1947, 49 United Nations Treaty Series No. 747.

However, a comparison of that art. 44 with art. 289 of the Treaty of Versailles may lead to a different construction. The Treaty with Italy says that "all such treaties not so notified shall be *regarded* as abrogated," whereas in the Treaty of Versailles it was said, "All the other treaties [not so notified] shall *remain* abrogated." It can therefore be argued that because of the particular wording of art. 44, a treaty is not automatically abrogated by war. Furthermore, in art. 44 it is said that each Allied or Associated power will notify which treaty it desires to *keep in force* or revive. The use of "keep in force" could also be interpreted in the sense of non-abrogation of treaties by war. On the other hand, the Treaty of Versailles only uses the words "wishes to revive," the words "to keep in force" being left out. This would leave no doubt that under the Treaty of Versailles, treaties were automatically abrogated by war and that only those treaties and conventions which became the subject of a notification were to be revived.

[30] (Cal. 1951) 238 P. (2d) 597.

fornia courts in interpreting an almost similar provision of the Treaty of Versailles[31] went so far as to say that the provision was never intended to apply to treaties which were not terminated by war, thus being in complete opposition to the interpretation of that provision by the State Department.[32]

It is incontestable that the French decision falls within the trend of authority and most nearly accords with international law and the facts of modern warfare. At a time when wars have touched upon every facet of society, questioning the whole order of things—especially when the belligerents have two opposite conceptions of life one of which is incompatible with the other—it is inconceivable that one country would wish to confer the advantages of peace upon the other in time of war, even though those advantages concerned private rights. When peace returns, it will be time to set up a new set of treaty agreements.

Also, as a practical factor, it seems desirable to have these conventions or treaties terminate in order to adapt them to new situations which have resulted from the war. The American line of decisions is an essentially generous one and has appealed to many foreign courts and writers. However, it does not seem to take into consideration the modern nature of war and it also seems to forget that modern wars are as much supported by the civilian population as by the armed forces. It thus becomes necessary to protect ordinary citizens in the conduct of their affairs against alien enemies. Mr. Politis[33] had based his interpretation of the American decisions on the assumption of a supposed progress of international customs and laws of warfare, presuming war to be only a struggle between organized forces of different

[31] Article 289 of part X of the Treaty of Versailles 1919 provides that "each of the Allied or Associated Powers, being guided by the general principles or special provisions of the present Treaty shall notify to Germany the bilateral treaties or conventions which such Allied or Associated Power wishes to revive with Germany. . . . A period of six months from the coming into force of the present Treaty is allowed to the Allied and Associated Powers within which to make the notification. 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 the others are and *shall remain* abrogated." United States Treaty Series No. 658, p. 64 (emphasis supplied).

[32] Although the United States did not ratify the Treaty of Versailles, the Treaty of Berlin of August 25, 1921 between the United States and Germany provided that the United States should have "all the rights and advantages stipulated" for its benefit in the Treaty of Versailles and particularly in certain parts thereof including Part X. United States Treaty Series, No. 658, 42 Stat. L., 1939.

The United States did not make any notification with respect to the treaty concerned in the In re Meyer's decision. See 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 386-388, as to the interpretation of art. 289 of the Treaty of Versailles by the State Department.

[33] See note 8 supra.

states temporarily disturbing the international order without questioning it. The last two world wars have proved that assumption to be erroneous.

Perhaps a practical intermediate solution should be found, as for example the necessity of a public announcement that the treaty or convention is abrogated. This would put an end to any confusion on the matter and would have the advantage of preserving the solutions followed in different countries. Also a declaration to the Secretary-General of the United Nations could effect such a denunciation. If this could be done, a simple manifestation of the intention of the contracting parties would be deemed to put an end to treaty obligations.

J. G. Castel