

ognition, or such topics, it is suggested that it is today more important for the international lawyer to go on the radio, to write popular articles, and in other ways to show to the people the vital importance in their lives of the development of international law, and to show that this law can not grow without their active support. It is important also that they study current problems and offer solutions in terms of international law for such international questions as aviation, trade, competition between private enterprise and totalitarian systems, and so on, and the organization and constitutional and administrative law needed for each. The effort of the international lawyer must be more positive, more utilitarian, more educational, than it has been in the past.

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THE ITALO-AUSTRIAN AGREEMENT ON THE AUSTRIAN SOUTH TYROL

Although Austria is not a Party to the Treaty of Peace with Italy of 1947, Part I of that document contains in Section III special clauses concerning Austria¹ and Annex IV² contains the text of the provisions agreed upon by the Austrian and Italian Governments concerning the Austrian South Tyrol. This Agreement must be viewed in the light of Austria's long fight for the Southern Tyrol, which goes back to the Paris Peace Conference of 1919 and even to 1914/15.

Two different problems are involved. The first problem is the territorial one.³ Italian irredentism had, long before the First World War, coveted those parts of the old Austria which were inhabited by an Italian-speaking population. That meant, in the case of Southern Tyrol, the province of Trento. In 1914/15 Italy, which had remained neutral at the outbreak of the war, carried on negotiations with Austria and, on the other hand, with Great Britain and France. Austria was unwilling to cede the Southern Tyrol but Great Britain and France promised to Italy in the secret London Treaty of April, 1915, among many other things, the cession of the Southern Tyrol up to the strategic frontier of the Brenner Pass as a prize for her entry into the war on the side of the Entente Powers.

President Woodrow Wilson's Fourteen Points, the agreed basis of the peace settlement, provided in Point 9: "A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality." Such clearly recognizable lines of nationality had existed for a thousand years. They passed through the Salurner Klause; south of it was the Italian-inhabited province of Trento, north of it the Austrian, German-speaking, Southern Tyrol including Meran and Bozen. Italy should have

¹ Article 10.

² September 5, 1946.

³ See Josef L. Kunz, *Die Revision der Pariser Friedensverträge, Vienna, 1932*, pp. 16-18, 209-210.

obtained the province of Trento. True, *vis-à-vis* Great Britain and France she could invoke the secret London Treaty, but the United States was not bound by this treaty, and Wilson's Point 9, in conformity with the basic principle of national self-determination, was clearly in favor of Austria's retaining the German-speaking part of the Southern Tyrol. The Italian delegation at the Paris Peace Conference prepared for a difficult battle with Wilson to obtain the frontier of the Brenner Pass, and was agreeably surprised to get it without difficulty, merely because President Wilson did not know the facts: "Already, the President had, unfortunately, promised the Brenner Pass boundary to Orlando, which gave to Italy some 150,000 Tyrolese Germans—an action which he subsequently regarded as a great mistake and deeply regretted. It had been done before he had made a careful study of the subject. . . ."⁴

The Austrian delegation at the Peace Conference had fought desperately, but unsuccessfully, for the Austrian Southern Tyrol.⁵ The Austrian National Assembly resolved, on September 6, 1919,⁶ that "Austria expects that the League of Nations will as soon as possible make good the incomprehensible injustice inflicted upon the Southern Tyrol."

This cession of the purely Austrian part of the Southern Tyrol, the German-speaking inhabitants of which had been Austrians for centuries, the land of Walther von der Vogelweide and of Andreas Hofer, a cession without a plebiscite, in open contradiction to Wilson's Point 9, remained during the whole inter-war period the main obstacle to good-neighborly relations between Austria and Italy. This cession led to the Austrian demand for territorial revision, to a real popular movement, especially in the Northern Tyrol, to demonstrations and symbolical acts, and to a rich literature on the subject.⁷

The second problem was that of the protection of the Austrian minority. The Paris Peace Conference did not impose special treaties for the protection of national minorities upon the Great Powers. Italy was, therefore, not bound by such treaty and the League of Nations could not interfere. Democratic Italy had, however, not only given such promises unilaterally; these promises were also made internationally binding by their acceptance by the Peace Conference and by their insertion in Clemen-

⁴ Ray Stannard Baker, *Woodrow Wilson and World Settlement*, New York, 1922, Vol. II, p. 146.

⁵ *Tätigkeitsbericht der österreichischen Friedensdelegation*, Vienna, 1919, Vol. II, pp. 210–212; see also the Austrian note on the Austrian Southern Tyrol: the same, Vol. I, pp. 140–141, 159–160.

⁶ *Tätigkeitsbericht*, Vol. II, p. 629.

⁷ F. Klein, *Die Revision des St. Germainer Vertrages*, Vienna, 1920; Grabmeyr, *Südtirol*, 1919; H. Voltolini, A. Verdross, W. Winkler, *Deutsch-Südtirol*, Vienna, 1925; A. Verdross, *Die rechtliche Lage Deutsch-Südtirols*, 1926; P. Herre, *Die Südtiroler Frage*, Munich, 1927; Mayreiter, *Die Literatur über Südtirol*, Innsbruck, 1926.

ceau's note to the Austrian Peace Delegation of September 2, 1919;⁸ in addition the Austrian note of September 6, 1919,⁹ emphasized that "the National Assembly expects that the promises given in the reply will be fulfilled by the Powers."

Democratic Italy kept these promises. But with Mussolini's fascism came one of Europe's worst examples of forcible denationalization.¹⁰ Mussolini's thesis that Fascist Italy is not bound by declarations made by pre-fascist governments involved, of course, a violation of international law. This policy of Italianizing the German-speaking mountain peasants in the *Alto Adige*, as the Austrian Southern Tyrol was now called, naturally impaired Italo-Austrian relations still further. In the great debate on the Southern Tyrol in the Austrian Parliament on February 23, 1928, even a man so little nationalistic as the Austrian Chancellor Dr. Seipel had, in cautious words, to recognize the difficulties arising out of the treatment of the Southern Tyrolese by Italy.¹¹ Mussolini answered immediately by a speech in Rome, in which he coined the sarcastic phrase: Austria is what she is.

True, Mussolini's fear of an *Anschluss* made him, during the nineteen-thirties, the quasi-protector of Austria, and, in 1934, when Chancellor Dollfuss was murdered in the National-Socialist revolt in Vienna, Mussolini was ready to march into Austria to prevent her annexation by Hitler. But nothing was changed with regard to the Austrian minority in the Southern Tyrol.

When Austria was annexed in 1938 by a powerful Germany, Mussolini was unable to do anything against it. But Hitler, the fanatical nationalist, was capable of political expediency. In his Rome visit he solemnly promised Italy the retention of the Brenner Pass frontier, abandoning a mistreated German-speaking minority to its fate. By Hitler's treaties with Italy of 1939 and 1941 the Austrians in the Southern Tyrol were free to opt for return to the Reich but if they did not so opt they were held to "de-

⁸ *Ainsi qu'il résulte des déclarations très nettes faites par le Président du Conseil des Ministres d'Italie au Parlement de Rome, le Gouvernement Italien se propose d'adopter une politique largement libérale envers les nouveaux sujets de race allemande, pour ce qui concerne leur langue, leur culture et leurs intérêts économiques: Tätigkeitsbericht, Vol. II, p. 323.*

⁹ Same, Vol. II, p. 330.

¹⁰ See, apart from the literature quoted in note 7: S. M. Bouton and Ch. H. Herford, *English and American Voices about the German South Tyrol*, New York, 1925; Fingeller, *Die Wahrheit über Südtirol, 1918-1926*; C. H. Herford, *The Case of German South Tyrol against Italy*, London, 1926; F. K. Hennersdorf, *Südtirol unter italienischer Herrschaft*, 1926; Reut-Nicolussi, *Tyrol under the Axe of Fascism*, London, 1930; see also for a brief report, Josef L. Kunz, "Italian Rule in German South Tyrol" in *Foreign Affairs*, Vol. V (1927), pp. 500-505.

¹¹ Fascist Italy pursued the same policy of Italianization toward her minority of 400,000 Yugoslavs.

serve neither protection, nor the privilege of claiming collective rights as a German minority.”

It is understandable that Austria hoped that the present peace settlement would correct Wilson's error. Austria was, therefore, deeply disappointed, as the Paris Council of Foreign Ministers in 1946, which took from Italy such overwhelmingly Italian cities as Pola and Trieste, decided against the return to Austria of the purely Austrian, German-speaking, part of the Southern Tyrol. The disappointment and the resentment grew deeper when the Council rejected the case for “minor frontier rectifications,” presented by the Austrian Foreign Minister Dr. Karl Gruber, who had been invited to submit this case.

Although the “Treaty for the reestablishment of an independent and democratic Austria” is only in the making, the Peace Treaty with Italy of 1947 already lays down that Italy's frontier will remain at the Brenner Pass.¹² The only clause in favor of Austria is Part I, Section VIII, Art. 10, par. 1: “Italy shall enter into or confirm arrangements with Austria to guarantee free movement of passenger and freight traffic between the North and East Tyrol.” This clause will remove a longstanding Austrian complaint.¹³

It was under these circumstances that Italy and Austria, at the Paris Peace Conference of 1946, both on the margins of the Conference, both representing countries in a terrible plight, began direct and independent negotiations, carried on by the Italian Prime Minister Alcide de Gasperi and the Austrian Foreign Minister Dr. Karl Gruber. These two men undoubtedly felt that the time had come to pave the way for good-neighborly relations between Italy and Austria. They must have felt that their two countries, although divided by historical events long antedating the First World War, were bound by common ties as countries of a great and ancient culture, as countries definitely belonging to Western Christian civilization.

These negotiations led to an Agreement, the original English text of which was signed by the two Parties at Paris on September 5, 1946, and transmitted to the Paris Conference on the following day, and which now constitutes Annex IV of the Treaty of Peace with Italy. This brief Agreement is basically a treaty for the protection of the German-speaking minority in the Southern Tyrol. From this point of view alone the Agreement is highly interesting. For current peace settlements have abandoned the idea of international treaties for the protection of national minorities.¹⁴

¹² Part I, Sec. I, Art. I, lays down that “The frontiers of Italy shall, subject to the modifications set out in Articles 2 (France), 3, 11 (Yugoslavia), 4, 22 (Free Territory of Trieste), be those which existed on January 1, 1938.”

¹³ The British Foreign Secretary Bevin had, on June 4, 1946, called the complication of Austrian rail transport caused by the amputation of South Tyrol “silly”: *The New York Times*, June 26, 1946, p. 10.

¹⁴ See this writer's Editorial Comment “The Future of the International Law for the Protection of National Minorities” in this *JOURNAL*, Vol. 39 (1945), pp. 89-95.

The Potsdam Agreement and the attitude taken by the United States and the United Kingdom at the Paris Peace Conference of 1946, an attitude in favor of assimilation rather than of perpetuation of racial minorities, is certainly very different from the attitude taken by the Paris Peace Conference of 1919. The new idea of the international protection of "human rights" is a different idea, which does not include specific minority rights, although the problem of the protection of minorities is bound to come up again within this new framework.¹⁵

The first paragraph of the Agreement deals with the protection of the German-speaking minority in the Austrian Southern Tyrol, no longer called *Alto Adige*, but "Bolzano Province." The German-speaking inhabitants of this province and of the neighboring bilingual townships of the Trento Province are assured of complete equality with Italian-speaking inhabitants, within the framework of special provisions to safeguard the ethnical character and the cultural and economic development of the German-speaking element. In particular they are granted elementary and secondary teaching in the mother tongue, parity of the German and Italian languages in public offices and official documents and equality of rights in candidacy for public office, with a view to reaching a more appropriate proportion of employment between the two ethnical groups. In order to abolish Fascist measures, they are granted bilingual topographic naming and the right to reestablish German family-names, which had been italianized in recent years. There should be mentioned here also point (a) of paragraph 3, by which the Italian Government pledges itself, in consultation with the Austrian Government and within one year from the signing of the present Treaty, to revise in a spirit of equity and broadmindedness the question of the options for citizenship resulting from the 1939 Hitler-Mussolini agreements.

The provisions of paragraph 1 are on the lines of the 1919 minorities treaties. The rights transcend "human rights"; they are specific minority rights. They reject the philosophy of assimilation; they are based not only on the preservation of the Austrian Tyrolese in their racial, linguistic, and cultural character, but they also provide means for the cultural and economic development of the Tyrolese as a different ethnical group from the Italians. They are also on the lines of the 1919 minorities treaties in that they grant only individual, not collective, minority rights; they protect the individuals, belonging to a national minority, but do not recognize the minority as such as a legal entity.

But paragraph 2 of the Agreement goes considerably farther than the 1919 minority treaties. It grants to the Austrian Tyrolese regional autonomy, the exercise of autonomous legislative and executive regional powers.

¹⁵ The United Nations Human Rights Commission has appointed a Subcommittee for the prevention of discrimination and protection of minorities.

Two ways of granting collective minority rights exist: cultural autonomy and territorial autonomy.¹⁶ Political or territorial autonomy, which is possible only in the case of a national minority, compactly settled in a certain area, was granted after the First World War to the Podkarpatska Rus, the Aaland Islands, and the Territory of Memel. It has a territorial basis, embraces all individuals, also those not belonging to the minority, living in this area and extends to all matters, not only to strictly cultural minority matters. It makes use, for the purpose of the protection of a national minority, of the device of decentralization by regional autonomy within a unitarian State.¹⁷ Cultural autonomy,¹⁸ on the other hand, is granted on a personal basis, to all individuals of the minority, wherever living in the state. It recognizes the national minority as such, but as a personal group, with autonomous competence restricted to cultural matters. A cultural autonomy can also be locally determined, as long as it is on a personal basis and restricted to all or certain cultural matters.¹⁹

The true nature of the regional autonomy of paragraph 2 of the Agreement will depend on the framework within which the said provisions of autonomy apply, a framework to be set up by Italy in consultation with local representative German-speaking elements. It looks like a new combination of cultural and territorial autonomy. It is territorial in so far as it seems not to be restricted to strictly cultural matters; but it is a locally determined cultural autonomy in so far as it does not apply to all, but only to the German-speaking, inhabitants of this area.

Par. 3 of the Agreement, apart from the revision of 1939 options and a pledge for free traffic between northern and eastern Tyrol—in the latter respect Italy is internationally bound by Article 10, par. 1, of the Peace Treaty—, envisages the mutual recognition of the validity of certain degrees and University diplomas, and, in the economic field, facilitating of Austro-Italian border traffic. But the Agreement contains nothing about an Italo-Austrian Customs Union, a project sometimes discussed in England, though strongly resented by the Soviet Union and the States under her influence.

The Italo-Austrian Agreement was praised as a principal achievement during, although outside of, the Paris Peace Conference of 1946, and was

¹⁶ See Josef L. Kunz, *Prolegomena zu einer allgemeinen Theorie des internationalen Rechtes nationaler Minderheiten* in *Zeitschrift für Öffentliches Recht*, Vol. XII (1932), pp. 221–272.

¹⁷ *La Tchécoslovaquie s'engage à organiser le territoire des Ruthènes au sud des Carpathes sous la forme d'une unité autonome à l'intérieur de l'état tchécoslovaque, munie de la plus grande autonomie compatible avec l'unité de l'état tchécoslovaque: Czechoslovak Minority Treaty, Art. 10.*

¹⁸ Granted by the Esthonian Law of February 5, 1923.

¹⁹ Such as the "local autonomy concerning religious and school questions" granted to the "community of Szekler and Saxons in Transylvania" by Art. 11 of the Rumanian Minority Treaty.

hailed by the Western Powers as a "very constructive step." But the equitable and beneficial purpose of the Agreement and its success will depend on legal problems, influenced by political considerations. The minority rights of par. 1 depend on Italian legislation "already enacted or awaiting enactment." The regional autonomy of par. 2 depends equally on Italian legislation. The carrying out of par. 3 depends on Italian action and on the conclusion of further special Austro-Italian agreements. The Agreement is thus rather a program, awaiting implementation.

But the legal status of the Agreement itself has to be considered in the first line. This Agreement is, no doubt, an international treaty which has been signed, but needs, it seems, ratification by Italy and Austria. The ratification by Austria will not prove to be easy politically. For, after all, the Agreement implicitly renounces Austria's territorial claim, a question on which most Austrians and, particularly the North Tyrolese, feel very strongly. The Agreement did not encounter a good reception by the political parties of Austria and caused resentment in North Tyrol. It is, finally, to be noted that the Agreement is not put under the guarantee of the Allies, who, by Article 10, par. 2, simply "take note" of this Agreement.

And yet it is earnestly to be hoped that real good-neighborly relations between Italy and Austria can be established. This will be to the benefit of the South Tyrolese and to the benefit of the two countries. It will promote not only the material but also the spiritual regeneration of Europe, of which Austria and Italy form so important a part. It will benefit the world and the United Nations. A basic precondition for the success of the United Nations, more vital than discussions about its Charter, is the conclusion of sound and just post-war settlements, acceptable to all nations. A solid house must be built upon firm ground, not on shifting sand.

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THE INTERNATIONAL COURT OF JUSTICE AND THE INTERPRETATION OF MULTILATERAL TREATIES

One important function of the Permanent Court of International Justice was to interpret multilateral treaties and presumably the International Court of Justice will be called upon to perform the same function. Construction of the third proviso in the American Declaration of August 14, 1946, accepting compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice, is, therefore, important. This proviso states:

This Declaration shall not apply to . . . (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.

According to Manley O. Hudson, formerly member of the Permanent Court of International Justice: