ASSERTED JURISDICTION OF THE ITALIAN COURT OF CASSATION OVER THE COURT OF APPEAL OF THE FREE TERRITORY OF TRIESTE

To an international lawyer examining the reports of the Italian Supreme Court of Cassation it must be with some surprise that he comes upon a case holding that that court has jurisdiction of appeals from the Court of Appeal of Trieste—notwithstanding that Italian sovereignty over Trieste terminated upon the coming into force of the Treaty of Peace;[1] that pursuant to that Treaty the Free Territory of Trieste continues for the time being to be administered by the Allied military commanders; and that the Allied Military Government has forbidden appeal from any court within to any court without the occupied territory. This note will examine that holding.

Article 21 of the Treaty provides that "There is hereby constituted the Free Territory of Trieste," and continues:

> 2. Italian sovereignty over the area constituting the Free Territory of Trieste, as above defined, shall be terminated upon the coming into force of the present Treaty.

The Treaty came into force on September 15, 1947.

Annex VI of the Treaty sets out the "Permanent Statute of the Free Territory of Trieste," and Annex VII establishes a "Provisional Régime" pending the coming into force of the Permanent Statute. A governor was to be appointed by the Security Council after consultation with the Governments of Yugoslavia and Italy. Annex VII provides:

> *Article 1.* . . . Pending assumption of office by the Governor, the Free Territory shall continue to be administered by the Allied military commands within their respective zones.
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> . . . . . .
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> *Article 10.* Existing laws and regulations shall remain valid unless and until revoked or suspended by the Governor. . . .

As is well known, a Governor has never been appointed, and accordingly the Territory remains under military administration—a British-U. S. Zone that includes the City of Trieste, and a larger but less populous Yugoslav Zone. (On March 20, 1948, the Governments of the United States, the United Kingdom, and France issued a statement recommending that the Free Territory be restored to Italian sovereignty—having regard to the fact that "agreement on the selection of a governor is impossible" and that there was "abundant evidence" to show that the portion of the Territory occupied by Yugoslav forces had been "virtually incorporated into Yugoslavia."[2])

[1] Dept. of State, Treaties and Other International Acts Series, No. 1648; this JOURNAL, Supp., Vol. 42 (1948), p. 47.

[2] Dept. of State Bulletin, Vol. XVIII, No. 456 (March 28, 1948), p. 425.

The system of Allied Military Government, of which the AMG of Trieste is the vestige, came into operation on Italian soil with the attack on Sicily, July 10, 1943. It was unrolled on the mainland as the 15th Army Group fought its way up the peninsula. On September 3, 1943, the military armistice was signed,[3] and on November 10, 1943, the Allied Control Commission for Italy was established.[4] As rapidly as the Italian Government was prepared to accept responsibility (delay was on the Italian, not the Allied side), and as the progress of the armies permitted, rear areas were handed over to be administered by the Italian Government. But along the cutting edge of the Allied advance it was of course necessary to maintain the Allied Military Government.

On June 12, 1945, the Supreme Commander's Proclamation No. 1[5] was posted in Venezia Giulia, the region on the extreme northeast of Italy. (The German forces in Italy had surrendered during the days preceding the High Command's surrender at Berlin on May 8.) Proclamation No. 1 declared that

> the laws of the territory, in effect on the 8th September, 1943, will remain in force and effect except insofar as it may be necessary for me, in the discharge of my duties as Supreme Allied Commander and as Military Governor, to change or supersede them by proclamation or other order by me or under my direction.

By General Orders No. 6[6] of July 12, 1945, the Senior Civil Affairs Officer directed that the civil courts constituted under the laws in effect on September 8, 1943, resume their duties, pronouncing judgment in accordance with the formula "in the name of the law":

> There shall be no appeal from the decision of any Court functioning in the Occupied Territory to any Court of whatsoever competence outside the Occupied Territory.

It was the practice of the AMG, in aid of the policy of restoring regions as rapidly as practicable to Italian administration, to adopt and make mandatory in AMG territory the current decrees of the Italian Government.[7] But so long as AMG bore direct responsibility for a region, it was sound principle to require that no appeal be taken from the local courts to any court outside the occupied territory. There were special reasons why this was important in the case of Venezia Giulia, where both Italian and Yugoslav interests were involved.

On June 9, 1945, at Belgrade, the Yugoslav Minister of Foreign Affairs and the United States and British Ambassadors agreed upon a line (the

[3] Treaties and Other International Acts Series, No. 1604.

[4] Dept. of State Publication 2669 (European Series 17), p. 76.

[5] Allied Military Government Gazette, Venezia Giulia, No. 1, p. 3.

[6] *Ibid.*, p. 32.

[7] Review of Allied Military Government and of the Allied Control Commission in Italy, Allied Commission APO 394 (1945), p. 45.

"Morgan line") that would separate the zone of the U.S.-British forces from that of the Yugoslavs.[8] Thereupon the Yugoslav Army fell back, after having occupied the city of Trieste for some forty days. It was agreed that these arrangements were not to prejudice or affect the ultimate disposal of Venezia Giulia.

The British-U. S. forces and the Yugoslav forces were separated by the same line when on September 15, 1947, the Treaty of Peace went into effect, with its provision that the military administrations should be continued in the respective zones of the Free Territory.

By Proclamation No. 1[9] of September 15, 1947, Major General Airey, the Commander of British-U. S. Forces, made provision for the continuance of military government:

> 1. Pending the assumption of office by the duly appointed Governor of the Free Territory of Trieste, all powers of Government and administration in that Zone of the Free Territory in which British and United States Forces are stationed, as well as jurisdiction over its inhabitants, shall continue to be vested in me in my capacity as Commander of the said British and United States Forces.
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> 2. All existing laws, decrees and orders in force in the British-United States Zone on the date of this Proclamation shall remain in force and effect except as abolished or modified by Proclamation number two which is promulgated herewith, and except as I may, from time to time, change or supersede them. . . .

This left in effect G.O. No. 6 of July 12, 1945, forbidding appeals to any court outside the occupied territory.

General Airey's Report No. 1, covering the period from September 15 to December 31, 1947, explained the policy of the "caretaker administration."[10] It "would naturally be bound to adhere to the democratic principles [and] to respect the basic freedoms and the fundamental human rights" embodied in the United Nations Charter. A main consideration was "to avoid creating any precedent which would limit or hamper the future action of the Governor." Existing legislation would be interfered with only "if such a course is essential for the well being of the Zone or for the maintenance of public and military security." Successive reports, after the appointment of a governor had come to naught and after the Three Powers had made their declaration of March 20, 1948, urged that the problem of Trieste "can only be solved satisfactorily and justly by the return, as soon as possible, of the Free Territory to Italy. . . ."[11]

In the meantime the Allied Military Government has had to carry on

[8] Dept. of State Publication 2562 (Executive Agreement Series 501).

[9] Allied Military Government Official Gazette, British-United States Zone, Free Territory of Trieste, Vol. I, No. 1, p. 1.

[10] Report of the Administration of the British-United States Zone of the Free Territory of Trieste, Report No. 1, p. 7.

[11] Report No. 9, Oct. 1 to Dec. 31, 1949, p. 8. So too Report No. 10, 1950, p. 7.

under difficult conditions.[12] Economic prospects are discouraging for an area wrenched from its natural context. The Territory has drawn support from the Marshall Plan, and has been admitted as a participating country in the Organization for European Economic Co-operation. Local government has been modeled on the pattern existing in Italy. Political parties have come into being, and communal elections have been held. The system of courts is similar to that prevailing in Italy; most of the judges are career members of the Italian judiciary, obtained on the request of the AMG from the Italian Government. The Italian legislation, including the civil and penal codes, is the basic law of the Zone. But the AMG has promulgated many orders amending or rescinding the Italian legislation in existence on September 15, 1947.[13] It has promulgated many orders reproducing current Italian legislation. It has promulgated orders having no counterpart in Italy. Some orders follow Italian legislation in part.

It is not surprising that cases arose involving questions of the jurisdiction of the Supreme Court of Cassation to hear appeals from decisions made at various times by the Court of Appeal at Trieste. In *Soc. An. Zanini* v. *Busato,*[14] decided September 20, 1948, it was held that appeal in cassation lay from a judgment of the Court of Appeal when the cause had arisen in a tribunal which *"è ed è sempre stato sotto la incondizionata ed assoluta sovranità dello Stato Italiano."* In such a situation it would be *"inopportunamente ed inefficacemente"* that the validity of G.O. No. 6 would be drawn into discussion.

Analysis discloses two possible bars to the jurisdiction of the Court of Cassation. One is the effect of the termination of Italian sovereignty over the place where the Court of Appeal sat—a termination that became effective after the Court of Appeal acted and before the appeal was heard in the highest court. The cause of action arose and suit had been brought in territory always Italian. Principle would accord jurisdiction to the Court of Cassation. It would perform its normal function with respect to litigation that had at all times been wholly Italian. Suppose (which God forbid) that the States composing our First Judicial Circuit, except Rhode Island, were separated from the United States: surely as to litigation arising in the United States District Court for Rhode Island, and decided prior to the cession by the Court of Appeals sitting in Boston, the subsequent cession would not cut off the appellate jurisdiction of the Supreme Court. The matter would remain within the reach of the Federal judicial power.

Now consider a second possible bar to the jurisdiction of the Italian Court of Cassation: the effect of the order of the occupying Power that

[12] Discussed in General Airey's reports, and summarized in Trieste Handbook 1950, issued by the Information and Public Relations Division of the AMG.

[13] Published in the Official Gazette, *supra,* note 9.

[14] Cass. Civ. I. 20.9.48, n. 1623. *Giurisprudenza Completa della Corte Suprema di Cassazione,* 1948, 3° Quad., p. 1197, No. 2324; and 1949, 1° Quad., p. 236, No. 42.

appeal should not be taken from a court within to a court without the occupied territory. For what reason would the Allied Military Government have made such an order? First, no doubt, to enforce the proposition that "all powers of government and administration" are, for the time being, exercised by the occupying Power. While yielding ready assent to the obligation to respect existing local law, it would not brook resort to the appellate courts of the country whose territory it was occupying *in invitum*. But this objection, it may be said, would not operate where the litigation had to do with a matter arising outside of the occupied zone. There is a second reason, however, why the occupying Power might properly object: It owes no duty to the government whose territory it is for the moment occupying to facilitate the operations of that government by permitting the use of courts sitting in the occupied zone. The Allied Forces were, however, following very benevolent policies toward the Italian Government and it may be—this is a question of fact on which the writer is uninformed—that the AMG acquiesced in the Court of Appeal at Trieste hearing cases arising outside the occupied territory. In that event there would be no reason of principle why the Italian Court of Cassation should refrain from entertaining such an appeal in third instance.

Two other appeals from the Court of Appeal of Trieste—*Pellegrini* v. *Travani*,[15] decided October 11, 1948, and *Ferro* v. *Mazzola*,[16] decided August 20, 1949—appear to have been entertained on the same basis. The reports are not specific as to dates of trial in first instance and of appeal, or as to the actual situation with respect to the military occupation.

Panagos v. *Drossopulo*,[17] decided on November 15, 1948, was an appeal from a judgment entered during the war by the Court of Appeal of Rhodes. By Article 14 of the Treaty of Peace, "Italy hereby cedes to Greece in full sovereignty the Dodecanese Islands . . . ," including Rhodes. The Court of Cassation was very clear that the appeal must be dismissed. By the fact of cession, every legal relation between the Italian state and the cause came to an end. It concluded:

> *E l'insuperabile impossibilità d'esercizio della funzione giuridizionale dell'autorità giudiziaria italiana su quel rapporto priva anche questa Suprema Corte di poteria su di esso esercitare quale organo del potere statuale de cui è investita.*

This is a hard-headed view of hard facts.

With this background[18] we come to the cases on which this note would

[15] Cass. civ. I, 11.10.48, n. 1725, *ibid.*, 1948, 3° Quad., p. 741, No. 1774.

[16] Cass. civ. I, 20.8.49, n. 2366, *ibid.*, 1949, 2° Quad., p. 783, No. 1916.

[17] Cass. civ. Sez. Un., 15.11.48, n. 1823, *ibid.*, 1948, 3° Quad., p. 684, No. 1660.

[18] As bearing upon the psychological situation, reference should be made to the address of Professor Ermanno Cammarata, Rector of the University of Trieste, at the opening of the academic year on Dec. 4, 1949, published in the *Giornale del Lunedì* of Dec. 5. It argued that the words "Italian sovereignty . . . shall be terminated upon the

focus—appeals from Trieste entertained by the Court of Cassation and decided respectively on September 26, 1950, and March 15, 1951. In the former case, *Ferronato* v. *Brocchi,*[19] the Trieste court's judgment had been rendered on January 15, 1945, at a time, that is, prior to the occupation of Venezia Giulia by the Allied Forces. In the latter, *C.E.A.T.* v. *Società Hungaria,*[20] the Trieste court's judgment was of March 29, 1950, subsequent to the entry into force of the Treaty by which Italian sovereignty over the area was terminated. In each case the Court of Cassation sustained jurisdiction to enter a judgment operative in a place (1) no longer under Italian sovereignty, a place (2) which, pursuant to the Treaty, was being administered by the Allied Military Government whose order forbade resort to any court outside the occupied territory. There were thus two distinct bars to the exercise of jurisdiction.

In the Ferronato case the court said of its clear-cut judgment dismissing the appeal from Rhodes that more careful study led to a different conclusion. The right to appeal was born at the time of the judgment sought to be reviewed; what mattered was the *nationality of the judgment,* not the factual situation that had come into being after its rendition. The cause pertained to the Italian juridical system; hence it belonged to the court at the apex of that system to pass final judgment.

The court then turned to the question whether its jurisdiction was controlled by proclamations issued first by the German authority and then by the Allied Forces prohibiting appeal in cassation from the court at Trieste. On this point the Court referred to Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land: the occupying forces shall respect, unless absolutely prevented, the laws in force in the country. On the basis of this provision, said the court, it had already denied relevancy for the Italian juridical system of such proclamations of the German Military Government; for the same reasons it now adopted that solution as to analogous proclamations of the Allied Military Government.

The opinion of March 15, 1951, took off from the ground thus assumed: it was the nationality of the decision, whether it belongs or does not belong to the juridical system of which the appellate judge is a part, that determines appellate jurisdiction. Assuming "for simplicity of demonstration" that, by Article 21, Italian sovereignty over Trieste had really been terminated, still the Provisional Régime was a transitory stage from one system (the Italian) to another (that of the FTT) during which the pre-existing

coming into force of the present Treaty" really did not mean "shall be *extinguished*"; that the extinction of sovereignty was conditioned on the actual setting up of the anticipated government of the Free Territory, and that Trieste was still subject to Italian sovereignty.

The Court of Cassation, in the decisions here discussed, does not found its reasoning on the "Cammarata thesis."

[19] Cass. civ. Sez. Un., 26.9.50, n. 2552. *Foro Italiano,* 1950, I, p. 1129.

[20] Cass. civ. Sez. Un., 15.3.51, n. 658, *ibid.,* 1951, I, 282.

system was to continue. (Article 10 of Annex VII provides: "Existing laws and regulations shall remain valid unless and until revoked or suspended by the Governor. . . .") So the courts at Trieste remained organs of the Italian state. As to the Allied Military Government, it now derived its powers, not from conquest, but from the Treaty; it remained limited, however, by Article 43 of the Hague Regulations, whereby military occupation does not destroy or suppress the juridical system of the occupied state or have any effect upon the state and its governmental organs which continue to exercise their authority in its name. The Military Government must abide by the laws of the occupied state: G.O. No. 6 was in conflict with that obligation and would not be recognized by the Court of Cassation.

Now this reasoning is plainly wrong, a compounding of errors. Take first the matter of the effect of a termination of sovereignty. (Exclude for the moment the matter of the powers of a military occupant, which is quite separable.) Territory Z is lost to State A, A's sovereignty over Z is "terminated." The instrument may provide that existing laws shall remain in effect until amended or repealed. A mere stipulation that the property and acquired rights of the inhabitants shall be respected necessarily requires observance of the law on which such property and rights were based, namely, the law of A. The judges of the acquiring state, or of the separate Territory of Z, will resort if need be to authoritative materials to learn what that law provides for cases arising before them. It may be strange and, in one sense, foreign law to them, in that they are applying law derived from the foreign sovereign A. To the judges in State A, the basic law of the Territory of Z is familiar, being in a sense their own national law; yet inasmuch as A's sovereignty over Z is terminated, Z and its law have become foreign to the judges of A. The principle is obvious, though one may perform a sleight of hand with the words. There was "French law" in Louisiana after the Louisiana Purchase, "Mexican law" in Texas and California, and for that matter "English law" in the original States after 1776: but it is American courts that have applied it whether familiar or strange. The Italian Court was acting on the right principle in the earlier case when it held that the moment Rhodes was lost to Italy the power of the Italian court over an appeal from Rhodes was lost.

Italian sovereignty over Trieste was "terminated"—came to an end—on a certain day. The treaty provision is really unequivocal. The United States and British Governments, and that of France as well, have gone on record as favoring retrocession. The actual Administration at Trieste urges that solution, and in the meantime follows Italian legislation as closely as practicable. But for the present Trieste remains foreign to Italy, and the "trustee administration"—no matter for the moment that it happens to be a military administration—is following a plain duty in insisting that the governmental organs of Trieste are not organs of the Italian state and that the Italian state, whether by its legislature or its

executive government or by the voice of its judiciary, does not command in the Free Territory.

Turn now to Article 43 of the Hague Regulations. The Italian court purports to be giving a general construction to the article: its holding was not addressed to the peculiar situation of the Allied Military Government of Venezia Giulia or of the Free Territory of Trieste. The text reads:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

What is involved in "respecting the laws?" The preparatory materials at the Hague Conferences record no discussion of the specific point involved in the court's holding. But the situation envisaged is one wherein the military forces of one government (or of Allied Governments) have excluded another government from a portion of its territory; the two parties are at war with one another; normal friendly intercourse is suspended; considerations of comity have no place; even private communication between the two zones will have been forbidden. And yet "the laws in force" includes the legislation on appellate jurisdiction, which the occupying Power must "respect" by permitting appeals from the local courts to be carried to the higher courts of the enemy country! A moment's reflection will suffice to reject this far-fetched contention. Reference to discussions of Article 43 in the books, with their observations on actual practice, will show that no such obligation is recognized. The excellent discussion of "Occupation of Enemy Territory" in the British *Manual of Military Law,* and the more concise but no less accurate summary in the American *Rules of Land Warfare,* make clear that those governments recognize no such rule as the Italian court sought to derive from Article 43.

The free governments that are today concerting measures for combined defense have a common interest in supporting sound doctrine in the law of military government and civil affairs. The work of reconstruction in liberated and occupied countries which followed progress of the Allied Forces in the Mediterranean, European, and Pacific Theaters during the late war was an important and a perplexing aspect of Allied operations. Principles of the law of occupation had to be applied in the context of a combined resistance to the totalitarian powers of the Axis—with due respect for "the laws in force," but with a sturdy determination, too, to substitute liberal for Fascist principles in law and administration. The experience thus developed is an important asset today. In making a bad precedent to meet the special situation in Trieste the Italian court has created confusion where it is to the common interest to maintain firm principle.

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[21] 36 Stat. 2277, 2306.