

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Christian Damson (United States) v. Germany

22 April 1925

VOLUME VII pp. 184-199



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

acts of the Congress or otherwise. This Commission can consider not what the Congress and the parties to the Treaty might or could have said or done but only what they did say and do. Germany's obligations are fixed by contract as expressed in the Treaty of Berlin. Her obligations to make compensation are by that contract limited to such damages as were suffered by those owing permanent allegiance to the United States. The sole question presented, therefore, is the narrow one, Did claimant owe permanent allegiance to the United States within the meaning of the Treaty of Berlin both at the time he suffered the damages complained of and at the time the Treaty became effective? Manifestly he did not. Therefore Germany is not obligated to compensate for the damages suffered by him.

Applying the rules in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

Edwin B. PARKER
Umpire

CHRISTIAN DAMSON (UNITED STATES) *v.* GERMANY

(*April 22, 1925, pp. 258-265; Certificate of Disagreement by the National Commissioners, April 4, 1925, pp. 243-258.*)

WAR: CIVILIANS AND CIVILIAN POPULATION AS DISTINCT FROM PERSONS WITH MILITARY STATUS; PERSONAL PROPERTY IMPRESSED WITH MILITARY CHARACTER; REQUISITION OF MERCHANT VESSELS; PUBLIC SHIPS.—INTERPRETATION OF TREATIES: (1) INEQUALITY, ARBITRARINESS IN APPLICATION, (2) TERMS, CONTEXT, OBVIOUS MEANING. Claim for damages on account of impairment of health suffered, and personal property lost, by American master of oil tanker, requisitioned by United States Shipping Board, operated by War Department as public ship, and sunk by German submarine on August 17, 1918, while engaged in transporting oil from United States to Europe for United States military forces. *Held* that claimant was not a "civilian" and, consequently, not a part of "civilian population" of United States, as those terms are used in Treaty of Versailles, Part VIII, Section I, Article 232, and Annex I, para. 1, as carried into Treaty of Berlin: (1) irrelevant whether under United States law claimant had or not "military status": use of national criteria would lead to inequality, arbitrariness in application of Treaty, (2) terms, read in context, obviously intended to describe class of nationals common to all Allied and Associated Powers and determined by individual's occupation at time of injury or damage, (3) nationals like claimant, whose activity aimed at direct furtherance of military operation against Germany or allies, were no "civilians" within meaning of Treaty (reference made to *United States, Garland Steamship Corporation, and Others v. Germany*, see p. 73 *supra*); and that claimant, therefore, not entitled to damages, neither for impaired health, nor for personal property lost (wearing apparel, personal effects, instruments used in navigation of ship), all of which was carried into war zone, served him in a military operation, and thus was impressed with military character of ship and himself.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 815-821; Annual Digest, 1925-26, pp. 435-437; Kiesselbach, *Probleme*, pp. 366-370 (German text); Witenberg, Vol. II, pp. 97-104 (French text).

Bibliography: Borchard, pp. 75-76; Kiesselbach, *Probleme*, pp. 11, 137-139.

CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over the claim of Christian Damson, Docket No. 4259, their respective Opinions being as follows:

OPINION OF MR. ANDERSON, THE AMERICAN COMMISSIONER

In this case two jurisdictional questions are presented for decision by the Commission:

1. Was the claimant at the time he suffered the injuries for which damages are claimed a "civilian" within the meaning of the provisions of subdivisions (1) and (2) of Annex I of the reparation clauses of the Treaty of Versailles as incorporated in the Treaty of Berlin, and
2. Was the property for the loss of which damages are claimed included in the exception of "naval and military works or materials," with respect to which damages can not be claimed under subdivision (9) of the aforesaid Annex I?

The damages for which the claim is made arose from the sinking of the *Joseph Cudahy* on August 17, 1918, by a German submarine, without warning. At that time the claimant was in the employ of the United States Government as the civilian master of that ship, and he claims damages for personal injuries inflicted upon him and for the loss of his personal property through the sinking of that ship.

The *Joseph Cudahy* when sunk was en route in ballast from France to the United States and this Commission has held, the American Commissioner dissenting, that "the *Joseph Cudahy* at the time of her destruction was impressed with the character of 'military materials' " on the ground that—

"Being a tank ship operated by and for the exclusive use of the Army Transport Service of the United States, her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations." (Opinion Construing the Phrase "Naval and Military Works or Materials", page 98.)

The status of the property destroyed

The decision of the Commission that the *Joseph Cudahy* was impressed with the character of "military materials" carries with it the consequence that damages for her destruction can not be claimed by the United States Government, because the Treaty excludes damages for property of that character. It does not follow, however, from this decision, and the Treaty does not provide, that all property on board of a ship having the character of "military materials" was impressed with that character and that damages can not be claimed for the destruction of such property. As stated in the Brief of the Agent for the Government of the United States:

"The mere fact that the personal property of claimant was on board a vessel that falls within the category of 'naval and military works or materials' no more makes such particular property naval and military works or materials than it

would make a civilian on board such a vessel a part of the military forces of a belligerent."

In each case the question of whether or not the cargo and other property on a vessel had the character of "naval and military works or materials" must be determined, just as the character of the vessel itself must be determined, with reference to its ownership, control, nature, use, and destination. That is the test established by that decision of the Commission for determining the character of all property in respect to which damages are claimed under subdivision (9) of Annex I aforesaid, and that is the test which must be applied to the claimant's property in this case.

It will be found on an examination of the opinion of the Commission construing the phrase "naval and military works or materials" that the reasons stated therein for impressing the *Joseph Cudahy* with the character of "military materials" furnish grounds against, rather than for, imposing that characterization upon the private property for the loss of which damages are claimed in this case.

The treaty provisions there under consideration are found in Annex I, subdivision (9), above mentioned, and are as follows:

"Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

* * * * * *

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war."

The meaning of the phrase "naval and military works or materials" as applied to ships is defined in that decision as follows:

"This phrase, in so far as it applies to hulls for the loss of which claims are presented to this Commission, relates solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies. A ship privately operated for private profit cannot be impressed with a military character, for only the government can lawfully engage in direct warlike activities."

The word "materials" is defined as follows:

"Reading the French and English texts together, it is apparent that the word 'materials' is here used in a broad and all inclusive sense, with respect to all physical properties not attached to the soil, pertaining to either the naval or land forces and impressed with a military character; while the word 'works' connotes physical properties attached to the soil, sometimes designated in military parlance as 'installations', such as forts, naval coast defenses, arsenals, dry docks, barracks, cantonnments, and similar structures. The term 'materials' as here used includes raw products, semi-finished products, and finished products, implements, instruments, appliances, and equipment, embracing all movable property of a physical nature from the raw material to the completed implement, apparatus, equipment, or unit, whether it were an ordinary hand grenade or a completed and fully equipped warship, provided that it was used by either the naval or land forces of the United States in direct furtherance of a military operation against Germany or her allies."

It is important to note that, as pointed out in these definitions, the word "works," as used in the phrase "naval and military works or materials", means only "physical properties attached to the soil, * * * such as forts,

naval coast defenses, arsenals, dry docks, barracks, cantonments, and similar structures". The "works" mentioned in this phrase, therefore, are properties which, in the nature of things, could be owned or controlled only by the Government when used for war purposes.

It is also to be noted that the words "works or materials" are associated together and governed by exactly the same qualifications in this phrase, and clearly it was the intention of the phrase makers that the word "materials" should apply equally with the word "works" only to properties owned by or under the control of the Government. The underlying reason for this interpretation is the same in each case, for unless either the "works" or "materials" were in the possession or under the control of the Government they could not properly have a naval or military character, because, as pointed out by this Commission in the above-quoted extract from its former decision, "only the government can lawfully engage in direct warlike activities".

The importance of this distinction between public and private property under the reparation clauses in the Treaty of Versailles has already been noted by this Commission in its opinion as to the meaning of the phrase under consideration, as follows:

"It is apparent that the controlling consideration in the minds of the draftsmen of this article [Article 232] was that Germany should be required to make *compensation* for all damages suffered by the *civilian population* of each of the Allied and Associated Powers during the period of its belligerency. It was the reparation of the private losses sustained by the *civilian population* that was uppermost in the minds of the makers of the Treaty rather than the public losses of the governments of the Allied and Associated Powers which represented the cost to them of prosecuting the war." (Page 77.)^a

It follows from these considerations that this phrase "naval and military works or materials" was not intended to apply to privately owned property, unless such property had come into the possession and under the control of the Government in such a way as to make the loss fall on the Government rather than on the private owner, and unless such property was being used by the Government in direct furtherance of a military operation.

The property in this case consisted of clothing and other personal effects and some navigation instruments belonging to the master personally. The nature of this property was not inherently military, and it was the sort of property which the claimant would have been allowed to retain in his possession if he had been captured, instead of being put adrift at sea, and this Commission has awarded damages in many instances where similar articles in the possession of prisoners of war when captured were not returned to them when released.

It would be a very far-fetched and forced construction of the established facts to hold that such privately owned property was in the possession or under the control of the Government or was being used at the time of its loss in furtherance of a military operation, and consequently within the excepted class. Furthermore such property can not in any sense be regarded as being used at the time of its loss *directly* in furtherance of such an operation.

As held in the above-mentioned decision of this Commission:

"In order to bring a ship within the excepted class she must have been operated by the United States at the time of her destruction for purposes directly in furtherance of a military operation against Germany or her allies." (Page 99.)^b

The reason given in that decision for holding that the *Joseph Cudahy* was engaged in a military operation was because it was presumed that she was

^a Note by the Secretariat, this volume, p. 76 *supra*.

^b Note by the Secretariat, this volume, p. 90 *supra*.

going to get "additional supplies of gasoline and naphtha for the United States Army on the fighting front". No such presumption, however, can be adopted about the personal property on board belonging to the civilian master, and it can not even be presumed that the master himself would have remained with the ship on a return voyage.

It was also held in that decision of the Commission that—

"The automobile belonging to the United States assigned to its President and constitutional commander-in-chief of its Army for use in Washington is in no sense military materials. But had that same automobile been transported to the battle front in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character." (Page 97.)^c

Inasmuch as the Commission has decided that even government owned property is not military material unless used *directly* in furtherance of a military operation, it is immaterial to consider in this connection whether or not the master of the *Joseph Cudahy* had a military or civilian status, for in neither case can his privately owned property be regarded as being military or naval materials at the time of its destruction.

The civilian status of the claimant

It is necessary in connection with the part of this claim which relates to damages for personal injuries suffered by the master to determine whether or not he had a civilian status, because the Treaty provides for compensation for such damages only when suffered by civilians.

This claim arises under the provisions of Article 232 of the Treaty of Versailles together with subdivisions (1) and (2) of Annex I thereto, which were incorporated in the Treaty of Berlin. These provisions in so far as they apply to the present case are as follows:

ARTICLE 232. * * * "The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto."

ANNEX I. "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks * * * on sea, * * * and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

"(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence * * * of exposure at sea * * *), wherever arising, and to the surviving dependents of such victims."

It is conclusively shown by the authorities cited in the Brief of the American Agent that under the laws of the United States the claimant in this case had a civilian and not a military status at the time the damages occurred.

His relation to the Government was that of employee under the control of the United States, but he was neither enlisted nor commissioned as a member of the military or naval forces of the United States.

He was required to take an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic". but the oath

^c Note by the Secretariat, this volume, p. 88 *supra*.

taken by him differs from that taken by an enlisted man in that the latter also swears to "obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War". The oath required from the claimant was practically the same as that required from any civil official of the Government of the United States.

As stated in the Brief of the American Agent:

"The master and crew of the *Joseph Cudahy* were employed, not for fighting, but for the ordinary and usual nautical work of navigating a noncombatant public vessel carrying supplies for the use of the military forces." (Page 20.)

And also:

"That the vessel commanded by the claimant in this instance was not entitled to engage in offensive action against enemy ships is recognized by this Commission in its opinion of March 25, 1924, page 96. The rights of this vessel to commit acts of war were exactly the same as were the rights of any armed merchant vessel of the United States. The only acts of war that either the *Cudahy* or the armed merchant vessel of the United States might commit were such acts as were necessary to defense against an attack by an enemy war vessel." (Pages 40-41.)

The American Brief also cites numerous decisions of the United States courts and opinions of the United States Attorneys General holding that the employment of civilians in the Army or Navy of the United States does not constitute the employee a part of the military service or establishment of the United States.

Furthermore, the Secretary of War, in response to an inquiry from the American Agent with reference to the particular question under consideration, has ruled officially:

"Employees of the Army Transport Service did retain their civilian status while so employed. They were, however, subject to military discipline on board in so far as such control was necessary to prevent interference with the general administration of the vessel with troops aboard and operating under war conditions. The determination of the guilt of members of the crew of offenses committed aboard the ship was controlled under rules laid down in Special Regulations No. 71, instead of by court-martial as in case of an enlisted man, and orders for the performance of their duties were issued by the master of the vessel through his subordinates." (Page 8, American Brief.)

In commenting on this ruling the American Agent says in his Brief:

"This decision of the Secretary of War as to the actual civilian status of the employees of the Army Transport Service is, it is submitted, if not controlling, at least entitled to the greatest weight. See *Brown v. U. S.* 32 Ct. Cl. pp. 379, 388." (Page 8.)

This contention of the American Agent has been recognized by the Supreme Court of the United States, in numerous cases, as a settled rule for the construction of doubtful statutes. (See *United States v. Johnston*, 124 U. S. 236, at page 253; *United States v. Cerecedo Hermanos y Compañia*, 209 U. S. 337, at page 339; and *Schell's Executors v. Fauche*, 138 U. S. 562, at page 572, and the cases therein cited.)

The American Agent finally shows, on the authority of the pension and bonus and other war legislation of the United States, in his Brief that:

"The claimant in this instance was clearly not in the military service so as to give him a pensionable status. He was not in such service so as to entitle him to compensation provided for naval and military victims of the war or to entitle him to receive from the United States an allowance for the benefit of his family and dependents. He was not in the military service so as to receive the benefits

of the bonus legislation. Had he been in the military service and not a civilian he would then have received the benefit of these particular rights." (Page 42.)

The Treaty of Berlin deals with claims of American nationals and not with claims of British or French or German nationals, and, accordingly, the word "civilian" as used in the clauses under consideration of the Treaty of Versailles, incorporated in the Treaty of Berlin, must be understood to relate to the civilian status of claimants who are American nationals.

Just as the American nationality status of a claimant under the Treaty of Berlin must be determined by the laws of the United States, so the civilian status of an American national must be determined by the laws of the United States. The question of whether a national is a civilian employee of his Government or a part of its military or naval service can only be determined by the laws of his own country. In this case, the civilian status of the claimant has been conclusively established by the laws of the United States, under the authorities cited in the Brief of the American Agent, and consequently his claim comes within the category of damages suffered by civilians, under Article 232 and Annex I, subdivisions (1) and (2) thereof.

The German Commissioner disagrees with this conclusion, and contends that the Treaty provisions under consideration should be so interpreted as to exclude damages suffered by any claimant who voluntarily participated in the military effort of the nation, irrespective of his civilian status under American law.

In support of this contention the German Commissioner cites the provisions of subdivision (7) of Annex I aforesaid, which permit the Allied Governments to recover for allowances paid "to the families and dependents of mobilised persons or persons serving *with* the forces". He concludes from this provision that a distinction was recognized between persons serving *in* the forces and *with* the forces but that in both cases it was intended that such persons should not be treated as civilians.

It may be noted in this connection that this distinction between *with* the forces and *in* the forces is not found in the French text of the Treaty, which is equally authentic with the English text. In the French text the above phrase is rendered "ou de tous ceux qui ont servi *dans* l'armée". The word *dans* in French may sometimes have the meaning of the word "with" in English, but always in the sense of "within," which is obviously the meaning of the word "with" as used in the English text.

Entirely apart from this consideration, however, the interpretation contended for by the German Commissioner is objectionable because it would exclude the claims of all civilians in the service of their Government who participated in the military effort of the nation. All members of the Cabinet and of the Congress, and of the many war boards and other governmental organizations, all of whom participated in the military effort of the nation, would be placed in the excluded class under the interpretation proposed, although under the laws of the United States their official positions and the services rendered by them did not disturb their distinctly civilian status.

The obvious difficulty with this proposed interpretation is that it substitutes for a legal definition an arbitrary distinction which is not recognized in law and not supported by the terms of the Treaty.

In conclusion, the claimant, as a civilian employee of the United States at the time the injuries occurred, is entitled to all rights accorded to civilians under the Treaty of Berlin.

Chandler P. ANDERSON

OPINION OF DR. KIESSELBACH, THE GERMAN COMMISSIONER

A. Claim for *personal injury*.—Claimant was the so-called “civilian master” of the oil tanker *Cudahy* sunk by a German submarine on August 17, 1918. Under the opinion construing the phrase “naval and military works or materials” (page 98)^d the Commission has found that the *Cudahy* was “operated by and for the exclusive use of the Army Transport Service of the United States” and that “her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations.”

Claimant had entered the Army Transport Service generally. This service is headed by an officer and is a special branch of the Quartermaster Corps of the War Department. Claimant, an American citizen, had taken an oath of allegiance upon entering the Army Transport Service.

The *Cudahy* was requisitioned and chartered under a bare-boat charter and was operated “by a civilian crew employed and paid by and in all things subject to the orders of the army authorities” (page 98).^e

The question to be decided is whether claimant is a “civilian victim” in the meaning of Annex I following Article 244 of the Versailles Treaty as incorporated in the Treaty of Berlin.

The question can not be answered either from a general conception of international law or by the application of terms of domestic law of the United States but only by a careful interpretation of the provisions of the Treaty itself, as contained in Annex I following Article 244.

I do not agree with the American Commissioner that “Just as the American nationality status of a claimant under the Treaty of Berlin must be determined by the laws of the United States, so the civilian status of an American national must be determined by the laws of the United States”.

The term “national” is a technical legal term of a generally acknowledged meaning, and a “national” of a “nation” can only be one who is recognized as such under the laws of that nation.

But the term “civilian population”, as well as the term “naval and military works or materials” and the term “property belonging to”, is not a technical legal term at all and can only be interpreted from the provisions and intentions of the Treaty. And it is significant that the Treaty, in using the broad term “mobilised persons or persons serving with the forces”, does not apply a legal term of an undisputed status but a rather vague and popular expression not a legal concept.

The interpretation of this expression leads in my opinion by two different roads to the conclusion that claimant has no right to compensation from Germany.

I. Annex I clearly distinguishes between “civilian victims” (clauses 2 and 3) or “civilians” (clause 1) and “naval and military victims” (clause 5) or “mobilised persons or persons serving with the forces” (clause 7).

This distinction follows the terms of the Pre-Armistice Agreement under which Germany’s liability was established for damage done to the “civilian population” and their property caused by Germany’s aggression on land, on sea, etc.

The well-founded reason for this discrimination was the desire of the Powers concerned to indemnify persons—and property—*involuntarily* drawn into the perils of the war.

^d Note by the Secretariat, this volume, p. 89 *supra*.

^e Note by the Secretariat, this volume, p. 89 *supra*.

The opposite of the term "civilian" as used here is not, as American counsel argue, any person "in the military service" or being a "member of the enlisted or commissioned personnel", which would probably square with the term "mobilised person", but the decisive criterion is his participation in the efforts of the nation's military and naval forces. This broader conception is embodied in the wording of the provisions of the Treaty, which manifestly excepts from the class of persons who are "civilians" in the meaning of the Treaty not only mobilized persons but every person "*serving with the forces*". The group thus excepted comprises (a) persons *not mobilized* but serving with the forces and (b) not only persons serving *in* the forces but—this being a broader term—*with* the forces.

Though, as the American Commissioner points out, the distinction between "*in*" the forces and "*with*" the forces is not found in the French text, I do not believe that that would weaken the force of my argument. The French text has the same distinction as the English text between "*des mobilisés*" and "*tous ceux qui ont servi dans l'armée*", thus showing that the French text also clearly embraces a broader conception than the strictly military force, i.e., the "*mobilisés*". And though the French word "*dans*" could have a different meaning from the English word "*with*", the conclusion would not be justified that *therefore* the French text would be decisive. When both texts are equally authentic, it follows that both phrases have the *same* weight and that then the undisputed rule of interpretation applies that "the language will be *strictly construed* against" the framers of the wording of the Treaty, and that the benefit of the doubt is in favor of Germany.

Therefore, under this principle the English text is controlling, and this the more so as it may certainly be assumed that an English-speaking nation will look for the meaning of an expression primarily to its own language.

So any person who serves *with* the forces of his country is *not* a civilian in the meaning of the Treaty and is therefore excluded from claims for compensation; and the same would apply to a person serving "*dans l'armée*", since the expression "serving with the forces" as well as the expression "having served '*dans l'armée*'" clearly was intended to include categories of persons other than such as are mobilized.

Now, a master of a ship designed and used for military operations and under the control of the military authorities of the United States is undoubtedly a person who serves, and serves very efficiently, with and in the forces of the United States. Similarly the British Government has classified transport workers under clause 5 as "naval and military victims," and the Reparation Commission has classified "civilian" minesweepers under the same clause.

It is therefore not decisive whether a person is "a military person" in the meaning of international law or of the law of the United States.

II. The intention already mentioned of the Powers concerned to protect and indemnify the population involuntarily drawn into the perils of the war was not confined to civilian *persons* only but also comprised property in so far as it was of a non-military character.

It therefore may be helpful to recall the principles laid down by this Commission to define the meaning of the phrase "naval and military materials" with regard to ships and to apply them by analogy in the definition of persons of a "non-civilian" character.

In order to bring a ship within the class of naval or military material it must (see page 78 of the opinion)[†] (a) be "used" or "designed" (or devoted) to use for (b) military purposes; and this use or design for use must be (c)

[†] Note by the Secretariat, this volume, pp. 78-79 *supra*.

ordered—or sanctioned—by the government, “for only the government can lawfully engage in direct warlike activities”.

An application of these rules brings this claimant clearly within the class of persons having a “military character”.

As master of the *Cudahy*, which ship was engaged in military operations, claimant himself was (a) active, that is, “used,” (b) for military purposes, and, as he was under the orders and in the pay of the Army Transport Service (this being a branch of the Quartermaster Corps of the War Department), his actions were (c) “ordered” by the Government.

Consequently the activities of the claimant were of a *military character* in the meaning of the Treaty, and therefore no claim exists to compensation for injuries suffered.

This does not mean that “all civilians in the service of their Government who participated in the military effort of the nation” were excluded from claims. But the conclusion means only that those who form a part of the military or naval forces of the nation by being *mobilized* or by *serving with such forces* are not civilians within the meaning of the Treaty.

B. Claim for *personal property*.—(a) Notwithstanding the question as to the military character of claimant being thus answered in the affirmative, a few further remarks are necessary with regard to his right of recovery for *property* lost.

It can be left in abeyance whether every cargo on board of a vessel which is naval material in the meaning of the Treaty could be considered as military or naval material, since the property for the loss of which claim is made here is certainly not a part of such cargo.

I can not agree with the American Commissioner in his argument that equally with the word “works” the word “materials” should only apply to properties owned by or under the control of the government, though I concur in his opinion that the private property of claimant lost on the *Cudahy* is neither owned nor controlled by the American Government.

But such interpretation of the phrase “naval and military works or materials” would not be in harmony either with the contention put forward by the American Agent or with the interpretation given by the Reparation Commission.

As to cargo, the contention of the American Agent is that Germany is obligated to make compensation for all cargoes “other than such cargoes as were owned by the United States and devoted by it to military purposes, or such cargoes in *private ownership* as were consigned directly to the naval or military forces in the area of belligerent operations.”¹

And the Reparation Commission held in respect of cargo losses “that cargoes should be classed as ‘naval and military material’ within the meaning of paragraph 9, Annex I, *if they reached a state of manufacture which would limit their economic use to war purposes* or use both for war and civic purposes if directly consigned to theatres of war for the use of forces”.

So the intention of the makers of the phrase invoked by the American Commissioner did *not* limit the definition of cargo in the phrase “naval and military materials” to property owned or controlled by the government.

In accordance with the opinion of the American Agent and the interpretation by the Reparation Commission it seems to me unquestionable that ammunition, for instance, though privately owned and privately shipped, but destined for the war, is naval or military material. Yet under the definition of the American Commissioner Germany would be liable for its destruction.

¹ American Brief on the question of naval and military works or materials, filed in Docket Nos. 29, 127, and 546-556, at page 80.

Therefore it is immaterial that the United States neither owned nor controlled the claimant's property.

"It was," as the American Commissioner justly cites from the Commission's decision, "the reparation of the *private losses* sustained by the *civilian population* that was uppermost in the minds of the makers of the Treaty." And the question at issue here is only whether claimant belonged to the "civilian population" in the meaning of the Treaty or not.

Clause 9 of Annex I following Article 244 excepts only naval and military materials from Germany's liability to compensation, and it may be doubtful whether—as far as the mere wording of the provision goes—the personal apparel of the claimant can be considered as naval or military material in the strict meaning of that phrase. But certainly the goods owned by a military person or by a person serving with the forces are military material indirectly and to the extent that they are designed to furnish and supply to their owners the necessities of his military life and existence. They are not property belonging to the "civilian population".

And it is therefore only logical that no power has ever claimed for compensation for property loss suffered by a military person in connection with his warlike activities.

It is undisputed that this Commission has awarded damages in many instances where similar articles in the possession of prisoners of war were not returned to them when released. The German Government has never contested its liability and the German Agent has always admitted the obligation to compensate for such loss, for the reasons pointed out in my opinion of February 9, 1924, on the "naval and military works or materials" question, saying:

"Germany's liability for prisoners' private property is exclusively based *by the Allies* on the ground of maltreatment. Under international law it is undisputed that such 'private' property of a military person is *military material*, but it is against international law to deprive prisoners of it, as far as it is privately owned and can not be used for attack or defense".

(b) So far as concerns the question whether such of claimant's property as was capable of being used for direct military purposes is naval materials (as, for instance, the sextant and binoculars here which were used in the navigation of the ship), the fact that it is in the actual possession of a person engaged in warlike purposes makes it clearly naval or military material, because even if it is not actually used it is at all events designed to be used in case of emergency. This part of claimant's property is therefore naval material even in the stricter meaning of that phrase.

W. KIESSELBACH

The National Commissioners accordingly certify to the Umpire of the Commission for decision the question of the jurisdiction of the Commission over this claim.

The National Commissioners have also disagreed as to the amount of the damages suffered by the claimant, and if the Umpire should decide that this claim comes within the jurisdiction of the Commission the National Commissioners also certify to the Umpire for decision the question of the amount to be awarded.

Done at Washington April 4, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement on three questions, which may be stated thus:

1. Did the claimant when he received the personal injuries complained of belong to the "civilian population" of the United States and was he then a "civilian", as those terms are used in Article 232 and Annex I to Section I of Part VIII of the Treaty of Versailles?

2. Was the personal property belonging to the claimant, which was lost with the sinking of the ship of which he was master, "naval and military * * * materials" as that term is used in paragraph 9 of the said Annex I?

3. If the first question should be answered in the affirmative and/or the second answered in the negative, what is the extent of the claimant's damages and the amount of the award against Germany to which the United States is entitled on his behalf?

These are the facts as reflected by the record herein:

Christian Damson, a naturalized American citizen, was in the employ of the Army Transport Service, a special branch of the Quartermaster Corps of the United States Army, and on July 12, 1918, was assigned to duty as the master of the Army Cargo Transport *Joseph Cudahy*, an oil tanker, requisitioned by the United States through its Shipping Board and on October 3, 1917, delivered to the War Department and operated by it through the Army Transport Service. The charter under which the Steamship *Joseph Cudahy* was operated provided that "the vessel shall have the status of a Public Ship" and that "the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States". The *Cudahy* was engaged in transporting oil supplies from the United States to Europe for the use of the American military forces. She was torpedoed and shelled by a German submarine and sunk on the morning of August 17, 1918, while returning from France to the United States in ballast. Her master, the claimant herein, the crew, and the naval gun crew were compelled to abandon the ship at a point in the Atlantic Ocean about 700 miles off the coast of France and take to small boats, from which they were finally rescued, the master's boat after being on the open sea some six and one-half days. The recovery here sought is compensation for impairment of health alleged to have been suffered by claimant as a result of his experiences and also for the value of his personal effects lost with the *Cudahy*.

The claimant was the master of the *Cudahy* and as such under special regulations governing the Army Transport Service had "full and paramount control of the navigation of the ship".¹ The Army Transport Service which operated the *Cudahy* was "organized as a special branch of the Quartermaster Corps, United States Army, for the purpose of transporting troops and supplies by water. All necessary expenses incident to that service will be paid from the appropriations made for the support of the Army."² The claimant as master

¹ Paragraph 65 of Special Regulations No. 71 of the United States War Department governing the Army Transport Service, hereinafter cited as Army Transport Service Regulations.

² Paragraph 1 of Army Transport Service Regulations.

of the *Cudahy* was appointed by the Quartermaster General of the Army.³ He had "the general direction of the movements" of the *Cudahy* and was "in general charge of its business".⁴ The oath which the claimant was required to take on entering this service was so far as it went the oath which any person "in the civil, military, or naval service" of the United States was required to take (unless a special oath is prescribed by law) and the oath taken by Regular Army officers.⁵ He was by the War Department regulations required to wear a uniform when on duty.⁶ He belonged to a class of persons "accompanying or serving with the armies of the United States in the field" and as such was subject to court-martial under the provisions of the 2nd Article of War of the United States.⁷

This Commission has expressly held⁸ that the *Cudahy* was at the time of her destruction "naval and military works or materials" within the meaning of that phrase as used in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles and hence not property "for which Germany is obligated to pay under the terms of the Treaty of Berlin". The basis for this holding was that, under the terms of so much of the Treaty of Versailles as is carried by reference into the Treaty of Berlin, there was no intention that Germany should be obligated to make compensation for destruction of or damage to property impressed with a military character either by reason of its inherent

³ Paragraph 6 of Army Transport Service Regulations.

⁴ Paragraph 20 of Army Transport Service Regulations.

⁵ Paragraph 40 of Army Transport Service Regulations and Exhibit No. 2 in this record. The oath taken by Regular Army officers is the oath prescribed by section 1757 of the Revised Statutes and is, under section 2 of the Act of May 13, 1884 (28 Statutes at Large 22), to be taken by "any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States," unless a special oath is prescribed by statute.

⁶ Paragraph 51 of Army Transport Service Regulations.

⁷ 39 Statutes at Large 651.

Ex parte Falls, 251 Federal Reporter 415 (May 24, 1918), wherein it was held that the chief cook on a ship operated by the Army Transport Service was a person "serving with the armies of the United States in the field" and hence "subject to military law" and liable to trial by court-martial. In its opinion the court said: "Carrying supplies to equip and sustain the army is a very important military operation in time of war. * * * It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies, in the class, in time of war, of those 'persons accompanying or serving with the armies of the United States in the field'."

Ex parte Gerlach, 247 Federal Reporter 616 (December 10, 1917), wherein it was held that a mate in the Army Transport Service was serving with the armies of the United States in the field and subject to court-martial. There the court said: "The words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted."

See also *Ex parte Jochen*, 257 Federal Reporter 200 (April 8, 1919), wherein the court said, at page 204: "That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority."

The Judge Advocate General of the Army of the United States distinguishes the class to which claimant belongs from the class "belonging to and serving in the Army" and who consequently have a military status (see manuscript letter J. A. G. 330.2, May 15, 1923).

⁸ See Decisions and Opinions, pages 97-98. (*Note by the Secretariat*, this volume, p. 89 *supra*.)

nature or by reason of the use to which it was devoted at the time of the loss. The *Cudahy* was being operated by the Army Transport Service for the purpose of transporting supplies of gasoline and naphtha for the use of the United States Army on the fighting front. As this operation was by the United States directly in furtherance of a military operation against Germany or her allies, such use impressed the *Cudahy* with a military character.

The claimant was the master of the *Cudahy* and as such had "full and paramount control of the navigation of the ship" in furtherance of a military operation against Germany or her allies. Was he a "civilian" and, as such, a part of the "civilian population" of the United States as those terms are used in the reparation provisions of the Treaty of Versailles?

It is contended that this question must be answered in the affirmative because, under the statutes of the United States and the decisions of its executive and legislative departments and of its courts construing them, the claimant did not have a "military status" and hence he had the status of a "civilian" within the meaning of the Treaty of Versailles. The conclusion is a *non sequitur*. Whether the claimant had or not a "military status" with respect to his relations with his government is a question purely domestic in character and its examination here would not prove profitable. Many of the statutes and decisions cited deal with claims to stipulated salaries, or to bonuses or to pensions or the like, of those serving *in* or *with* the military or naval forces of the United States. Manifestly all such questions are of a domestic nature and their consideration here tends to confuse rather than to clarify the language of the Treaty entered into by the United States and Germany, within the terms of which all claims must fall before Germany's obligation to pay attaches.

Turning to the Treaty and reading in connection with their context the words which this Commission is called upon to construe, it is obvious that the terms "civilian population" and "civilian" as used in the reparation provisions of the Treaty of Versailles were intended to describe a class of nationals common to all of the Allied and Associated Powers. The true test in determining what nationals of each power belong to this class is to be found in the object and purpose of their pursuits and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them. Twenty-six Allied and Associated Powers signed the Treaty of Versailles, which has become effective as to all of the signatories save three, including the United States of America. If the term "civilian population" shall be so construed as to include all nationals of each of the Allied and Associated Powers, save such as are given a technical military status by their respective laws, then the term will have as many meanings as there are Allied and Associated Powers. Where the laws of one of those powers give to practically all of its adult male population a military status, then, under the test proposed, such a nation would have practically no adult male "civilian population". The inequalities produced by the proposed test as between the several powers, all claiming under the same terms of the same Treaty, in themselves suggest the unsoundness of the test proposed. By reading the reparation provisions as a whole, it is clear that the terms "civilian population" and "civilian" describe a class common to all of the Allied and Associated Powers and that Germany's liability under the Treaty attaches only where claims are put forward by such a power for damages suffered by such of its nationals as fall within the general class described. If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they can not be held to have been "civilians" or a part of the "civilian population" of their respective nations within the meaning of the Treaty. The line of demarcation between

the "civilian population" and the military within the meaning of the Treaty is not an arbitrary line drawn by the statutory enactments of the nation, each nation drawing it in a different place, but a natural line determined by the occupation, at the time of the injury or damage complained of, of the individual national of each and all of the Allied and Associated Powers without reference to the particular nation to which he may have happened to belong.

An individual who is wholly in the employ and control of the army of an Allied and Associated Power and is immediately engaged in a work directly in furtherance of a military operation against Germany, can not at the time be treated as a part of the "civilian population" of the nation to which he belongs, although he may not be nominally enrolled in the military organization of that nation so as to have a "military status" for all purposes affecting the domestic relation between him and his government.

In this Commission's opinion construing the phrase "naval and military works or materials" as applied to hull losses,⁹ where the test of the use to which the ship was devoted at the time of the loss was applied in determining whether it was impressed with a military or a non-military character, this illustration was used:

"The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners."

The same rule, having its source in the same reason, applies to the drivers of those taxicabs. On the streets of Paris, operating their vehicles for profit, they were a part of the "civilian population" of France. But when pressed into service and used to transport the army to the battle front where the taxicab drivers were exposed to risks to which the "civilian population" was not generally exposed, they became a part of the French fighting machine; they were directly engaged in a military operation launched against the enemy and were no longer embraced in the "civilian population" of France within the meaning of the Treaty, although they may not have been enrolled in the army, or authorized to wear uniforms or bear arms, or possessed of a "military status".

The Umpire finds that the claimant was an American national in the exclusive employ and pay of the Government of the United States in time of war and a part of and subject to the absolute control of a military arm of that Government whose every resource and effort was directed against Germany and her allies; that he was subject to military discipline and to trial by court-martial; that under the decisions of the Judge Advocate General of the Army of the United States and of the courts of the United States he was "serving with the armies of the United States in the field"; and that he was in command of and had "full and paramount control of the navigation of the ship" which this Commission has already held was impressed with a military character *because* it was being used by the United States directly in furtherance of a military operation against Germany or her allies.

The Umpire holds that the claimant at the time of the sinking of the ship of which he was master was not a "civilian" or a part of the "civilian population" of the United States as those terms are used in the Treaty of Berlin and hence that Germany is not obligated to pay for such damages as claimant may

⁹ Decisions and Opinions, pages 75-101. (*Note by the Secretariat*, this volume, p. 73-91 *supra*.)

have sustained by reason of the exposure and privation which he suffered as a result of the sinking of the *Cudahy*. It follows that the first question propounded must be answered in the negative.

The personal property which the claimant lost consisted of his wearing apparel and personal effects and the instruments used by him in the navigation and operation of his ship. Had property real or personal belonging to claimant in France, Belgium, or elsewhere, not in claimant's immediate possession, "been carried off, seized, injured or destroyed by the acts of Germany or her allies", or had such property been damaged" directly in consequence of hostilities or of any operations of war", such damages would have fallen within paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles and Germany would have been liable therefor, notwithstanding that the claimant was at the time engaged in a military operation against Germany and not a "civilian" within the meaning of the Treaty. But the personal property which the claimant required for his immediate personal use and for use in the navigation of the ship which he was commanding and which was engaged directly in furtherance of a military operation against Germany was impressed with the military character of the ship and of the claimant. This property was deliberately carried into the zone of war and exposed to risks to which it would not have been exposed save to serve claimant in the operation of his ship, which was a military operation, and Germany is not obligated to make compensation for its loss. The second question presented must therefore be answered in the affirmative.

In view of these answers the point of disagreement between the National Commissioners covered by the third question does not arise.

Applying the rules announced in the previous decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

Edwin B. PARKER
Umpire

EISENBACH BROTHERS AND COMPANY (UNITED STATES) v.
GERMANY

(*May 13, 1925, pp. 269-272; Certificate of Disagreement by the National Commissioners, May 12, 1925, p. 267; Opinion of German Commissioner, April 20, 1925, pp. 268-269.*)

SEA WARFARE: DESTRUCTION OF VESSEL AFTER ARMISTICE BY SUBMARINE MINE.—WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN; NEGLIGENCE.—DAMAGE: RULE OF PROXIMATE CAUSE.—INTEREST. Claim on behalf of American nationals for loss of shipment by destruction after Armistice, but during period of belligerency, of American merchant vessel, without negligence on her part, through submarine mine planted during war and prior to Armistice by unidentified belligerent. *Held* that under Treaty of Berlin Germany obligated to make compensation: (1) planting of mine was proximate cause of sinking; remote in time, not in natural and normal sequence, no proof of act or omission of Allied Powers