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## REVISION OF THE ITALIAN PEACE TREATY

NORMAN KOGAN\*

Recent efforts of the Italian Government to obtain revision of the Italian Peace Treaty have encountered the refusal of certain of the signatories, particularly the Soviet Union, to countenance such revision save on terms unacceptable to the Italians. As a consequence the Italian Government announced, on December 21, 1951, that certain armaments and other clauses of the peace settlement were no longer binding. This stand was repeated on February 8, 1952, as a result of the fifth Soviet veto of Italy's application for United Nations' membership.<sup>1</sup> These moves had the support of Italy's allies in the North Atlantic Treaty Organization, especially the United States. The purpose of this discussion is to examine the claims which may be advanced to support legal denunciation under such circumstances, and to advance some comments on the political aspects of American encouragement of these actions.

While treaties, particularly multilateral treaties, have some attributes of international legislation they also partake of the nature of contracts as understood in municipal law. They are generally considered to be agreements between two or more states relating to various matters of concern in conformity to law.<sup>2</sup> Like contracts, treaties, unless there are stipulations to the contrary embodied in the agreement, can be revised only with consent of all parties concerned.<sup>3</sup> The Italian Peace Treaty of 1947 is a typical peace treaty.<sup>4</sup> With one possible exception, the docu-

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1. N.Y. Times, Dec. 22, 1951, p. 1, col. 2, and Feb. 10, 1952, p. 1, col. 6 contains official announcements and texts of the Italian notes.

2. WILSON, HANDBOOK OF INTERNATIONAL LAW 199 (3d ed. 1939).

3. "Treaties . . . which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things . . . are as a rule not terminable by notice, although they can be dissolved by mutual consent of the contracting parties. All treaties of peace, and all boundary treaties belong to this class. History records many cases in which treaties of peace have not established an everlasting condition of things. . . . But this does not prove either that such treaties can lawfully be dissolved through giving notice, or that, at any rate as far as International Law is concerned, they are not intended to create an everlasting condition of things." 1 OPPENHEIM, INTERNATIONAL LAW 791-792 (6th ed., Lauterpacht, 1947).

4. The official English text is contained in U.S. TREATY SER. No. 1648 (Dep't State 1947).

ment contains no provision for termination, denunciation or revision.<sup>5</sup> On the face of it, an everlasting condition of affairs has been created. As a consequence, a legal basis for the revision of this treaty must be found in general principles of International Law.

### *Mutual Consent*

The recognized requirement for revision of a treaty is consent of all the signatories. This principle received its classic statement in 1871 when Czarist Russia, taking advantage of the Franco-Prussian War, repudiated the Black Sea restrictions of the Treaty of Paris of 1856. In the Treaty of London of 1871 the powers party to the Treaty of Paris agreed to release Russia from the restrictions but at the same time declared: "It is an essential principle of the Law of Nations that no power can free itself from the engagements of a treaty, nor modify its terms, except with the consent of the contracting parties by means of a friendly understanding."<sup>6</sup> This declaration was reaffirmed by the Council of the League of Nations in 1935 in condemning Germany's repudiation of the military articles of the Treaty of Versailles.<sup>7</sup> The requirement of mutual consent is so well established that further substantiation is hardly necessary.

### *Natural Right of Effective Self-Defense*

It has sometimes been claimed that the right of effective self-defense is so basic as to overcome treaty provisions which drastically reduce the effective defensive capabilities of a state. This position is derived from the broader legal conception that "a state cannot be expected to sacrifice its very existence to uphold its treaty obligations."<sup>8</sup> Presumably being relatively disarmed in an armed world creates the danger of such a sacrifice. The basis of such a derivation from the general principle is weak. Legally it runs into the qualification that "a treaty . . . becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state, provided that its injurious effects are not intended by the two contracting parties at the time of its conclusion."<sup>9</sup> Since the injurious effects of unilateral disarmament are precisely intended by the victors and accepted by the vanquished in a treaty of peace, the argument fails.

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5. See p. 339, *infra* for a discussion of this possibility.

6. 61 BRITISH AND FOREIGN STATE PAPERS 7 (1877).

7. JOURNAL OF THE LEAGUE OF NATIONS 551 (1935).

8. FENWICK, INTERNATIONAL LAW 454 (3d ed. 1948).

9. HALL, A TREATISE ON INTERNATIONAL LAW 415 (8th ed., Higgins, 1924).

The right of effective self-defense is essentially non-judicial. It establishes a political standard, the right of a state to be a power among the powers. Armaments restrictions are an additional factor, among others, which limit Italy's relative power position in the world.<sup>10</sup> But few nations today, including most of the victors of World War II, are by themselves capable of erecting an effective defense against one of the super-powers. Italy is no worse off in this respect than the other states.

### *Soviet Failure to Keep Its Pledge*

One Italian justification for denunciation is the allegation that the Soviet Union has failed to honor its obligation to support Italy's application for membership in the United Nations. This pledge appears in the preamble to the Peace Treaty:

. . . the Allied and Associated Powers and Italy are desirous of concluding a treaty of peace . . . thereby enabling the Allied and Associated Powers to support Italy's application to become a member of the United Nations. . . .<sup>11</sup>

In interpreting the sense of these words it is customary to look at their grammatical meaning. The International Court of Justice has said:

. . . the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.<sup>12</sup>

Applying this standard it might seem questionable that the preamble cited above creates a binding obligation. The phrase "thereby enabling the Allied and Associated Powers to support Italy's application" appears merely to create a situation in which certain action may take place in the future. This interpretation receives further support upon an examination of the Italian text of the Treaty. The key words of the Italian

10. On the factors of power see SPROUT, *FOUNDATIONS OF NATIONAL POWER* (2d ed. 1951).

11. U.S. TREATY SER., *op. cit. supra* note 4, at 126.

12. Competence of Assembly Regarding Admission to the United Nations, Advisory Opinion, I.C.J., 4, 8 (March 3, 1950); 44 AM. J. INT'L L. 582, 584, (1950).

version read as follows—“*permettendo così alle Potenze Alleate ed Associate di appoggiare le domande che l'Italia presenterà. . .*”<sup>13</sup> Literally—“thereby permitting the Allied and Associated Powers to support the application Italy will make. . .” “Permettendo” is even less obligatory than the English word “enabling.”<sup>14</sup> A reasonable construction of the text might lead to the conclusion that completion of the Treaty becomes a prerequisite to further action which the victor powers may take but are not obliged to take in their capacity as members of the United Nations.

The problem which arises, however, is whether this interpretation actually represents the intention of the States which wrote the Treaty. The Italians maintain, of course, that the preamble created a binding obligation to support their application. They did not write the document; the victors merely handed it to them for their signature. Britain, France and the United States, which did participate in the writing of the document have, however, backed the Italian position. In their view, presumably, a binding obligation was created. Of course it may well be argued that they are supporting Italy for political reasons rather than for the cogency of the Italian interpretation.

The remaining major party which wrote the Treaty is the Soviet Union. Its interpretation is given in the following extract from a note addressed to the Italian Government on February 24, 1952:

In its Note the Italian Government represents the matter as if the Soviet Union were hindering Italy's admission to the United Nations, thus violating its obligations under the Peace Treaty with Italy. Such an assertion is contrary to reality and is a distortion of the generally known facts.

As is known, the Soviet Union has repeatedly proposed that Italy be admitted to the United Nations, together with other States having a lawful right to this, including States which during the war were in the same position as Italy. With regard to these States the Soviet Union, like other countries which signed the Peace Treaties in Paris on February 10, 1947,

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13. U.S. TREATY SER., *op. cit. supra* note 4, at 374.

14. An instructive precedent is the debate over the armaments clauses of the Treaty of Versailles. The preamble to the section on German disarmament reads: “In order to render possible the initiation of a general limitation of the armaments of all nations, Germany undertakes strictly to observe the military, naval and air clauses which follow.” *Treaty of Peace with Germany*, SEN. DOC. No. 51, p. 191, 66th Cong., 1st Sess. (1919). This became the basis of subsequent German claims that the Allies were under an obligation to disarm. The Allies insisted, however, on the non-binding nature of the provision upon themselves. For a description of the debate see *The Treaty of Versailles and After*, U.S. CONFERENCE SER. No. 92, p. 309 (Dep't State 1947).

also has the obligation to support their requests for admission to the United Nations.<sup>15</sup>

It appears that the Soviet Union recognizes that the preamble creates an obligation. The agreement of the major drafters of the Treaty on this point, as a result, can be said to override the interpretation of the text given above. The Soviet Union has not recognized, however, that it violated its obligations.<sup>16</sup> What its note to Italy failed to mention was that when the applications were voted upon individually in the Security Council the Soviet Union vetoed Italy's application. In essence Russia was attempting to tie the admission of Italy to that of Bulgaria, Roumania and Hungary, other ex-enemy states which are now Soviet satellites. That the Soviet Union on several occasions has expressed no objections to Italy's admission,<sup>17</sup> cannot gainsay the fact that Russia has voted against admission.

A question arises concerning the action of the Western Allies towards the application for admission of Roumania, Bulgaria and Hungary. The peace treaties with these nations contain the exact pledge in their preambles that appears in the Italian Treaty.<sup>18</sup> Yet, in the past, Britain, France and the United States have voted against their admission. Have the Western Allies violated their obligations?

The United States, France and Britain have voted against these states on the grounds they did not possess the qualifications for admission prescribed in the United Nations Charter.<sup>19</sup> The International Court of Justice has already stated in an advisory opinion that Members of the

15. The English text is published in *SOVIET NEWS*, No. 2633, March 1, 1952, p. 4 (published by the Soviet Embassy, London).

16. *Ibid.* "At the Sixth Session of the United Nations General Assembly which closed in February this year, the Soviet Union again submitted a proposal that Italy and thirteen other States be admitted to United Nations membership. On January 25 the Political Committee of the General Assembly adopted this Soviet proposal by a majority vote, with the delegation of the United States voting against it and the delegations of Great Britain and France abstaining. Only as a result of crude pressure exerted by the United States on the delegations of other countries was the Soviet proposal, which had been approved by the Political Committee, not accepted at the plenary meeting of the General Assembly. When the proposal of the U.S.S.R. was taken up in the Security Council on February 6, the United States delegation again voted against this proposal, while the delegations of Great Britain and France abstained, and this prevented the admission of Italy and thirteen other States to the United Nations."

17. *Journal of the Security Council*, No. 81 at 2127 (Aug. 21, 1947).

18. U.S. TREATY SER. NOS. 1649, 1650, 1651 (Dept. State 1947).

19. "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present charter and, in the judgment of the organization, are able and willing to carry out these obligations." U.N. CHARTER Art. 4, ¶1. The grounds for rejection have been that these satellites violate human rights and fundamental freedoms. *Journal of the Security Council*, No. 81 at 2119, 2131, 2132 (Aug. 21, 1947).

United Nations in acting on applications for membership, must take into account only those criteria set forth in Article 4 of the Charter and nothing else.<sup>20</sup> It would appear that in order to live up to their obligations under the Charter, the Western Allies must violate their obligations under the Peace Treaties. This is not so, for the former overrides the latter.<sup>21</sup>

The Soviet Union has preferred not to take advantage of the cover offered by Article 4 of the Charter to justify its vote against Italy. The criteria are sufficiently subjective to leave considerable latitude. For example, Russia could claim Italy is not a "peace-loving nation" for it is a member of what the Soviet Union has already called "that aggressive, war-mongering North Atlantic Treaty Organization." Since the Soviets have admitted Italy's qualifications, however, this escape is not available to them. It appears that the Soviet Union has violated its obligations under the Peace Treaty, which remains in force.

While recognizing violation of the obligation, it still remains questionable that the Italian Government could denounce the Peace Treaty as it applied to Russia and announce an intention to rearm beyond its limits. Can a treaty be denounced on a claim that another party has failed to live up to it? After a careful examination of the problem two students of the issue reached the following conclusions:

Furthermore, it is submitted that customary international law, as revealed by the actual practice of states and as distinguished from the theoretical statements of publicists and the arguments of diplomats, does not recognize such a right [unilateral denunciation on the ground of violation by other parties]. Attempts actually to exercise the right appear to have been remarkably rare, and when the attempt has been made the existence of the right has been vigorously denied by the other states concerned.<sup>22</sup>

This conclusion is supported in almost identical language by the group of scholars who produced the Harvard Research in International Law.<sup>23</sup> This group went on to recommend that the complaining party, if it had provisionally suspended performance of its treaty obligations,

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20. Conditions of Admission of a State to Membership in the United Nations, I.C.J. (May 28, 1948).

21. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER Art. 103.

22. Garner and Jobst, *The Unilateral Denunciation of Treaties by One Party Because of Alleged Non-Performance by Another Party or Parties*, 29 AM. J. INT'L L. 569, 581 (1935).

23. "In the light of what little practice there is, as distinguished from the theoretical

submit the question to a competent international tribunal or authority. In case of a favorable decision the provisional suspension may become definitive; if the decision is to the contrary the party suspending performance may itself be held liable for failure to perform its own obligations.<sup>24</sup>

Given this conclusion, the unilateral Italian action appears highly irregular. It is also doubtful whether the Italian Government could ignore the disarmament clauses of the Peace Treaty on these grounds. Italy's duty to disarm to specified levels is not an obligation to the Soviet Union alone but to all the Allied and Associated Powers. Although a number of the latter have voluntarily agreed to revision of the armaments clauses,<sup>25</sup> others of them have not done so. Such signatories of the Treaty as Poland, Czechoslovakia, the Ukraine, and Byelorussia can be presumed to support Soviet attitudes toward revision. There is no evidence that Yugoslavia or Ethiopia agreed to the Italian requests. As Italy has not charged them with violation of its rights it is assumed the obligations of Italy to them remain standing. The Harvard Draft Convention on the Law of Treaties provides that:

Two or more of the States parties to a treaty to which other States are parties may make a later treaty which will supersede the earlier treaty in their relations *inter se*, only if this is not forbidden by the provisions of the earlier treaty and if the later treaty is not so inconsistent with the general purpose of the earlier treaty as to frustrate that purpose.<sup>26</sup>

The agreement of Britain, France and the United States to permit Italy to rearm is completely inconsistent with the disarmament clauses of the

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statements of writers and the arguments of diplomats, it is submitted that a State does not have the right to terminate a treaty as between itself and a party to the treaty which it alone considers to have failed to fulfill its obligations under the treaty. It would seem, certainly, that at most . . . a State may provisionally suspend performance of its obligations under a treaty *vis-a-vis* a party which fails to fulfill its obligations thereunder, pending the alteration or termination of the treaty by mutual agreement of the parties thereto. This is very different from a right of unilateral termination." Harvard Law School, *Research in International Law*, 29 AM. J. INT'L L. 1089 (Supp. 1935).

24. *Id.* at 1091.

25. DEPT. STATE BULL. 570 (1951) (Three Power Communique of September 26, 1951).

26. Harvard Law School, *op. cit. supra* note 23, at 661. Hyde writes: "It is doubtless a sound proposition of law that in the case of a multi-partite treaty, supersession by a later agreement calls for acquiescence therein by all States that were parties to the original arrangement." 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1522-1523 (2d ed. 1945); also see the opinions of Judges Van Eysinga and Schücking in the Oscar Chinn Case, P.C.I.J., Ser. A/B No. 63 (1934).



Peace Treaty. Italian action, lacking the necessary acquiescence of all the signatories, seems hardly justifiable under the circumstances.

Writers who accept a right of unilateral denunciation are divided as to the effect of a violation of one part of a treaty upon the validity of the remaining parts, especially when an instrument, such as the Italian Peace Treaty, embraces a wide variety of subjects. Fenwick states that a majority of publicists arguing *a priori* insist that contravention of any part of a treaty gives grounds for denunciation since it is impossible to distinguish between essential and non-essential clauses.<sup>27</sup> The more representative standard, however, is that cited by Hall—it is only the failure of one party to “observe a material stipulation, a stipulation which is material to the main object, or, if there are several, to one of the main objects,” that justifies the other party in abrogating a treaty.<sup>28</sup> Even more recently Professor Kunz has written :

. . . where treaties consist of different parts, dealing with completely different subject-matters, it is now recognized by the majority of writers, by the treaties themselves, by international tribunals, and by the practice of states, that the problem of the validity or termination of treaty-created norms can arise not only with regard to the treaty as a whole, but also with regard to certain parts or articles of the treaty.<sup>29</sup>

If one accepts the former point of view, Italy could denounce the Treaty if the rights of other states were not involved.

If one accepts the latter point of view, then the Italian position becomes tenuous. The main objects of the Peace Treaty are boundaries, reparations, colonies and armaments. The statement in the preamble concerning admission to the United Nations seems wholly incidental and not material to the primary purpose of concluding a peace settlement with a defeated state. Certainly the failure to keep such a promise seems to have little legal relation to the continuing validity of the armaments and boundaries provisions.

It might be argued from the Italian position that the opportunity to become a member of the United Nations had a very close relation to the rest of the Treaty. The United Nations Charter, unlike the Covenant of the League of Nations, contains no specific reference to the

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27. FENWICK, *INTERNATIONAL LAW* 452 (3d ed. 1948).

28. HALL, *A TREATISE ON INTERNATIONAL LAW* 409 (8th ed., Higgins, 1924). This position is supported by, among others, BRIERLY, *THE LAW OF NATIONS* 200 (3 ed. 1942); 2 HYDE, *op. cit. supra* note 26, § 546; OPPENHEIM, *INTERNATIONAL LAW* 853 (6th ed., Lauterpacht, 1947); Harvard Law School, *supra* note 23, at 1134-1144.

29. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 *AM. J. INT'L L.* 180, 194-195 (1945).

possibility of future treaty revision.<sup>30</sup> Nevertheless the Italian government hoped to obtain revision through the United Nations in spite of the negative results of the League in this respect.<sup>31</sup> Some of the victors encouraged Italy in this hope.<sup>32</sup> Yet it cannot be said that the Allies ever formally and collectively obligated themselves to revise the Treaty at some future date.<sup>33</sup> Neither can it be said that Italy's signature to the Treaty is based on the assumption that a right of revision exists, inside or outside the United Nations. Italy had no choice but to sign. The alternative was continued occupation.

An apparent exception to the statement that the Allies never formally obligated themselves to revision might be found in Article 46 of the Treaty:

Each of the military, naval, and air clauses of the present Treaty shall remain in force until modified in whole or in part by agreement between the Allied and Associated Powers and Italy or, after Italy becomes a member of the United Nations, by agreement between the Security Council and Italy.<sup>34</sup>

Careful examination of the wording removes the exception, however. There is nothing here granting a right of revision. The first part merely restates a general principle of International Law that treaties remain binding until revised by mutual consent of all the parties. The second part demonstrates something of a change in that it permits revision by agreement between the Security Council and Italy after the latter has become a member of the United Nations. All signatories might not be on the Security Council when revision is considered. Some of the Security Council members might not be signatories to the Treaty. The principal Allied and Associated Powers, however, have permanent membership in the Security Council so their agreement would be necessary in either case, given the voting procedures prevailing in that organ of the United Nations.<sup>35</sup>

Nothing in Article 46 obligates the Allied and Associated Powers to reach any agreement with Italy on revision of the armaments clauses. At best Article 46 creates a moral obligation to consider the issue in

30. See discussion *infra*.

31. Statement of Premier DeGasperi to the Constituent Assembly. *Assemblea Costituente, Verbale*, July 31, 1947, pp. 6545-6546.

32. *Ibid.* (Letter of President Truman to Premier DeGasperi).

33. Foreign Minister Sforza on the date of signature of the Treaty, July 24, 1947, sent a circular note to the Allied and Associated Powers calling for a revision. *Id.* at 6162. The Soviet Government replied, July 31, 1947, to the effect that the Treaty was a good one and revision was therefore unnecessary. *Id.* at 6539.

34. U.S. TREATY SER., No. 1648, p. 143 (Dep't State 1947).

35. The Charter establishes the requirement of the concurrence of all permanent members on substantive questions. U.N. CHARTER Art. 27.

the future. At the time of the drafting of the document the Italian government tried to insert an amendment requiring revision proceedings to take place within two years after the Treaty had entered into force.<sup>36</sup> The Italian effort was rebuffed. Italy has the right to bring up the question and any of the other signatories may support the request, but without the consent of all the Allied and Associated Powers, or of the Security Council, there is no right to revise.

In discussing the question of treaty termination, some writers assert a principle akin to the concept of the Statute of Limitation. This proposition is expounded in terms of reasonable or due time,<sup>37</sup> but these terms have never been defined. The first Soviet veto of Italy's application for membership in the United Nations was cast on August 26, 1947.<sup>38</sup> The Soviet veto in February, 1952, was the fifth on this issue, yet it was only then that Italy acted. A presumption may be raised that the Italian right had been waived. Thus, it appears that although the Soviet Union seems to have violated an obligation to Italy, the latter, in any case, had no right to relieve itself of certain obligations of the Peace Treaty, especially the armaments clauses.

#### *Clausula Rebus Sic Stantibus*

One of the most difficult questions in the law of treaties involves the impact of changing conditions on the effectiveness of an international agreement. The claim of a "change of circumstances" as relieving a state of its treaty obligations has been a subject for discussion among the major writers in the field.<sup>39</sup>

Machinery for eliminating obsolete or impolitic obligations is inadequate. There is no legislative body in the international community empowered to set aside treaty obligations on the grounds of a higher public policy.<sup>40</sup> Certainly the League of Nations never had this status, nor does the United Nations. Under Article 19 of the Covenant, the League Assembly could at best recommend to member nations the reconsideration of treaties which had become inapplicable.<sup>41</sup> This article remained

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36. *Paris Peace Conference*, 1946, U.S. CONFERENCE SER. No. 103, p. 239 (Dep't State 1947).

37. "The right to cancel the treaty on the ground of its violation must be exercised within a reasonable time after the violation has become known. If the power possessing such a right does not exercise it in due time it must be taken for granted that such a right has been waived." OPPENHEIM, *INTERNATIONAL LAW* 854 (6th ed., Lauterpacht, 1947). Also see 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 348 (1943).

38. U.N. SECURITY COUNCIL, Doc. S/P/V/196, pp. 82-85 (Aug. 26, 1947).

39. For bibliographical citations see 5 HACKWORTH, *op. cit. supra* note 37, at 349.

40. See BRIERLY, *THE LAW OF NATIONS* 208 (3d ed. 1942).

41. *Treaty of Peace With Germany*, SEN. Doc. No. 51, p. 19, 66th Cong., 1st Sess. (1919).

a dead letter. No comparable provisions are found in the United Nations Charter. In fact, one of the major purposes of the United Nations is the establishment of conditions "under which justice and respect for obligations arising from treaties and other sources of international law can be maintained. . . ."<sup>42</sup> The Security Council might advise revision of treaties as part of its power to recommend peaceful settlements of disputes.<sup>43</sup> And Article 14, which permits the General Assembly to make recommendations for the peaceful adjustment of any situation likely to endanger friendly relations, especially holds possibilities in this area.<sup>44</sup> In all cases, however, the power of these United Nations organs is purely recommendatory, and so, in reality, no greater than that available to the League. It is still far removed from a real legislative power.

The doctrine of "changing conditions" as a basis for voiding treaty obligations is accepted by most writers although there is considerable difference of opinion as to its meaning and the circumstances under which it can be properly invoked. There is no case on record where both parties to a dispute have admitted its applicability or where the doctrine has been defined or applied by an international tribunal.<sup>45</sup>

Some consider *rebus sic stantibus* as granting release from an obligation when the conditions upon which it was founded have vitally changed. This position is illustrated by an opinion of the Attorney General of the United States to President Roosevelt in 1941:

It is a well established principle of international law, *rebus sic stantibus*, that a treaty ceases to be binding when the basic conditions upon which it is founded have essentially changed.<sup>46</sup>

Others consider the test to be whether the change in conditions would be so injurious or damaging to a party as to justify termination of the treaty.<sup>47</sup> The most probable meaning, however, is the one expressed by Hyde.

That which causes a demand for performance to be unreasonable, and which, conversely, clothes a party with freedom to rid itself of the obligation to perform is the coming into being of a new condition of affairs which was not only not brought to the attention of the parties when they concluded their agreement, but also one which, if it had been brought to their

42. U.N. CHARTER (Preamble).

43. *Id.* Arts. 36, 37, 38.

44. Also see *Id.* Arts. 10, 11.

45. BRIERLY, *op. cit. supra* note 40, at 205.

46. 40 OPS. ATT'Y GEN. No. 24, pp. 119, 121 (1941). Also see 5 DEP'T STATE BULL. 114 (1941).

47. For a description of this point of view and others see Harvard Law School *Research in International Law*, 29 AM. J. INT'L L. 1096-1126 (1935).

attention, would have necessarily produced common acknowledgement that the agreement would be inapplicable, and hence permit a party to regard it as no longer binding in case that condition or situation should subsequently arise. This requirement, which refers the matter to the thinking of contracting parties when they concluded their agreement, or to such implications from their thought at that time as are impregnable, involves primarily a fact-finding endeavour.<sup>48</sup>

This interpretation appears to be supported by the Permanent Court of International Justice in its opinion in the "Free Zones" case. While refusing to define the doctrine as the facts did not warrant a claim of "changed conditions," the Court seemed to imply that the change must be pertinent to conditions which were an element in the minds of the parties inducing them to make the treaty.<sup>49</sup>

Applying a fact-finding endeavour to the conditions which might have been in the minds of the parties to the Italian Peace Treaty and to the pertinent changes, the conclusion appears to be that no "change of circumstances" has occurred. Was the signatories' satisfaction with the Treaty a factor in the completion of the Treaty and has their satisfaction disappeared?

Let us examine the attitudes of the principal parties, Italy, the Soviet Union and the Western Allies. The Italian government was unalterably opposed to the major settlements of the Peace Treaty, especially the Yugoslav boundary and the disarmament clauses.<sup>50</sup> It is still opposed to them today. The United States, Britain and France were against the boundary settlement then, although they accepted it reluctantly.<sup>51</sup> They are against it today.<sup>52</sup> They were less opposed to the armaments

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48. 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1524 (2d ed. 1945).

49. Free Zones of Upper Savoy and the District of Gex., P.C.I.J., Ser. A/B, No. 46 (1932). For a comment on this decision see BRIERLY, *op. cit. supra* note 40, at 206-207.

50. The Italian position can be found in the following sources: Italia, Ministero Dell' Aeronautica, CONSIDERATIONS REGARDING THE ITALIAN AIR FORCE WITH REFERENCE TO THE PEACE TREATY (1946). Italia, Ministero Degli Affari Esteri, AIDE MEMOIRE, CONSIDERATION UPON THE MEMORANDUM AND OTHER STATEMENTS SUBMITTED BY THE YUGOSLAV REPRESENTATIVES AT THE FIRST SECTION OF THE COUNCIL OF FOREIGN MINISTERS IN LONDON IN SEPTEMBER 1945 (1946); GENERAL CONSIDERATIONS REGARDING THE COMPOSITION OF THE ITALIAN ARMED FORCES WITH REFERENCE TO THE PEACE TREATY (1946); THE ITALO-YUGOSLAV FRONTIER FROM THE STANDPOINT OF SECURITY. (1946); MEMORANDUM ON THE ITALO-YUGOSLAV FRONTIER (1945). Italia, Ministero Della Guerra, CONSIDERATIONS REGARDING THE ITALIAN ARMY WITH REFERENCE TO THE PEACE TREATY (1946). U.S. CONFERENCE SER., No. 103 (Dep't State 1947).

51. For a map showing the British, French and United States boundary recommendations see THE WORLD TODAY, November, 1946, p. 503.

52. 25 DEP'T STATE BULL. 570 (1951) (Three Power Communique of September 26, 1951).

settlement although by the time the Treaty became effective the United States realized that modification of these terms might be desirable.<sup>53</sup> France and Italy were already engaged in working towards an alliance and customs union.<sup>54</sup> Britain and the United States, after signature and ratification of the treaty, waived their share of the Italian fleet, returning it for scrap. The Western Allies have sponsored the Italian request for revision today.<sup>55</sup> Apparently only the Russian attitude has changed. It considered the Treaty a good one and in no need of revision at the time it was signed.<sup>56</sup> It was willing to consider revision of the armaments clauses in 1951 in return for certain political considerations.<sup>57</sup> Since the present Italian government could not possibly accept these terms it is easy to interpret the Soviet position as not showing a real change.

Was the nature of the world situation a factor in the minds of the signatories which was related to their acceptance of the Treaty, and has the world situation changed? This argument was made by the Italian government in its note of December 8, 1951, requesting revision of the Treaty.

The basic assumption was that universal adherence to the principles of the United Nations Charter would assure the security of all the democratic family of nations and therefore would also assure Italy's status as an equal member of that family.

The above assumption on the basis of which the Italian Peace Treaty was signed and was ratified, has not been fulfilled.<sup>58</sup>

Adherence to the principles of the United Nations Charter meant commitment to policies of peaceful relations. In other words the Peace Treaty was presumably accepted on the assumption that the post-war world would be peaceful, but today it is not peaceful.

In fact, there was no basis for the original assumption and there has been no marked change in the world. For the Treaty came into force in September, 1947, when the Soviet ratification was deposited.<sup>59</sup>

53. Assemblée Constituyente, *Verbale*, July 31, 1947, pp. 6545-6546 (Letter of President Truman to Premier DeGasperi).

54. On the Franco-Italian *rapprochement* see Sforza's statement to the Constituent Assembly, *id.* at 6534. Also see Sforza, *Italy, the Marshall Plan, and the "Third force,"* FOREIGN AFFAIRS, April, 1948, p. 452.

55. See note 52 *supra*.

56. See note 33 *supra*.

57. 25 DEP'T STATE BULL. 649 (1951).

58. *Id.* at 1011.

59. Article 90 of the Peace Treaty provided that the document became effective when ratified by the principal Allied and Associated Powers. U.S. TREATY SER., No. 1648 (Dep't State 1947).

At that time the "Cold War" between the Soviet and Western blocs was already in existence. Some have dated the beginning of the "Cold War" from Russia's refusal, made at the conference in Paris in June-July, 1947, to participate in the Marshall Plan. Others have selected earlier dates: Former Secretary of State Byrnes' attack at Stuttgart in 1946 on Soviet predominance in Eastern Europe; Winston Churchill's speech of 1946 in Fulton, Missouri; the struggle among the victors over the Peace Treaty itself; the Russian ultimatum to Roumania in February, 1945, shortly after the Yalta Conference, or even the Russian charges of separate peace negotiations in Northern Italy between the Western Allies and Germany at the end of 1944. In any case, the "Cold War" was a fact when the Treaty became effective.

In 1947 there were civil wars in progress in Greece, China, Indo-China, Indonesia and Burma plus a stalemate between the United States and the Soviet Union over a settlement of the partition of Korea. Four power unity in the administration of Germany was collapsing. In December, 1951, the civil wars in Greece, China and Indonesia were over, but those in Burma and Indo-China were still being fought. Germany was still divided, and open warfare involving Communist Chinese and the United Nations forces had been continuing for over a year in Korea. The diplomatic tug of war was still in progress. The situation was certainly more critical but the change that had occurred was one of degree; it was hardly drastic.

Even in the case of Italian security there has been no vital change. When American occupation troops left Italy in 1947 after the Peace Treaty came into force President Truman took the occasion to announce:

If . . . it becomes apparent that the freedom and independence of Italy . . . are being threatened directly or indirectly, the United States . . . will be obliged to consider what measures would be appropriate.<sup>60</sup>

This guarantee is still the effective basis of Italian security. The commitments of the North Atlantic Treaty are but formalizations.<sup>61</sup>

Was completion of the Treaty conditioned on the existence of a certain type of internal regime in Italy and has that regime changed? Was it conditioned on relations between Italy and other nations and have those relations changed? The United States government has as-

60. N.Y. Times, Dec. 14, 1947, p. 1, col. 3.

61. The only commitment made by a party to the North Atlantic Treaty is, in case of armed attack, to take "such action as it deems necessary, including the use of armed forces, to restore and maintain security in the North Atlantic area." This leaves it up to each party, in the last analysis, to determine its obligations, and how they shall be executed. N.A.T.O., Art. 5, U.S. TREATY SER., No. 1964 (1950).

serted that the spirit of the peace settlement no longer accords with Italy's present status as an active and equal member of the democratic and freedom-loving nations. It has further asserted that all Italy has accomplished since the war's end deserves recognition in the form of revision.<sup>62</sup>

The original Italian position during the peace negotiations was that the nation had been democratic and freedom-loving ever since Mussolini was overthrown in 1943 and Italy participated in the war against Germany as a co-belligerent on the side of the Allies. The Italian government complained bitterly at the time of ratification that the document failed to consider Italy's democratic political institutions and the contribution that it had made as a co-belligerent.<sup>63</sup> Italy wanted the treaty revised, not because of changes that have taken place since the peace settlement, but because it considered that settlement unjust from the beginning.

In a recent assertion of revision, however, the Italian government shifted its position and adopted the American point of view that the spirit of the peace treaty no longer coincides with Italy's present status as an active and equal member of the democratic and freedom-loving nations.<sup>64</sup> In fact, since the war there have been no significant changes in Italian political institutions. The regime in power today is the regime which has been in power since the end of hostilities.<sup>65</sup> Italy is no more or no less democratic and freedom-loving today than it was then. The day the Treaty became effective Italy returned as an equal member of the community of nations. Many of the other members are democratic, many are not. Some of the democratic nations, Switzerland, for example, are not in the United Nations. Italy maintains friendly relations with almost all of them.

Even if there were a substantial change in the internal character of a state this would be no basis for releasing that state from its international obligations. International law supports, in general, the doctrine of succession by governments to the international obligations assumed for the state by earlier governments.<sup>66</sup> Nazi Germany was held respon-

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62. American statement dated October 12, 1951. 25 DEP'T STATE BULL. 648 (1951).

63. See the resolution of the Constituent Assembly, *Assemblea Costituente, Verbale*, July 31, 1947, pp. 6566-6567.

64. 25 DEP'T STATE BULL. 1011 (1951); N.Y. Times, Dec. 22, 1951, p. 1, col. 2.

65. The Italian Communists and their Socialist Allies were ejected from the Cabinet in the Spring of 1947 before the Treaty became effective. However, they had not been able to dominate the government during the period they were members of the coalition of the Committee of National Liberation. This coalition formed the cabinets of Italy from June, 1944 to 1947.

66. *The Tinoco Arbitration*, 18 AM. J. INT'L L. 147 (1924). The Harvard Research group concluded that "unless otherwise provided in the treaty itself, the



sible for the Treaty of Versailles signed by representatives of the Weimar Republic.<sup>67</sup> It might be an act of political wisdom, on the part of the other states, to revise treaties when there have been substantial changes in the internal nature of a nation. Until they do so, however, the duty to observe these obligations remains.

It is concluded, as a consequence, that an appeal to the *clausula rebus sic stantibus* is an unjustified basis for termination of Italy's obligations. Its use in this instance is extremely dangerous.<sup>68</sup>

### *Relationship to Other Treaties*

The Italian Peace Treaty was drafted concurrently with similar treaties for Roumania, Bulgaria, Hungary and Finland. It has been contended that there is an interrelationship among these treaties greater than a mere coincidence in time. It has been further deduced that violations of their obligations by Roumania, Bulgaria and Hungary, especially in the area of armed forces limitations, relieves Italy of its obligations in this area.

Two comments can be made with respect to this argument. First, two wrongs do not make a right. The three Soviet satellites have also been charged with violation of the human rights and fundamental freedoms clauses of their peace treaties.<sup>69</sup> This would hardly justify Italian violation of the same obligations in its own treaty. Second, Italy is not a party to the peace treaties with Roumania, Bulgaria and Hungary and has acquired no rights under those treaties.<sup>70</sup> These states have not violated any obligations to Italy which would relieve Italy of its similar obligations. There is, in fact, no legal identification among any of the

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obligations of a State under a treaty are not affected by any change in its governmental organization or its constitutional system." Harvard Law School, *Research in International Law*, 29 AM. J. INT'L L. 662, also see comment at 1044-1055 (1935).

67. JOURNAL OF THE LEAGUE OF NATIONS 551 (1935).

68. "For political treaties and for the invocation of political changes in the balance of power, the doctrine [*rebus sic stantibus*] is pernicious. In such situations it would amount to the proposition that no peace treaty accepted by a defeated state remains valid after that state recovers sufficiently or the victors weaken sufficiently to make it politically possible for the defeated state to throw off the burden without danger of another defeat. No more unsettling legal principle could be imagined; but it would in fact, if accepted, reflect what has frequently occurred. For this very reason the doctrine *rebus sic stantibus* has been discredited." JESSUP, A MODERN LAW OF NATIONS 150-151 (1948).

69. These charges were brought before the International Court of Justice by Great Britain and the United States. See *Interpretation of Peace Treaties With Bulgaria, Hungary and Roumania*, PLEADINGS, ORAL ARGUMENTS, DOCUMENTS, I.C.J., pp. 20, 67, 257-330 (March, 1950).

70. ". . . [A] treaty only creates law as between the States which are parties to it; in case of doubt no right can be deduced from it in favour of third States." German Interest in Polish Upper Silesia, P.C.I.J., Ser. A, No. 7, p. 29 (1926).

above treaties. They were imposed upon the defeated states by the victors at the same time. There the relationship ends.

### *Political Policy*

The Soviet Union, in its reply to the joint American-French-British memorandum urging revision of the Peace Treaty, offered to consider the possibility of revision of the arms limitations if Italy were to withdraw from the North Atlantic Treaty Organization.<sup>71</sup> Prime Minister DeGasperi denounced the offer as blackmail and refused to consider it.<sup>72</sup> The Soviets have not, as of this writing, offered to consider revision of the Trieste settlement. On the contrary, in a note addressed to the three Western powers they called once again for the continuation of the Free Territory of Trieste and the appointment of a governor for the Territory by the Security Council. They accused the three Western powers in addition to Italy and Yugoslavia of planning the partition of the Free Territory in violation of the Peace Treaty.<sup>73</sup>

The American government rejected the Soviet counter-proposal on armaments in the following terms:

. . . the United States Government does not propose to be deterred by such propoganda from its effort to find the way to recognize Italy's new stature and its right to participate with other free nations in working for international peace and security.<sup>74</sup>

If it is admitted, on the basis of the foregoing analysis, that no grounds for the Italian denunciation exists, then American acceptance and encouragement of Italy's action involves endorsement of illegality.<sup>75</sup>

It should hardly be necessary to criticize any attempts to circumvent the law even for the most noble of ends. In the particular case of the United States, it would seem to be to the national interest of our country to encourage respect for international obligations and legal procedures. For the major part, the existing distribution of legal obligations in this world favors the power position of the United States and its friends and allies. In that sense we are a *status quo* nation. Positive International Law has always been a strong bulwark of the *status quo* and it is to our benefit to promote respect for it.<sup>76</sup>

71. 25 DEP'T STATE BULL. 649 (1951).

72. N.Y. Times, Oct. 17, 1951, p. 2, col. 6.

73. 25 DEP'T STATE BULL. 911 (1951).

74. *Id.* at 648.

75. The American acceptance of the Italian position was made in a note presented to the Italian Ambassador on December 21, 1951. *Id.* at 1050.

76. The author does not wish to imply that the United States should support

As a case in point, we have seen how the position of the United States and its friends has been damaged by Egypt. After Egypt unilaterally denounced its agreement with Britain on Suez and the Sudan, former Secretary of State Acheson publicly lectured the Egyptians on the necessity of observing their international obligations.<sup>77</sup> While it is recognized that complete consistency on our part would in no way be a restraining force on those states which are determined to achieve their ends even at the expense of law, nevertheless it seems of some importance not to provide propaganda ammunition for them to use. Thus, we would not want to be put in the position of seeming to tell Italy to ignore its treaty when it injures the Soviet Union while we tell the Egyptians they must obey their treaties which benefit Great Britain directly and the United States indirectly.

Consequently, we must ask ourselves whether the gains to be obtained by revising the Italian Peace Treaty against Soviet wishes are worth the reduced respect for International Law. This writer is in no position, obviously, to have all the necessary facts to evaluate relative gains or losses. Some attempt can be made, however, on the basis of public knowledge.

The first presumed objective of revision is to achieve a settlement of the Trieste problem that would give greater justice to Italy, reduce Italo-Yugoslav tension, and lead to more friendly relations between those two countries. The second probable objective is to raise the size of Italy's armed forces to enable that nation to make a larger contribution to the North Atlantic Treaty Organization.

The first objective could presumably be achieved by a partition of the Free Territory of Trieste giving Zone A, containing the city of Trieste, to Italy, and Zone B to Yugoslavia with perhaps some modifications.<sup>78</sup> This writer considers the original determination of the frontiers to be unjust to Italy.<sup>79</sup> If this change will satisfy all Italian aspirations it is a reasonable one to make. The proposed solution would, from the Italian point of view, however, be only a partial remedy leaving many Italian

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the social and economic *status quo* in all parts of the globe. On the contrary, this is believed to be the wrong policy to follow. What is meant is that the United States benefits from the present distribution of power among the major powers and its policy should be to hold on to this position. If disrespect for positive law is encouraged, it may be to our disadvantage.

77. 25 DEF'T STATE BULL. 647 (1951).

78. There has been some newspaper discussion of this possible solution. See N.Y. Times, Oct. 3, 1951, p. 22, col. 7.

79. The standard of justice used is national self-determination, *i.e.*, political boundaries should coincide with ethnic ones. On this basis the revision of the Franco-Italian frontier in 1947 was also unjust to Italy while the retention of the South Tyrol by Italy was unjust to Austria. A standard of justice other than national self-determination would lead to different conclusions.

territories still outside the frontier. The west coast of Istria, for example, containing such formerly Italian-populated cities as Rovigno and Pola is now in Yugoslavia and would remain there.<sup>80</sup> To Italian nationalists, limited gains might merely whet the appetite for further demands, with the consequence that tensions between Italy and Yugoslavia would again be aggravated in the future.

It must be remembered also that the Trieste settlement of 1947 was more than a compromise between Italy and Yugoslavia; it was a compromise between the Soviet Union and the Western Allies. Changing that settlement involves more than the relative positions of Yugoslavia and Italy; it involves the power position and prestige of the West versus that of the Soviet Union, even though Yugoslavia is no longer in the Soviet bloc. It is impossible to predict the Soviet's reaction to a challenge to their prestige in the area, but their well-known interest in the Balkan and Danubian zone makes it certain that they would view such a threat with great seriousness.<sup>81</sup> These political, as well as the legal factors must be taken into account in evaluating the available courses of action.

The real question is the effect of territorial changes on international stability. In 1938 Nazi Germany claimed the Sudeten areas of Czechoslovakia on principles of national self-determination. There was little question but that the predominantly German-speaking people of the region wanted to become part of Germany at that time. The cession of the territory to the Nazis at Munich met German demands but it started a chain of events which led to the overthrow of the peace and security of the world.<sup>82</sup> In judging any territorial claims the ultimate consequences to world peace must always be considered as well as the immediate claim for justice.

In any discussion of raising the arms limitations it must be remembered that as late as the end of 1951, after receiving substantial aid from the United States for over five years, the Italian government was unable to create the limited military establishment permitted it by the Peace Treaty.<sup>83</sup> Italy has the potential to go above those limits in a very

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80. In the spring of 1946 a four-power commission composed of American, British, French and Russian experts visited the area for the purpose of drawing a boundary based primarily on ethnic grounds. The commission returned with four different frontier lines. The American and British frontier proposals would have left the area now called the Free Territory of Trieste plus Western Istria to Italy. The French line became the eastern boundary of the Free Territory. The Russian line would have given all of Venezia Giulia and even more, to Yugoslavia. See map in *THE WORLD TODAY*, November, 1946, p. 503.

81. On the importance of this area to the Soviet Union see 2 *BELOFF, THE FOREIGN POLICY OF SOVIET RUSSIA, 1929-1941*, 320-384 (1949).

82. On the Munich crisis see *WHEELER-BENNETT, MUNICH PROLOGUE TO TRAGEDY* (1948).

83. *N.Y. Times*, Dec. 22, 1951, p. 1, col. 2.

minor way (a few more divisions at best), and then only with United States financial aid. Its increased contribution to the defense of Western Europe under such circumstances must be small.

Certainly, portions of the peace settlement were unjust. However, the original injustice was a product not of ignorance of the Socratic good but of the power struggle among the victors. The present support for change is not the result of a recently awakened realization of the good but of a different phase of the same power struggle.

Revision is not simply a case of formal justice versus "higher justice." The price to be paid for this "higher justice" is worth considering. First, all the peace treaties of World War II including those yet undrafted become scraps of paper. The ex-enemy Soviet satellites can now rationalize their violation of international obligations by claiming that the spirit of the peace settlement does not accord with their present status as equal members of the "peace-loving peoples democracies." The Japanese treaty, and German and Austrian treaties, if and when concluded, will be likewise subject to disregard on the ground of incompatibility with the ideological nature of some future government.

Second, the United States is, however inadvertently, abandoning the general principle of governmental succession. We have held that a change in the internal nature of a regime does not *ipso facto* relieve a state of its international responsibilities.<sup>84</sup> It is a principle necessary for the maintenance of international order; without it, carrying the argument to a ridiculous extreme, every time a political party comes into power anywhere the rest of the world must wonder what will happen to all previous arrangements. It is therefore pertinent to question whether the gains anticipated from supporting unilateral denunciation are worth the blow to the doctrine of integrity of treaties.

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84. The United States is a signatory to the Convention on Treaties adopted by the Sixth International Conference of American States, February 20, 1928. Article 11 provides in part: "Treaties shall continue in effect even though the internal constitution of the contracting States has been modified." *Report of the Delegates of the United States of America to the Sixth International Conference of American States* 199 (Dep't State 1928).

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