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**Treves Case—Decision No. 144**

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# TREVES CASE—DECISION No. 144 OF 24 SEPTEMBER 1956 [1]

Claim under Article 78 of the Treaty of Peace—Exemption from special progressive tax on property—Active right to claim—Owners naturalized "United Nations nationals" after 3 September 1943 —Applicability of second part of paragraph 9 (*a*) of the aforementioned Article—Interpretation of treaties—Treatment as enemy—Meaning and scope of the expression "laws in force in Italy during the war"—State responsibility—Acts of a local *de facto* Government.

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Réclamation au titre de l'article 78 du Traité de Paix — Exemption d'un impôt extraordinaire progressif sur le patrimoine — Droit d'action — Propriétaires possédant le statut de « ressortissants des Nations Unies » après le 3 septembre 1943 — Applicabilité de la seconde partie du paragraphe 9 a) de l'article 78 du Traité — Interprétation des traités — Traitement comme ennemi — Signification et portée de l'expression « législation en vigueur en Italie pendant la guerre » — Responsabilité de l'Etat — Actes d'un gouvernement *de facto* local.

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The Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between Italy and the Allied and Associated Powers, and composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Plinio Bolla, former President of the Swiss Federal Tribunal, Third Member chosen by mutual agreement between the United States and Italian Governments, on the Petition of the Government of the United States, represented by its Agent, Mr. Carlos J. Warner and subsequently represented by its Agent, Mr. Edward A. Mag at Rome, on behalf of Messrs. Peter G. Treves and Gino Robert Treves, 30 Broad Street, New York 4, New York, *versus* the Government of the Italian Republic, represented by its Agent, State's Attorney, Prof. Dr. Francesco Agrò at Rome.

CONSIDERATIONS OF FACT:

A. Elia Emanuele Treves of the late Elia, an Italian national of the Jewish race, was arrested in Turin by the nazi-fascists, imprisoned and, subsequent to December 2, 1943, was transferred to the extermination camps in Germany. Since then no ascertainable news of him was ever received notwithstanding the inquiries made by his relatives.

On June 21, 1951 the Turin Civil and Criminal Court declared that Elia Emanuele Treves was to be presumed dead as of December 2, 1943 at 24 hours.

Elia Emanuele Treves had three sons, Enrico, Pietro and Gino Roberto. Enrico acquired Cuban nationality at a date subsequent to March 28, 1947;

[1] *Collection of decisions*, vol. IV, case No. 95

Pietro and Gino Roberto were naturalized as nationals of the United States of America on July 19, 1945 and May 13, 1946 respectively.

Elia Emanuele Treves owned real property at Ivrea, Pinerolo, Turin and Bianzè (province of Vercelli) as well as stocks.

On July 24, 1952 the tax collector of Turin requested of the sons of the late Elia Emanuele Treves the payment of the special progressive tax on the property they had inherited from their father.

Enrico, Pietro and Gino Robert Treves have requested to be exempted from the payment of said tax.

This request was rejected on the following grounds: Enrico Treves is a Cuban national, that is a State for which no exemption from this tax is provided; Pietro and Gino Robert Treves acquired United States nationality only subsequent to September 3, 1943 and therefore were not treated as enemies during the war (Article 78, paragraph 9 (*a*) of the Treaty of Peace).

B. On May 17, 1954 the Agent of the United States of America requested that the Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace:

(*a*) Decide that the claimants have been treated as enemy under the laws in force in Italy during the war within the meaning of Paragraph 9(*a*) of Article 78 of the Treaty because their property was confiscated by Decree No. 17291/3 issued on September 23, 1944 under Decree Law No. 2 of January 4, 1944 of the Salò Republic and by other Orders issued by the Italian authorities.

(*b*) Order the Italian Government to exempt under Paragraph 6 of Article 78 of the Treaty the claimants and their property from the Extraordinary Progressive Patrimonial Tax.

(*c*) Give such further or other relief as may be just and equitable.

C. The Agent of the Italian Government concluded for the rejection of the Petition by first of all denying that the anti-Jewish legislation of the Italian Social Republic can be considered as "legislation in force in Italy during the war" within the meaning of second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace.

D. By *Procès-verbal* of Non-Agreement dated March 29, 1955, the Representatives of the Italian Republic and of the United States of America on the Conciliation Commission decided to have recourse to a Third Member "in order to resolve the disputed questions raised by this claim".

E. The Conciliation Commission, completed and presided over by the Third Member, Dr. Plinio Bolla, former President of the Swiss Federal Court at Morcote, heard the Agents of the two Governments in an oral discussion held at Rome on March 12, 1956.

The Agents confirmed their conclusions and arguments which will be referred to, insofar as necessary, in the following considerations of law.

CONSIDERATIONS OF LAW:

1. The question at issue is whether or not the claimants, Pietro and Gino Robert Treves are obligated to pay the special progressive tax on the property they inherited in Italy from their father, the late Elia Emanuele Treves *quondam* Elia.

The Italian Government has admitted to the United States Government that the special progressive tax on property falls under the provisions of paragraph 6 of Article 78 of the Treaty of Peace, which reads as follows:

United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

The Italian Government nevertheless denies the claimants the status of United Nations nationals, within the meaning of the Treaty of Peace.

This question of active right to claim is the only subject of this dispute.

2. The definition of the expression "United Nations nationals" is given in paragraph 9, letter (*a*) of Article 78:

"United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

There is no doubt that the first paragraph of this provision cannot be invoked by the claimants because American naturalization was obtained on July 19, 1945 by Peter Treves and on May 13, 1946 by Gino Robert Treves, that is, after September 3, 1943, the date of the Armistice with Italy.

It is on the other hand disputed whether or not claimants can benefit by the second paragraph of the above provision.

3. The Agent of the Italian Government first of all contends that the time limit of September 3, 1943 mentioned in the first paragraph of paragraph 9 (*a*) of Article 78 should be understood to be included also in the second paragraph which, he states, serves as a clarification of the first paragraph.

In actual fact, the two paragraphs deal with essentially different questions. The first, in order to avoid fraudulent manoeuvres which may have been made at a time subsequent to the Armistice, establishes a time limit after which the amendments of the *status civitatis* must be considered as irrelevant in the application of the Treaty of Peace: physical persons shall not be considered as "United Nations nationals" unless they possessed this status on September 3, 1943, nor will companies and associations be considered as "United Nations nationals" unless they were established under the laws of one of the United Nations prior to September 3, 1943. The second paragraph of paragraph 9 (*a*) draws a similarity between "United Nations nationals" and physical persons, companies and associations that never were such nationals, but were treated as enemies under the legislation in force in Italy during the war; as the facts on which this similarity depends (legislation and treatment in Italy) are completely foreign to the intiative of the physical person, company or association affected thereby (an initiative which would have further represented a phenomenon of self mutilation) the drafters of the Treaty of Peace had no reason to guard against fraudulent manoeuvres, subsequent to the Armistice and directed at obtaining a more favourable treatment in the application of the Treaty of Peace to come, by the insertion of a time-limit.

On the other hand one cannot consider as applicable, in the sphere of the second paragraph, the time-limit of September 3, 1943, for the very reason that the second paragraph establishes, at least implicitly, a different time-limit

with the proposition "during the war". In order that the similarity intended by the Treaty may have its effect, it is sufficient that the person, whether physical or moral, having been treated as enemy under the legislation in force in Italy *during the war*, without letting the letter or the spirit of the Treaty authorize a distinction according to whether such a treatment occurred before or after September 3, 1943, which does not represent the date of the end of the war.

On this point this Commission comes to the same conclusions that were reached by the Italian-United States Conciliation Commission, Judge Emil Sandström acting as Third Member, in the decision issued in December 1954 in the Jack Feldman case.[1] The dissenting opinion drawn up on that occasion by the Italian Representative, in the opinion of this Commission, does not appear to raise any decisive arguments against the theory that prevailed at that time and which is adopted here. If treatment as enemy is a criterion which is added to that of effective nationality in order to broaden the number of the beneficiaries of Article 78 of the Treaty, there is no reason whatever why the time-limit established to restrict the efficacy of the amendments in the *status civitatis* should be valid also to distinguish, in terms of time, the treatment as enemy. If subsequent to the Armistice, and as is asserted by the Italian party, the national Government (which had its seat at Brindisi first, then at Salerno and finally at Rome) subjected to war measures only German nationals and companies in which German interests were prevalent, these physical and legal persons could not benefit by the provisions imposed by the Allied and Associated Powers on Italy, certainly not in behalf of Germany their principal enemy, or of German nationals.

If the Italian theory were accepted, the conclusion would be reached that the Italian companies placed under sequestration in Italy by the Italian Social Republic after the armistice because of an allied participation, could not avail themselves of the United Nations nationality; nor can one see any reason why the victors should have accepted such a difference in treatment with that to which similar companies sequestered before September 3, 1943 were subjected. Article 78, second paragraph of paragraph 9 (*a*), refers solely to conditions which no longer existed at the time the Treaty was drafted; the drafters thereof were certainly not unaware that the racial legislation enacted in Italy before the war (see principally the law of November 17, 1938), had become much more severe after the Armistice at the hands of the authorities of the Italian Social Republic (*Enciclopedia Italiana*, Appendice 1938-48, Vol. I, pp. 811 through 812) and must have borne in mind the fact that the second paragraph of paragraph 9 (*a*) of Article 78 would have largely failed one of its recognizable purposes, which was that of lessening the harmful consequences of racial persecution, should the latter have been considered as relevant until September 3, 1943; hence the total and intended absence of any mention of this time-limit in the aforementioned second paragraph.

4. The Italian Agent further denies that the claimants were treated as enemies "under the legislation in force in Italy during the war". First of all, the laws enacted by the Republic of Salò do not constitute legislation, he states, because only the State can enact laws. The Italian Social Republic was not a State, and even less the Italian State.

In this connexion it should be recalled that, after the Armistice with the Allies, announced on the evening of September 8, 1943 the German forces became *de facto* the masters of Italy from the Alps to the south of Naples. They did not, however, take over the direct government of this part of the country.

[1] *Supra*, p. 212.

Hitler had Mussolini liberated from imprisonment on September 12, 1943 and reinstated him in power. On September 28, 1943 Mussolini took over the duties of Provisional Chief of the State pending a Constitution (established but never convened) and in that capacity he jointly covered the offices of Head of the Government and Minister of Foreign Affairs; the seats of the Government were established in northern Italy and Mussolini himself took up residence in the vicinity of Salò; thus the Republic of Salò was born with the officially adopted title of Italian Social Republic. When Mussolini was shot (April 28, 1945) and the German forces in Italy surrendered unconditionally (April 29/May 2, 1945) the Italian Social Republic ceased to exist (*Enciclopedia Italiana*, Appendice 1938-48, vol. II, pp. 102, 373, 686). For nineteen months, and therefore not transiently, there were thus, *de facto*, two Italys, each claiming to be the only lawful one. Each had its own territorial base. At the outset the Italian Social Republic was more extended and had more population, but the territory controlled by it in the peninsula became gradually increasingly smaller. Also the Italian Social Republic, which cannot be considered as an agency of the German Reich, had its own Government, a local one but one which aimed at losing this quality and which exercised legal powers with effective extrinsicality, by means of appropriate agencies; these agencies carried out *de facto* a legislative, jurisdictional and executive activity; the laws enacted had the force of law for all citizens subjected to that system and were enforced as far as was permitted by the presence of foreign troops in the territory of the peninsula, by the war fought by these troops in the territory of the peninsula, by the civil war, by the deepening of the internal contrast in the Italian spirit which gave rise to the phenomenon of resistance. The Italian Social Republic specifically enacted laws, let alone the Jewish persecution, for the repression of the enemies of the new régime, for the punishment of the "traitor" fascists, for the establishment of a new Fascist army, for the establishment of a General Confederation of Labour; it also enacted laws in the technical and artistic field and on the socializing of enterprises (*Enciclopedia Italiana*, *loc. cit.* vol. II, p. 102).

5. As is clearly indicated by the letter of the provision, the second paragraph of paragraph 9 (*a*) of Article 78 intended that the obligations imposed on Italy with regard to "United Nations nationals" were to be valid also on behalf of physical and legal persons who, *ope legis*, had been treated as enemies in Italy during the war.

For the purposes of the text of Article 78, Italy must be here considered as the entire Italian territory recognized as such by the Treaty of Peace itself (Decision dated March 16, 1956 of the Franco-Italian Conciliation Commission on the interpretation of Article 78, paragraph 7[1], and therefore also that part of the territory which was actually controlled by the Italian Social Republic, excepting those portions ceded to France or Yugoslavia in compliance with the Treaty or those destined to constitute the Free Territory of Trieste. The only matter of importance in the minds of the drafters of the Treaty was therefore focused on the laws which had actually been in force in that part of Italy where the treatment had occurred and which had brought about that treatment; they did not and could not give any consideration to the legality of said laws vis-à-vis the Italian system as it existed prior to the Armistice and later in force in southern Italy. Likewise they could give no consideration to the fate that these laws would suffer in the legal system of post-war Italy.

There are no grounds for assuming that the second paragraph of paragraph

[1] Volume XIII of these *Reports*, Decisions Nos. 176 and 201.

9 (*a*) of Article 78 of the Treaty of Peace intended to give an *ex post facto* recognition, for some reason or other, to the Italian Social Republic or to render an opinion for or against the lawfulness of the so-called Salò legislation and thus clearly exceed the limits of the problems it intended to solve. In order to obtain the recognizable purpose of the provision it would have sufficed that the enforcement, at the desired time, of the discriminatory legislation of Salò were considered as a condition of fact of the right accorded by the Treaty to the physical or legal persons victims of such discrimination to avail themselves against Italy of the privileges accorded to United Nations nationals.

In other words, the term "legislation" contained in the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace does not constitute a formal judgement nor does it represent any reference to the *present* Italian legal system but should be interpreted bearing in mind the condition prevailing in Italy during the war and referred to above. By using the term legislation the drafters of the Treaty intended to avoid that similarity could be claimed by physical or legal persons, who were victims in Italy during the war of oppressive or discriminatory measures not based on a provision of law but due for instance to the arbitrary action of an individual official (arbitrary action connected with the legislation that said official had been called upon at the time to apply). Legislation generally means an aggregate of provisions which have legally the specific aim of governing the State collectivity. Doubtless, this is the purpose aimed at by the laws of the Italian Social Republic.

On the other hand, even at this point one could ask oneself whether the drafters of the Treaty would not have foregone the pursuit of one of their clearly recognizable aims—at least a partial reparation of the damages caused by the racial persecutions—had they excluded from the expression "legislation in force in Italy during the war" the anti-Jewish laws of the Italian Social Republic, which were generally much more drastic than those of pre-Armistice Italy and which were enforced with greater severity. But the text does in no way justify the theory according to which such an exclusion was intended.

6. The Agent of the Italian Government does not consider that there is sufficient evidence to prove that Elia Emanuele Treves, claimants' father, was the victim of an actual conduct on the part of the Italian authorities, permitted by the legislation of the Italian Social Republic, and directed at placing him on the same level as enemy nationals.

Even before the Legislative Decree of the Head of the Government, No. 2, of January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944 came into effect, Elia Emanuele Treves was arrested by the nazi-fascists, imprisoned and, after December 2, 1943 transferred to Germany in the extermination camps and has never been heard of since. The question may be left open as to whether or not the Italian authorities in applying the laws at the time in force in the Salò Republic, were responsible in depriving Elia Emanuele Treves of his freedom, a dispossession which later cost him his life. But there can be no serious doubt with regard to the treatment suffered by the property owned by Elia Emanuele Treves. The decree, included in the records of the case, which confiscated on behalf of the State Elia Emanuele Treves' property in the territory of the Municipality of Bianzè, 13 Edison shares and 137 coupons attached to said shares, was issued by the Chief of the Province of Vercelli and in application of the aforementioned Decree of the Duce of January 4, 1944. That his other property suffered the same fate, which was the legal fate, appears from other documents also contained in the records: the letter dated March 10, 1945 of the Prefecture of Turin which shows that certain items of personal property owned by Treves to be inventoried and to be delivered to

E.G.E.L.I. were located at the Prefecture itself; and the statement of January 19, 1944 of the Instituto di San Paolo at Turin, wherein mention is made of delivery effected to that Institute, by an official of the Prefecture of Turin, of No. 9 packages containing valuables, coming from the sequestration of the property owned by the Jew Elia Treves". On the other hand there is no document mentioning any interference on the part of German troops stationed in northern Italy against Treves' property; the question which would have come up for consideration had there been any such interference may therefore be left open.

Certainly, no provision of the legislative decree of January 4, 1944 rules that the Italian nationals belonging to the Jewish race, as regards their property, shall be considered or treated as enemies under the Italian War Law. But the second paragraph of paragraph 9 (*a*) of Article 78 does not require an abstract statement of similarity to enemy persons, and even less to persons having a specific enemy nationality; it is sufficient that the effective treatment ("*traitées*", "treated") intended by the law and applied by the Italian authorities is that reserved to enemy persons. As regards enemy property, the Italian War Law provides conservative seizure; the Decree of January 4, 1944 ordered confiscation on behalf of the State, that is, not only the administration on the part of E.G.E.L.I., but the sale of the property involved and the transfer of the price collected "to the State for the partial recuperation of expenses sustained in assisting and in paying subsidies and compensation for war damages to the persons rendered homeless by enemy air attacks". In other words, Italian nationals belonging to the Jewish race were doubtlessly considered to be responsible for certain war damages caused by the enemy and therefore, in actual fact, considered as enemies. The Decree of the Duce of January 4, 1944 thus only gave material form to principle No. 7 put before the First Assembly of Republican Fascism: "Individuals belonging to the Jewish race are aliens. During the war they belong to enemy nationality" and confirmed a practice already followed, as is shown by a decree contained in the records of the case dated December 28, 1943 of the Chief of the Province of Brescia; this decree placed under sequestration the property of Mr. Vittorio Cohen by invoking the War Law and "having seen that the Jews are considered as subjects of an enemy State".

It is true that by decision of June 21, 1951 Elia Emanuele Treves was declared presumed dead as of December 2, 1943 at 24 hours, and that this date is prior to the coming into force of the Legislative Decree of January 4, 1944.

But Elia Emanuele Treves' property was transferred to his sons on December 2, 1943, and thus it is the claimants who were treated as enemies by the confiscation effected in the implementation of Legislative Decree of January 4, 1944.

Or, Elia Emanuele Treves' property was transferred to the claimants only following the decision of June 21, 1951, and in that event they can avail themselves of the fact that their father was treated as enemy by the seizure of his property effected in application of the Legislative Decree of January 4, 1944. Paragraph 6 of Article 78 of the Treaty of Peace does not in fact exempt, from the taxes referred to by it, United Nations only but their property as well; the related privilege would therefore have simply followed the property of the late Elia Emanuele Treves.

DECIDES:

1. The Petition is admitted in the sense that Peter G. Treves and Gino Robert Treves are entitled to be exempted from the payment of the special

progressive tax on the property they inherited in Italy from their father, the late Elia Emanuele Treves.

2. This Decision is final and binding.

Rome, September 24, 1956.

*The Representative of the United States of America*
Alexander J. MATTURRI

*The Third Member*
Plinio BOLLA

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DISSENTING OPINION OF THE REPRESENTATIVE OF THE ITALIAN REPUBLIC IN THE PETER G. AND GINO ROBERT TREVES CASE

1. By this Decision in the Treves Case and the other two Decisions rendered at the same time in the Levi[1] and Wollemborg[2] Cases, the Italian-United States Conciliation Commission, Judge Bolla acting as Third Member, has settled several important questions of principle. I fully agree with a part of these (like that which denies the existence, and therefore the jurisdiction, of the Commission until such time as the Italian Government has taken a position with regard to the claims submitted to it; or that which acknowledges the fact that costs of legal proceedings cannot be allowed); while with regard to others I must instead confirm the disagreement which I have already had an opportunity to express on preceding occasions.

2. The majority Commission first of all held that the inclusion in the second paragraph of paragraph 9 (*a*) of Article 78 of the time limitation appearing in the preceding paragraph, is not implied, that is to say that treatment as enemy entitles the individual concerned to the status of United Nations national even if said treatment occurred subsequent to September 3, 1943. On this specific point the interpretation given by this same Conciliation Commission (Judge Sandström acting as Third Member) is confirmed. I expressed my disagreement at the time and the contentions I set forth on that occasion are referred to here.

Once again reference is made to the literal interpretation, without bearing in mind that the effective content of the provision can be obtained from logical elements modifying its seemingly clear content; and in this connexion I wish to be permitted to recall that the French-Italian Conciliation Commission in the Pertusola Case[3] (Judge Bolla himself acting as Third Member), clearly stated that the old practice of interpreting difficult points of law such as *in claris non fit interpretatio* and *clara non indigent interpretatione* is now disclaimed by the more authoritative legal writings of all countries, because the interpretation must determine the content of every provision through a logical process.

The majority Commission observed that there are no grounds justifying a restrictive interpretation; but the reasons, in my opinion, do exist and originate from the practical possibility that an effective treatment as enemy could be

[1] *Infra*, p. 272.
[2] *Infra*, p. 283.
[3] Volume XIII of these *Reports*, Decisions Nos. 47, 95, 121.

applied in Italy subsequent to the political and military events of September 1943, events which the victor Powers could not have disregarded at the time the Treaty of Peace was drafted. After this date, the Italian Government—the legitimate Government, naturally—could only sequester German property; therefore, a literal interpretation would lead to the consequence that the implementation of Article 78 could be invoked on behalf of a German national who was treated as enemy in Italy after September 3, 1943, and who, at a later date, fortuitously became a United Nations national; the senselessness of this consequence prompts one to believe that the content of the provision must of necessity be more restricted than appears from its wording.

The majority Commission held it could overrule the exception by denying that such a contingency could arise on the grounds that German nationals and German companies could not avail themselves of provisions which had not been imposed for their benefit; but the observation does not take into consideration the fact that when one of the conquering Powers requests the application of Article 78 it proceeds in behalf of an individual who at that time is its national, just like its other nationals; if it is furthermore admitted—as it is admitted by these three Decisions—that the treatment creating similarity with United Nations nationals must not of necessity be that which is required for the nationals of States at war, but that it is sufficient that this treatment be, in substance, equivalent to it, it can be clearly seen that the hypothesis referred to above is far from being fanciful.

There remains the other case of treatment as enemy operated by the Salò Republic; the reason why this cannot be relevant for the purposes of Article 78, a reason which the majority Commission said it failed to see, is to be found in the basis of the responsibility with which Italy was charged under this title; the extension, in favour of the individual who was treated as enemy, of the benefits accorded to United Nations nationals has its title, not in an objective reason, but in the resposibility incurred by the Italian Government by that specific act. Now, it would have been sufficient to give due consideration to the Preamble of the Treaty of Peace in order to determine the limits of the responsibility it was intended to impose on Italy; it is stated here that whereas Italy *under the Fascist régime* became a Party to the Tripartite Pact with Germany and Japan, undertook a war of aggression, *bears her share of responsibility in the war*; that the Fascist régime was overthrown on July, 25, 1943, that after the Armistice, Italian armed forces took an active part in the war against Germany, in which Italy became a co-belligerent.

Consequently, when it is said that there is no reason why the victors should have accepted a difference between the attachments effected before and after September 3, respectively, one does not bear in mind this distinct separation of responsibility which is specifically set forth in the Preamble of the Treaty of Peace, wherefore a non-acceptable conclusion is reached here too; namely, that Italy should have been charged with the consequences of acts performed by a Government—whatever the legal qualification of said Government—against which she was at war side by side with the Allies. It may be added that if treatment as enemy were separated—as it has been separated by these three Decisions—from any concrete reference to the nationality of one of the United Nations, even the determinant motive of the protection of the interests of *its own* nationals would have been entirely lacking.

It is added, finally—and this is the new argument—that the drafters of the Treaty must have been cognizant of the fact that the racial legislation enacted in Italy before the war had undergone a radical change for the worse, after the Armistice, at the hands of the Italian Social Republic authorities, wherefore, the provision under consideration, with the afore-mentioned limita-

tion, would have largely failed one of its recognizable purposes, which was that of diminishing the harmful consequences of racial persecution.

That one of the purposes of the provision was that indicated above is affirmed but not proved, and I wish to be permitted to express my doubts with regard to the foundation of this assertion. There is nothing in the Treaty of Peace that permits one to believe that the United Nations, besides protecting the property, rights and interests of their own nationals also intended to protect individuals affected by racial persecution.

It was established in former Decisions of this Conciliation Commission that paragraph 1 of Article 78 constitutes the provision containing the directives of the article itself, while the following provisions only represent a specific manner in which these directives are to be implemented. Now, paragraph (1) speaks of restoration of rights and interests, of restitution of property, the former and the latter belonging to the *United Nations and their nationals*. Any reference to the victims of racial persecution is completely alien to the contents of this provision.

In the second place one might observe that if the aims attained by the victorious Powers had included the restoration of the position of racial persecutees as well, one would come to the conclusion that the provisions drafted are utterly inadequate. In view of the fact that only the United Nations can avail themselves of Article 78, the restoration provided thereunder would be only applicable to the few persecutees who, at a subsequent date, acquired the nationality of one of said Nations; the provision would not be applicable to those who have remained Italian nationals (and their number is by far the greatest).

It seems clear that if the drafters of the Treaty had had this purpose in mind, they would have said so more clearly in the first place and in the second place they would have readily discovered that the results would be quite negligible.

3. The second question of principle on which I do not agree concerns the interpretation of the phrase "legislation in force in Italy during the war". The majority Commission expressed the opinion that it should be given an exclusive interpretation to the extent of including therein the laws enacted by the so-called Italian Social Republic which were implemented *de facto*, if not *de jure*, throughout the greater part of Italy during the war.

At the time the Mossé Decision[1] was rendered by the Italian-French Conciliation Commission, I had an opportunity of expressing my opinion on the question as to whether or not the acts committed by the Salò Republic could be charged to the Italian Government; in the instant case my disagreement is even stronger because, to my mind, the concept of "law" has an exact meaning, implying the "juridicity" thereof, a quality which the Government of Salò lacked completely. It is true that many times *de facto* Governments acquire, as a result of subsequent events, the character of legitimate Governments, a character which is made retroactive; but any reference to such an eventuality is of no avail because these results are obtained when the phenomenon has become an actual fact.

In the second place it seems to me that the question of the nature of the Salò Republic and its legislative enactments should be considered not in the abstract but in connexion with the position taken by the Powers who drafted the Treaty of Peace with respect to such enactments; these Powers disregarded them completely and once again a useful reference can be made to the Preamble of the Treaty of Peace which stresses the continuity between Italy under the

[1] Volume XIII of these *Reports*, Decision No. 144.

Fascist régime up to and including July 25, 1943 and Italy under the legitimate Government at a subsequent date. There is no mention whatever in any part of the Treaty of an Italian Government co-existing with the legitimate Government.

4. The question of principle which, to my mind, was not resolved correctly is that under which treatment as enemy is not conditioned exclusively on measures which had as a pre-requisite the placing of the individual who had been the victim of such treatment on the same level as that of a national of a State at war with Italy.

Now on this point I should like to answer the wording of a preceding Decision rendered by this same Italian-United States Conciliation Commission in the Bacarach Case[1], which dealt with this specific issue. In the afore-mentioned Decision it is stated that "the racial legislation enacted, beginning in 1938, by the Fascist régime was certainly inhuman and barbarous, but it was not legislation enacted within the framework of a state of war, as the term is used in international law (State, or national of a State, with which one is at war). Article 78 refers to enemy with a more definite meaning, that is, in the sense that an individual received the same treatment he would have received had he been a national of one of the States with which Italy was at war".

It seems to me that the three subject Decisions contrast distinctly with the above statement.

5. I consider I should restrict my dissent to the questions of principle alone without going into the aspects of each individual case, on certain points of which I am also in disagreement.

Rome, October 11, 1956.

*The Representative of the Italian Republic*

Antonio SORRENTINO

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## LEVI CASE—DECISION No. 145 OF 24 SEPTEMBER 1956[2]

Claim under Article 78 of the Treaty of Peace—Compensation for war damages sustained by enemy property—Exemption from special progressive tax on property —Action right to claim—Owners nationalized "United Nations nationals" subsequent to 3 September 1943—Applicability of second part of paragraph 9 (*a*) of the aforementioned Article—Whether time limit of 3 September 1943 implied therein —Interpretation of treaties—Treatment as enemy—Meaning and scope of the expression "laws in force in Italy during the war"—State responsibility—Acts of a local *de facto* Government.

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[1] *Supra*, p. 187.

[2] *Collection of decisions*, vol. IV, case No. 96.