# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

# RECUEIL DES SENTENCES ARBITRALES

**Kummerow, Otto Redler and Co., Fulda, Fischbach, and Friedericy Cases**

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CARACAS, *July 1, 1892* (29° and 34°)

*To the Citizen Administrator of Municipal Rents:*

To be charged to the expenses of war, according to the authorization of the President of the Republic, please pay to Messrs. O. Becker & Co., successors, the sum of 1,470 bolivars, the value of certain blankets taken by this office for the expeditionary army.

God and the federation.

PEDRO VICENTE MIJARES

There is no evidence of any demand for the payment of this order. Treating it as a draft, certainly a presentment and demand for acceptance is essential before interest will commence to run. Apart from the requirements of the civil law, in which the argument of the Commissioner for Venezuela finds considerable support, the umpire is of the opinion that according to the principles of commercial law the instrument would draw interest only from the date of demand for payment. It was decided by the Supreme Court of the United States that the presentment for payment of a drainage warrant, substantially similar to the order in this case, issued by the city of New Orleans, was necessary to start the running of interest. (New Orleans *v.* Warner, 176 United States Reports. p. 92.) [1]

In view of the full consideration given by the claimant for the order so many years ago, it would not be equitable to decide against any allowance of interest prior to the presentation of the claim to this Commission. The claimant will, therefore, be allowed a reasonable time to prove a demand for payment, so that interest may be computed from that date. The same course will be taken in the case of A. Daumen.

In the case of Christern & Co. simple interest at the rate of 3 per cent per annum will be allowed upon the sums hereafter found due by the Commissioners and the umpire from the dates of demand for payment of the several amounts, and a reasonable time will be allowed to prove such date.

The cases of Fishbach, Friedericy, and Kummerow are not yet ready for a decision on the merits. The umpire is waiting for further briefs from the Commissioners. In case of their allowance they will be governed as to interest by the conclusions reached in this case, so far as they may be applicable.

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KUMMEROW, OTTO REDLER & CO., FULDA, FISCHBACH, AND FRIEDERICY CASES [2]

(By the Umpire:)

The Government of Venezuela is liable, under her admissions in the protocol, for all claims for injuries to or wrongful seizures of property by revolutionists resulting from the recent civil war.

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[1] Under the provisions of an act of Congress, the United States courts administer, in cases at law, the practice of the several States in which they sit. In the State of Louisiana the civil law obtains. (Note by the umpire.)

[2] The Commissioners for Germany and Venezuela both filed opinions in these cases separately, the umpire rendering his opinion in the cases as grouped. The cases of Henry Schussler, Carl Mohle (see p. 413), Gotz & Lange, E. Nicolai, Adolph Ermen, Paul Flothow, and Hugo Valentiner (see p. 403) were also allowed by the umpire for the reasons set forth in the following opinion, the Venezuelan Commissioner holding as in these cases that the Venezuelan Government was not liable for revolutionary damages.

Such admission does not extend to injuries to or wrongful seizures of property at any other times or under any other conditions.

Such admission does not include injuries to the person.

As to these two last classes of claims her liability must be determined by general principles of international law, under which she is not liable, because the present civil war, from its outset, has gone beyond the control of the titular government.[1]

[KUMMEROW CASE]

GOETSCH, *Commissioner:*

By the sworn declarations of the witnesses, Páez, Ojada, and Infante, it is proved that in the months of May, June, and July, 1902, the objects specified in the claim and valued at 3,200 bolivars were taken from the claimant by revolutionary troops at his ranch "Mañongo." The witnesses worked and slept in the place where the events occurred, and were present at the act of confiscation. They state expressly that the authors were troops of *the "Libertadora" revolution* under the immediate orders of Generals Boggier, Bonito Estraño, Raimundo Tejado, and of the official Felipe Colmenares. The supposition that the authors of the confiscation were marauding robbers or highwaymen without any leader is therefore inadmissible. The nature of the objects taken shows that they were destined for revolutionary purposes — that is to say, to carry on war (beasts of burden, rifles, cartridges, field glasses, blankets, and clothing.)

The third article of the protocol of February 13, 1903, is of the following tenor:

The Venezuelan Government admit their liability in cases where the claim is for injury to, or a wrongful seizure of, property, and consequently the Commission will not have to decide the question of liability, but only whether the injury to, or seizure of, property were wrongful acts, and what amount of compensation is due.

By these clauses it has been agreed by contract between the German and Venezuelan Governments that Venezuela makes itself liable for the property of German subjects illegally confiscated by authorities or troops of the Government or authorities or troops of the revolution. If the Government of Venezuela were not liable for the damage caused by the revolution, this ought to have been expressly mentioned in Article III, which otherwise would have no meaning. I mention, moreover, Article I of the protocol by which the Government of Venezuela recognizes the German claims in principle, and therefore, also, the claims for the confiscation of property on the part of revolutionists. Although it is not shown by the proofs, it is nevertheless possible that small bands confiscated the German property in question. The mode of carrying on war here, the difficulty of obtaining resources, the desire to commence depredations, generally obliges the troops of the country to separate into small divisions whereby they do not lose their character of revolutionists, for whose illegal acts the Government of Venezuela is liable in accordance with the protocol. If, in Venezuela, these small detachments are known by the name of guerrillas, the Government will be liable for the damages of guerrillas, since "guerrilla" means nothing else but war on a small scale. The removal of liability of the Government of Venezuela could only be brought into question in treating of personal crimes of rebels or highwaymen, and this is not the case, as is shown by proofs.

Article III of the protocol, which governs the Commission, does not create

[1] Headnotes by the umpire.

a new right which is burdensome to Venezuela or in contradiction to the law of nations.

The law of nations recognizes, moreover, that those States in which revolutions are frequent, and whose governments are therefore subject to frequent changes, are liable for the acts of revolutionists, provided that the revolutionists are, because of the means at their command, the government de facto, so far as the one against which they are exercising their forces is concerned. This liability has been more than once recognized by the judgments of international commissions. Thus the Government of the United States of America has claimed damages and injuries from the Government of Venezuela because of the seizure of American vessels *by Venezuelan revolutionists*, and these have been allowed by a commission. (See Moore, History and Digest of International Arbitrations to which the United States has been a party, Washington, 1898, pp. 1693-1732; see especially pp. 1716-1722-1724.) Thus also the Government of the United States of America demanded an indemnity from the Government of Peru for the robbery committed against an American, Dr. Charles Easton, by a " body of partisans of the rebel chieftain seeking to overthrow the Government," and demanded that the Commission allow it, inclusive of interest at 6 per cent. (History and Digest, pp. 1629-1630.) This case is in every sense analogous to the present case of Kummerow. (See, moreover, Panama riot and other claims, Moore, p. 1631; case of Montijo, seizure of an American vessel by Colombian revolutionists, Moore, p. 1421, where the following opinion of the umpire is found: " But there is another and a stronger reason for such liability — this is, that the General Government * * * failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and the stipulation of said treaty, it was bound to do. The first duty of every government is to make itself respected both at home and abroad. * * * If it does not do so, even by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.")

It is, therefore, beyond doubt that the Government of Venezuela is liable for the damages occasioned by revolutionists, not only by virtue of the precise terms of the protocol, but also by the law of nations, and above all by the decisions of international commissions of arbitration.

Incidentally it may be mentioned that in Germany such liability, by virtue of which a community (the city or the rural district) ought to indemnify the person who has been injured by revolt or riot, has been sanctioned by law.

The present case is analogous to the claim of Christern in Maracaibo (sackage of " El Finglado " by revolutionary troops at the command of Generals Marquez and Zuleta). According to the minutes of the fourth session, the honorable Venezuelan Commissioner has recognized in principle in this case the liability for damage occasioned by revolutionists, and it only remains for the honorable umpire to determine the amount of damage. The recognition has taken place in view of the provisions of the protocol. In the present case it will not be for the Commission to deliberate upon the liability of the Government of Venezuela. It has been materially settled by international law and formally settled by the protocol. The Commission ought preferably to decide upon the illegality of the confiscation and upon the amount of the corresponding indemnity. The illegality of this seizure is fully proved by the testimony of the witnesses, and with respect to the prices fixed for the objects taken, these appear acceptable and no objection has been made by the Venezuelan Commissioner in this respect. The costs of judicial proceedings (200 bolivars), paid by the claimant are a direct injury which the latter has received, and its return seems justified. (Art. 2 of the supplemental convention.) With respect to the interest, reference is made to the opinion contained in the claim of Christern.

The German Commissioner asks that the honorable umpire decide the admissibility of the claim, amounting to 3,200 bolivars, with interest at 6 per cent, beginning from August 1, 1902, until the complete extinguishment of the debt.

ZULOAGA, *Commissioner:*

In this claim of Kummerow, in my opinion, the facts are not proven, nor do I believe that the foundation upon which he bases it justifies the claim. The claim is founded upon the testimony of three witnesses, laborers of the claimant of such an ignorant class that they do not even know how to sign their names. The declarations are dictated in a common formula, and the estimate which they make of the value of the objects stolen proves by its uniformity that it proceeded from orders received, because of the circumstance that it is to be supposed on account of the class of work which they did they could not testify as to the existence in the possession of Kummerow of many of the objects which he says were stolen from him, nor of their value as expert valuers. To the foregoing is added the consideration that they omit all elements of time and other circumstances, which might serve to throw light upon the facts which they alleged. They say that the acts were performed during a period running over three months. It does not appear that any violence was employed, nor that the objects, if there were any, were cared for, not even that they were taken without the consent of their owner. Mr. Kummerow appears to have considered that the State is a sort of surety who pays with increase for every injury that he might suffer. To all this is added the consideration against the claim that the acts were performed by revolutionary bands, as he states. The very character of the acts which are relied upon, if they were committed, and it is of no importance to the case that the robber was called General This or That, since in Venezuela the name "general" in common speech is given in internal disturbances to every one who follows, of his own will, the rebellion against the constitutional authority. These detachments in general do not obey any central political chief, and only accident or circumstances make them join in an army, thus putting an end to the arbitrary proceedings. In the present war the revolutionists have shot down some of these ringleaders. For my part it is necessary to prove that these roving detachments constituted, properly speaking, the forces of the revolution, and if the claimant believes that this justifies his claim he ought to prove it fully.

But there is a further consideration. Since the German Commissioner believes the liability of the Government to be established by virtue of article III of the protocol, I ought to make an explanation concerning my way of understanding it. I confess that my first impression upon reading it was one of extreme uncertainty; but a more careful study of the subject convinced me that it can not in any way be contended that the Government is liable for every wrong committed against Germany.

It is not creditable that Germany seeks to impose on Venezuela rules which she does not consider just, and it is not possible that in order to apply exceptional rules in favor of Germany a mixed commission should be formed whose president and umpire has been named by the President of the United States. These ideas by themselves plainly show that article 3 of the protocol contains nothing distinct from the rules which in general these nations recognize upon this subject, but only a confirmation of those principles with the idea at most of going counter to the doctrine of absolute nonliability of governments in the matter of civil wars sustained by many governments and publicists. If any doubt might exist it would suffice to know that Venezuela is paying to-day the claims of all the powers with 30 per cent of the receipts of two of her custom-

houses, and this supposes that the nationals of all of them should be treated in the same manner and not with the inexplicable and unjust difference in favor of Germany. The Commissioner of Germany also quotes in support of his opinion article 1 of the protocol, which says that Venezuela recognizes in principle the justice of the claims of German subjects presented by the Imperial German Government; but it is to be borne in mind that that article refers to the claims already presented, which are those which article 2 of the protocol treats of — claims which the Government of Venezuela maintains in general were completely unjustified. This article which the German Commissioner relies upon has not, in my opinion, so far as Venezuela is concerned, any other meaning than the necessity to put an end to a state of war. To seek to find in it a pretext for supporting the new claims is to make the work of this Commission useless; it is to make the legation of Germany the exclusive judge of the justice of the claims.

These preliminary considerations having been established, I must seek in accordance with these ideas the principles which, according to international law, must serve to establish the liability of governments in cases of injury; and in order to do this it suffices to set forth those which Germany and the United States profess. Those of Germany appear from a treaty celebrated with Colombia, article 20 of which says:

> It is also stipulated between the two contracting parties that the German Government will not seek to make the Colombian Government liable, *except there might be fault or want of diligence* of the Colombian authorities or of its agents for the damages, insults, or confiscations occasioned during the time of insurrection or civil war to German subjects in the territory of Colombia on the part of rebels or caused by the savage tribes outside the pale of the authority of the Government.

Those accepted by the United States appear in a note of the Department of State to the minister of the United States in Lima. In this note it is said:

> In respect to the latter it is the doctrine of this Department that the Government can not be held to a strict accountability for losses inflicted by such violence. (In speaking of the liability of the Government for acts of insurgents whom it could not control and for the violence of mobs.)

This note relates to the destruction of a Peruvian ship in Chesapeake Bay.

> The position the United States took on that subject was that such destruction having been effected by a sudden attack of insurgents, which could not by due diligence have been averted, the Government of the United States was not bound to make indemnity. (For. Rel. U.S. 1888, pp. 1377, 1378.)

The Commissioner of Germany has set up as a precedent in the case of the *Transportation Company*, but it is to be remarked that in it there are many other complex elements which might have been the efficient cause for the decision, since this is not set down as one of them. Venezuela was charged with negligence in punishing the guilty parties; there was a question of constitutionality and unconstitutionality and the failure to perform contracts made by Congress; they were not residents of the country; they were traveling about in a ship under the flag of the United States, etc. This decision which is cited I believe in no way establishes the principles sought to be maintained, and everything depends upon the appreciation that the judges might make of the facts alleged.

I consider that the protocol can not be interpreted except in accordance with what has already been set forth, and bearing that in mind I am of opinion that the claim of Kummerow ought to be rejected, it being well understood that I also consider that the damage and much less the fault of the Government of Venezuela is not proved.

The circumstances oblige me to make a general statement of the principles, although it may be that the umpire will not think it necessary to consider all of them in the case of Kummerow.

GOETSCH, *Commissioner* (second opinion).

The opinion of the Venezuelan Commissioner in this claim imposes the duty upon me of supplementing my opinion in various ways.

I. Now that the Venezuelan Commissioner seeks to deny, in the present case, the liability of the Government, founding his opinion upon the fact that the authors of the damage were *guerrillas*, it is necessary to make reference to two annexed official telegrams.[1]

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[1] [Official bulletin of the State of Aragua, December 9, 1902. National telegraph from Miraflores to La Victoria.]

DECEMBER 9, 1902—6.40 p.m.

For the PRESIDENT OF THE STATE:

In the most felonious and unjust manner the German and English ships of war have committed the most unusual assault likely to be recorded in history in the port of La Guaira, having captured, without previous notice of war, the steamers *Crespo*, *Ossun*, *Totumo*, and *Margarita*. Therefore, if the same thing should take place in that port, proceed so as to be able to prepare yourself immediately to repel force with force, holding myself responsible to all of you, together with your companions, that the national honor shall remain unsullied in every case. Also you shall proceed to take prisoners all the Germans and Englishmen who may be there, *without any exception, in order that if the foreign rapacity should be directed against you they shall be the first to be fired upon.*

*Thus also you will take possession of all their properties.*

Acknowledge receipt and fulfillment.

CIPRIANO CASTRO

[National telegraph from La Victoria to Caracas.]

DECEMBER 9, 1902

For Gen. CIPRIANO CASTRO, *Caracas:*

The constitutional President of the State, impressed by the contents of your telegram in which you announced the great assault committed to-day in the port of La Guaira against the national sovereignty by English and German men-of-war, has sent me notice by telegram to notify you that in any case the State of Aragua will show itself equal to its great duties in this new and tremendous test to which the destiny of our beloved Venezuela is subjected.

The Araguan people *en masse*, and as soon as they had notice of the nefarious occurrence, hastened to protest with strong words of devout patriotism against the foreigners who thus trample upon the principles of international law, proclaimed and observed by all the civilized nations of the globe. Likewise the Chief Executive charges me to say to you that he and his companions pledge themselves to you that the national honor will remain unsullied in any case, since they will follow you steadfastly along this line until they show not only to those who spurn our inalienable prerogatives as citizens of a free and independent nation, but also to the entire world, that we are the worthy descendants of the forefathers who instituted and crowned with success the great national emancipation.

Your positive orders concerning the most important affair to which this telegram relates have been communicated to all the districts of the State.

FRANCISCO E. RÁNGEL.

[Circular telegram.]

LA VICTORIA, *December 9, 1902.*

*To the Civil Chiefs of the State:*

Immediately after receiving this telegram—that is to say, without losing even a single moment—you shall proceed to place under arrest all the Germans and English-

It will be seen from these that in Venezuela this term is also in current use in the language to designate small bodies of the revolutionary army armed and in the field against the Government. The reasons already set forth in the first opinion fix the responsibility of the Government for the actions of these, unless the responsibility of the Government of Venezuela for damages by revolutions be excluded in principle.

II. Until now the Commissioner of Venezuela has not disputed this responsibility. Like his colleague, Doctor Paúl, a member of the French-Venezuelan Commission, he has recognized until now the responsibility of his Government for revolutionary acts. It so appears in the minutes of the fourth session in the conference concerning the claim of Christern, to which reference is now made; likewise in the conference concerning the claim of Ermen. He has been guided by this interpretation, as appears in the minutes, and his argument in that claim before the honorable umpire. It was there always maintained that in the case mentioned the responsibility of Venezuela should be denied because there was question of guerrillas and not of the regular troops of the revolution. Otherwise the supplemental proof of Mr. Ermen, agreed to by the parties, would be without reason. It is recently that the honorable Commissioner of Venezuela has modified his opinion. It is seldom that in a diplomatic international commission a question of international law already recognized and approved in principle should be disputed later. In the interest of uniformity of judgment of the Commission, it appears desirable that the question of law should not be determined in one way to-day and in another to-morrow.

In any case this change of judicial opinion of his Venezuelan colleague imposes upon the German Commissioner the special duty of showing the honorable umpire, in case he may deem this change of opinion allowable, that the first interpretation of the honorable Venezuelan Commissioner is the just one, and the one which corresponds to the tenor of the protocol and to the principles of international law, without any possible error.

III. The Commissioner of Venezuela asserts that Germany pursues special measures in demanding indemnity for its subjects for damages occasioned by the revolution. Such insinuations should be contradicted. The honorable Commissioner of Venezuela should not be ignorant of the fact that the third articles of the German, English, and Italian conventions with Venezuela contain the same provisions, and that France has also demanded revolutionary damages before the Commission.

In the French Commission the question has already been decided in favor of France, wherefore, as is stated, the Venezuelan Commissioner, and later the umpire of the Commission, have recognized in principle the liability of the Venezuelan Government in all cases. In my first opinion I have expressly shown that the Government of the United States of America has also collected these damages and that it has been allowed them by commissions of arbitration, not only with respect to Venezuela, but also with respect to many other South

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men who may be domiciled in each and every one of the municipalities which compose the district under your command. *You shall likewise proceed to take possession of the properties which belong to the above-mentioned German and English subjects.*

In order that you may understand the rapid and efficacious way in which you ought to fulfill this order, let it be sufficient for you to know that it has been communicated directly from the worthy President of the Republic, General Castro, as a reprisal of the grave assault committed to-day against the national sovereignty in the port of La Guaira by ships of Germany and England.

God and federation.

FRANCISCO E. RÁNGEL.

American States. In Germany itself there exists the same liability legally sanctioned.

To the reference which the honorable Commissioner of Venezuela makes to the German-Colombian treaty, it ought to be objected that the form which they care to give to their respective mutual relations, and if they desire to restrict certain international rules with respect to their citizens, is a matter of policy as between Germany and Colombia. No such treaty exists between Germany and Venezuela. Venezuela can not deduce for herself rights from the German-Colombian treaty, all the less since Colombia has made concessions to Germany in order to obtain the concession noted. The protocol, and in its absence the law of nations, ought to serve as a rule for Venezuela and for the Commission. And to the citation which the Commissioner of Venezuela makes, referring to the United States, in the case of the destruction of a Peruvian vessel in Chesapeake Bay, answer must be made that this case is not sufficient to alter the opinion of the German Commissioner. In the first place, it is known that the matter was afterwards adjusted through diplomatic channels and that Peru was indemnified. (See Moore, History and Digest, p. 1624.) The Mixed Commission which met in Lima only decided that it had no jurisdiction over the claim, and refrained from making an award upon its merits. Apart from this no analogy can be deduced from this case with the United States of America. These States are a powerful, flourishing nation, where order rules, the direction of which is intrusted to a strong hand and affords to foreigners and their interests the most absolute security, as the enormous amount of immigration proves, and where, from every point of view, revolutions like those which in Venezuela are the order of the day are impossible. Under these circumstances the case cited by the Venezuelan Commissioner has no other character than that of a commission of a common crime which the authorities of the United States could not foresee, and on account of which, therefore, liability did not attach to the Government. This is not so in Venezuela. One revolution is substituted for another. Revolution has been made a matter of politics. The confiscation of and damage to property of foreigners are here simply the means for the support of revolutions, and have as an object to bring these to a favorable end, although ordinarily they are only dedicated to the enrichment of a few revolutionary partisans.

Moreover, according to press notices of a recent date, the Government of the United States of America paid an indemnity to Italy for the lynching of Italian subjects.

Besides, the following reasons exist to sustain the responsibility of the Venezuelan nation as such:

(*a*) It has forbidden foreigners to mix in political affairs. This has been decreed anew in Venezuela by the law governing foreigners. If they take part in a revolutionary movement they must suffer severe penalties, and they may even be expelled. They are incapacitated — not so the Venezuelans — from defending their property against losses by force of arms or by their adoption of one of the parties. As a compensation for this the Government of Venezuela is under obligation to protect foreigners. If it does not do so, or if it is impossible for it to do so, there is nothing more just and equitable than to indemnify the person for the losses suffered.

(*b*) The confiscation of foreign property by revolutionists has as a consequence the enrichment of the national wealth of Venezuela at the cost of foreign property. The money, the cattle, the thing taken ought to accumulate somewhere. If the revolutionists surrender, if a reconciliation with the party in power is effected, as usually happens, a general amnesty is decreed, as, for example, in the recent case of the " Hernandistas." Frequently it happens that

revolutionary leaders surrender themselves to the Government and place their troops at the disposition of the latter against the revolution. In this case it never occurs to anyone to return the moneys, merchandise, or objects seized in support of the revolution to their rightful owner, nor does the Government take any proper means to return to foreigners their property or to cooperate in its return. It is therefore an obligation of the nation, founded upon the principles of equity, to make reparation to foreigners.

(*c*) But the real reason is the following: If the Commission denies the liability of the Government of Venezuela, all the foreign residents in Venezuela will be exposed to the mercy of future revolutionists. The decision in international law, of the Commission which denies the liability of the nation, would have in the future, as a consequence, a complete want of consideration for foreigners. The admissibility of enriching themselves at the cost of foreigners would be converted into a policy for the revolutions to come. The Commission would assume a grave responsibility in the eyes of history if it should determine to deny the liability of the Government for damages occasioned by revolutionists.

IV. The Venezuelan Commissioner is of opinion that according to international law, especially in accordance with the opinions of many jurists, professors on the subject, the liability of the Government for damages arising out of civil wars can not be established. Only conditionally and in special cases is this true. The difference rather ought to be established whether or not, in a civil war, the factions enjoy the rights of belligerents (as, for example, in the war in the United States between the North and South). In the first case the damages would fall upon everyone as "casualties of war." (See Moore, pp. 1716, 1718.) In the second case the liability of those states in which revolutions are frequent, as has been shown in the first opinion, is considered as obligatory. In the present case the liability is necessarily established by the circumstance that the actual revolution has not been recognized as a belligerent party by any of the powers.

V. The honorable umpire saw fit at the session of the 22d of the present month to ask a juridic declaration of the Commission, as explicit as possible, concerning the interpretation which article I of the protocol should receive. The declaration there contained by which the Government of Venezuela recognizes in principle the claims presented by the German Government refers, according to the opinion of the German Commissioner, to the claims contained in the ultimatum of the German Government, and published by the Government of Venezuela in its Yellow Book. Article I has been supplemented by article III. There the recognition in principle has been limited, in so far as it pertains to the facilities of the German-Venezuelan Commission, to decide also the material justice of the claims submitted to its jurisdiction. This right of the Commission to decide upon the material part of the claim is in its turn limited by the following paragraph, according to which the Government of Venezuela recognizes in principle its liability in the case of claims for illegal damages to and confiscation of property. It would be superfluous to establish this interpretation; moreover, it would be a pleonasm (a redundancy) if it had to be interpreted in the sense that the Government of Venezuela is liable for that which the *Government itself* had confiscated or illegally damaged. The extent of that liability is understood, and it does not require the solemn declaration of a treaty of peace to fix it.

The only object of this clause has been to assist the Commission placing beyond discussion and dispute by the Commission the liability even for damages of the revolution; a liability maintained in principle by the German Government, and up to now always disputed in principle by the Government of Venezuela.

Otherwise the provision would have no meaning. As for the rest, in the opinion it has already been thoroughly demonstrated, that it is the object of article III to give a conventional form to an international rule, disputed until now by Venezuela.

ZULOAGA, *Commissioner* (second opinion):

It is not true that I deny in principle that which has been admitted before. In the Christern case no question of law nor of fact was discussed, and the German Commissioner can not properly assert on account of any declaration of mine what the reasons were that induced me to allow it. I believe that it is useless to insist upon this disagreeable matter.

I have attempted, inspired in a large degree by the same idea which later the umpire has expressed in the Ermen case — that cases in the relation to revolutionary matters may be very different — not to treat of this the question except in so far as the case necessitates it.

In the Ermen case it appears to me that the question of liability for revolutionary damage is unimportant, since, from the way Ermen states that the act was committed, it is seen that there is question of a common fault which never involves the liability of the Government, be those who have committed the act who they may, to which is added the fact that Ermen himself could not say that they were revolutionists.

In the case of Kummerow I am inclined to believe the same, since in my judgment it is sufficient to notice that neither the acts are proved nor the violence shown. To reject these claims for those reasons does not mean to say that I do not reject them also for other reasons or because Venezuela is not liable in international law for the acts of *guerrillas* because of which claim is made.

The question with respect to guerrillas is in my opinion simple. The guerrillas may in reality belong to the revolutionary army, but they may also not belong to it, and, in general, they do not belong to it, and under this name bands of robbers are shielded who take advantage of the disturbed political situation of the country and make depredations, and in this case the liability of the Government would be as much involved as that of the German or English Governments would be for the acts of the highwaymen of Berlin or London or that of the Government of the United States for the acts of those who stop and rob the trains in the middle of the plains.

In a vast, unpopulated country like Venezuela the question of getting rid of *guerrillas* in certain cases is a different problem, because of the immensity of the forests and plains where they hide themselves. With respect to this, it is worth while to recollect an interesting incident of our history. The war of independence having been terminated, certain marauding bands of guerrillas continued in existence, and among them a band by the name of " Cisneros;" in vain it was pursued; it always escaped. In this state of affairs the President of the Republic, General Páez, resolved to go in person, and an interview was proposed in a forest. Cisneros answered that he would be alone in his den, and Páez went; there the bandit had everything ready to shoot him and drew up his forces and said to Páez that *he* (Páez) should give the order to *fire*; the extreme calmness of Páez saved him, and the bandit submitted himself to the authority of the Government.

In order that the revolutionary question might arise it would be necessary that the claimant should have proof (since it is a principle of law that the burden of proof rests upon the one who sets up the fact) that these *guerrillas* were regular forces of the revolution, as the German Commissioner himself desired that Ermen should prove. But regular forces are only those who are subject to the orders of the chiefs of the revolutionary movement. When this fact has been

proven, then in reality the question arises whether the Government is or is not liable for acts of revolutionists, and until then it seems to me that we are within the domain of common law and of ordinary punishment.

The principle of the liability of the state with respect to damages is, in the opinion of the authors (see Pradier-Fodéré), within the rule of common law that everyone is liable for his acts and those of his subordinates. But as the juridic organization of the state is complex and its acts must be governed by many political economic relations, etc., this principle must be restricted with respect to it. In Venezuela, for example, article 9, law of 1873 (Seijas, vol. 1, p. 57) says —

> That it can not be contended that the nation should make indemnity for damages and injuries or confiscations which have not been committed by legitimate authorities *acting in their public capacity.*

The Government is therefore not liable unless it be proved that the authorities committed the injury acting in their public capacity. (See art. 11 of the decree of June 9, 1893, Official Compilation, vol. 16, p. 544.)

The protocol of February appears to have wished to abolish just this distinction, and thereby violence committed by the forces of the Government, which took advantage of their position, it appears to me, involve the liability of the Government.

In the question of a revolution it appears that, according to these same principles, the government is not and can not be liable for acts which are not its own but those of persons occasionally outside the pale of its authority. The rule, therefore, is the nonliability of the government. (See Seijas, vol. 1, p. 50.) This liability may in law be established according to the doctrines of some countries if it is shown that the state is negligent or blamable in a concrete case for not having furnished timely protection. But this is an exception, by virtue of which in judging the case only the negligence or culpability charged can be considered.

The German Commissioner is of opinion that the protocol of Washington has derogated these principles of the law of nations with respect to Venezuela, but such a thing does not appear. If it had been intended to make such a declaration of exception it would have been essential to state it clearly, and it is a fundamental principle of interpretation that the clauses making exceptions should be interpreted *restrictively.* Besides, article III of the treaty provides that the Commission must decide if the damage or seizure were unjust, and, in accordance with the principles of international law, it can not be said that the acts of the rebels were just or unjust. This is said of the acts of governments.

With respect to persons who are not the legitimate authorities there exists in Venezuela the right of direct action against them for the damages caused, as also for crimes committed — an action which those who have been injured may institute by appearing before the civil or criminal judge, according as the fact is or the relief which the claimant seeks. Article 11 of the law of 1873 says:

> Everyone who, having no public capacity, may decree contributions or forced loans, or commit acts of spoliation of whatever nature, as well as those who execute them, shall be liable, directly and personally with their property, to the injured person. (See Seijas, vol. 1, p. 57.)

*The executive power* is not to intervene in this proceeding and would only be liable if they demanded justice before the judge which should have been impossible for a person to obtain on account of fraud, that is to say, the *denial of justice.* The law of Venezuela in these matters has its importance, since it is a principle of international law, as I understand, that the foreigner has no greater

right than which is granted to nationals, and it is worthy of note that Venezuela does not concede to Venezuelans the right to indemnity for damages committed by the revolution.

The Commissioner of Germany states that Germany is making no special contention, according to the interpretation which he gives to the protocol and the protocols of England and Italy; but I object, for it does not appear that those protocols were interpreted in the manner which he alleges. And nothing appears in the convention of France, and, as that of Paris, payment is to be made in diplomatic debt, not in gold, and there are other reasons or special advantages for Venezuela. The Venezuelan Commissioner might have had sufficient reasons for judging and determining in a different manner, if he did so (which I do not know); or rather to present the questions and their proceedings in other forms. With respect to the United States, I do not know that demands are on Venezuela such as the demand of the Commissioner of Germany and I believe that there will not be any such, bearing in mind the doctrine professed by that country. And since the United States and Spain, as well as other nations, share in the division of the 30 per cent pro rata, I do not understand how one nation can ask more than other nations, since the nations that did not join in the blockade did not insert the third clause, which, interpreted in the form the German Commissioner desires, would be a cause of preference. I consider that they did not believe that this article had such a meaning.

The German Commissioner then enters into considerations of a political nature with reference to Venezuela in order to justify his doctrine. These considerations are so devoid of international equity and contain such strong statements against my country that I prefer to abstain from answering them as they deserve, leaving them to the consideration of the umpire and making only a few concise remarks. If the Commission decides in accordance with the principles which I maintain it will do nothing but keep to the doctrine which, up to now, civilized nations and writers of public law have professed. I do not see why it should be charged with liability before history because it does not care to submit Venezuela to the special theories of the Commissioner of Germany.

The Germans then would enjoy, *as they have been enjoying*, more guaranties than those which the Venezuelans have. I say more guaranties, since, if they preserve their neutrality, they will only be molested occasionally. I shall ask, in my turn, if Venezuela has agreed to establish a mixed commission, and that commission has been established in order to judge in conformity with the principles of equity, what will history say if that commission, because of capricious reasons *of a political order*, should sanction principles contrary to the law of nations in order to apply them to Venezuela? Will it not say that it has disregarded its trust?

To the sketch which the Commissioner of Germany has made, supposing that the Venezuelans are enriching themselves at the cost of the Germans, I am going to oppose a parallel one. A civil war arises in Venezuela; the Venezuelan, more or less involved in the political strife, fears for his property, and if he has cattle or valuables in an insecure place he wishes to rid himself of them; but this operation is not easy. Then appears the neutral, the foreigner, especially those who by occupation are mere merchants, indifferent to the politics of the country. This latter, who solely thinks of his business, shielded by this especially favorable opportunity, realizes the profit in the negotiation, and obtains everything at a low price. Or even more, the same person has no resources, but he has the advantage that he is a foreigner. He insinuates to the Venezuelan that the goods should be placed in his name, and thereby he obtains an advantage; if the goods are lost, he will certainly make an advanta-

geous claim. Or in the midst of the conflict he will be the manager and partner of him who by violence may be able to take possession of the property of others, and by insatiable greed he will institute its destruction, and later, if he be the victim of the natural redress and should suffer the consequence of his acts, he will make there, in the interior of the country, with four witnesses at his command, a proof of violence, and who shall discover the truth? Nevertheless, it is not impossible that some time the corner of the veil which covers these things may be lifted, and it may well serve as an index of what may happen in the case of Otto Redler & Co. (Considerations like these can be found in Pradier-Fodéré). I do not attempt to make a charge against the claimants, nor a general observation concerning them; I speak of what at times happens.

As an opportune observation, it is well to note that the commerce of Venezuela has generally been carried on by Germans and they have entered into the country, driving out the Venezuelans who theretofore carried on this industry. Is not this the reason why the Venezuelans rob them?

The Commission says the convention of Washington shall proceed upon a basis of absolute equity, and if we adhere to this we must decide against the doctrine of the German Commissioner, returning his own argument, that it is not just to demand the same liability of a state of a political organization which is in a certain manner incomplete, as from another which, to its praise, has enjoyed a solid constitution. The man who comes to the United States, for example, has a right to expect more from that Government than the immigrant who comes to these countries whose historical condition is still that of political disturbances, and therefore if the liability is not to be equal the advantage must be with us. Liability is in direct proportion to capacity.

I repeat, and I desire that the umpire shall carefully investigate, this final portion of my opinion to which the absolute necessity of defense urges me, and remember that I would have desired to keep the discussion upon a more elevated plane.

The Commissioner of Germany says that amnesty in Venezuela frequently shields the acts of revolutionists, and it is natural, therefore, that the Government should be held liable for acts done by them. The honorable Commissioner is in error; amnesty only shields *political* crimes, but with respect to the liability at common law that a rebel might have incurred a perfect right of civil or criminal action against him remains to the injured party. This results from the general spirit of our laws.

I seek the truth loyally, and I do not attempt to deny the obligations contracted by Venezuela. The umpire will consider and decide in his high sense of equity, and I will conform my conduct to his judgment.

I am of opinion that the claim of Kummerow should be disallowed.

[OTTO REDLER & CO. CASE]

GOETSCH, *Commissioner:*

The claim of Redler & Co. is composed of three parts.

I. A claim for 7,647.68 bolivars. This sum was admitted by the Government of General Crespo, after his rise to the constitutional presidency of the Republic, as appears from document No. 1 (decree of the National Executive, signed Velutini). The recognition was published in the Official Gazette, No. 7147, of October 23, 1897. The recognition took place by virtue of a decree of June 9, 1893. It has emanated, therefore, from a legal act of Venezuela. This constitutes, according to the opinion of the German Commissioner, a final adjudication, coupled with the circumstance that Venezuela has not paid up to the present. It is not for the Mixed Commission to examine this

decision, nor to seek the origin of this debt; and still less to declare the determination of that Government without force. This would be equivalent to annulling the decree of June 9, 1903, which could not pertain to the jurisdiction of the Commission.

After the Government of General Crespo had become established in a legal and constitutional character, it acquired the right, not only by the constitution of Venezuela, but also by the laws of nations, to adjust, by means of legislation the claims arising out of the revolution. This right has not been disputed by governments subsequent to that of Crespo, and therefore they have recognized the decree and they have also issued similar decrees. If the German-Venezuelan Commission should alter the decree, it would intervene in the order of things legally constituted and would exceed its powers and create a disastrous juridic conflict.

A decree issued at a later date, in consideration of the financial situation of Venezuela, by which only the payment to the creditors of 15 per cent upon their claims is ordered, in no way impairs the legal right which the claimant has, since the debtor — in this case the Venezuelan nation — has no right to reduce at its discretion claims which have been recognized, to the injury of the creditor. Thus, the claimant has shown in a credible manner, in his letter of June 18 of the present year, that, notwithstanding his repeated attempts and owing to the revolution which afterwards arose against General Andrade, he could not obtain the payment of his recognized claim.

The claim of 7,647.68 bolivars appears, therefore, to be justified, as also the 6 per cent interest, counting from the 7th of October, 1893, the date of its presentation to the Commission, which then had jurisdiction, until the payment of the debt.

II. The second claim amounts to 3,732 bolivars. The juridic foundations which support this claim are the same as those in Case I, with the difference that there is no question of *res judicata*. But the claimant having presented his demand at a proper time, it is the fault of the Government then existing that until now no determination in the matter has been reached.

It is for the Venezuelan-German Commission to make satisfaction for the omission. The decree issued by the Government of General Crespo should serve as a guide which permits the determination of the claim. The amount of the claim, 3,732 bolivars, not having been disputed, and the legal relation being the same as that in Claim I, the demand should be allowed, including interest at 6 per cent annually, beginning with January 28, 1893, until the complete extinguishment of the debt.

III. The third claim amounts to 9,932.88 bolivars. Neither the agent of the Government of Venezuela nor the Venezuelan Commissioner disputes the amount of this claim. On the other hand, they deny to claimant, as they do also with respect to claims I and II, the right to present his claims before the Mixed Commission, arguing that because of active participation in the revolution of 1892 — that is to say, ten years ago — he has violated his neutrality, and has thereby lost his right to be protected by the German Government.

In the first place, the German Commissioner notes the lack of strict proof to sustain the objection that the claimant had violated his neutrality in 1892. Mr. Redler has never acknowledged that he knew that the merchandise sold by him was destined to aid the revolution. The sale was made to individuals. With respect to the sale to Ysava, it was only afterwards that the vendor learned that the merchandise was destined for General Crespo. (See letter of Redler, dated June 15, 1903.) In the second case also the sale was made to an individual. The circumstance that he made demand then upon Carlos Herrera for payment proves the good faith of Redler. (See letter of Redler, June 15, 1903.) In this

case also he learned later that the merchandise was for Crespo, for which reason his demand was rejected, and he was compelled to address himself to the Government. But even in the supposition, which is denied, that Redler did not observe the necessary caution, and has failed to observe the neutrality imposed on foreigners, the following observations should be taken into consideration:

The Government of that time would have had to submit Redler to trial and to demand an account of his actions. This has not been done. Moreover, the revolution succeeded and assumed the power. Afterwards amnesty was decreed and put into effect in favor of all the individuals and in relation to all the acts connected in any way with the revolution — a logical attitude, since the triumphant revolutionists could hardly impose punishment upon themselves. The decree of Crespo, dated June 9, 1893, by which all the claims of persons who had furnished aid and support to the revolution are recognized, gave legal expression to the foregoing conclusion.

A similar state of things exists now. All the persons who cooperated in the triumph of General Castro also resisted the laws of the country; but lawfully they must be considered as pardoned, for General Castro had legally attained the constitutional Presidency of the Republic. Thereby Redler, in consequence of the effective and legal amnesty, can not have lost his right to claim before a mixed commission. Moreover, ten years have passed since the pretended violation of neutrality. Therefore the offense made should be considered pardoned, and with it all the consequences which might have been derived therefrom disappear as the general principles of law provide.

It seems absurd to the German Commissioner to contend that the Commission should fulfill the office of a Venezuelan judge, imposing fines upon Mr. Redler for an action which took place ten years ago, and which in general has been wiped out by amnesty.

With reference to the third claim, it is also asked that Mr. Redler be allowed the sum of 9,932.88 bolivars, together with interest at 6 per cent, commencing from the 11th of August, 1902 (the report of the judge of Barquisimeto to the attorney-general of the State), until the extinguishment of the debt. The reasons which impose liability upon the Government of Venezuela in principle in the case have already been set forth in the claim of Kummerow. Reference is made to them.[1]

ZULOAGA, *Commissioner:*

Otto Redler & Co. claim (1) 7,647.68 bolivars, the value of the munitions of war furnished the revolution in 1892 upon the western coast, near Puerto Cabello. In the proof which they present General Mora says that this is proven by the account which was presented to him with the approval, at the foot, of the gentlemen who composed the revolutionary committee. This sum was acknowledged to be due by the Government and was to be paid in debt of the revolution. They claim, moreover, 3,732 bolivars as a balance of the price of supplies of war furnished also to the revolution in 1892, as appears from the receipt of the revolutionary committee, which is produced in copy. As appears from the receipts presented, Messrs. Redler & Co. were revolutionists in 1892, since they furnished munitions of war to the revolutionary parties.

The revolution in 1892 was successful, and the Government paid *those who aided its cause* (as Redler & Co.) with bonds of the revolution. In the Official Gazette, No. 7147, of October 23, 1897, which they cite, it appears *that the*

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[1] See *supra*, pp. 370, 374.

*bonds that belonged to them were at their disposal*, because of the credit which had been recognized. From the moment that the claimants intervened in the revolution of the country they lost their neutrality and the right of diplomatic protection of their Government. This is a principle of international equity generally accepted. And it is, moreover, singular that protection to recover the value of munitions of war furnished revolutionists and to compel them to be paid for under more favorable conditions than the other aiders of the revolution.

The claimants, in their new application which they make, assert that they sold those supplies, some to Casimiro Ysava, who paid for them partly in cash, which is false, since in the certificate of the company it is said that the supplies were furnished to the revolution of the 20th of June and that a sum on account was paid on the 23d of June, three days after the sale. Carlos Herrera, from information which I have received (I do not assert it), appears to be an individual who at that time had been at arms against the Government. The explanation which the claimants make, even if it were true, would not in any way change the situation, since they themselves say that their credits are for supplies to the revolutionists.

I am of opinion, therefore, that the case of the two credits claimed ought to be disallowed and that, it appearing from them that Otto Redler & Co. had interfered in the political strifes of the country, the other claim referring to the sacking of their house in Barquisimeto ought not to be considered, because they lost their neutrality which gives them the right to claim before this Mixed Commission. It would be impossible to acknowledge the right to recover in persons who take part in the politics of the country if the violences which they suffer are unjust or the work of just retaliation on account of their partial conduct.

P.S. — I disallow these claims in the first place because I believe that there can not be admitted to Redler & Co. the right to present them, having lost their neutrality, against the claim of Barquisimeto. In case Redler had not lost that neutrality, the reasons set up by the agent of Venezuela and the general principle that it was an act of the revolution would prevail.

I do not find that the theory of amnesty is in any way applicable to this matter.

## [FULDA CASE]

GOETSCH, *Commissioner:*

From the evidence it is proved that the claimant has suffered damages amounting to 5,000 bolivars occasioned by revolutionists. Neither the fact nor the amount of the damage have been disputed by the agent of the Government of Venezuela.

The German Commissioner is of the same opinion as before and refers to his opinion in the other claims, to the effect that Venezuela ought to repair the damage without considering whether or not it could have been avoided.

The agent of the Government of Venezuela objects that the Government was unable to protect Mr. Fulda against the injury of the revolutionists because this took place during the course of an international conflict; but with respect to this proofs have not been produced nor obtained.

The warlike attitude of the allies limited itself, as is well known, to the seizure of the Venezuelan ships to maintain an effective blockade of the ports of Venezuela without any resistance on the part of the latter. Therefore it is not seen why the state was prevented from properly protecting the resident foreigners in the interior where warlike action on the part of the allies was not conducted, not even expected.

Now, if what is proposed with reference to the international conflict is to

assert that the subjects of the State which finds itself at war with Venezuela can be deprived with impunity of their property so long as the war endures, this would be a doctrine which would be in conflict with the principles of the law of nations, as well as against those of civilized humanity.

The German Commissioner asks that the demand of Mr. Fulda for an indemnity amounting to 5,000 bolivars be allowed with interest at 6 per cent annually from the day upon which the injury was committed until the complete extinguishment of the debt.

GOETSCH, *Commissioner* (second opinion):

The umpire of the German and Venezuelan Commissions, the honorable General Duffield, desires to know the opinion of the Commissioners on the following questions growing out of the claims above mentioned:

I. Is it admissible that the liability of the Government of Venezuela should be limited to damages occasioned by revolutionists in such cases as the Government of Venezuela was able to prevent the damages and did not do so?

II. In case of an affirmative answer to the question contained in No. I, is it for the Government or claimant to furnish the proof that the Government was capable of preventing the injuries and did not do so?

The German Commissioner answers the question I negatively. Bearing in mind the clear provisions of the protocol of February 13 of the present year, he does not hesitate in saying, as his personal and juridic opinion, that in case the Commission should reach a contrary decision it might perchance be considered in contradiction to the terms and spirit of the treaty. Besides, in order to better sustain his opinion, he makes reference to the judgments before cited, of prior international commissions, in the judgments of which the culpability of the Government in no way entered. (See seizure of an American ship by Venezuelan revolutionists, Moore, 1693-1732; the case of Easton, Moore, 1629-30; and the seizure of the American ship *Montijo* by Colombian revolutionists, Moore, p. 1421.) In the last case cited it was said:

> The first duty of every Government is to make itself respected both at home and abroad. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.

Besides, after this matter has been settled in the French Commission in favor of the French claimants, the German Commissioner, by virtue of the right of the most-favored nation, ought to insist energetically that the German claimants should not be treated worse than the French claimants, or than the American claimants have been in former cases. Do not equity and justice demand that all foreigners, so long as their governments insist upon it, should be treated alike in Venezuela?

III. If, notwithstanding all this, the honorable umpire should arrive at the conclusion that the question of blame is decisive of the case, the German Commissioner is of opinion that the burden of presenting proofs as to the lack of negligence falls on the Government. The German Commissioner agrees with the honorable umpire in the interpretation, which he has occasionally given orally, that in a constitutional state — and he desires to consider Venezuela as such — the ability of protecting its inhabitants is presupposed.

Besides this, it ought to be considered as an obligation that international law imposes upon all civilized nations, to offer protection to foreigners — an obligation from which Venezuela can not escape. All the less, since by the law of May 14, 1869, she has invited foreigners " to embark their capital and skill in Venezuelan commerce." (Moore, p. 1702.) From the obligation of

furnishing protection springs the obligation of freeing itself from blame in case protection in a particular case was not possible.

In the oral discussion of the question the Venezuelan Commissioner set up the analogy of the civil law and deduced therefrom that the introduction of proofs belonged to the party demanding anything — that is to say, to the claimant. But there also exist in civil law " presumptions of law," which shift the burden of proof (*pater est quem justæ nuptiæ demonstrant.* The responsibility of railroad companies etc.). According to this, presumption of international law should take the place of proof, or, what would be the same thing, the Venezuelan Government should only be able to avoid the liability by the production of counter proof. This in every case would be in accord with the protocol.

He who has recognized in principle his " liability " in cases of confiscation of or injury to property and wishes to free himself from the liability, conventionally assumed, is at least under the obligation to prove facts which would free him from such liability. Besides this, there is the following: The claimant would almost always be unable to present proofs that the Government could have protected him. He does not know the tactical and strategic dispositions and intentions of the Government, and as the peaceful citizen, in the generality of cases, he will not be able to know the objects, management, and movements of the revolutionary troops. On the other hand, it is easy for the Government to show in a particular case why a village should have to be abandoned to the revolution, or the troops and the police of the Government had to be withdrawn from it. Therefore it is equity which places the burden of proof upon the Government.

ZULOAGA, *Commissioner:*

I believe that the claim ought to be disallowed, because of the reasons set forth by the agent of Venezuela. The Commissioner of Germany says that it is well known that the warlike attitude of the allies was limited, after having made capture of the Venezuelan vessels, to making the blockade effective. It is also well known that General Castro, President of the Republic, had completely conquered the revolution in the action at La Victoria; that immediately, therefore, in order to be able to dispose of the remainder of the revolutionary armies, he divided the forces of the Government, sending a part to the east in order to stop the passage of General Rolando, who was marching toward that place, and another to the west in order to quickly overtake the rebels, Matos, Riera, and others; that in this state of things the international conflict arose and the Government prevented, on account of the losses of its ships, from concentrating its forces, Rolando was able to rally in the central region, and even to menace the capital, since the army of the Government had to go overland by forced marches for a great distance.

The Government did at that time everything that was reasonably possible to put a stop to the revolution, as well in a military manner as politically. If the international conflict had not arisen, very probably the revolution would have terminated last year.

The imputation which the Commissioner of Germany casts upon the honorable agent of Venezuela, that the latter might assert that subjects of a state which were not at war with Venezuela might be deprived of their property with impunity, is an uncalled-for accusation, since from the words of the agent of Venezuela it is not possible to loyally deduce what the Commissioner seeks to charge him with. This language of the Commissioner is very poorly suited to facilitating the labors of this Commission. I am of opinion that the claim of Fulda ought to be disallowed.

ZULOAGA, *Commissioner* (second opinion):

The Government is not liable to individuals for the damages which insurgents, revolutionists, or people in revolt, in whatever manner against the constituted authority may cause.

The Government should furnish protection and security, but it is in so far as the means at its disposition and the circumstances under which the acts have been committed permit. And the causes which may make a government more or less culpable are so many and so different that it would be impossible even to form general ideas about the matter. Besides, the circumstances which control in a disturbed society are so complex that it is a question of political tact, which is only exceptionally found in men of the government.

Extreme energy and implacable repression are at times the greatest errors and serve only to foster insurrection. Revolutions are not always occasioned by faults or errors of the Government or by the simple rebellious spirit of the revolutionists. They follow multiple causes, and not seldom upon the political horizon the cloud of revolution is seen and condenses itself without the patriotism of the best citizens of the Government or of the opposition being sufficient to restrain its violent effects, they having their source in such profound economic or political causes.

Europe itself, so proud to-day of the internal peace which its states have been happy to preserve during the second half of the past century, notwithstanding the powerful organization of its governments, sees with dread, to say the least, how each day the social revolution grows to which the entire working masses are affiliating themselves.

Governments are constituted to furnish protection, but not to guarantee it, and it is absolutely impossible that a tribunal such as this should undertake to investigate the causes of an injury upon general principles of internal politics, under the penalty of finally constituting itself as a judge, not of the *cases* for damages submitted to it, but of the Government or of the country itself, which would be an act of intervention contrary to the principles recognized by all states.

Nevertheless some governments and authorities maintain that for certain particular acts, taking into consideration the circumstances of the case, liability may be fastened upon the state for damages which an individual may suffer, if the facts show in a clear and evident manner that the state has been negligent in every way, in furnishing protection which he ought reasonably to expect from it. According to this theory the state is *not liable because of want of protection*, but for such culpable and grave negligence, which is equivalent to its own acts against private property.

He therefore who seeks to recover from a state for damages suffered under those conditions, in order that his action may prevail, has to prove (1) that he has suffered the damage and (2) that the state is in a certain manner liable for its negligence in the concrete case.

This is the doctrine of Fiore. He says:

> It is not sufficient that a state should prove that it has suffered an injury resulting from an act of individuals who reside in another state in order to fasten the liability upon the latter, and to oblige it to make reparation; it is necessary that it prove that the prejudicial act is morally chargeable to the other state, or that that state ought or could have prevented it, and that voluntarily it has been negligent in doing so.[1]

But this is nothing except the application of the principles of common law that the burden of proof is upon the *claimant*.

[1] Fiore Droit Int. Pub., vol. I, p. 582, sec. 673.

In the application of these principles of indirect liability it is necessary to bear in mind that the government of a country during times of war finds itself confronted with greater difficulties and problems than in times of peace, and its special attention must be directed first to the reestablishment of the disturbed peace, and that liability is in direct proportion to capacity.

Fiore, speaking of neutrality, says:

> The incapacity of a neutral state to prevent the violation of the duties of neutrality also excludes the liability of the Government, and therefore the right of the belligerent to consider the neutral state as liable by reason of the violation of the duties of neutrality.[1]

If this rule was concisely expressed concerning neutrality where the obligations of neutral governments are in a certain manner direct, what shall we say if in the case under consideration there is a question of the internal management of a state? This principle of the liability of a state for negligence would have to be further modified by the one which provides that foreigners can not assert more right in the territory than that which nationals may possess, and by the law of Venezuela the state is not liable for revolutionary damages.

Putting aside all this discussion and the principles of international law to which the necessity of interpreting the meaning of certain provisions of the protocol of Washington has brought us, and confining ourselves solely within the scope of absolute equity, I ask, would it be equitable that foreigners who live in the territory of Venezuela should withdraw themselves from the political conditions of the country, and that in advantage over the Venezuelans they should not only obtain an indemnity from the Government for damages which the latter might have caused them, but also for the damages of revolutionists, against whom the Government has had to contend and against whom it has had to employ all its energy and money and sacrifice the lives of not a few Venezuelans? Would it be equitable that between a Venezuelan and a foreigner the first might say: " My home is in mourning, since beloved members of my family have died in the defense of the Government and the constituted authorities; my ruin has been consummated, since I have not been able to carry on my business, or I have been the victim of passions of its opponents, because I have resisted them," and that the foreigner should say: " But I lose nothing, and I live in this community which is in conflict just as if in the best of times. I do not defend the Government, I am not under this obligation, but the Government pays me not only for the injury which it may cause me, but also for the injuries which its opponents occasion." I believe that in equity the claims of Kummerow and F. L. Fulda can not be admitted.

[FISCHBACH AND FRIEDERICY CASES.]

GOETSCH, *Commissioner:*

Various witnesses testify that both claimants were taken prisoners on October 20, 1902, near Carúpano by a revolutionary detachment, with the intention of taking money from them, and that to this end they were insulted, assaulted, robbed, bound to a post, threatened with death, and thrown into a house infected by smallpox, in order that the payment of the sum demanded might be accomplished. The claimants demand for this treatment an indemnity, to which Friederic especially adds the injury resulting in a rupture caused by the tying and other ill treatment to which he was subjected. The detachment in question was commanded by two officers, Gutierrez and Gonzalez,

[1] Idem. Sec. 1569.

and was distinguished, as one of the claimants states, by a white design with black letters thus: " Libertador Army." This proves that the authors were regular troops of the revolution, and not merely marauders or robbers. Both Commissioners ask the honorable umpire to decide for the present, in principle only, the question whether the Government of Venezuela is obliged to pay to the two claimants an indemnity for the ill treatment suffered. The question of the amount of this indemnity will be a matter for future consideration. It is recognized by the law of nations, and also it has been adjudged by international commissions of arbitration, that States may make themselves liable for the unlawful ill treatment and imprisonment of foreign subjects, and that they are obliged to pay a proportional indemnity. Thus it happened in the case of *Col. Lloyd Aspinwall.* " Something would seem to be due to the crew of the vessel as indemnification for ill treatment, as it were." (Moore, History and Digest, pp. 1015 and 1016.) (See also page 1171, Henry Dubo's claim for illegal arrest and imprisonment; also page 1579, the Santo case; 1653, No. 15, Charles Weile; page 1852, Van Bokkelen; see also page 1714 and page 1724, the arrest of the crew of the Venezuelan Steam Transportation Company.)

It is undoubted that the liability *extends* to the arrest and ill treatment suffered at the hands of the officials of the Government; but the liability *might also be extended* to the hands of officials or revolutionary troops.

The principles of international law and those derived from other sources which imply liability in cases of confiscation or damage of property by officers or troops of the revolution that have been already discussed in detail with respect to the claim of Kummerow I refer to said opinion.

These principles fix also the liability in cases of acts executed against the liberty and health of a person, inasmuch as these are properties more precious than material or monetary ones. Likewise, every Government is obliged to furnish protection to foreigners, whose liberty it ought to guarantee. By not doing so it makes itself liable and should make reparation to the person injured. (See Moore, p. 1444, and the Panama riot, p. 1362.) Neither the Government of Venezuela nor that of the revolution has instituted any sort of proceedings against the officials named and the detachment under their command in order to chastise them for the barbarous ill treatment and tying of which they made German subjects the victims. If with reference to this representation before the Government in Caracas it had been attempted, no other result would have been obtained than the statement that the Government had lost control in the neighborhood of Carúpano. In the claim of the Venezuela Steam Transportation Company, an indemnity was allowed by the Commission, at the solicitation of the Government of the United States of America, to the American sailors imprisoned by Venezuelan revolutionists. (Moore, History and Digest, p. 1714-1724.) The honorable umpire is therefore asked to declare in principle the liability of Venezuela in the present case also.

In any case the Government of Venezuela would be liable for the articles stolen, in accordance with article 3 of the protocol.

ZULOAGA, *Commissioner:*

The claims of Friedericy and Max Fischbach are founded, as they say, upon ill treatment which a revolutionary band inflicted upon them. Taking into consideration the facts, if they are proved, I find that they constitute a common injury received from a group of highway robbers, and I believe that the penalties of the case, as, for example, a fine, should be put into effect, but I do not understand why the act which constitutes the private wrong has to be gone into and pecuniary indemnity made by the State to the victims of the atrocity. There

are precedents, it is true, of indemnities claimed diplomatically for unlawful seizures, but as far as I have been able to see they have been committed by authorities in violation of the laws, and in that case the State is liable because its officials are the wrongdoers — because the one who commits the violation of the law is charged with furnishing protection. From this to seek to make the State a sort of surety against every sort of wrongdoing which individuals suffer in its domains there appears to me to be some difference. These acts, as the claimant himself states, are committed by a band of revolutionists — that is to say, by men who proceed upon their own account, without any other rule than to take advantage of the disturbed situation of the country to commit their depredations. Revolutions or political disturbances and their natural consequence of insecurity and violence are social epochs which in general all countries have passed through and against which none can provide nor believe that it may withhold itself definitely, and it is inadmissible that a State should be made liable for private acts, only because of the fact that they are committed during a revolution. By the Venezuelan law a criminal suit can be instituted (1) if the judge has knowledge of the fact; (2) by a *charge* made by the party aggrieved; (3) by information of any citizen to the judge of the act committed. It is therefore in the hands of Friedericy and Fischbach to accomplish the punishment of the guilty parties.

DUFFIELD, *Umpire:* [1]

The Commissioners disagree as to the liability of Venezuela under the protocol for acts of revolutionists in the recent civil war, and as to the responsibility of Venezuela for wrongful seizures of or injuries to property.

The Commissioner for Germany is of the opinion that under Articles I and III of the protocol of the 13th of February the Venezuelan Government is liable in these cases, because of the admission of liability of the Venezuelan Government in those articles, and also upon general principles of international law.

The Commissioner for Venezuela disagrees with the Commissioner for Germany, and is of the opinion that Article III of the protocol contains nothing which differs from the rules —

that nations have laid down in general as established in this connection, but is only a confirmation of those principles, with the intention at most, of contradicting the doctrine of absolute irresponsibility of governments in civil wars as held by many governments and sustained by international authorities.

He also is of the opinion that Article I of the protocol, in which the Government of Venezuela acknowledges in principle the justice of the claims of German subjects *presented* by the Imperial German Government —

refers to the claims already [then] presented, which are those of which Article II of the protocol treats, claims which the Government of Venezuela held were, in general, entirely unjustified.

It is insisted by the Commissioner for Germany that because of the admission made by the Venezuelan Commissioner of the justice in principle of two claims heretofore submitted to the umpire based upon acts of revolutionists, and in which the Commissioners only disagreed upon the question of amount, that the principle must be considered as settled by the Government of Venezuela in this and all future cases coming before this Commission. The umpire agrees

[1] For a French translation see Descamps-Renault, *Recueil international des traités du XX*ème *siècle*, 1903, p. 769.

with this position of the Commissioner for Germany, in so far as the particular claims referred to are concerned. It has been held in former international commissions that there is no power vested in an umpire to grant a rehearing. In the present case the umpire is of the opinion that the true interpretation of the protocol does not authorize any rehearings, unless perhaps in extreme cases where the application is based upon newly discovered substantive and not cumulative evidence. He is unable, however, to go to the length urged by the Commissioner for Germany. It is undoubtedly true, as he says —

> that in the interest of unity of decisions of the Commission a question of law should not be decided in one way to-day and in another way to-morrow.

But, as the Venezuelan Commissioner frankly says in his opinion in one of said former claims —

> although I have accepted the claim in principle, a better study of the matter has convinced me that it is an error, and that the principles which are to govern me are those which appear in my opinion in the matter of Kummerow (claim No. 7),

in which he says —

> I confess that my first impression upon reading it (Article III of the protocol) was one of extreme perplexity and uncertainty, but a more careful study of the matter convinced me that it could in no way contain a rule of exception which goes so far as to make the Government responsible for every injury done a German,

the umpire is of the opinion that it is not only the privilege but the duty of the Commissioner for Venezuela to present his more carefully studied opinion on the question, the more so because the first impression of the umpire upon reading it "was one of extreme perplexity and uncertainty," and because the question is complicated and not readily solved. Moreover, the question is one of great gravity and importance, and upon its correct decision will depend the allowance or disallowance of many claims involving in the aggregate a very large sum of money.

The disagreement between the commissioners is evidence that the language of the article appears to be susceptible of two contrary meanings, and in determining which is the correct construction regard must be had to the situation of the high contracting parties and the circumstances preceding and surrounding the execution of the protocol. (Opinion of Umpire Little in the United States and Venezuelan Commission, 1889 and 1890.) After a considerable period of diplomatic correspondence between the two Governments with reference to the claims of German subjects against the Republic of Venezuela, without reaching any agreement as to a satisfactory adjustment of the same, the German Government on the 7th day of December, 1902, submitted an ultimatum containing the following:

> In addition, the manner in which the German claims arising from the wars have been treated by the Government of the Republic has led the Imperial Government to believe that the other credits also of her subjects against the Republic need her protection to obtain a just settlement. In that sense are to be considered the German claims arising from the present civil war, the credits of the German houses growing out of the construction of the slaughterhouse in Caracas, and the sums owing the Gran Ferrocarril de Venezuela for the interest and amortization of the bonds of the Venezuelan 5 per cent loan of 1896, which were delivered to it in the place of a guaranty of interest. Instructed by the Imperial Government, I must also ask the Venezuelan Government to immediately make a declaration to the effect that it recognizes in principle that these claims are well founded, and that it is ready to accept the decision of a mixed commission with the object of having them settled and assured in all their details. (P. 40 of Correspondence of the Department of Foreign Affairs of the United States of Venezuela, published

under the authority of an executive decree of the Republic of Venezuela, December, 1902.)[1]

A similar position was taken by the other allied powers, and on the 9th day of December, 1902, the allied powers established the blockade of the ports of Venezuela and seized certain of her war vessels.

The protocols of February 13 and May 7, 1903, were entered into by the parties while the war vessels and ports of Venezuela were still in the control of the allied powers, and as the only amicable mode of raising the blockade and restoring peaceful relations between the respective Governments.

Soon after the institution of the blockade the Government requested Mr. Bowen, envoy extraordinary and minister plenipotentiary of the United States to Venezuela, who was also the temporary representative of British and German interests in Venezuela, to propose to Great Britain and Germany that the claims for alleged " damages and injuries to British and German subjects be submitted to arbitration." With the consent of his Government he was soon after appointed such arbitrator and mediator.

The ability and diplomacy with which he performed the duties of his office have resulted in the meeting now in Caracas of international arbitration commissions between Venezuela and ten of the principal nations of the world, to adjust amicably and according to the principles of justice and equity their conflicting claims; the most notable instance of international arbitration in the history of the world.

In the correspondence which took place during these negotiations the following statements by the representatives of the respective Governments are material:

To the request of the Government of Venezuela through Mr. Bowen, that those Governments would refer " the settlement of claims for alleged damages to the subjects of the two nations during the civil war " to arbitration (Mr. Bowen's pamphlet, Venezuelan Protocols, p. 2),[2] the Government of Great Britain and the German Government replied through the Secretary of State for the United States, December 22, 1902.[3]

His Majesty's Government have, in consultation with the German Government, taken into their careful consideration the proposal communicated by the United States Government at the instance of that of Venezuela. The proposal is as follows:

" That the present difficulty respecting the manner of settling claims for injuries to British and German subjects during the insurrection be submitted to arbitration. The scope and intention of this proposal would obviously require further explanation. Its effect would apparently be to refer to arbitration only such claims as had reference to injuries resulting from the recent insurrection. This formula would evidently include a part only of the claims put forward by the two Governments, and we are left in doubt as to the manner in which the remaining claims are to be dealt with. * * * "

His Majesty's Government desire, moreover, to draw attention to the circumstances under which arbitration is now proposed to them. The Venezuelan Government have during the last six months had ample opportunities for submitting such a proposal. On July 29, and again on November 11, it was intimated to them in the clearest language that unless His Majesty's Government received satisfactory assurances from them, and unless some steps were taken to compensate the parties injured by their conduct, it would become necessary for His Majesty's Government to enforce their just demands. No attention was paid to these solemn warnings, and in consequence of the manner in which they were disregarded, His Majesty's

[1] See the original Report, Appendix, p. 971.
[2] Idem, Appendix, p. 1029.
[3] Idem, Appendix, p. 1033.

Government found themselves reluctantly compelled to have recourse to the measures of coercion which are now in progress. His Majesty's Government have, moreover, already agreed that in the event of the Venezuelan Government making a declaration that they will recognize the principle of the justice of the British claims and that they will at once pay compensation in the shipping cases and in the cases where British subjects have been falsely imprisoned and maltreated, His Majesty's Government will be ready, so far as the remaining claims are concerned, to accept the decision of a mixed commission, which will determine the amount to be paid and the security to be given for payment. A corresponding intimation has been made by the German Government. This mode of procedure seemed to both Governments to provide a reasonable and adequate mode of disposing of their claims. They have, however, no objection to substitute for the special commission a reference to arbitration with certain essential reservations. These reservations are, so far as the British claims are concerned, as follows:

1. The claims, small as has already been pointed out in pecuniary amount, arising out of the seizure and plundering of British vessels and outrages on their crews and the maltreatment and false imprisonment of British subjects, are not to be referred to arbitration.

2. In cases where the claims is [are] for injury to, or wrongful seizure of, property the questions which the arbitrators will have to decide will only be *(a)* whether the injury took place and whether the sentence [seizure] was wrongful, and *(b)* if so, what amount of compensation is due. That in such cases a liability exists must be admitted in principle.

3. In the case of claims other than the above we are ready to accept arbitration without any reserve.

This was sent from Washington December 27, 1902, by cipher cable, and on the 31st of December, 1902, President Castro wrote to Mr. Bowen: [1]

I recognize in principle the claims which the allied powers have presented to Venezuela. They would already have been settled if it had not been that the civil war required all the attention and resources of the Government. To-day the Government bows to superior force, and desires to send Mr. Bowen to Washington at once to confer there with the representatives of the powers that have claims against Venezuela, in order to arrange either an immediate settlement of all the claims or the preliminaries for a reference to the tribunal of The Hague or to an American Republic to be selected by the allied powers and by the Government of Venezuela.

The reply of the German Government, through the United States ambassador at Berlin, to the Secretary of State, and by him to Mr. Bowen, on the date of January 6, 1903, stated among other things:[2]

The German Government learns with satisfaction that the Venezuelan Government has accepted its demands in principle. Before further negotiations can be undertaken with Venezuela, however, it seems necessary that the President of Venezuela should make a definite statement as to the unconditional acceptance of the three preliminary conditions set forth in the German memorandum of December 22, 1902.

On the following day President Castro wrote to Mr. Bowen: [3]

Mr. MINISTER: The Venezuelan Government accepts the conditions of Great Britain and Germany; requests you to go immediately to Washington for the purpose of conferring there with the diplomatic representatives of Great Britain and Germany and with the diplomatic representatives of other nations that have claims against Venezuela, and to arrange either an immediate settlement of said claims or the preliminaries for submitting them to arbitration.

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[1] Idem, Appendix, p. 1034.
[2] Idem, Appendix, p. 1035.
[3] Idem, Appendix, p. 1036.

At the instance of the German Government Mr. Bowen, under his authority from Venezuela, signed the document of January 24, 1903, containing this language: [1]

II. All the other claims which have already been brought to the knowledge of the Venezuelan Government, in the ultimatum delivered by the imperial minister resident at Caracas — i.e., claims resulting from the present civil war, further claims resulting from the construction of the slaughterhouse at Caracas, as well as the claims of the German Great Venezuelan Railroad for the nonpayment of the guaranteed interest — are to be submitted to a mixed commission should an immediate settlement not be possible.

III. The said commission will have to decide both about the fact whether said claims are materially founded and about the manner in which they will have to be settled or which guaranty will have to be offered for their settlement. Inasmuch as these claims result from damages inflicted on property, or the illegal seizure of such property, the Venezuelan Government has to acknowledge its liability in principle, so that such liability in itself will not be an object of arbitration and the decision of the commission will only extend to the question whether the inflicting of damages or the seizure of such property was illegal. The commission will also have to fix the amount of indemnity.

From these documents it clearly appears that Germany and Great Britain insisted upon the admission of the justice in principle of the claims of their subjects already presented, and specifically demanded that in respect to claims for injuries to or wrongful seizures of property arising from the present civil war, * * * the questions which the arbitrators will have to decide will only be (*a*) whether the injury took place and whether the sentence [seizure] was wrongful, and (*b*) if so, what amount of compensation is due. That in such cases the liability exists must be admitted in principle. Three. In the case of claims other than the above we [they] are ready to accept arbitration without any reserve.

The result was the execution of the protocols of February 13 and May 7, 1903, under which this Commission is acting.

All of the protocols between Venezuela and the peace powers are in the same language, mutatis mutandis, as the United States protocol. (Note to the United States protocol in Mr. Bowen's pamphlet, p. 30.)[2]

It is therefore too plain to need argument that if any effect whatever is to be given to Articles I and III of the German-Venezuelan protocol, the rule of liability must be different from that under the protocols of the peace powers.

The umpire, therefore, agrees with the argument of the Commissioner for Germany that Articles I and III of the protocol can not be treated as merely superfluous or redundant. Certainly the admission which was required as a sine qua non to any arbitration, which was the consideration to the allied powers for returning to Venezuela the control of her war vessels and her ports, can not be disregarded in determining her liability.

Marshall, Chief Justice, says, speaking for the United States Supreme Court, in the *Nereide*, 9 Cranch, 419:

Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations, and can not be supposed either to omit or insert an article common in public treaties without being aware of the effect of such omission or insertion; neither the one nor the other is to be ascribed to inattention.

This must be equally true in the case of the insertion of an article most uncommon, if not unprecedented, in treaties, and which contains a general ad-

[1] Idem, Appendix, p. 1037.
[2] Idem, Appendix, p. 1047.

mission of liability. A fortiori in this case, where an admission of liability is contained only in the protocols of those Governments which still held control of the war vessels and ports of Venezuela.

It is therefore the plain duty of the umpire, under the protocol, to treat those provisions in Articles I and III as substantive and material, and to give them the interpretation which they should have in the light of the circumstances immediately preceding and surrounding their execution.

The umpire agrees in opinion with the Venezuelan Commissioner that the fair construction of Article I, in which the Venezuelan Government "recognizes in principle the justice of claims of German subjects 'presented' by the Imperial German Government," is to restrict it to claims which had been presented at the time of the execution of the protocol. This is its literal wording, and Article II restricts the claims to "those originating from the Venezuelan civil wars of 1898 to 1900" and provides for their payment modo et forma. Moreover, there is a plain inference, from the special admission of liability in Article III in cases of wrongful seizures of or injuries to property, that the parties did not consider that Article I covered that class of claims. It is therefore necessary to determine the true intent and meaning of these words in Article III.

The German claims not mentioned in Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, the claims of the Great Venezuelan Railroad Company against the Venezuelan Government for passages and freight, the claims of the engineer, Carl Henckel, in Hamburg, and of the Beton and Monierban Company (Limited), in Berlin, for the construction of a slaughterhouse at Caracas are to be submitted to a mixed commission.

Said commission shall decide both whether the different claims are materially well founded and also upon their amount. The Venezuelan Government admit their liability in cases where the claim is for injury to or a wrongful seizure of property, and consequently the commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due.

In the opinion of the Commissioner for Venezuela the words of the article can not be literally interpreted —

because [he says] that it would then make Venezuela admit her liability for any common crime committed by an individual upon a German subject, and that inasmuch as it is self-evident that this class of seizures or of injuries to property, while within the literal wording of the provisions, is not within its reason, it is the duty of the Commission to classify these wrongful seizures of or injuries to property.

And he suggests this classification: That the admission of liability includes all injuries to or wrongful seizures of property by the governmental troops or Government officials, but that it *does not include* wrongful seizures of or injuries to property by revolutionists.

The umpire agrees that the admission does not embrace common individual crimes not resulting from insurrectionary events, because it is quite apparent that with respect to wrongful seizures of or injuries to property the high contracting parties had in mind only those occurring during the present civil war. (See the ultimatum of Germany, above quoted, and the British memorandum of December 22, speaking also for Germany in regard to the terms of arbitration.[1]

The umpire can not agree with the opinion of the Venezuelan Commissioner that the admission of liability by Venezuela is restricted to wrongful seizures of or injuries to property inflicted by the authorities of Venezuela acting in their

[1] Idem, Appendix, p. 1033.

official character. The Commissioner in support of this position quotes from Seijas the law of Venezuela of 1873, which enacts that the nation will not be expected to indemnify for injuries, damages, or seizures which were not caused by the legitimate authorities, acting in their public character, and he says —

> the protocol of February seems to have wished to abolish this just distinction, and for the reason that injuries inflicted by the forces of the Government, taking advantage of their position, it seems to me, makes the Government responsible;

and he continues:

> In the matter of the revolution [revolutionists] it results, according to those same principles, that the Government is not and can not be responsible for acts which are not its acts, but the acts of persons temporarily withdrawn from its control.

And that this rule of nonliability is —

> not only declared by the act referred to, but by the concensus of opinion of international law writers and precedents.

His argument, in brief, is that Venezuela only admitted, first, that German subjects would not be compelled to regard the provisions of the law of February 14, 1873, and present their claims to her *courts*; second, that said law should not be the test of liability in cases of injuries to or wrongful seizures of property, although he insists that the law declares the international rule of liability. It is to be remarked in passing that his statement is not accurate, because he does not deny the liability of Venezuela for acts committed by revolutionists who afterwards succeeded in establishing a new government, thus making the wrongfulness of the seizure depend not upon the act itself, but the result of the revolution.

It is plain that the admission was not demanded by Germany for the first reason, because that purpose was contemplated and actually consummated by the submission to arbitration and is explicitly stated in the first paragraph of Article III. As to the second, passing, for further consideration later in this opinion, the correctness of an interpretation of general words of admission of liability which permits their restriction to one of several grounds of liability, it is equally clear that this purpose is fully accomplished by the provision in the protocol with reference to local legislation.

It is now argued in behalf of Venezuela that her law in respect to acts of revolutionists declared the recognized rule of international law. It would seem logically to follow that her admission of liability would be as broad as the statute. And if the statute and the rule of international law were equally broad, her admission would cover both. It certainly can not be argued that while she admitted in general words her liability, contrary to the conditions of the rule laid down in her own statute, she may now claim nonliability under a rule of international law which she alleges is recognized by the consensus of opinion of all authorities on international law. Manifestly this is no admission at all.

From what has been shown by the correspondence it plainly appears that the principal bone of contention between the parties was their disagreement as to Venezuela's liability for injuries to or wrongful seizures of property resulting from the present Venezuelan civil war. Venezuela claimed nonliability because of her statute which she then insisted and still insists declared the correct international-law rule of liability. Germany denied this. Venezuela, from the necessity of the situation, receded from her position and admitted her liability. Now she contends: " I did not admit my liability under international law, although I did admit my liability under my statute, which declared the same principle of immunity I am now contending for. I did admit my liability under my statute, but I did not admit it under the principles of international

law unanimously conceded, notwithstanding the rule of liability is the same in both."

Coming now to the final argument of the Commissioner for Venezuela, that international law absolves Venezuela from liability for acts of revolutionists and that her admission must be interpreted in the light of this rule —

Is his premise well founded? International law is not law in its usually defined sense. It is not a rule of conduct prescribed by a sovereign power. It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed. Its principles are ascertained by the agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice or by the superior force of the particular nation or nations whose interests are involved.

Applying this inherent nature of international law to the question under discussion, it follows that neither Germany nor Venezuela was by force of law compelled to accept the other's judgment as to a principle of international law upon which they differed. Each nation held to its own opinion of what the correct rule of international law was in the premises — Germany, that Venezuela was liable for injuries arising from insurrectionary events, and Venezuela that she was not. Arbitration is proposed by Venezuela. This, if accepted, would unquestionably leave the question of liability to be decided upon principles of international law. But Germany says, " No! I will not refer these claims to arbitration unless Venezuela first admits her liability." Now, Venezuela having by her admission regained control of her ports and her war vessels, contends that she admitted liability only in cases where she was legally liable. Certainly, this position can not be maintained. She was always liable for claims for which she was legally liable. Hence she admitted nothing. And yet we have seen of what momentous consequence this admission was to her. It is perfectly plain that Germany would never have released the ships and ports from which they were in position to make payment of the claims of their subjects if Venezuela had then interpreted her admission as she now seeks to do, or if Germany had had any conception that such interpretation would be sought to be given to words admitting liability generally.

The case of Venezuela falls within the rule stated by Vattel:

> If one who can and should clearly and completely explain has not done so, it is to his damage; he will not be allowed afterwards to bring forward restrictions [limitations] which he has not expressed. (Vattel, book 2, sec. 264.)

Here Germany requires from Venezuela an admission of liability in as broad terms as can be used. Venezuela could and should have explained her understanding of them. Not having done so then, she can not do so now. When Venezuela admits, without qualification, her liability for wrongful seizures of or injuries to property growing out of insurrectionary events during the civil war, she must be held to admit her liability for all wrongful seizures of persons and property during that period and under those conditions.

Moreover, substantially all the authorities on international law agree that a nation *is responsible* for acts of revolutionists under certain conditions — such

as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injury. *There is*, therefore, a rule of international law under which Venezuela would be held liable in certain cases for acts of revolutionists. And there are some very respectable authorities which hold that a nation situated with respect to revolutions as Venezuela has been for the past decade and more, and with the consequent disordered condition of the State, is not to be given the benefit of such exemption from liability. These considerations may be presumed to have been in the mind of either or both of the contracting parties, and to have induced the insertion in the protocol of the admission of liability.

The case, therefore, is one in which two nations who are presumably aware of this diversity of opinion among nations as well as between themselves as to the liability of governments for the acts of revolutionists enter into a solemn agreement containing an express admission of liability for *all wrongful seizures of or injuries to* property growing out of insurrectionary events in a civil war. Can there be any other conclusion than that they intended to settle themselves this question of liability and not leave it to be determined as a commission might decide, one way or another? Whatever strength the argument might have if there was the unanimity of opinion claimed, and therefore the admission of liability might be interpreted as a mere declaration of an existing uniformly recognized principle of international law, the argument fails when it appears in the case before us that there is a contrariety of opinion on the subject. Moreover, the well-recognized canons of construction prohibit a restricted interpretation of this article. It is a uniform rule of construction that effect should be given to every clause and sentence of an agreement. The result of the construction insisted upon by the Commissioner for Venezuela would be to give the same meaning to the German protocol and to those of the peace powers, in effect striking out Article III. It is a conceded principle of interpretation that an admission is taken most strongly against the party making it. (Vattel, above quoted.) Finally, it is a rule of construction of treaties, sustained by the highest authorities, that if a clause in a treaty is susceptible of two interpretations, one broad and the other restrictive, the courts will give the clause the former interpretation in favor of private rights. In the case of Shanks *v.* Dupont (3 Peters, 242, 250) the Supreme Court of the United States, in construing the treaty of the United States with Great Britain of 1794, confirmed this rule. Mr. Justice Story delivered the opinion of the court. In it he said:

> If a treaty admits of two interpretations, and one is limited and the other liberal, *one which will further and the other exclude private rights*, why should not the most liberal exposition be adopted? * * * This part of the stipulation, then, being for the benefit of British subjects who became aliens by the events of the war, there is no reason why all persons should not be embraced in it who sustained the character of British subjects, although we might also have treated them as American citizens. * * * In either view of this case, and we think both are sustained by principles of public law, as well as of the common law, and by the soundest rule of interpretation applicable to treaties between independent states, the objections taken to the right of recovery of the plaintiffs can not prevail.

The rule is again affirmed by the same court, speaking through Mr. Justice Swayne, in this language:

> Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. (Hauenstein *v.* Lynham, 100 U.S., 483.)

The principle was recognized by the Commission under the United States and Venezuelan convention, in Aspinwall *v.* The United States of Venezuela.

The Commissioner (Little), speaking for the Commission, says,[1] this doctrine —

is thoroughly embedded in the jurisprudence of the United States, and is believed to be, internationally, a sound one. * * * [And] this finds support, if any were needed, in what Grotius says: " In the things which are not odious, words are to be taken according to the general propriety (totam proprietatem) of popular use, and, if there are several senses, according to that which is widest." (De Jure Belli ac Pacis, book 2, chap. 16, par. XII.)

In discussing the language of the treaty of 1819 between the United States and Spain, which it was contended did not include claims on torts, Mr. John Quincy Adams, Secretary of State, referring to the fact that in the course of the negotiations a proposal was made to omit the renunciation which included the latter class of these claims, said:[2]

As there is no limitation in the words of this renunciation, with regard to the nature of the transactions in which the claims originated, whether by contract or by tort, so none was intended. They were claims, of all of which it was believed that the only possible chance of obtaining any satisfaction to the claimants, consisted in the execution of the treaty.

It has been suggested that this interpretation will extend the liability of Venezuela to all injuries, because the word " wrongful " does not precede the word " injury; " that the clause must in that case be read " The Venezuelan Government admit their liability where the claim is for *any injury* to property," whether accidental or justifiable. Even if the word " injury " is taken in its generic or popular sense, the umpire is of the opinion that this interpretation is forced and untenable. The word " injury " when used in a legal or moral sense involves intentional wrongdoing.

" Injury in morals and jurisprudence is the intentional doing of wrong." (Fleming, Webster's Unabridged Dictionary, " injury.")

Again it is suggested that the word "wrongful " must be interpreted by reference to international law, and that Venezuela admits liability only for those seizures and injuries which are wrongful in the light of international law. This is incorrect. The admission is confined to property rights and must be read in that connection. It clearly means that the injury or the seizure shall be wrongful in respect to the right of property of the owner — *his title to the property* — and that any act which violates that right is wrongful. This right of property or title must be decided by municipal or local law, because it is derived from and is conferred by that law. One does not derive his title to property in any country through international law, but through the local law of the country. That law confers, permeates, and restricts his title. He takes his title subject to any and all the qualifications and limitations of the local law at the time of its acquisition.

It is also suggested that if Venezuela is held liable for injuries caused by the acts of insurrectionists, it will tend to discourage future revolutions. If the suggestion were pertinent, it might be possible to argue the opposite result; that, in the language of an eminent representative of the United States, " revolutions might then become a pastime for foreigners." But it is not pertinent. The functions of the Commission are strictly judicial. They have nothing to do with questions of statecraft and diplomacy. Their simple duty is to determine the rights of the parties according to justice and equity. They must not be influenced in reaching their conclusions by theories or predictions as to the possible effect of their decisions upon the political future of Venezuela. It is none of their concern. Fiat justitia ruat cœlum.

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[1] Moore's Arbitrations, 3624.
[2] Moore's Arbitrations, 4504.

In view of these considerations, the umpire is of the opinion that the admission of liability in Article III extends to claims of German subjects for wrongful seizures of or injuries to property resulting from the present Venezuelan civil war, whether they are the result of acts of governmental troops or of Government officials or of revolutionists.

This, however, does not dispose of the entire question. First, the admission of liability in Article III does not include injuries to the person; it covers only seizures of or injuries to property. Second, of these it only includes those resulting from the present Venezuelan civil war. The liability in these two classes of claims must be determined, therefore, upon the general principles of international law, because under the language of the protocol, read in the light of the British and German memorandum of December 22, 1902, *they* are referred to " arbitration without any reserve."

In thus determining them it is not, however, necessary to discuss the general question of the character and extent of the liability of a nation for acts of insurgents. There is diversity of opinion among the authorities on the question.

In the opinion of the umpire, however, the modern doctrine, almost universally recognized, is that a nation is not liable for acts of revolutionists when the revolution has gone beyond the control of the titular government. It is not necessary that either a state of war, in an international sense, should exist or any recognition of belligerency. Immunity follows inability.

This rule was very recently affirmed and approved by the United States Spanish Treaty Claims Commission sitting at Washington April 28, 1903 (Opinion No. 8).

Judicial cognizance can properly be taken of the condition of Venezuela during the present civil war. And there can be no doubt that from its outset it went beyond the power of the Government to control. It was complicated by the action of the allied powers in seizing the forts and war vessels of Venezuela; and if it is now fully suppressed (as is to be hoped), its extinction was only within a few days past. During all this period considerable portions of the country and some of its principal cities have been held by revolutionary forces. Large bodies of organized revolutionist troops have traversed the country, and in their train have followed the usual marauding and pillage by small bands of guerrillas and brigands. The supreme efforts of the Government were necessary and were directed to putting down the rebellion. Under such circumstances it would be contrary to established principles of international law and to justice and equity to hold the Government responsible.

It only remains to apply these conclusions to the particular claims submitted for decision.

The claim of Otto Kummerow is for property taken by the revolutionists from his residence in Naguanagua in May, June, and July, 1902.

It is specially objected to by the Venezuelan Commissioner on the ground that the testimony is insufficient to establish it, because the witnesses are servants on the claimant's farm and are so ignorant that they can not sign their names; that their testimony is word for word the same, and their appraisals of the value are precisely alike. From these facts he urges that their testimony is not to be received. He also claims that the time and other circumstances of the occurrence are too generally stated, and that the entire list of articles taken are said to have been taken in the course of three months, without any specification as to the dates or the number of seizures or as to what articles were taken at each seizure. He further objects that there is no evidence of any violence or even that they were taken without the consent of the owner, and finally that the acts were committed by revolutionary guerrillas as shown by the character of the acts mentioned. In reply to the last objection the Commissioner for

Germany insists that the witnesses testified expressly that they were revolutionists and give the names of their officers. No reply is made by him to the other objection to the credibility of the witnesses.

In the opinion of the umpire the proof fails to make out a case. While he can not agree with the argument of the Commissioner for Venezuela that the witnesses are to be discredited because they are ignorant farm hands or servants, the vague generality and at the same time verbatim identity of their testimony mark the case as one which might easily be manufactured.

In view of these facts, and the further fact that as to many of the articles it is obvious that the witnesses were not competent judges of their value, the umpire is compelled to disallow the claim for lack of sufficient proof.

Certainly if evidence of this character is to be received, there would seem to be no protection whatever for Venezuela as against manufactured claims, and it is significant in this connection that the claimant claims to have gone to considerable expense in the employment of an attorney, whose first and natural duty should have been to have presented the case of the claimant in a more satisfactory manner.

The first item of the claim of Otto Redler & Co. is for 9,932.85 bolivars, for the sacking of their store on the 26th of June, 1902, by revolutionists under the command of Gen. Lidano Mendoza.

The injuries occurred during the siege of Barquisimeto, which lasted from the middle of June, 1902, until June 26, when the revolutionists occupied the city. The house of the claimants was occupied by forces of the revolutionists under the command of Col. Manuel R. Vilaro, whose troops by night and day took away many articles of gold, hardware, and brass ware.

The proof seems to be complete as to the taking of the articles and the fact of the sacking of the store, and a district judge who took the testimony certifies that he has carefully examined the books of the firm, and the balance sheet shows the loss of 9,932.85 bolivars as correct.

This item of the claim falls within the ruling of the umpire upon the liability of Venezuela under her admission in Article III of the protocol.

The second item of 7,647.68 bolivars is for goods supplied the revolutionary forces under General Crespo, and it is not disputed that the government established by General Crespo, of which he was the constitutional President, acknowledged the claim. It is claimed, however, in defense of this item that the claimants were aiding the revolutionists by supplying them with munitions of war, and that having been shown thereby to have been revolutionists they have forfeited their claim. While, on the other hand, it is contended on the part of Venezuela that the authority of the revolutionary committee, upon whose action is based the third item of the claim for 3,732 bolivars, is not shown. It is further contended, as to the second item of 7,747.68 bolivars, that Venezuela offered to pay the claimant in bonds or evidences of debt, and that the claimant should have taken it, and not having done so can not now assert his claim.

The umpire is of the opinion, first, that it does not clearly appear that the claimant knew, in the case of one of the sales at least, that the purchasers were revolutionists. But in his judgment this whole claim of defense is disposed by the fact that these revolutionary forces were successful, and that Venezuela is estopped to refuse compensation for goods received from the claimants which materially assisted in the establishment of the Crespo government, whose title was never attacked. They are likewise estopped from claiming any pains or penalties or forfeitures against foreigners on the ground that the foreigners assisted the Crespo party in obtaining possession of the government.

The third item of the claim of 3,732 bolivars is based upon the same fact as

the second, although it does not clearly appear whether this item of the claim was recognized, as the second was, by the decree of the Crespo government. The same objection therefore obtains against the claim of defense to this item.

The umpire can not agree with the position taken on behalf of Venezuela that the claimants were bound to take bonds of Venezuela in payment of their claim. Even if the Government had tendered them cash in payment of their claim and the tender had been refused, its only effect would be to stop interest. But certainly if Redler & Co. had a claim, as has been adjudged, they were not bound to take in satisfaction thereof anything but cash.

It results, therefore, that the claim of Redler & Co. will be allowed for the full amount claimed, namely, 17,050.05 marks, with interest at 3 per cent per annum from the time of the presentation of the claim to the Commission up to and including the 31st day of December, 1903.

The claim of Luis Fulda is for property taken, a portion by " Venezuelan forces under the command of Gen. Nicolás Rolando " and a portion by forces of General Matos. Both the Commissioners, however, agree that the property was taken by revolutionary forces. Neither the fact nor the amount of the damage is denied by the Venezuelan Commissioner. It nowhere appears in the evidence when these injuries happened, but in the brief of the Venezuelan agent it is stated as a ground of defense that the international conflict, meaning the seizure of the war vessels and ports of Venezuela by the allied powers, had commenced at that time. This statement is not denied by the Commissioner for Germany.

The claims therefore fall within the above ruling of the umpire as to the extent of the admission of liability by Venezuela for acts of insurgents growing out of the present civil war, and as there appears to be no dispute as to the amount, it will be allowed at the sum of 5,000 bolivars, with interest at 3 per cent per annum from the date of the presentation of the claim to the Commission up to and including December 31, 1903.

The claim of Max Fischbach is for 19,200 marks for gross personal injuries committed by bands of revolutionists on October 24, 1902, in Los Azufrales, in Carúpano. They took away from him his watch and kept him until some friends came along and ransomed him and his fellow-sufferer Friedericy by the payment of 10 pesos. On the day of making the declaration of his claim, November 20, 1902, he alleges that he was still suffering from the effects of his injuries.

The claim of Richard Friedericy is based on practically the same assault by the same parties, because he protested against the treatment of Fischbach. He claims he was recovering from a rupture and his treatment brought back his troubles, from which he was still suffering on November 20, 1902. He claims the same amount, 19,200 marks.

These two claims are not within Venezuela's admission of liability, save as respects the watch taken from Fischbach, as to the value of which no evidence is given and no specific claim made, and the money taken from them both.

The claims for personal injuries will be, therefore, disallowed, and each claimant awarded the sum of 5 pesos, with interest at the rate of 3 per cent per annum from the date of the presentation of their claims to the Commission up to and including December 31, 1903.

The umpire is under appreciated obligation to the commissioners for their painstaking and able expositions in presenting the important questions arising in these cases.