

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Mixed Commission established under the Convention concluded between the
United States of America and Mexico on 4 July 1868

**Case of Salvador Prats v. the United States of America,
opinions of the Commissioners**

Commission mixte constituée en vertu de la Convention conclue entre les
États-Unis d'Amérique et le Mexique le 4 juillet 1868

**Affaire concernant Salvador Prats c. les États-Unis d'Amérique,
opinions des Commissaires**

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It further results that the United States, at least, is not now at liberty to claim a government *de facto* for the Prince Maximilian, having always during the contest in Mexico recognized the republic and repudiated the empire—committed no less by the sympathies of its people with the people of Mexico in their arduous struggle for the republican form (endeared to the people of the United States) and liberal principles (which they also cherish) than by their appreciation of the fact that the European intervention attacked the United States and every other republican state in America.

I have said nothing about governments *de jure*, because, outside of the field of moral considerations, a government *de facto* is also a government *de jure*.

I feel assured, moreover, that the Government of the United States can not desire to hold the Republic of Mexico responsible for the acts of the so-called empire by obtaining awards here, which must condemn the stand taken by that government in behalf of republican institutions in its hour of trial and danger; but that this case has found its way here in the name of that government, in pursuance of a purpose to acquit itself of responsibility to claimants, by the final judgment of this impartial tribunal.

For my part, I cheerfully accept the responsibility thus imposed and the labor which belongs to it.

Claimant may have a remedy for the wrong which he has sustained; but he must look elsewhere than to the government of the Republic of Mexico.

It is therefore considered by this commission that the Republic of Mexico is not responsible for the injury complained of herein, and this claim is rejected and disallowed.

**Case of Salvador Prats v. the United States of America, opinions
of the Commissioners^{*}**

**Affaire concernant Salvador Prats c. les États-Unis d'Amérique,
opinions des Commissaires^{**}**

Commissioner of the United States

Civil war—conflict to be governed by the laws of war—question of the recognition by foreign States of the belligerent rights of insurgents—non-recognition by a foreign State does not deprive the United States of any right of war or immunity against this foreign State.

^{*} Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. III, Washington, 1898, Government Printing Office, p. 2886.

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State responsibility—question of responsibility of the government for injuries committed by rebel enemies against aliens in time of civil war—non-responsibility resulting from the fact of the belligerency itself and not the recognition of the belligerency of the rebel enemy by foreign States—principle of non-responsibility for acts of rebel enemies having withdrawn themselves from the control and jurisdiction of the sovereign.

Estoppel—having conceded to the United States the exercises of its right of war against it, Mexico was estopped to deny the fact of war or to ignore the changes which the war introduced into the relations between the two governments.

Treatment of foreigners during civil war—special protection to be given to foreigners, viewed as an engagement to treat foreigners equally with citizens and not as granting them a further protection—foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of their wars—after the beginning of the war, no obligation for the government, by treaty or the law of nations, to protect the property of aliens situated inside the enemy country.

Commissioner of Mexico

State responsibility—no responsibility without fault (*culpa*) and no fault (*culpa*) for having failed to do what was impossible—the fault is essentially dependent upon the will, but the will disappears before the force whose action cannot be resisted.

Recognition of rebel forces—foreign governments bound to respect denomination of rebels inflicted on the Confederates by federal authorities.

Treaty interpretation—the term “special protection” shall not be construed as qualifying the protection due to foreign residents in comparison with the one accorded to native residents, but as a superlative tending to ascertain a perfect degree of protection—foreigners not entitled to greater protection than citizens.

Due diligence—duty limited by practical possibility: *ad impossibile nemo tenetur.*

Commissaire des États-Unis

Guerre civile—conflit régi par les lois de la guerre—question de la reconnaissance des droits des insurgés belligérants par les États étrangers—l’absence de reconnaissance par un État étranger ne prive pas les États-Unis de tout droit à la guerre ni de l’immunité envers cet État étranger.

Responsabilité de l’État—question de la responsabilité d’un gouvernement pour les dommages causés aux étrangers par les insurgés en temps de guerre civile—l’absence de responsabilité résulte de l’état de guerre en tant que tel et non de la reconnaissance de belligérance des insurgés par les États étrangers—principe de non-responsabilité pour les actes des insurgés s’étant soustraits au contrôle et à la juridiction de l’État souverain.

Estoppel—ayant concédé aux États-Unis l’exercice de son droit à la guerre contre lui, le Mexique a été empêché de nier l’état de guerre ou d’ignorer les changements intervenus dans les relations entre les deux gouvernements du fait de la guerre.

Traitement des étrangers durant une guerre civile—la protection spéciale accordée aux étrangers est considérée comme un engagement à traiter les étrangers de la même façon que les citoyens, et non comme l’octroi d’une protection supplémentaire.

taire—les étrangers domiciliés dans un pays belligérant partagent avec les citoyens de ce pays les aléas de leurs guerres—une fois la guerre déclenchée, le gouvernement n'est soumis à aucune obligation de protéger les biens situés sur le territoire du pays ennemi appartenant à des étrangers, que ce soit en vertu d'un traité ou du droit des gens.

Commissaire du Mexique

Responsabilité de l'État—pas de responsabilité sans faute (*culpa*) et pas de faute (*culpa*) pour ne pas avoir réussi à réaliser l'impossible—la faute dépend uniquement de la volonté, mais la volonté cède face à la force dont l'action ne peut être contrée.

Reconnaissance des forces rebelles—les gouvernements étrangers doivent respecter la qualification de rebelles attribuée aux Confédérés par les autorités fédérales.

Interprétation des traités—le terme “protection spéciale” ne doit pas être interprété comme qualifiant la protection due aux résidents étrangers par rapport à celle accordée aux autochtones, mais en tant que superlatif tendant à affirmer un degré complet de protection—les étrangers ne peuvent prétendre à une protection plus importante que les citoyens.

Obligation de diligence—obligation limitée en pratique : *ad impossibile nemo tenetur.*

Opinion of Mr. Wadsworth, Commissioner of the United States

The commercial house of Prats, Pujol & Co., doing business in the city of New Orleans, on the 2d of April or 7th of January 1862 (the dates are in conflict), shipped on a quasi British brig, the *M. A. Stevens*, 213 bales of cotton, to be delivered at the port of Havana; the brig not to sail, however, until the port of New Orleans should be opened by the United States: so claimant asserts.

This vessel with her cargo and passengers (including a member of said firm) was lying at Barataria when, on the morning of the 27th of April 1862, two days after the capture of New Orleans by the fleet of the United States, commanded by the renowned Admiral Farragut, a naval force in the service of the so-called Confederate States of America, coming up from Fort Livingston, under command of one Henry Wilkinson, burned the brig and cotton to prevent their capture by the vessels of the United States.

Claimant, asserting ownership to one-half the cotton, as a member of said firm and as a Mexican citizen, demands an award in his favor for half the gold value of said 213 bales of cotton at the price then current in the port of Havana.

He claims in his memorial to be by birth a Mexican citizen, always domiciled at Campeachy. The only evidence of domicil offered by him is his own

affidavit, in which he states that he had resided for many years in the city of New Orleans, where he *seems* to have been residing at the time of the loss.

At the time of the destruction of this cotton a civil war was raging between the United States and a portion of its citizens styling themselves "the Confederate States of America"; and this war, conducted both by land and sea on the part of the United States, had then lasted over a year, attaining to large dimensions. Numerous battles between large armies had been fought, and a blockade of the entire coast and all the ports of the so-called Confederate States, including New Orleans, had been proclaimed and made effective by a competent naval force of the United States. Two days before the losses complained of the Confederates held, by force of arms, the entire State of Louisiana, with the city of New Orleans, together with an extensive territory reaching from the confines of Mexico almost to the capital of the United States.

The subsequent history of the contest shows how truly it must be characterized as war and be governed by its laws, although carried on within the State. It required a period of four years on the part of the United States to bring this war to a successful close; employed a million of men in arms, and exhausted several thousand millions of treasure.

It is true that, while other nations prior to the event now under review had made haste to accord to the insurgents belligerent rights, Mexico, animated by friendly sentiments toward the government and people of the United States, withheld such recognition. Nevertheless, the fact remains fixed and undisputed that on the 27th of April 1862 civil war existed, and of the magnitude we have indicated.

The question, then, most prominently presented by this claim of Salvador Prats for our decision is that of the responsibility of a government for injuries committed by its rebel enemies against aliens in time of civil war.

It is attempted in the argument for claimant, however, to vary this question on two grounds, viz:

1st. That since, by the fourteenth article of the treaty of 1831 between the United States and Mexico, each government engages to give its "special protection" to the persons and property of the citizens of the other, transient or dwelling in its territory, etc., each government has thereby contracted to guarantee the safety of such persons and property.

2d. That, as neither the United States nor Mexico ever recognized the so-called Confederate States as a belligerent, the former government is not at liberty to rely upon the fact of belligerency to exonerate itself from responsibility for injuries committed by the insurgents to citizens of the latter, however the question may be changed as to the subjects of those powers who recognized the belligerent rights of the Confederates.

The argument for claimant treats this stipulation for special protection as a guaranty of security under all circumstances; but we do not take that

view of it. The most literal interpretation of special protection can not make an insurance.

The whole article defines the character of this protection and shows that the government merely designed to place aliens, transient or dwelling within their territory, on an equality with citizens in this respect. Herein consists this special protection. Indeed, it stipulates no more than every just government must undertake in behalf of its own citizens within its own jurisdiction. We do not think by this article either of the governments has agreed to afford any more or further protection to strangers within its borders than is justly due to its own citizens, or meant to establish any inequality between subjects and strangers either in the matter of protection or in the mode or measure of redress for injuries to persons or property. Each government *has* given special protection to all having a right to invoke it whenever it does all in its power to enforce *its* laws, repress and punish violence, and put down by force of arms armed revolt.

In these particulars, for aught that here appears, the United States is blameless so far as claimant is concerned. He makes no charge against the United States for failure to enforce her laws before they were overthrown at New Orleans by war; and after the war broke out it will be difficult to deny the magnitude of the sustained exertions of the United States or the sacrifices incurred by that government to suppress and put down the violence of the insurgents.

So, also, we dissent from the view taken of the consequences of the refusal by Mexico to recognize the rebel enemies of the United States as a belligerent power, and placing it thereby on an equality of belligerent rights with the parent government inside the jurisdiction of Mexico. Such refusal did not deprive the United States of the exercise of any right of war or any immunity resulting from a state of war; but merely refused, in a spirit friendly to the United States, to extend those rights to the insurgents.

Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers' sovereign. It resulted from the *fact* of belligerency itself, and whether recognized or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and, so to speak, an *estoppel* as to that government. This, probably, is all Mr. Adams meant in his dispatch to Mr. Seward (quoted in an argument, June 11, 1861, Diplomatic Correspondence, 105.) If responsibility on the part of the United States in the absence of such recognition is intimated, we do not concur with that distinguished minister, for had Great Britain never recognized the Confederates as belligerents at all, the consequences of the state of war as a fact to Great Britain, as to all other neutral powers, would have been the same: such as the liability of their vessels on the high seas to search and seizure as prize by the armed cruisers of the United States, and to capture for

attempts to violate the blockade. These rights the United States exercised against Mexico and all other nations, and did it in virtue of the fact of war, and not because of the recognition of the belligerency of the insurgents by those powers or any of them. Mexico conceded to the United States the exercise of these rights of war against her, and is equally estopped now with other nations to deny the *fact* or to ignore the changes which the war introduced into the relations between the two governments.

The existence of a civil war the United States could not and did not deny. The whole of it is, that government denied the necessity or propriety of the recognition of its rebel citizens as a belligerent power, when first accorded, at that time and under the circumstances. While such a recognition did not create or change the fact of war, it increased the opportunities of the rebel enemy without increasing or diminishing the rights of the United States growing out of the existence of war.

So far, therefore, as the responsibility of the United States to Mexico in this case is concerned, it is in nowise increased or diminished by the failure of the latter to accord belligerent rights to the Confederates.

The naked question therefore remains: Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, "transient or dwelling?"

We have no difficulty in answering that question in the negative.

The Confederate armed forces were in no sense "authorities of the United States" within the meaning of the convention under which we are assembled.

If we admit for the moment that, under the convention, the United States is liable for neglect of a duty stipulated by treaty or imposed by the law of nations, and if such a duty in the present instance be postulated it would be difficult to show such neglect, in view of the history of the late civil war, and particularly of the capture of New Orleans. But no such duty, in fact, rested on the United States after the commencement of the war. That government was under no obligation, by treaty or the law of nations, to protect the property of aliens situate inside the enemy country against the enemy. The international duty of the United States or its engagements by treaty to extend protection to aliens, transient or dwelling, in its territories, ceased inside the territory held by the insurgents from the time such territory was withdrawn by war from the control of that government, and until her authority and jurisdiction were again established over it.

The principle of non-responsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own

subjects, between whom, in this respect, no inequality of rights can justly be asserted.

Rutherford has placed it upon this ground in his valuable work. Speaking of the duty of a nation to prevent its citizens from offending against the subjects of other states, and the consequences of neglect in this particular, he says: "But such neglect does not make a nation accessory to the acts of subjects that are in a state of rebellion and have renounced their allegiance, or that are not within its territories, for in these circumstances the subjects, whatever they may be of right, are not under its jurisdiction in fact. (Institutes, p. 509, Second American Edition.)

Aliens residing and trading inside the rebel territory acted at their peril. Indeed, the fact of residence and trade constituted them enemies of the United States in common with the rest of the inhabitants whose "spirit and industry" contributed to the resources of the enemy. The house of Prats, Pujol & Co., conducting business in New Orleans in 1862, was engaged in commerce injurious to the United States. Shipping cotton by that house to Havana from New Orleans, while the latter port was held by the enemy whether blockaded or not, subjected the property to capture on the high seas as prize of war. The fact that one of the house was an alien, even if domiciled in Campeachy would not exempt his share.

We are at a loss, therefore, to perceive on what ground aliens resident in the hostile territory could claim the protection of a power lawfully exercising the rights of war against that territory and all its inhabitants.

It is certain, if the forces of the United States, in the course of their operations to reduce the forts of the enemy below New Orleans and to capture the city, had destroyed the vessel and cotton, that government would not thereby have incurred any responsibility to claimant's government.

This doctrine was affirmed in the strongest terms by Mr. Marcy in answer to M. De Sartiges, claiming indemnity for losses suffered by French merchants during the bombardment of Greytown. (S. Ex. Doc. No. 9, pp. 4-7, 35 Cong. 1 sess.)

The American Secretary asserts, as a principle never doubted, that "foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of their wars." In the debate on this subject in the British Parliament Mr. Marcy's position was justified. Lord Palmerston said: "Those who go and settle in a foreign country must abide the chances which befall that country." The Attorney-General, speaking for the law officers of the crown, said: "The principle which governed such cases was, that citizens of foreign states who resided within the arena of war had no right to demand compensation from either of the belligerents for losses or injuries sustained." (Hansard, Parl. Deb. 3d Series, Vol. 146, pp. 37-49.)

The French and English claims in this case were abandoned, and no compensation was ever made to American merchants.

If, therefore, persons residing within the arena of the struggle have no right to demand compensation from either of the belligerents, much less can such persons rightly demand indemnity from one belligerent for losses inflicted by the other.

This question arose out of the trouble in Italy in 1849, on the occasion of the demand of the English Government for injuries suffered by her subjects from acts of war at Florence and Naples, in which Austria was also implicated. Prince Schwartzenberg distinctly repelled the claim for the Austrian cabinet, that of Florence being willing to refer the question to the Government of Russia. The latter country declined the umpirage on the ground that the acceptance of such an office would admit that the question was involved in doubt, or rested on some foundation, and, under the advice of Count Nesselrode, Her Majesty's government desisted from its pretensions.

We are not aware of an instance where such claims have ever been conceded by any nation able to protect itself, or at liberty to refuse such unjust demands.

The nonresponsibility of the United States for the acts of its late rebel enemies, while forcibly withdrawn from the jurisdiction of that government, must have been generally conceded by other nations; for, although many citizens of American and European states were resident in the hostile territory during the struggle, and suffered losses common to all inhabitants of the arena of war, no nation has made a demand upon the United States for indemnity (unless the present case forms the exception), while it is certain that that government would promptly repel all such demands.

To admit the principle would place just governments, driven to the employment of arms for the suppression of wicked attempts at their overthrow under serious disadvantages, and very much strengthen and embolden the cause of insurrection. It is not likely therefore, soon to find a place in the code of nations.

The claimant's case is not free from grave suspicions, and might be rejected on other grounds, but we finally disallow and reject, his claim on the ground that the United States Government is not responsible for the destruction of his cotton by the naval forces of the so-called Confederate States of America during the late civil war.

The motion to dismiss and disallow the claim is granted.

Opinion of Mr. Palacio, Commissioner of Mexico

This is a claim for the value of a number of cotton bales destroyed by an officer and twenty men of the navy of the so-called Confederate States during the war of the secession.

Before determining whether the United States are or not bound, in consequence of this fact, to indemnify the claimant, it is necessary

to examine whether the same fact can be duly considered as an *injury* made by the authorities of said States.

It is well known that these injuries arise either from an act of positive and direct violation of the rights of the injured, or from the condemnable neglect of extending the necessary protection to said rights.

It is, in my opinion, self-evident that, in the present case, there was not any aggressive and direct action on the part of authorities of the United States, because the authors of the fact, which has given origin to the claim, are neither *de facto* nor *de jure* authorities of the United States, nor of any of the States of the Union. It is sufficient to prove it—the consideration that those who acted as the authorities of the so-called confederation had been declared rebels and traitors by the supreme federal authorities, and that whatever question may arise within the United States in regard to the propriety or legitimacy of that declaration, the foreign nations can not but accept it and acknowledge the power of pronouncing it, which the Constitution has vested in the President and the Congress of the United States, the supreme rulers of the nation. So the denomination of rebels inflicted on the Confederates by the explicit declaration of those powers, against whom they were in arms, ought to be considered out of question by the foreign governments. It was not the province of said governments to investigate whether the political movements of the so-called Confederate States were or not legitimate and in accordance with their local legislations. They are bound, on the contrary to respect the action of the President and Congress of the United States, who deprived those States of their participation in the National Government and declared them enemies of the nation until, by their submission, they might lose such a character and be restored into the Union. In the mean time, those States could not enjoy the political *status* to which, in another case, the Constitution framed would have entitled them; nor constitute an independent nationality whose acts and resolutions were to be considered by the international law as perfectly valid, and emanated from a legal source entirely distinct from the Federal Government. In consequence of this the authorities appointed or elected by said States can not be considered as legitimate, nor their official capacity as such authorities recognized as far as the relations with the foreign governments are concerned.

As for the responsibility arising from the neglect of due and efficient protection, the following is to be considered:

It is the duty of the governments to protect in an efficient manner, against all kinds of unjust aggression, all persons residing within their jurisdiction and under the shelter of their laws. To this protection the alien residents are no less entitled than the citizens, but it would be wrong, however, to pretend a better right to it in the former case than in the latter—and the reason is very clear, because the supposition that a government is obliged to protect in a more efficient manner the foreign residents than the natives would

be equivalent to admit that the duty of said government is not to secure in the highest degree, and in the most practicable manner permitted by law, the same protection to the persons and property of its own citizens. And, in fact, if anything would be done in favor of the aliens which would have been omitted in favor of the citizens, these would undoubtedly be entitled to claim against the government that failed to employ for their protection the efficient means it had in its power. The duty of the government is not to omit any practicable measure tending to that purpose; and hence we are forced to conclude, either that something impracticable is pretended in favor of the aliens, or that something practicable and efficient has been omitted in the protection of the citizens. These are entitled to *all* that is possible in the matter, and consequently there remains *nothing* to add in regard to the aliens.

It is, therefore, a wrong construction of the word *especial*, used by the convention to qualify the protection due to foreign residents, to suppose that it means something more accurate and scrupulous than what is due to the native. It is simply a great mistake, because such a construction would involve a legal impossibility and an absurdity. That word *especial* can only be construed as a *superlative*, tending to ascertain so perfect a protection as to make it impossible to have it better. It can never be understood as a *comparative*, tending to establish a distinction between the foreign and the native residents, favorable to the former and unfavorable to the latter.

It being thus ascertained that the duty of protection on the part of the government, either by the general principles of international law or by the *especial* agreements of the treaties, only goes as far as permitted by possibility, the following question arises: What is the degree of diligence required for the due performance of this duty? And the answer will be very obvious—that diligence must be such as to render impossible any other, better or more careful and attentive, so as not to omit anything, practical or possible, which ought to have been done in the case. Possibility is, indeed, the last limit of all the human obligations: the most stringent and inviolable ones can not be extended to more. The purpose of trespassing this limit should be equivalent to pretend an impossibility; and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur*, have merely been the interpreters of common sense.

The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing the same, and that he who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts. To ask of him some other thing, would be the same as to pretend an action *ultra posse*, which is positively an absurdity.

Let us see, now, what are the means that a government can employ for the protection of foreign and native residents against all kinds of injuries to their persons and property.

In the regular course of social events the protection of the rights of the inhabitants of a state, either citizens or aliens, is commended to the courts of justice, which are vested with sufficient authority to redress the grievances and to punish the criminals. And the government that has done its best for the capture of a wrongdoer, and brings him to trial before a court of justice, has perfectly fulfilled its duty, either in case the injured resident is a foreigner, or when he is a native citizen. As for the courts, they will have also fulfilled their duty by fairly applying and enforcing the laws, whatever they may be in relation to the case.

Let us suppose, however, that the wrongdoers resist the legitimate authorities and oppose against them military forces enough to check their efforts and make impossible the capture and punishment they attempted. Let us suppose that the ordinary agents of the authority to which the capture of the offenders has been committed find them in arms and protected by numerous bodies of men; that they are able to oppose a battalion to a company, a division to a brigade, or a strong *corps d'armée* to a division, sent against them to enforce the laws. What else can be done by the authorities for the perfect fulfillment of their duties? It is clear that the only means the legitimate authorities possess to preserve order and maintain the empire of law consist in raising the military forces required to subdue the rebels, in obtaining from the national representative the pecuniary resources necessary to meet the expenses of the war, in calling around them all the good citizens and leading them to fight against the disobedient; in declaring, in fine, that these are rebels and enemies of the nation whose legal and moral existence they have attacked by their resistance. There is no doubt that all these measures have created a new situation and changed the legal *status* of some persons, as well as the character of public affairs. If we are willing to call everything by its own name we shall be bound to admit that the *state of peace* in which every law is enforced and obeyed without resistance and the duties of public officers performed without obstacle has been replaced by a *state of war*, in which the nation can not make justice for herself but by means of arms. We shall also be bound to admit that those who commenced by merely being offenders, who were to be submitted to the action of the judicial authorities, have become rebels, and ought to be treated as the enemies of the nation. A *state of war* being thus *de facto* and undeniably existent, the duty of the government must be measured in accordance with it, and its responsibility must be determined without losing sight of that important fact. The state of war exists irrespective of the recognition of other nations. No written declaration, no legal fiction, can be sufficient to destroy this fact, as palpable as positive, "that the nation pursues the rebels by means of the armies because she is unable to bring them before the courts."

Under such a state of things it is not in the power of the nation to prevent or to avoid the injuries caused or intended to be caused by the rebels, either to the foreign residents or to the native citizens of the country; and

as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no responsibility without *fault* (*culpa*), and it is too well known that there is no *fault* (*culpa*) in having failed to do what was impossible. The *fault* is essentially dependent upon the will, but as the will completely disappears before the force, whose action can not be resisted, it is a self-evident result that all the acts done by such force, without the possibility of being resisted by another equal or more powerful force, can neither involve a fault nor an injury nor a responsibility.

It must not appear strange to speak of violence (*vis major*) when the question is of nations, and even of very powerful ones. It is not impossible that said nations, although perfectly able to obtain at last an easy and final victory over their enemies, on account of their overwhelming superiority, should not display the same resources in all the acts of the war, and always and everywhere provide, at the opportune moment, what was required to prevent the injury.

Nobody has thus far believed that the duty of governments was to indemnify their citizens for the losses and injuries sustained by cause of war; and it is not easy to perceive the reason why an alien might be entitled to claim what is refused to the citizen. Nations can and must afford protection, and prevent and punish the offenses, by all the means they have within their reach; but none has had the temerity to maintain as a principle of public law the duty of indemnifying for losses and injuries caused by *the enemy*.

The propriety with which we employ this word when we speak of civil wars can be easily perceived. Enemies are all those against whom the nation has been compelled to employ the public force and to put itself, for its own conservation, on a footing of war. It matters little that the other nations may or may not recognize the position of the rebels as belligerents. Such a recognition can entail certain liabilities and duties to the government that deems proper to make it; but neither a new obligation can be imposed on account of it upon the contending parties, nor much less any alteration introduced in the diplomatic intercourse with the foreign powers who have not made the recognition.

For this reason it is very easy to disclose the fallacy of the argument presented in favor of the claimant, and based on the ground that the American Government refused to England the right of claiming, as the logical consequence of her recognition of belligerency of the Southern States. It is said that England has no right because she recognized the rebels as belligerents; and hence it is concluded that Mexico, who did not make that recognition, is perfectly entitled to claim and obtain remuneration. This argument, *a contrario sensu*, as the scholars used to say, fails in the present case by want of an essential requisite. The reason assigned in the first part of the argument is not the only one to be considered, and consequently the conclusion is not right. If the refusal made to Great Britain of any right to claim against the acts of the Confederates should be based exclusively on the ground of their

recognition as belligerents, perhaps it would be proper to conclude that the other nations, who never recognized the rebels as belligerents, are fully entitled to claim. But this is not the case. Mr. Adams did not say to Lord John Russell that England had no right only on account of said recognition. This reason was one among many others, and perhaps it was employed only on account of its conclusive character when applied to England. Arguments *ad hominem* of this kind are much in favor among diplomatists.

It is certain that such an argument can not be used against Mexico. The government of this republic, as a good friend of the United States, always refused to recognize the rebels as belligerents. But this recognition is not the *only* reason existing to reject the claim. We can not conclude from the fact that Mexico did not recognize the belligerency of the Southern Confederacy, that the United States have contracted a responsibility which is in fact inconsistent with the state of things above described.

It is natural and proper that a nation carrying on a war, whether foreign or civil, should endeavor, for the sake of duty and convenience, to prevent her enemies from causing the mischiefs which they might attempt to commit. If, in this respect, she does all in her power, and all that can be accomplished by means of her resources, it can be said that she fulfills the whole of her duties, both toward her own citizens and the citizens of foreign countries. The evils which it was not possible to avoid constitute a calamity for which she can not be responsible; and there is not a shadow of reason in pretending that either a nation or an individual should be bound to do in behalf of others more than he has done in his own defense. If the nation herself could not avoid suffering incalculable losses, it is clear that she could not possibly avoid those sustained by others. Her only duty was to cause the war to be as short and exempt from disasters as possible; and if she endeavored to do this and employed all the means within her reach, she can not be blamed for omission or neglect of duty and consequently can not have any responsibility. The United States fulfilled that duty nobly and worthily, and the immense magnitude of its efforts, which everybody knows, shows that the sufferings occasioned by the gigantic struggle could not be possibly avoided.

The claimant argues that the act of which he complains was not an act of war, perpetrated by the enemies of the United States, but rather a crime committed by its subjects within its jurisdiction. The natural consequence of this aspect of the case should be that the complainant ought to have applied to the courts and prosecuted before them all his legal resources until exhausting them. Should the compliance with his just pretensions have been refused, then he would have been able to exact the responsibility of the country which had not done him justice. If in response to this it is said that there were no tribunals to which one might have applied, or that their action had no sufficient efficacy against the authors of the crime, this would only prove the fact that the country was in a state of war; that

its authorities were not recognized or obeyed by the rebels; that the government was almost unable to try and punish them; and that, it being engaged in the important task of defending its existence and its prerogatives with arms, it had to try the transgressors of the laws, not as authors of private wrongs, but considering them as public enemies. The alternatives of the following dilemma are both equally conclusive. There were tribunals with sufficient power to punish the delinquents, or there were not. If there were any then the claimant ought to have applied to them, that the American nation might have fulfilled the duty of doing him justice. If there were not, the existence of delinquents in a country against whom the ordinary tribunals and authorities are impotent, and against whom it is necessary to employ force, is a conclusive proof, both of the state of war and of the character of enemies of those who committed the offense. It is, no doubt, possible that the regular action of the courts should fail at times to be as effective and efficacious as usual, and that a crime should remain unpunished but the national responsibility can not exist, nor can the government of the complainant prefer any claim unless he should prove that he diligently exercised all his legal resources, and the rendering of justice to him was deliberately refused.

The argument offered by the claimant, founded on a doctrine of Chitty, is likewise destitute of importance in this case. However worthy of respect that doctrine may be, it can not have application in the present question. Said doctrine refers to the obligation of indemnifying those who have to perform some act in favor of others, when they have failed to do it, even in fortuitous cases, or in cases of force.

If we were to make a full exposition of that doctrine we should find its origin in the Roman law with reference to the contracts *stricti juris*, the extension given by the pretor to those denominated *bona fide* and *prescriptis verbis*, its introduction into the common law first, and then into the jurisprudence of the courts of equity; but it is not necessary to enter into such an exposition to be able to perceive that said doctrine of indemnification only refers to the case of the nonfulfillment of a specified obligation relative to a concrete fact nominally promised. It will be very easy for anyone versed in the science of law to perceive the difference existing between that kind of obligations and those which arise from a mere principle of justice, indeterminate in its extension, susceptible of infinite variety in the cases of its application, of an immense latitude in its construction, and of a very ample discretion in the selection of the proper and adequate means of making it effective; but to perfectly understand the point in question it is sufficient for us to direct our attention toward the foundation upon which the said doctrine rests. If it establishes the responsibility of the promiser, even in fortuitous cases, it is in consideration of the omission of him who bound himself without limitation and without making an exception of such cases. Such omission can only exist in those cases in which an express contract or

stipulation has been made, and in which the object of said stipulation is to be executed according to the limits and conditions established by the promiser; but obligations of a general character, whose fulfillment can be demanded in a thousand fortuitous cases, are confined within the limits fixed by their own nature and the reasons of universal justice. To that kind of obligations belongs that which a government has of protecting the residents of the country, both foreign and native. Its limitation, by means of a contract, that it might not be exacted in fortuitous cases and in cases of force, would only be necessary when determinate and well-defined facts should have been promised, since the one who offers to perform such facts is the only one entitled to decide not to perform it, and to receive in its default the payment of indemnification.

The irresponsibility of the government for the mischiefs caused by the rebels in a civil war has in its favor the opinions and decisions of eminent statesmen. The English Government, which is not in all cases the best guide in international questions, when seeking to enforce the rights of its subjects, has, on several occasions, run the risk to be censured by the public opinion in its own country, as well as by foreign cabinets, and this on account of its obstinacy in exacting indemnifications for damages sustained in the civil wars of other countries.

The case of D. Pacifico is very well known, in which Great Britain compelled the Grecian Government to pay indemnification for damages suffered in consequence of a mutiny, which said government resisted and succeeded in repressing. Greece, unable, on account of its weakness, to oppose the demands of the British cabinet, yielded to them; but she protested that her submission was only due to force, and that she was persuaded of the great injustice of which she was the object. That same opinion was expressed by the French envoy, Baron de Gros, to his government, and the cabinet of St. Petersburg also expressed it to the English Government in terms extremely severe. It also happened that both houses in England condemned the course followed by the ministry, and its members were obliged to resign.

On another similar occasion England demanded from the imperial Government of Austria the payment of a certain indemnification for damages sustained by some of its subjects in consequence of revolutionary movements in Tuscany and Naples, and it was agreed to submit the question to the decision of the Czar of Russia, who, as soon as he acquainted himself with the case, declined to act as arbitrator, for the reason that it was not proper for him to decide about so evident a case, it being clear and beyond doubt that England was not right in the least. There are not, undoubtedly many instances like this, in which a sovereign should have condemned in such severe terms the pretensions of another with whom he is not at war.

The American Government also had occasion to decide this question. In a riot which occurred in New Orleans in 1859, in consequence of the excitement created by the news of the shooting of several Americans in the Island of Cuba,

some Spanish subjects suffered insults and damages. When the Government of Spain made the claim, the American Secretary of State, the illustrious Daniel Webster, while expressing the sorrow his government felt at what had happened, and while promising to punish the delinquents, peremptorily declined all responsibility and the payment of indemnification. The Spanish Government subsequently declared that it was completely satisfied.

After these precedents it is painful to see the claimant cite in support of his pretension the course followed by England, France, and Spain in making the celebrated tripartite convention of London concluded in October 1861 for the purpose of claiming indemnity for the alleged damages sustained by the subjects of said powers in Mexico at the time of the civil wars. Everybody knows what was the real and true design of those three governments, and that they did not succeed in their enterprise. On the other hand, it was very strange that such precedents should be invoked by a Mexican, and in a claim supposed to be made in the name of the same government which considered itself highly offended by the conduct alluded to.

This is my opinion on this question, which induces me to concur with my distinguished colleague in the point that the claim preferred by D. Salvador Prats against the United States before this commission ought to be rejected.

**Case of McManus Brothers *v.* Mexico, opinion of the Umpire,
Sir Edward Thornton, dated 26 November 1874* and case of
Francis Rose *v.* Mexico, decision of the Umpire, Sir Edward
Thornton, dated 13 September 1875****

**Affaire concernant les frères McManus *c.* Mexique, opinion du
Surarbitre, Sir Edward Thornton, datée du 26 novembre 1874,*** et
Francis Rose *c.* Mexique, décision du Surarbitre, Sir Edward Thornton,
datée du 13 septembre 1875******

Tax imposition on foreigners–forced loans levied in accordance with the law shall be equally distributed amongst all inhabitants, whether natives or foreigners–forced

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 3415.

** *Ibid.*, p. 3421.

*** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 3415.

**** *Ibid.*, p. 3421.