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STATE RESPONSIBILITY

[Agenda item 3]

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Introduction

To assist the International Law Commission in its work on the question of State responsibility, the Secretariat has prepared the following supplement to the "Digest of the decisions of international tribunals relating to State responsibility".¹ It covers the relevant aspects of the decisions of the International Court of Justice since 1964 and of other international tribunals whose awards are contained in volumes XII-XVI of the *Reports of International Arbitral Awards*.

The material has been arranged under subject headings which follow as closely as possible the outline programme of work approved by the Commission in 1963² and 1967.³

I. ORIGIN OF INTERNATIONAL RESPONSIBILITY

1. General

1. In the *Armstrong Cork Company case* (1953) (Italian-United States Conciliation Commission),⁴ the company's claim arose from the action of the Italian Government in recalling on 6 June 1940, the vessels of the Italian merchant marine. The Commission, first, quoted with approval the following passage from Strupp in *Das Völkerrechtliche Delikt* (1920):

One must consider as illicit actions . . . producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects who have suffered damage to demand reparation, all actions of a State which are in contradiction with any rule whatsoever of international law.⁵

and, second, reaffirmed that

The responsibility of the State would entail the obligation to repair the damages suffered to the extent that said damages are the result of the inobservance of the international obligation.

¹ See *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/169, p. 132.

² See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 224, para. 54.

³ See *Yearbook of the International Law Commission, 1967*, vol. II, documents A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 42.

⁴ *Reports of International Arbitral Awards*, vol. XIV, p. 159.

⁵ *Ibid.*, p. 163.

2. The claimant in the *Wollemborg case* (1956) (Italian-United States Conciliation Commission)⁶ argued that, in terms of the Italian Peace Treaty, he should be exempted from certain Italian taxes. In argument the parties discussed at length certain questions of Italian tax law. The Commission refused to enter into these questions since "One thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation". The Commission referred to three decisions of the Permanent Court of International Justice to this effect.⁷ See similarly the *Flegenheimer case* (1958),⁸ decided by the same Commission.

3. See also the *Différend S.A.I.M.I. (Società per azione industriale marmi d'Italia)* (1948); the *Différend Guillemot-Jacquemin* (1948); and the *Différend Société Verdol* (1949)⁹ where the French-Italian Conciliation Commission held that, under a well-known principle of international law, the international jurisdiction set up by a treaty prevails over municipal jurisdiction: any municipal proceedings must be discontinued, and any judgement given could be ignored. Similarly, in the *Différend Dame Mossé* (1953)¹⁰ the French-Italian Conciliation Commission held that it was not necessary for it to determine whether the claimant had a right of action under Italian law:

Apart from the repercussions of one juridical system upon the other, each of them—in this instance, the international juridical system—appears to be autonomous (Morelli, *Nozioni di Diritto internazionale*, p. 77).

The Commission then went on to consider the merits of the claim.

2. International wrongful act

4. In the *Rosa Gelbrunk claim* (1902),¹¹ the property of the claimant's predecessors in title (who were also United States nationals) was looted by soldiers of an El Salvador revolutionary army. There was no proof

⁶ *Ibid.*, p. 283.

⁷ *Ibid.*, p. 289.

⁸ *Ibid.*, pp. 327, 359 and 360.

⁹ *Ibid.*, vol. XIII, pp. 43 and 45; 62 and 63; 94 and 95.

¹⁰ *Ibid.*, pp. 486, 490 and 491.

¹¹ *Ibid.*, vol. XV, p. 463.

that this was done pursuant to the orders of army officers in authority or as an act of military necessity; it was apparently an act of lawless violence by the soldiers. In an opinion in which all three arbitrators concurred, it was said to be a "well established doctrine of international law" that

A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own is to be considered as having cast in his lot with the subjects or citizens of the State in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that State, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that State are liable to the same. The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens.

This proposition might, however, be subject to a qualification:

It is, however, not to be assumed that this rule would apply in a case of mob violence which might, if due diligence had been used, have been prevented by civil authorities alone or by such authorities aided by an available military force. In such a case of spoliation by a mob, especially where the disorder has arisen in hostility to foreigners, a different rule may prevail. It would, however, be irrelevant to the present case now to discuss such a question. It therefore appears that all we have to do now is to inquire whether citizens of the United States, in the matter of losses incurred by military force or by the irregular acts of the soldiery in the revolution of November, 1898, in Salvador, were treated less favourably or otherwise than the citizens of Salvador.¹²

They were not, said the arbitrators, in any way discriminated against, and, accordingly, the claim was rejected.

5. The same tribunal, by a majority, affirmed the above positive proposition in the *Salvador Commercial Company claim* (1902):¹³

... such [United States] citizens as... invested their money in the Republic of Salvador must abide by the laws of that country, and seek their remedy, if any they have, in the courts of Salvador....¹⁴

In the instant case, however, because of actions taken by the El Salvador Government, an appeal to the Courts would have been in vain. This action was both a capricious annulment of the concessions in issue and a violation of "the rule of natural justice obtaining universally throughout the world" which afforded to the parties to a contract, in the exercise of their reciprocal rights and remedies, the right equally "to invoke for their redress and for their defence the hearing and the judgment of an impartial and disinterested tribunal".¹⁵ Since this right had been denied to the claimant by El Salvador

it was entitled to compensation. See also the *Affaire du Guano* (1901).¹⁶

6. Several of the cases decided by the Conciliation Commissions established under the Italian Peace Treaty concerned the responsibility of Italy and (in respect of certain Italian property in Tunisia) of France for losses resulting from the sequestration of property. In the *Différend concernant l'interprétation de l'Article 79* (1955)¹⁷ (relating to Italian property in Tunisia), France argued that it was responsible provided that the losses resulted from the grave negligence (*une faute grave*) of the Government or of persons for whose acts it was responsible. It also denied any responsibility for loss of profit. Italy, on the other hand, denied the relevance of negligence (*faute*) and argued that loss of profit could be claimed. The Conciliation Commission, acting as a *Collège arbitral*, ruled as follows:

The responsibility of the French Government... derives... from the general principles of public international law. It is true that the putting of enemy property under sequestration—as distinct from requisition without compensation and appropriation without compensation of foreign property (cf. Rousseau, *Droit international public*, pp. 371 and 372) is recognized as legal by public international law by reason of its character as a simple measure of conservation and administration (cf. Sibert, *Traité de Droit international public*, vol. II, p. 323). But if sequestration in itself does not involve the responsibility of the seizing Government, the way in which it is effected, or in which the sequestered property is administered, may constitute an act contrary to the law of nations; in such a case, if a loss to the owner results, the seizing Government is bound to make the loss good. The Franco-Italian Conciliation Commission has on several occasions, when interpreting article 78 (4) (d) of the Treaty, decided in that sense when Italy has appeared as sequestrator of property of the United Nations or their nationals.

As regards measures of sequestration applied to Italian property in Tunisia, ordered by the French Government up to the coming into force of the Peace Treaty (15 September, 1947) and their effects up to that date (the position subsequent thereto will be dealt with later on), a causal nexus between the said measure (the sequestration) and the damage or loss, is not sufficient to give rise to responsibility on the part of the French Government; there must also be a causal nexus between the loss or damage and the negligence of the French Government in the person of its organs. These may have committed an error (negligence or indiscretion) in the appointment of the administrator-sequestrator (*culpa in eligendo*) or in the control of the administration (*culpa in custodiendo*) or in giving the requisite instructions (*culpa in instruendo*), or in giving the authorizations required by municipal legislation (cf. article 7 of the Residential Decree of 8 March, 1943). On the other hand, the administrator-sequestrator, himself also an organ of the French Government, may have been guilty of negligence *in committendo* or *in omittendo*.

In legal theory, the basis of international responsibility of States is a matter of controversy. Traditional doctrine, which goes back to Grotius, requires that there be negligence, while Anzilotti and other modern writers are content with "risk" and speak of an objective responsibility founded on the causal connexion between the activity in question and the act which is contrary to international law (cf. Rousseau, *Droit international public*, pp. 359 and 360; Verdross, *Völkerrecht*, 2nd ed., p. 285; Guggenheim, *Traité de Droit international public*, vol. II, pp. 49 *et seq.*; Morelli, *Nozioni di Diritto internazionale*, pp. 348 *et seq.*). The second opinion mentioned cannot in any way be admitted, for example, as concerns facts which

¹² *Ibid.*, pp. 464-466.

¹³ *Ibid.*, p. 467.

¹⁴ *Ibid.*, p. 476.

¹⁵ *Ibid.*, pp. 477 and 478.

¹⁶ *Ibid.*, pp. 125, 245 and 246.

¹⁷ *Ibid.*, vol. XIII, pp. 422, 431 ff.

consist of the omission of preventive or punitive measures with regard to individual activities, which prejudice given foreign interests; in such a case, the State is responsible in so far as its organs have not exercised a certain degree of diligence (see Morelli, *op. cit.*, p. 350; Rousseau, *op. cit.*, p. 360). In the present instance, the act contrary to international law is not the measure of sequestration, but an alleged lack of diligence on the part of the French State—or, more precisely, of him who was acting on its behalf—in the execution of the said measure, as the Italian Government has recognized even for the period under consideration.

It follows that the loss to be compensated cannot consist of the difference between the total estate [*la situation patrimoniale*] of the owner of the sequestered property at the moment of restitution (or the moment when restitution ought to have taken place) and what it would have been if sequestration had not been imposed. The object of a sequestration is purely conservatory and, by definition, there is no room for the initiatives which the owner of the sequestered property could have taken, and probably would have taken, at his own risk, if he had not been deprived of the powers of management and disposition. The so-called "loss of profit" is therefore excluded from compensation so far as it goes beyond the idea of profits which could arise from an administration free from negligence on the part of the sequesteror, if the normal course of business had been pursued.

On the other hand, it is not necessary that the negligence attributable to the French Government or its organs, officials, agents or, in particular, the sequesteror, should be gross negligence. On behalf of the French Government, it is said that this proviso finds a justification in the provision of French civil law that when an agency is gratuitous, the responsibility of the agent is lighter (article 1992, para. 2). It is contended that we are dealing with a gratuitous agency, since the Italian Government is claiming repayment of all sums paid to the administrator-sequesteror. But, on the one hand, it is here a question of the international responsibility of the French Government for the execution of administrative measures which it has ordered; that responsibility has nothing to do with the provisions of French municipal law relating to contractual agency. On the other hand, the Italian Government is wrong in claiming repayment of all sums paid to the sequesteror: the Franco-Italian Conciliation Commission held in its decision of 6 July 1954,¹⁸ in the case of the *Société anonyme de filatures de Schappe* that "The sequestration being also a measure of conservation, the owner of the sequestered property ought, in principle, to bear the expenses, which are not a charge within the meaning of article 78 (2) of the Treaty...". In that decision the Franco-Italian Conciliation Commission only reserved the right to examine the account for the expenses of the sequestration in case any of the charges were excessive; the *Collège arbitral* will not decide differently in the application of general principles of public international law. [*Translation from the French by the United Nations Secretariat.*]¹⁹

7. So far as sequestrations following the entry into force of the Treaty of Peace were concerned, the *Collège arbitral* held, first, that because of agreements concluded between France and Italy, the above stated rules would apply until the property was restituted, but, secondly, that

On the other hand, on 2 February 1951, the Italian Government did not recognize that the French Government had the right to liquidate, either wholly or in part, properties in respect of which the question had arisen whether or not the respective owners could claim the benefit of article 79 (6) (c) of the Treaty. The French Government ought to have preserved these properties; to have liquidated them (except under *force majeure*) renders the Govern-

ment liable to compensate the owners in a sum equal to the value which the liquidated property would now have if it had been kept up and managed in the ordinary way, less the costs of management and administration if these were greater than the profits or adding the balance of the profits if they were not. [*Translation from the French by the United Nations Secretariat.*]²⁰

The fact that certain sequestrations were carried out by a Court made no difference (see further, para. 19 below).

8. The principle stated in paragraphs 6 and 7 above was applied in several other cases, in particular in the following decisions of the French-Italian Conciliation Commission acting as *Collège arbitral* in accordance with an agreement concluded between France and Italy: the *Différend biens italiens en Tunisie—Patrimoine Giuseppe Canino* (1959, 1960);²¹ *Patrimoine Marcello Cellura* (1959);²² *Patrimoine Pia Maria Teresa Ambre* (1959);²³ *Patrimoine Clément Raoul Boccara* (1959);²⁴ *Patrimoine Bonomo Francesco* (1959);²⁵ *Patrimoine Tagliarino Filippo* (1959);²⁶ the *Différend Joseph Ousset* (1954);²⁷ the *Différend Industrie Vicentine Elettro-Meccaniche (I.V.E.M.)* (1952, 1955);²⁸ the *Différend Société Anonyme de Filatures de Schappe* (1954);²⁹ and the *Différend Textiloses et Textiles* (1959).³⁰ For discussions of the standards of negligence see, for example, *Patrimoine Bonomo Francesco* (1959); (*une erreur d'appréciation not une faute*);³¹ the *Différend Société anonyme de filatures de Schappe* (1954); and *Différend Textiloses et Textiles* (1959).

9. In the *Don Luis Piola case* (1901),³² the arbitrator, who was obliged to decide in accordance with a treaty in force between Italy and Peru, the rules of international law, as well as with established practice and decisions, held that the claimant could not recover damages in respect of the killing of his brother by Peruvian soldiers, since the shooting was not intentional but the result of an accident. On the other hand in the *Doña Carolina Soria Galvarro case* (1901),³³ decided by the same arbitrator, the widow of a foreign neutral recovered in respect of his death, although it was not proved that the Peruvian soldiers who had killed him had shot at him intentionally and deliberately. In this case the deceased had been forced to act as a go-between by one of the belligerent forces, and they had not taken the necessary steps to guarantee his safety. This was not a case where persons not involved in a conflict happened by accident to be injured. Moreover, although the responsibility might be reduced by the absence of proof of intention to kill,

²⁰ *Ibid.*, p. 438.

²¹ *Ibid.*, p. 440.

²² *Ibid.*, p. 453.

²³ *Ibid.*, p. 457.

²⁴ *Ibid.*, p. 461.

²⁵ *Ibid.*, p. 466.

²⁶ *Ibid.*, p. 475.

²⁷ *Ibid.*, p. 258.

²⁸ *Ibid.*, p. 325.

²⁹ *Ibid.*, p. 598.

³⁰ *Ibid.*, p. 742.

³¹ *Ibid.*, p. 473.

³² *Ibid.*, vol. XV, p. 444.

³³ *Ibid.*, p. 449.

¹⁸ *Reports of International Arbitral Awards*, vol. XIII, p. 598.

¹⁹ *Ibid.*, pp. 431-433 and 610.

it was not established that the Peruvian Government had taken adequate steps to discover the wrongdoer. On this final point, see also the *Don Jacinto Cadino case* (1901).³⁴

10. The same arbitrator affirmed in several other cases that it is a universally recognized principle of international law that a State is responsible for violations of international law committed by its agents, when it fails to take all necessary care to safeguard the interests of aliens who are neutral in the civil war: *Don Luis Chiessa*; *Don Jeronimo Sessarego*; *Don Juan B. Sanguinetti*; *Don Pablo Vercelli*; *Don Lorenzo Roggero*; and *Don Jose Miglia* claims (1901).³⁵

11. The Italian-Netherlands Conciliation Commission in the *Affaire relative à une quantité d'or revendiquée par les Pays-Bas* (1963),³⁶ held that the Italian Peace Treaty, which required Italy to restore monetary gold "wrongfully" removed from one of the United Nations, did not impose responsibility on Italy if it acquired the gold *dans des transactions normales*. In the instant case Italy had not acted negligently when it received the gold and accordingly was not responsible.

3. Causation

12. The Italian Peace Treaty 1947 required the Italian Government to compensate those nationals of the United Nations whose property in Italy had been lost or damaged as a result of the war. The Conciliation Commissions established under the Treaty, accordingly, had to determine what damage was "a result of the war" and as such involved Italy's responsibility. Many of the decisions bear on the "war" element and are not of general purport, but others discuss the question of causation. In the *Currie case* (1954),³⁷ the Anglo-Italian Conciliation Commission upheld a claim which included damage resulting from the subsequent deterioration of buildings which had been damaged by bombing. The Commission held Italy liable to make good foreseeable damage whether it arose directly and immediately or indirectly and subsequently.

13. On the other hand, the Italian-United States Commission rejected a claim based on the theft in 1946 of an American national's property from an American Army warehouse in Naples: the loss sustained was the result of an occurrence which did not have a "sufficiently direct causal relationship" to the war, notwithstanding the fact that the social conditions existing shortly after the cessation of hostilities may have resulted in an increase in theft: *Hoffman case* (1952).³⁸ Similarly the French-Italian Conciliation Commission rejected the claim made in the *Différend Dames de Wytenhove* (1950),³⁹ in respect of property which was lost while it was being moved for fear of damage caused by bombardment: the loss was

fortuitous and could not be considered to be the result of the war.

14. The following decisions of the Italian-United States Conciliation Commission may be mentioned: the *Armstrong Cork Company case* (1953);⁴⁰ (see also paragraph 1 above); the *Shafer case* (1954);⁴¹ the *MacAndrews and Forbes Co. case* (1954);⁴² and the *Palumbo case* (1956);⁴³ and, among the decisions of the French-Italian Conciliation Commission, the *Différend Guillemot-Jacquemin* (1949);⁴⁴ the *Différend Tournes* (1949);⁴⁵ the *Différend Roger Sudreau* (1955);⁴⁶ and the *Différend Etablissements Agache* (1955).⁴⁷

II. IMPUTABILITY

1. General

15. In the *Salvador Commercial Company claim*,⁴⁸ (see also paragraph 5 above) the arbitrators affirmed that, in the words of Halleck whom they quoted with approval,

a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Governments, so far as the acts are done in their official capacity.⁴⁹

16. Thus in *The Lottie May Incident* (1899),⁵⁰ the arbitrator, awarding damages to the United Kingdom against Honduras in respect of the wrongful detention of a ship, underlined the fact

the *Comandante* had full authority to make the arrest without having recourse to the courts. It was therefore an official act carried out by him by virtue of the powers invested in him as a military servant of the Nation. It was an act of the Government, carried out under an order of the Government on its behalf, and the doctrine of obedience and the rule of *respondeat superior* makes the Government responsible for the detention of the ship and the arrest of its captain.⁵¹

And in the *Doña Clara Lanatta case* (1901),⁵² Peru was held responsible for the assassination of an Italian national by members of the defence forces who were accompanied by commanders who did nothing to prevent or to punish the wrongdoers. This was not the simple act of a marauding or disbanded group. See similarly the *Don Ricardo Castiglione* and *Don Evangelista Machiavello* claims (1901).⁵³ Conversely, the same arbitrator in the *Don Aquilino Capelletti case* (1901),⁵⁴ held that the Peru-

³⁴ *Ibid.*, p. 414.

³⁵ *Ibid.*, pp. 399, 400, 403, 406, 408 and 411.

³⁶ *Ibid.*, vol. XVI, p. 299; see also Société suisse de droit international, *Annuaire suisse de droit international*, 1933 (Zurich, Editions polygraphiques S.A.), vol. XX, p. 135.

³⁷ *Reports of International Arbitral Awards*, vol. XIV, p. 21.

³⁸ *Ibid.*, pp. 97 and 100.

³⁹ *Ibid.*, vol. XIII, p. 227.

⁴⁰ *Ibid.*, vol. XIV, p. 159.

⁴¹ *Ibid.*, p. 205.

⁴² *Ibid.*, p. 221.

⁴³ *Ibid.*, p. 251.

⁴⁴ *Ibid.*, vol. XIII, p. 64.

⁴⁵ *Ibid.*, p. 105.

⁴⁶ *Ibid.*, p. 680.

⁴⁷ *Ibid.*, p. 696.

⁴⁸ *Ibid.*, vol. XV, p. 467.

⁴⁹ *Ibid.*, p. 477.

⁵⁰ *Ibid.*, p. 23.

⁵¹ *Ibid.*, p. 30.

⁵² *Ibid.*, p. 416.

⁵³ *Ibid.*, pp. 417 and 439.

⁵⁴ *Ibid.*, p. 438.

vian Government was not responsible for the theft of the claimant's property since the theft was not imputable to the Government forces, any official nor any other authority. This was a delict under domestic law for which the remedy was an action pursuant to Peruvian law. Nor, in another case, was it responsible for the acts of private citizens who damaged the claimant's property by fire: the unfortunate facts were not imputable to the armed forces with the exactness necessary to establish the responsibility: *Don Juan B. Serra claim* (1901).⁵⁵

17. The same arbitrator refused, in determining whether Peru was or was not responsible, to distinguish between acts or omissions of superior and of inferior officers: see the cases mentioned in paragraph 10 above. The acts of disbanded, individual soldiers not under command would not, however, give rise to responsibility unless the authorities failed to punish those responsible, e.g., the *Lanatta* and *Castiglione* cases, paragraph 16 above.

18. In the *Différend Société Verdol* (1949),⁵⁶ Italy argued that it was not responsible for the "wrongful acts" of the liquidator of the claimant's business since they could not be considered as "acts committed in the discharge of his duties but were personal acts on his part". The French-Italian Conciliation Commission rejected the contention: the claimant company had been placed under syndication by a ministerial decree, its liquidation had been ordered by a ministerial decree, and these measures were taken within the framework of Italian law. These measures were of a nature to engage the responsibility of the Italian Government. See similarly the *Différend Dame Mossé* (1953)⁵⁷ (para. 20 below).

19. In the *Différend concernant l'interprétation de l'Article 79* (1955),⁵⁸ the French-Italian *Collège arbitral* in ruling on France's responsibility for sequestrations ordered by French courts in Tunisia said:

Although it is true that in certain arbitral awards handed down in the twentieth century the opinion is expressed that the independence of the courts, in accordance with the principle of separation of powers generally recognized in civilized countries, excludes the international responsibility of States for acts of the Judiciary which are contrary to law, that theory now appears to be universally and rightly repudiated by writers on and courts administering international law. The judgement or order of a court is something issuing from an organ of the State, just like a law promulgated by the Legislature or a decision taken by the executive authorities. The non-observance by a court of a rule of international law creates international responsibility on the part of the collectivity of which the court is an organ, even if the court has applied municipal law in conformity with international law (cf. Guggenheim, *Traité de Droit international public*, vol. II, p. 11, n. 6; Cavaré, *Le Droit international public positif*, vol. II, p. 381; l.c., No. 3 at p. 11; Charles Rousseau, *Droit international public*, pp. 370 and 374; Verdross, *Völkerrecht*, 2nd ed., p. 291). Now, either the French courts ordered the liquidations in conformity with French municipal law but in violation of the Treaty, in which case France is responsible for the legislative act which is contrary to its international obligations; or the French courts ordered the liquidations in violation of both

French municipal law and the Treaty, in which case France is responsible for the judicial act which is contrary to its international obligations. [Translation from the French by the United Nations Secretariat.]⁵⁹

2. Excess of competence and erroneous acts

20. In the *Différend Dame Mossé* (1953),⁶⁰ the claimant's property had been taken by error. The Italian Government was nevertheless held responsible:

Such an error does not have the effect of transforming the removal of the property of Mme Mossé into a personal act on the part of the officials who carried out that removal; mistakes of this kind are clearly conceivable and inevitable in the ordinary conduct of administration. [Translation from the French by the United Nations Secretariat.]⁶¹

The acts were acts within the competence of the officials (see para. 18 above), and, moreover,

Even if it were to be admitted that Albertini and the officials who accompanied him were, at the time of the removal of the effects of Mme Mossé, acting outside the prescribed limits of their duties, it should not be deduced from that, without more ado, that the present claim is not well founded. It is also necessary to consider a question of law and a question of fact, namely, whether in the international juridical system a State should be held responsible for acts committed by officials within the apparent limits of their duties, according to a line of conduct which was not completely contrary to the instructions they had received (Cavaré, *Le Droit international public positif*, vol. II, pp. 337-340), and whether a group of police officials who, in northern Italy and in 1944, that is to say when the atmosphere of anti-Jewish persecution was most intense, removed property hidden in a church, were not acting in a manner contrary to the instructions received from the real political authority and were acting within the apparent limits of their duties.

The two questions may be left unanswered. [Translation from the French by the United Nations Secretariat.]⁶²

See also the *Différend Joseph Ousset* (1954).⁶³

3. Fraudulent acts

21. In determining the legality of measures taken under sequestration (see generally paragraph 6 above), the French-Italian Conciliation Commission required the proof of either negligence (*faute*) or fraud (*dol*). The latter certainly did not have the effect of excluding the Government's responsibility; on the contrary, in the absence of negligence, it was an essential element: e.g., *Différend Joseph Ousset* (1954);⁶⁴ *Différend Société anonyme de filatures de Schappe* (1954).⁶⁵

4. Acts of de facto local government

22. The acts of the Italian Social Republic (The Salò Republic) established in 1943 were in issue in several

⁵⁵ *Reports of International Arbitral Awards*, vol. XV, p. 410.

⁵⁶ *Ibid.*, vol. XIII, p. 94.

⁵⁷ *Ibid.*, pp. 486, 492 and 493.

⁵⁸ *Ibid.*, p. 422.

⁵⁹ *Ibid.*, p. 438.

⁶⁰ *Ibid.*, p. 486.

⁶¹ *Ibid.*, p. 493.

⁶² *Ibid.*, p. 494.

⁶³ *Ibid.*, pp. 258 and 265.

⁶⁴ *Ibid.*, pp. 258, 265 and 267-269.

⁶⁵ *Ibid.*, pp. 598 and 605.

cases decided by the Conciliation Commissions set up under the Italian Peace Treaty.

23. In one group of cases decided by the Italian-United States Conciliation Commission, the question was whether the claimants had been treated as enemy aliens "under the laws in force in Italy during the war" and as such had status to recover from Italy. The laws in question were laws enacted by the Social Republic. The Italian Government argued that the laws enacted by the Republic were not "laws" within the meaning of the Treaty, since only a State can enact laws and the Social Republic was not a State. In several cases, this question was treated solely as one of interpretation and the Italian argument was rejected: *Treves case* (1956),⁶⁶ *Levi case* (1956),⁶⁷ *Wollemborg case* (1956),⁶⁸ and the *Sonnino case* (1956).⁶⁹ In three other cases, the decision rejecting the Italian argument was put on broader grounds: *Baer case* (1959),⁷⁰ *Falco case* (1959),⁷¹ and *Fubini case* (1959).⁷² The majority of the Commission stated:

In point of fact, in conformity with the principle of effectiveness sanctioned by the law of nations, when a legal Government and a Government of insurgents share power within a State, the laws enacted by each one of them, in the parts of territory which they respectively occupy, are considered as laws in force which find support in the actual power exercised by each of these two Governments over the territory where it is able, by threat of punishment, to insure the carrying out of its intent. It follows that, in all parts of Italy subjected to the power of the Italian Social Republic, the legislative acts emanated by this Republic fall within the notion of "laws in force in Italy during the war" contained in the aforementioned Article. A teleological interpretation of this provision would not lead to a different conclusion, because the purpose of the text adopted by the contracting Parties is that of according the benefits of the Treaty of Peace to persons whose property, rights and interests sustained damages under the laws in force in Italy during the war; as the contracting Parties failed to indicate by which Italian power these laws were to have been enacted, this gap must be filled, as has been affirmed by the Institut de droit international in its resolution of April 19, 1956, Grenade session, "in accordance with good faith and in the light of the principles of international law" (*Annuaire*, vol. 46, p. 365); the principle that must be applied in the instant case is that of effectiveness as it is explained above.⁷³

24. The other case involving the acts of the Republic of Salò was one in which the Republic's officials had taken the claimant's property: the *Différend Dame Mossé* (1953).⁷⁴ Again in interpreting the relevant provisions of the Treaty and holding the Italian Government responsible for the Republic's acts, the French-Italian Commission referred to the principles of international law: This interpretation of the Peace Treaty does not depart from the doctrines of public international law. As Balladore Pallieri observes (*Diritto internazionale pubblico*, p. 92):

The internal organization to which the international juridical system refers is that which in fact really exists within the State.

In that connexion, international law does not consider as the organization that which should exist, according to internal rules, but that which does exist, effectively and positively. An internal revolutionary movement may, violently and without juridical continuity, substitute new organs for those which formerly existed, but it is of no importance to the international juridical system that those organs have no basis in the former rules and assert themselves as organs of the State in fact only, in virtue of the success of the revolution which brought them to power. It is that fact alone which matters, without limitation of any sort, for international law and for the international juridical system. As far as the latter system is concerned, the organization of the State begins with its *de facto* constitution, and is maintained or modified by the facts. The imputation concerns whoever possesses the real public authority within the State, and consequently, in the eyes of the international juridical system, those who no longer effectively wield such authority cease to be organs of the State, while those who for any reason come to possess such authority become organs of the State. [Translation from the French by the United Nations Secretariat.]⁷⁵

See also the *Affaire du Guano* (1901).⁷⁶

III. CIRCUMSTANCES IN WHICH AN ACT IS NOT WRONGFUL

1. Self-defence

25. The Italian-United States Conciliation Commission in the *Armstrong Cork Company case* (1953)⁷⁷ affirmed that

It is not necessary to say that the action performed by the State within the limits of its rights or inspired by the protection of its own defence does not constitute an illegal international act (Fiore, Oppenheim). And one must not confuse the right of legitimate defence, which is the legitimate protection of the right of preservation of the State, with the right of the necessity which very often is only an expedient created in order to legalize the arbitrary.⁷⁸

See also the *Affaire concernant la fixation par la Belgique des prix minima des tomates pour le deuxième trimestre de 1957* (1958),⁷⁹ and the *Affaire du Lac Lanoux* (1957).⁸⁰

2. War measures

26. See the *Gelbrunk* and *Galvarro* cases (paragraphs 4 and 9 above), for the proposition that aliens are, generally speaking, entitled to no better treatment than nationals in time of civil war. See similarly the *Don Rafael Crovetto claim* (1901).⁸¹ See the sequestration cases, paragraph 6 above, and also the *Orr and Laubenheimer claim* (1900):⁸²

the right of eminent domain and the rights incident to a state of war, and martial law, justify the use by any Government, in an emergency, of any private property found available.⁸³

⁶⁶ *Ibid.*, vol. XIV, pp. 262, 266 and 267.

⁶⁷ *Ibid.*, pp. 272 and 281.

⁶⁸ *Ibid.*, pp. 283 and 288.

⁶⁹ *Ibid.*, pp. 296 and 302.

⁷⁰ *Ibid.*, p. 402.

⁷¹ *Ibid.*, p. 408.

⁷² *Ibid.*, p. 420.

⁷³ *Ibid.*, p. 406; see also pp. 417, 428-431.

⁷⁴ *Ibid.*, vol. XIII, p. 486.

⁷⁵ *Ibid.*, p. 493; for the dissenting opinion, see pp. 495-497.

⁷⁶ *Ibid.*, vol. XV, pp. 125, 349-354.

⁷⁷ *Ibid.*, vol. XIV, p. 159.

⁷⁸ *Ibid.*, p. 163.

⁷⁹ *Ibid.*, vol. XII, p. 319 and especially p. 330.

⁸⁰ *Ibid.*, pp. 281 and 305.

⁸¹ *Ibid.*, vol. XV, p. 419.

⁸² *Ibid.*, p. 37.

⁸³ *Ibid.*, p. 40. See also p. 42.

But the arbitrator went on to say:

Full compensation, however, for all damage suffered by private parties must afterwards be made.

(This was a case of sequestration of the claimant's steamers by the Nicaraguan Government in an effort to put down an insurrection, and not a case of sequestration of property used by enemy aliens; see also the *Don Luis Palmi claim* (1901).⁸⁴)

27. The arbitrator in the Italian-Peruvian arbitration of 1901 resulting from the Peruvian civil war of 1894-95 also exempted Peru from responsibility if it were shown that the claimant had not remained neutral: this rule was stated in the arbitration agreement, but, according to the arbitrator, was also part of the universally recognized principle of international law that

when a Government does not use the means within its power to prevent an attack on a *neutral alien who respects and observes the law of the country in which he resides*, or does not punish the offenders, it becomes responsible... [Translation from the French by the United Nations Secretariat—Italics added by the Secretariat] (Don Jacinto Gadino claim).⁸⁵

See also the *Don Rafael Canevaro* (two); *Don José Nocetti* and *Don Romulo Guidino* claims (1901).⁸⁶

IV. EXHAUSTION OF LOCAL REMEDIES

28. In the *Ambatielos claim* (1956),⁸⁷ one of the questions put to the Commission of Arbitration was whether the claim submitted by Greece was valid having regard to

...

(ii) The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;

...

"This well established rule means", said the Commission, that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.

In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.

...

Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may

also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be *obviously futile*.

Here a question of considerable practical importance arises.

If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule?

As the arbitrator rules in the *Finnish Vessels Case* of 9th May-1934, the only possible test is to assume the truth of the facts on which the claimant State bases its claim. As will be shown below, any departure from this assumption would lead to inadmissible results.⁸⁸

In this case, the majority of the Commission held that Mr. Ambatielos had failed to exhaust his domestic remedies in the following three respects:

(a) He failed to call a witness whose evidence, the Greek Government alleged, would have resulted in a decision favourable to him. This allegation was accepted for the purpose of the plea. Moreover, the rule of domestic remedies applied to such a failure:

The rule requires that "local remedies" shall have been exhausted before an international action can be brought. These "local remedies" include not only reference to the courts and tribunals, but also the use of procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane. . . .

It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure—even one which is not important to the defence of the action—would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.

In the view of the Commission, the non-utilization of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.⁸⁹

(b) Mr. Ambatielos had failed to exhaust his rights as an appellant. The reason for this failure was that the Court of Appeal had refused to admit the evidence of the witness who had not been called at the trial level (a) above and that the appeal would, as a result, be futile. The Commission rejected this argument on the ground that

It would be wrong to hold that a party who, by failing to exhaust his opportunity in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.⁹⁰

(c) Two other claims, as formulated in argument before the Commission, had never been submitted to the English Courts. There was no obstacle to such submission.

⁸⁴ *Reports of International Arbitral Awards*, vol. XV, p. 412.

⁸⁵ *Ibid.*, pp. 414 and 415.

⁸⁶ *Ibid.*, pp. 420, 424-427; 452 and 453; 434 and 435.

⁸⁷ *Ibid.*, vol. XII, p. 83.

⁸⁸ *Ibid.*, pp. 118 and 119.

⁸⁹ *Ibid.*, p. 120.

⁹⁰ *Ibid.*, p. 122.

See also the individual opinion of Mr. Alfaro⁹¹ and the dissenting opinion of Professor Spiropoulos.⁹²

29. See also *The Lottie May Incident* (1899);⁹³ *Don Virgilio Dall' Orso claim* (1901);⁹⁴ the *Salvador Commercial Company claim* (1902);⁹⁵ the *Gelbrunk claim* (1902);⁹⁶ and the *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgments*⁹⁷ (where the plea was joined to the merits). Compare the decisions of the Conciliation Commissions noted in paragraph 3 above.

V. LEGAL INTEREST OF CLAIMANT

1. General

30. In the *South West Africa Cases* Ethiopia and Liberia asked the International Court of Justice to adjudge and declare that the mandate for South West Africa remained in force, that South Africa was under certain obligations of a procedural and substantive nature, and that, by certain actions and policies, South Africa had violated these obligations. In 1962, the Court rejected a number of preliminary objections to its jurisdiction, one of which was that

the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;⁹⁸

The Court decided that

the manifest scope and purport of the provisions of this Article [7] indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory and toward the League of Nations and its Members.⁹⁹

Preliminary Objections, Judgment, see also the separate opinions of Judges Bustamante and Jessup and the dissenting opinions of Judges Winiarski, Spender and Fitzmaurice, Morelli and Van Wyk.¹⁰⁰

31. In the *Second Phase, Judgment*, the Court referred to another "matter . . . which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings—not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right

or interest regarding the subject-matter of their claim, as set out in their final submissions".¹⁰¹

32. The Court held that the Applicants did not have such a legal right or interest under the Mandate and rejected their claims.

One of the arguments on this issue amounted, said the Court,

to a plea that the Court should allow the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c) of its Statute.¹⁰²

See also the separate opinions of Judges Morelli and Van Wyk, and the dissenting opinions of Judges Wellington Koo, Koretsky, Tanaka, Jessup, Padilla Nervo, Forster and Mbanefo.¹⁰³

2. Nationality

33. The Italian-United States Conciliation Commission held in the *Flegenheimer case* (1958),¹⁰⁴ that it was entitled to go behind the certificate of nationality given to the claimant, to determine whether, according to national and international law, the certificate was correct. Thus the certificates could be rejected

. . . when these certificates are the result of fraud, or have been issued by favour in order to assure a person a diplomatic protection to which he would not be otherwise entitled, or when they are impaired by serious errors, or when they are inconsistent with the provisions of international treaties governing questions of nationality in matters of relationship with the alleged national State, or, finally, when they are contrary to the general principles of the Law of Nations on nationality which forbid, for instance, the compulsory naturalization of aliens.¹⁰⁵

34. The Treaty of Peace with Italy provided that claims could be brought in respect of "United Nations nationals" who were defined, *inter alia*, as "individuals who are nationals of any one of the United Nations . . .".¹⁰⁶ In several cases claimants who were nationals of one of the United Nations were also Italian nationals. Italy argued that the

. . . principle of international law, universally recognized and constantly applied, by virtue of which diplomatic protection cannot be exercised in cases of dual nationality when the claimant possesses also the nationality of the State against which the claim is being made¹⁰⁷

should be applied. The United States and the United Kingdom invoked the "clear and literal sense of the expressions in the Treaty": any national of one United

⁹¹ *Ibid.*, pp. 124-126.

⁹² *Ibid.*, pp. 126-132.

⁹³ *Ibid.*, vol. XV, pp. 23 and 31.

⁹⁴ *Ibid.*, pp. 432 and 434.

⁹⁵ *Ibid.*, pp. 467 and 477.

⁹⁶ *Ibid.*, pp. 467 and 476.

⁹⁷ *I.C.J. Reports 1964*, pp. 6, 46, 114 and 115 and 166.

⁹⁸ *I.C.J. Reports 1962*, p. 327.

⁹⁹ *Ibid.*, p. 343.

¹⁰⁰ *Ibid.*, pp. 319; 349, 387, 449, 465, 564 and 575.

¹⁰¹ *I.C.J. Reports 1966*, pp. 6 and 18.

¹⁰² *Ibid.*, p. 47.

¹⁰³ *Ibid.*, pp. 57; 65; 214; 237; 248; 323; 441; 472 and 482.

¹⁰⁴ *Reports of International Arbitral Awards*, vol. XIV, pp. 327, 336-349.

¹⁰⁵ *Ibid.*, p. 349.

¹⁰⁶ United Nations, *Treaty Series*, vol. 49, p. 163.

¹⁰⁷ *Reports of International Arbitral Awards*, vol. XIV, p. 239.

Nations was entitled to claim, regardless of the fact that he may have some other nationality (*Cases of Dual Nationality* (1954),¹⁰⁸ and *Mergé case* (1955)).¹⁰⁹ The Italian-United States Conciliation Commission adopted neither of these views (the Anglo-Italian Commission refused to rule on the issue: *Cases of Dual Nationality* above; the French-Italian Commission appears implicitly to have adopted the same rule as the Italian-United States Commission: see decisions in paragraph 36 below). It held, first, that the Treaty did not resolve the question but that rather it was to be decided according to "the general principles of international law". Second, these principles entitled the United States to protect its nationals before the Commission in cases of dual nationality, United States and Italian, whenever the United States nationality was the effective nationality. The Commission said that habitual residence was one but only one of the criteria. "The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered." The Commission then stated a number of guiding principles.¹¹⁰

35. It applied these principles in several later decisions:¹¹¹ *Mazzonis* (1955); *Spaulding* (1956); *Zangrilli* (1956); *Gattone* (1957); *Cestra* (1957); *Salvoni* (1957); *Ruspoli-Droutzkov* (1957); *Vereano* (1957); *Puccini* (1957); *Tuciarone* (1959); and *Ganapini* (1959) cases; cf. the *Flegenheimer case*.¹¹²

36. The French-Italian Commission appears to have applied basically the same test: the *Différend Dame Rambaldi* (1957); the *Différend Dame Menghi née Gibey* (1958); the *Différend Dame Lombroso née De Bonfils de Rochon de Lapeyrouse* (1958); and the *Différend Consorts Lupi* (1958).¹¹³

37. On dual nationality see also the *Don Rafael Canevaro claim* (1901),¹¹⁴ and the *Don Romulo Guidino claim* (1901).¹¹⁵ See also the *Don Agustin Arata*, and the *Don Carlos Yon* claims (1901);¹¹⁶ concerning the right of a widow with dual nationality to pursue claims originally made by her husband, on behalf of her children. See also the *Doña Carolina Soria Galvarro claim* (1901).¹¹⁷

3. Companies

38. In the *Salvador Commercial Company claim* (1902),¹¹⁸ the majority of the Arbitrators, in awarding damages to the American shareholders in an El Salvador corporation

whose concession had been wrongly terminated by the El Salvador Government, stated:

We have not discussed the question of the right of the United States under international law to make reclamations for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.¹¹⁹

See also the *Don Evangelista Machiavello claim* (1901).¹²⁰ 39. This question was also raised in the *Barcelona Traction, Light and Power Company, Limited (Preliminary Objections)*,¹²¹ but has not yet been decided by the International Court of Justice, having been joined to the merits,¹²² see also the separate opinions of Judges Wellington Koo and Bustamante, and the dissenting opinions of Judges Morelli and Armand-Ugon.¹²³ See also the many claims brought by France on behalf of French shareholders in Italian and other foreign companies before the French-Italian Conciliation Commission: this right was, however, conferred by the express terms of the Peace Treaty; e.g. the *Différend Société financière métallurgique électrique (SOFIMELEC)* (1949),¹²⁴ and the *Différend Società Mineraria et Metallurgica di Pertusola* (1950).¹²⁵ See also the *Affaire du Guano* (Judgement of 8 January 1901).¹²⁶

VI. EXTINCTIVE PRESCRIPTION AND WAIVER

1. Extinctive prescription

40. In the *Ambatielos claim* (1956),¹²⁷ the United Kingdom Government argued that "the claim of the Greek Government ought to be rejected by reason of the delay in its presentation". The Commission ruled that

It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (Oppenheim—Lauterpacht—*International Law*, 7th Edition, I, paragraph 155 c; Ralston—*The Law and Procedure of International Tribunals*, paragraphs 683-698, and *Supplement*, paragraphs 683 (a) and 687 (a). L'Institut de Droit international expressed a view to this effect at its session at The Hague in 1925.

There is no doubt that there is no rule of international law which lays down a time-limit with regard to prescription, except in the case of special agreements to that effect, and accordingly, as l'Institut de Droit international pointed out in its 1925 Resolutions, the determination of this question is "left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate."¹²⁸

¹⁰⁸ *Reports of International Arbitral Awards*, vol. XIV, pp. 27 and 28.

¹⁰⁹ *Ibid.*, pp. 236, 238 and 239.

¹¹⁰ *Ibid.*, pp. 247 and 248.

¹¹¹ *Ibid.*, pp. 249; 292; 304; 307; 311; 314; 321; 323; 398 and 400.

¹¹² *Ibid.*, pp. 375-378; see also para. 33 above.

¹¹³ *Ibid.*, vol. XIII, pp. 786; 801; 804 and 821.

¹¹⁴ *Ibid.*, vol. XV, p. 420.

¹¹⁵ *Ibid.*, p. 434.

¹¹⁶ *Ibid.*, pp. 401 and 446.

¹¹⁷ *Ibid.*, p. 449.

¹¹⁸ *Ibid.*, p. 467.

¹¹⁹ *Ibid.*, p. 479.

¹²⁰ *Ibid.*, p. 439.

¹²¹ *I.C.J. Reports 1964*, p. 6.

¹²² *Ibid.*, pp. 44-47.

¹²³ *Ibid.*, pp. 53-64; 81-84; 110-114; 165 and 166.

¹²⁴ *Reports of International Arbitral Awards*, vol. XIII, p. 88.

¹²⁵ *Ibid.*, p. 174.

¹²⁶ *Ibid.*, vol. XV, p. 107.

¹²⁷ *Ibid.*, vol. XII, p. 83.

¹²⁸ *Ibid.*, p. 103.

41. The United Kingdom depended solely on the fact that it was only in 1939 (the claim was originally presented in 1925) that the Greek Government based its claim on the Greek-United Kingdom Treaty of 1886; previously it had referred only to general international law. The Commission rejected the argument:

If it [the Greek Government] did not adopt this attitude until 1939 when its initial diplomatic intervention dates back to 1925, that fact cannot be held against it in so far as concerns the operation of prescription, unless it brought about results which, *in themselves*, would justify the operation of prescription—such, for instance, as the difficulties of the United Kingdom in assembling the elements of proof requisite for or useful to its defence.

Furthermore, it is not very clear from the United Kingdom Counter-Case whether the allegation against the Greek Government is directed to that Government's having waited until 1939 to decide upon the present legal basis for its action, or whether it is not rather directed to the Greek Government's having waited until 1951 to institute the legal proceedings which it was open to it to "institute, compulsorily, as early as, at the latest, 1926" (Counter-Case, paragraph 168).

In the latter case the alleged delay would be concerned not with the fact that reliance was placed on the Treaty of 1886, but that *legal action* was taken on the basis of that Treaty.

The Government of the United Kingdom desires it to be understood that if the Greek Government had acted earlier, the evaluation and appreciation of the events in dispute would have been simpler and more certain. (Counter-Case, paragraph 169.) This contention, however, does not find support in any specific fact, and it would seem to be all the more difficult to accept because—even though *the legal basis* of the claim has been changed during the diplomatic exchanges—*the facts* which constitute its substance have remained the same from the beginning, and from the point of view of difficulty of proof these facts are, above all, important.¹²⁹

2. Waiver

42. In the *Barcelona Traction, Light and Power Company, Limited case*, Belgium alleges injury and damage to Belgian interests in a Canadian Company, resulting from the treatment of the company in Spain said to engage Spain's international responsibility. Spain advanced a number of preliminary objections to the claim. One of them was that Belgium's discontinuance of the earlier proceedings relating to the same dispute disentitled it from bringing the new proceedings.¹³⁰ The Court first held that, under the Rules, the act of

discontinuance is a procedural and, so to speak, "neutral" act, the real significance of which must be sought in the attendant circumstances...¹³¹

The Court accordingly then considered the arguments based on those circumstances and put forward by Spain in an attempt to establish that Belgium no longer had the right to bring proceedings on its claim.

43. Spain contended first that there was an understanding between it and Belgium about the discontinuance. The Court rejected this argument, given that (i) the acts in question were the acts of the representatives of the

private interests involved, who did not act in such a manner as to commit their Governments, and (ii) the acts were in any event wholly inconclusive.¹³²

44. The second argument, "having the character of a plea of estoppel", was to the effect that Belgium had "by its conduct misled [Spain] about the import of the discontinuance, but for which [Spain] would not have agreed to it, and, as a result of agreeing to which, it had suffered prejudice". The Court saw two preliminary difficulties: first, "it [was] not clear whether the alleged misleading conduct was on the part of the [Belgian] Government itself or of private Belgian parties, or in the latter event, how far it is contended that the complicity or responsibility of the [Belgian] Government is involved". Second, it did not consider that the conduct had been proved. Moreover, the Court held that Spain was not prejudiced by the fact that Belgium was able in the new proceedings, to frame its application and memorial with a foreknowledge of the probable nature of Spain's reply: "The scope of the Court's process is... such as, in the long run, to neutralize any initial advantage that might be obtained by either side".¹³³ Judge Bustamante in his separate opinion and Judges Morelli and Armand-Ugon in their dissenting opinions also discussed the objection.¹³⁴

45. The claimant in the *Wollemborg case* (1956),¹³⁵ was attempting to recover tax which he had paid but from which he was exempt under the Italian Peace Treaty. The Italian Government opposed the claim on the ground that the claimant's attorney signed an agreement with the Italian financial administration and that the taxes were paid pursuant to that agreement. The Italian-United States Conciliation Commission rejected this argument:

Viewed from the international standpoint, the cited settlement (*concordato*) could be relevant only as a waiver of a right on the part of its principal (Balladore Pallieri [*Diritto internazionale pubblico*] p. 251). Certainly, the waiver is, save in exceptional cases, binding on the subject from whom the unilateral declaration of relinquishment emanates (*ibid.*). But waivers cannot be presumed and there is nothing in the instant case that authorizes one to admit that there was intention to relinquish.¹³⁶

The attorney and the claimant were unaware, at the relevant times, of several important facts: the relevant provisions of the Treaty of Peace and of another Italo-United States agreement and a relevant decision of the French-Italian Conciliation Commission. Further, because of the attitude of the Italian authorities, the claimant could succeed in his claims only before the Conciliation Commission "and it was not necessary to make any specific reservation in this connexion".¹³⁷

46. The questions of estoppel and preclusion were discussed by the Court of Arbitration in the *Argentine-*

¹²⁹ *Ibid.*, pp. 22 and 23.

¹³⁰ *Ibid.*, pp. 24 and 25.

¹³¹ *Ibid.*, pp. 78-82; 101-109; 116-133.

¹³² *Reports of International Arbitral Awards*, vol. XIV, p. 283.

¹³³ *Ibid.*, p. 290.

¹³⁴ *Ibid.*

¹²⁹ *Ibid.*, pp. 103 and 104.

¹³⁰ *I.C.J. Reports 1964*, pp. 6, 16-26.

¹³¹ *Ibid.*, p. 21.

Chile Frontier case (1966)¹³⁸ and by the Arbitral Tribunal in the *Case concerning the interpretation of the Air Transport Services Agreement between the United States of America and France* (1963).¹³⁹

VII. FORMS AND EXTENT OF REPARATION

1. General

47. In the *Affaire relative à une quantité d'or revendiquée par les Pays-Bas* (1963)¹⁴⁰ the Italian-Netherlands Conciliation Commission noted with approval the Netherlands concession that it could not simultaneously pursue its claim to the return of certain monetary gold before two separate tribunals:

Such a double claim would involve an unlawful enrichment which is prohibited by the general principles of law that are recognized by civilized nations and form an integral part of international law (cf. Guggenheim, *Traité de droit international public*, vol. I, p. 155). [Translation from the French by the United Nations Secretariat.]¹⁴¹

Accordingly the Netherlands declared that it was ready to withdraw its claim (under the Paris Agreement of 1946) before the Tripartite Commission for the Restitution of Monetary Gold to the extent that it was indemnified by the Italian Government, under the Peace Treaty.

2. Monetary compensation

(a) General

48. As already noted (see paragraph 1 above), the Italian-United States Conciliation Commission has affirmed that

The responsibility of the State [which has violated international law] would entail the obligation to repair the damages suffered to the extent that said damages are the result of the inobservance of the international obligation.¹⁴²

49. The Anglo-Italian Conciliation Commission was asked in the *Theodorou case* (1961),¹⁴³ to determine the amount of damages even although the exact amount could not be established partly because the evidence adduced was not sufficiently precise. Guided by certain precedents, it decided "to determine equitably the amount of the compensation". The Commission quoted the following statement from the *Pinson case* (1928):

... in any case, the convention does not in any way limit the power of the Commission to decide on the admissibility and value of evidence. In these circumstances, it must be assumed to have complete freedom of appreciation, a restriction of such freedom does not appear to be anymore a general principle of public international law on the subject of arbitration....

Admitting that international law has never drawn up precise rules as to the conditions to be satisfied by evidence before international tribunals, and that they have generally benefited by great freedom,

which permitted them to evaluate evidence according to the normal or abnormal circumstances, in which the evidence happened to have been got together, equity remained all the same.... If the use of the word "equity" in this context runs up against objections, I am quite prepared to replace it by "freedom to evaluate evidence according to the attendant circumstances." [Translation from the French by the United Nations Secretariat.]¹⁴⁴

See also decisions of the Conciliation Commissions established under the Italian Peace Treaty in which the amount of compensation was fixed by reference to their "power of appreciation", *ex aequo et bono*, or by the Commission acting in a spirit of conciliation, e.g. the *Feldman case* (1954),¹⁴⁵ and the *Différend Héritiers Raoul Mailhac* (1956).¹⁴⁶

(b) Punitive damages

50. In the *Orr and Laubenheimer claim* (1900)¹⁴⁷ (see paragraph 26 above) the arbitrator ruled, in a case where damages were being claimed in respect of losses arising from the seizure of the claimants' vessels by the Government to put down an insurrection, that

There is no question of a "solatium" or of punitive damages, for the right of eminent domain and the rights incident to a state of war, and martial law, justify the use by any Government, in an emergency, of any private property found available. Full compensation, however, for all damage suffered by private parties must afterwards be made. But the obligation rests upon every party damaged to do all in his power to reduce his losses to a minimum.¹⁴⁸

(c) Indirect damages, including loss of profits

51. The Italian Peace Treaty, *inter alia*, provided that certain nationals of the United Nations were entitled to compensation to the extent of two-thirds of the sum necessary "to make good the loss suffered". In the *Currie case* (1954),¹⁴⁹ the Anglo-Italian Conciliation Commission ruled that the Italian Government was responsible for foreseeable and unavoidable increases in the damage and that the "loss suffered"

is not only that arising directly and immediately "as a result of injury or damage" but also that arising indirectly and subsequently....¹⁵⁰

Accordingly Italy was held responsible for the subsequent deterioration in the state of the claimants' property and not merely for the initial damage caused by bombing. Compare the decision of the French-Italian Conciliation Commission in *Différend Textiloses et Textiles* (1959).¹⁵¹

52. The arbitrators in the *Salvador Commercial Company claim* (1902),¹⁵² had "full power to grant complete, just and legal relief to the parties: the damages awarded shall be fully compensatory but shall not include any which are merely speculative or imaginary". As seen (paragraph 5 above), the arbitrators, by a majority, held

¹³⁸ *Reports of International Arbitral Awards*, vol. XVI, p. 109.

¹³⁹ *Ibid.*, p. 5.

¹⁴⁰ *Ibid.*, p. 299.

¹⁴¹ *Ibid.*, p. 318.

¹⁴² *Ibid.*, vol. XIV, p. 163.

¹⁴³ *Ibid.*, pp. 53, 64 and 65.

¹⁴⁴ *Ibid.*, vol. V, pp. 412 and 414.

¹⁴⁵ *Ibid.*, vol. XIV, p. 212.

¹⁴⁶ *Ibid.*, vol. XIII, p. 723.

¹⁴⁷ *Ibid.*, vol. XV, p. 37.

¹⁴⁸ *Ibid.*, p. 40.

¹⁴⁹ *Ibid.*, vol. XIV, p. 21.

¹⁵⁰ *Ibid.*, p. 24.

¹⁵¹ *Ibid.*, vol. XIII, pp. 742 and 745.

¹⁵² *Ibid.*, vol. XV, p. 467.

that the El Salvador Government was responsible for the termination of the claimant's concession which then had twenty-one years to run. The arbitrators held:

Under the terms of the protocol and by the accepted rules of international courts in such cases, nothing can be allowed as damages which has for its basis the probable future profits of the undertaking thus summarily brought to an end.¹⁵³

The arbitrators then went on to calculate the value of the franchise "computed without reference to future or speculative profits or any speculative or imaginary basis whatever".

53. Similarly the arbitrator of the claims made by Italians resident in Peru in respect of the civil war of 1894-95 excluded loss of profits and other indirect damages: *Don Lorenzo Roggero*; *Don Juan B. Serra*, *Don Nicolas O. Maltese* ("indirect damages are not taken into consideration in claims of this kind"); *Don Andrés Ratti*; and *Don Juan Tiscornia et Compagnie* claims (1901).¹⁵⁴

54. On the other hand, the arbitrator in the *May case* (1900),¹⁵⁵ having held that there were no legal and moral reasons for expelling May from his post as manager of the Guatemalan Railways, and noting that under the terms of his contract with the Government he was entitled to serve for another five months, decided that he was entitled to the profits which he would have earned in that period. The parties seem to have been agreed on this issue, however, since the Guatemalan Government, in its pleadings, stated:

The law of Guatemala... (to which the claimant is subject in this case*), establishes, like those of all civilized nations of the earth, that contracts produce reciprocal rights and obligations between the contracting parties and have the force of law in regard to those parties; that whoever concludes a contract is bound not only to fulfill it, but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned, and that such compensation includes both the damage suffered and the profits lost. *Damnum emergens et lucrum cessans*.¹⁵⁶ [* *Italics added by the Secretariat.*]

The arbitrator also held that May was entitled to substantial damages for the delay in reaching a settlement of the debt owing to him, but that since there was clearly a speculative element in his acceptance of the contract, the damages "should be confined to what may be considered a sufficient amount to cover May's actual expenses and losses."¹⁵⁷

55. Under an agreement of 1895 Guatemala agreed to indemnify those Mexican citizens

who were injured by its agents, for the value of the property occupied or destroyed, and for the damages that may have been *directly* * caused to them by such occupation or destruction.¹⁵⁸ [* *Italics added by the Secretariat.*]

In one case, the claimant sought the payment of profits allegedly lost because of the fact that it could not, as a result of the Guatemalan occupation, cut and sell timber. The arbitrator rejected that part of the claim:

Loss of earnings (*lucro cesante*) is certainly a damage caused to the claimant by the occupation; but the allegation mentioned above did not succeed in convincing the arbitrator that such damages are the direct damages to which article 2 applies. The arbitrator had to bear in mind that if the High Contracting Parties, in drawing up their Convention, had wished to include in it indirect or secondary effects, they would have had to express that clearly, in such a way as not to give rise to any doubt. Since they did not do so, the arbitrator had to attribute to the expressions used a strict sense, thus following established precedents in the many arbitral decisions before him. He also had to take into account that in this case, as the claimants acknowledged in their submission, and as Mexico acknowledged in signing the Convention, it was a matter of one who caused damage, but acted in good faith, in the belief that he was exercising acts of jurisdiction in his own territory.¹⁵⁹

Romano and Company, Successors claim (1898);¹⁶⁰ see also *Policarpo Valenzuela and Sons*; *Tránsito Mejenes*; and *Frederico Schindler* claims (1898).¹⁶¹

(d) Interest

56. In the *Fatovich case* (1954),¹⁶² a claim for interest was rejected by the Italian-United States Conciliation Commission since no express request for interest had been made and

the fundamental principles of justice and equity, as well as the sounder opinion of other international tribunals, require that a clear and express request for interest, whenever the subject matter of the claim does not involve a prior contractual provision for interest, is a condition precedent to the responsibility of a State (if it exists) for interest on claims.¹⁶³

See similarly the *Batchelder* (1954); *MacAndrews and Forbes Co.* (1954); and *Rosasco* (1955) cases;¹⁶⁴ and see also the *Carnelli case* (1952).¹⁶⁵

57. In several cases Commissions set up under the Peace Treaties following the Second World War, were asked to award interest. In some cases, they did so—the *Différend Dame Mélanie Lachenal* (1953, 1954);¹⁶⁶ the *Différend Dame Baron née Vaccari* (1958);¹⁶⁷ *Tidewater Oil Company case* (1960),¹⁶⁸ (see similarly the *Post-Glover Electric Company case* (1900),¹⁶⁹ and the *May case* (1900))¹⁷⁰—and in at least one, they refused—the *Wollemborg case* (1956);¹⁷¹ (see similarly the *Don Andrés Ratti* and *Don Juan Tiscornia et Compagnie* cases (paragraph 53 above)).

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, p. 12.

¹⁶¹ *Ibid.*, pp. 7, 10 and 11; 16 and 17; 19 and 20.

¹⁶² *Ibid.*, vol. XIV, pp. 190, 195-200.

¹⁶³ *Ibid.*, p. 196.

¹⁶⁴ *Ibid.*, pp. 201 and 204; 221 and 226; 227 and 230.

¹⁶⁵ *Ibid.*, pp. 86, 94-96.

¹⁶⁶ *Ibid.*, vol. XIII, pp. 117, 125 and 130.

¹⁶⁷ *Ibid.*, pp. 793 and 794.

¹⁶⁸ *Ibid.*, vol. XIV, pp. 480 and 483.

¹⁶⁹ *Ibid.*, vol. XV, pp. 37 and 46.

¹⁷⁰ *Ibid.*, pp. 47 and 75.

¹⁷¹ *Ibid.*, vol. XIV, pp. 283 and 290.

¹⁵³ *Ibid.*, p. 478.

¹⁵⁴ *Ibid.*, pp. 408; 410; 413; 431 and 445.

¹⁵⁵ *Ibid.*, p. 47.

¹⁵⁶ *Ibid.*, p. 73.

¹⁵⁷ *Ibid.*, p. 75.

¹⁵⁸ *Ibid.*, p. 13.