

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**The Italian-United States Conciliation Commission established under Article 83  
of the treaty of Peace with Italy (Italy, United States)**

1952-1960

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## THE ITALIAN-UNITED STATES CONCILIATION COMMISSION

**Memorandum of understanding<sup>1</sup> between the Government of the United States of America and the Government of Italy regarding settlement of certain wartime claims and related matters. Signed at Washington, on 14 August 1947<sup>2</sup>**

As an integral part of the measures which are now being taken to restore normal financial and economic relations between our countries, and as a step toward the economic stability of Italy, the Government of the United States of America and the Government of Italy have reached an understanding providing for mutual renunciation of claims and for related agreements, as follows:

### *Article III*

#### PROPERTY OF NATIONALS OF THE UNITED STATES OF AMERICA

16. (a) The Government of Italy will expedite in any manner necessary arrangements now being undertaken, or those necessary to be undertaken, for the desequstration of and release of any unusual controls over the property or interests in property in Italy of nationals of the United States of America, including the cancellations of any controls, contracts, including contracts for the sale of capital assets or a part thereof, agreements or arrangements undertaken during the period of control in accordance with the request, or at the direction of the Government of Italy, its agencies or officials, which are not deemed to have been in the best interest of such property or interests. The Government of Italy further agrees that with respect to the application of Paragraph 4 (a) and 4 (d) of Article 78 of the Treaty of Peace to cases which fall within the terms of this provision, as well as to all cases to which Paragraph 4 (a) and 4 (d) of Article 78 apply, the requirement "for the restoration to complete good order" shall be followed in all cases where there has been (1) deterioration of the physical property while under Italian control, and (2) where the physical property has suffered non-substantial damage as a result of acts of war. In all other cases the requirement to compensate in lira to the extent of "two-thirds of the sum necessary" shall apply, provided that the Government of Italy may, with respect to any case, apply the requirement "for the restoration to complete good order".

(b) The Government of Italy agrees that with respect to the property or interests in property of United States nationals which property or interests are not covered by section (a) above, it will accord such property or interests treatment identical with that provided in section (a) above.

(c) The Government of Italy shall, with reference to paragraphs (a) and (b) above, apply Paragraph 4 (b) of Article 78 of the Treaty of Peace.

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<sup>1</sup> United Nations *Treaty Series*, vol. 36, p. 62.

<sup>2</sup> Came into force on 14 August 1947.

(d) Compensation paid in accordance with terms of this section shall be free of levies, taxes, or other charges and shall be freely usable in Italy but shall be subject to the foreign exchange control regulations which may be in force in Italy from time to time.

. . .

*Article V*

DEFINITIONS

18. For the purposes of this Memorandum of Understanding, the term "nationals" means individuals who are nationals of the United States of America, or of Italy, or corporations or associations organized under the laws of the United States of America or Italy, at the time of the coming into force of this Memorandum of Understanding, provided, that under Article III above, nationals of the United States of America shall, for purposes of receiving compensation, also have held this status either at the time at which their property was damaged or on September 3, 1943, the date of the Armistice with Italy.

*Article VI*

CLAUSES OF THE TREATY OF PEACE

19. It is agreed that any of the clauses of the Treaty of Peace, dated at Paris February 10, 1947, to which this Memorandum of Understanding may refer, shall be considered as constituting an integral part of this Memorandum of Understanding, as between the Governments of the United States of America and Italy.

*Article VII*

EFFECTIVE DATE

20. This Memorandum of Understanding shall enter into force upon the day it is signed.

DONE at Washington in duplicate, in the English and Italian languages, both of which shall have equal validity, this 14th day of August, 1947.

*For the Government of the United States of America:*

Robert A. LOVETT

*For the Government of Italy:*

LOMBARDO

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*EXCHANGE OF NOTES*

## III

*The Chief of the Italian Economic and Financial Delegation to the  
Acting Secretary of State*

ITALIAN EMBASSY

WASHINGTON, D.C.

ITALIAN ECONOMIC AND FINANCIAL DELEGATION

August 14, 1947

Sir:

With reference to the "Memorandum of Understanding between the Government of the United States of America and the Government of Italy regarding settlement of certain wartime claims and related matters", I have the honour to inform you of my Government's undertakings as set forth below with respect to the assistance to be given to nationals of the United States of America with respect to their properties in Italy. This assistance is directed particularly to the implementation of Article 78 of the Treaty of Peace with Italy and to Article III, paragraph 16, of the above Memorandum of Understanding.

The Government of Italy shall, as soon as possible, designate an Italian governmental agency having authority to receive and determine claims of nationals of the United States of America with respect to their properties in Italy, and to effect the restoration of such properties, or pay compensation, or both, as provided in Article 78 of the Treaty of Peace with Italy, and in accordance with the terms of Article III, paragraph 16, of the Memorandum of Understanding.

With a view to rendering appropriate assistance to nationals of the United States of America having claims falling within the scope of this agreement, and also to any representative who may be designated by the Government of the United States of America to assist such nationals in the preparation and establishment of their claims, the Government of Italy further will, upon request and without charge, furnish copies of pertinent evidence and records in Italy, and will also, upon request and without charge make available to the designated representative of the United States of America funds in lira to the extent necessary to defray the local expenses in Italy, including subsistence, of such representative and his assistants, and also to pay compensation to Italian personnel designated in Italy by such representative, it being understood that such expenses will be kept to a minimum.

Accept, Sir, the renewed assurances of my highest consideration.

LOMBARDO

*Chief of the Italian Economic  
and Financial Delegation*

The Honorable Robert A. Lovett

*Acting Secretary of State*

## IV

*The Acting Secretary of State to the Chief of the Italian Economic and Financial Delegation*

August 14, 1947

Sir:

I have the honour to acknowledge receipt of your note of this date in the following terms:

[See note III]

I am pleased to inform you that the undertakings and procedures set forth in your note are satisfactory to my Government. These procedures can be expected to limit the expenses to be incurred under section 5 of Article 78 of the Treaty of Peace, which is a desirable result for both Governments.

Accept, Sir, the renewed assurances of my highest consideration.

Robert A. LOVETT  
*Acting Secretary of State*

The Honorable Ivan Matteo Lombardo  
*Chief of the Italian Economic and Financial Delegation*

## V

*The Chief of the Italian Economic and Financial Delegation to the  
Acting Secretary of State*

ITALIAN EMBASSY  
WASHINGTON, D.C.

ITALIAN ECONOMIC AND FINANCIAL DELEGATION

August 14, 1947

Sir:

Reference is made to Article III, paragraph 16, of the "Memorandum of Understanding between the Government of the United States of America and the Government of Italy regarding settlement of certain wartime claims and related matters", signed this date.

One of the more troublesome problems which has arisen in connexion with Article 78 of the Treaty of Peace has been concerned with the property in Italy of American oil companies. The principal difficulty which has been encountered in returning such properties to the rightful owners has been the question of the employment rights which accrued during the period of control of the American oil companies by the Government of Italy.

I am authorized by my Government to advise you of the following agreement on the question of employment rights which has been reached between the Government of Italy and representatives of the oil companies:

1. The Anglo-American companies (which had originally requested the Government of Italy to consider as broken the continuity of employment for the employees on their pay rolls at the moment of liquidation of the companies) have now in principle agreed to re-engage 95% of the personnel.

The Azienda Generale Italiana Petroli on its side shall, in full agreement with the Italian Treasury, pay the indemnities for the period running from the date of the liquidation to the date of re-employment. The implementation of this formula can be expected to take place in the very near future.

2. An agreement has been reached on the partitioning of the market between the foreign companies on the one side and Azienda Generale Italiana Petroli on the other side. This agreement has involved considerable sacrifice on the part of Azienda Generale Italiana Petroli.

3. Insofar as the war damages suffered by the American companies are concerned, the duty of the Government of Italy derives from Article 78 of the Treaty of Peace, and the policy applied will be in accordance with Article III, paragraph 16, of the above referred to Memorandum of Understanding.

It is also understood that the properties and all assets will be returned, including, of course, the employee compensation funds which were on hand at the date of liquidation and which represent the funds available for persons still employed by the companies.

This agreement was made known to the representatives of the American oil companies in the United States of America concerned with this problem, as well as to officials of your Department, all of whom signified their approval.

I can, therefore, confirm to you that the Government of Italy accepts all the above engagements and will implement them at the earliest possible date.

Accept, Sir, the renewed assurances of my highest consideration.

LOMBARDO

*Chief of the Italian Economic and  
Financial Delegation*

The Honorable Robert A. Lovett

*Acting Secretary of State*

VI

*The Acting Secretary of State to the Chief of the Italian Economic and Financial  
Delegation*

August 14, 1947

Sir:

I have the honour to acknowledge receipt of your note of this date in the following terms:

[*See note V*]

My Government is very pleased to know that the question of the return of the properties in Italy of American oil companies has been resolved in the manner set forth in your note. The solution is consistent with the terms of Article III, paragraph 16, of the "Memorandum of Understanding between the Government of the United States of America and the Government of Italy regarding the settlement of certain wartime claims and related matters", signed this date.

Accept, Sir, the renewed assurances of my highest consideration.

Robert A. LOVETT  
*Acting Secretary of State*

The Honorable Ivan Matteo Lombardo

*Chief of the Italian Economic and Financial Delegation*

**Exchange of notes constituting an Agreement<sup>1</sup> interpreting certain phrases contained in the text of the above-mentioned memorandum of understanding. Rome, 24 February 1949<sup>2</sup>**

I

*The American Embassy to the Italian Ministry of Foreign Affairs*  
EMBASSY OF THE UNITED STATES OF AMERICA

F.O. No. 2450

*Note verbale*

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honour to refer to previous correspondence between the Embassy of the United States of America and the Ministry of Foreign Affairs, and to conversations between representatives of the Embassy and of the Ministry with regard to the desirability of clarifying the meanings of the phrases (1) "deterioration of the physical property while under Italian control," and (2) "where the physical property has suffered non-substantial damage as a result of acts of war". Such phrases appear in the second sentence of Article 3, paragraph 16 (a) of the "Memorandum of Understanding between the Government of the United States of America and the Government of Italy regarding settlement of certain wartime claims and related matters," signed in Washington on August 14, 1947 (hereinafter referred to as the Memorandum of Understanding) and relate to the obligation of the Government of Italy to restore property to complete good order.

As a result of these communications and conversations agreement has been reached with regard to the foregoing matters and certain other connected problems, subject, however, to confirmation by the Governments of the United States of America and Italy.

The Embassy takes pleasure in informing the Ministry that the Government of the United States of America gives its approval and is prepared to enter into the agreement referred to above (hereinafter referred to as the "agreement"), which is as follows:

1. The Government of Italy shall in all cases where the approved amount of a claim is, at the date of payment, 1,500,000 lire or less, consider that the claim relates to deterioration of physical property while under Italian control or to non-substantial damage as a result of acts of war, and shall therefore pay the full amount of the claim. In all cases, moreover, where the approved amount of a claim is, at the date of payment, in excess of 1,500,000 lire, but two-thirds of such approved amount is less than 1,500,000 lire, the Government of Italy shall pay the sum of 1,500,000 lire.

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<sup>1</sup> United Nations *Treaty Series*, vol. 80, p. 319.

<sup>2</sup> Came into force on 24 February 1949.

2. The Government of Italy shall in all other cases pay two-thirds of the approved amount of a claim.

3. The obligation of the Government of Italy under the first sentence of paragraph 16 (a) of the Memorandum of Understanding is understood to remain un-impaired. Property or interests which were subjected to the measures enumerated in that first sentence in a manner not deemed to have been in the best interest of such property or interests shall, if in existence, be returned irrespective of the possession or purported ownership thereof. Where, however, property or interests cannot be returned because they are not in existence, the provisions of paragraphs 1 and 2 of this agreement shall apply.

4. A claimant may present separate claims in those instances where the properties with respect to which he is claiming are not physically contiguous and do not form part of a related whole.

Properties of a commercial or business enterprise that are used in the prosecution of the activities of that enterprise shall be considered as forming part of a related whole. In an instance where separate claims can properly be presented, each claim shall be entitled to separate consideration under this agreement.

5 (a). The word "claim" shall be deemed to refer to claims presented against the Government of Italy by nationals of the United States of America under paragraph 4 of Article 78 of the Treaty of Peace and Article 3 of the Memorandum of Understanding.

(b). A national of the United States shall be considered, for purposes of the Memorandum of Understanding and of this agreement, as any person, corporation or association on whose behalf the Government of the United States would be entitled to claim the benefits of Article 78 of the Treaty of Peace or of the Memorandum of Understanding or of both.

6. Any dispute that may arise in giving effect to the Memorandum of Understanding or to this agreement shall be submitted to a Conciliation Commission constituted under Article 83 of the Treaty of Peace in the same manner as a dispute that may arise in giving effect to Article 78 of the Treaty of Peace.

If the Government of Italy is prepared to give its approval to the foregoing agreement, it is suggested that a *note verbale* indicating such approval be transmitted by the Ministry of Foreign Affairs to the Embassy of the United States of America. The agreement shall be considered as having entered into effect as of the date of such *note verbale*.

Rome, February 24, 1949  
To the Ministry of Foreign Affairs,  
Rome

## II

(Translation—Traduction)

MINISTRY OF FOREIGN AFFAIRS  
S.E.T.

*Note verbale*

45/03662/26

The Ministry of Foreign Affairs has the honour to confirm to the Embassy of the United States of America the receipt of *Note verbale* No. 2450 of this date, which is transcribed below:

[*See note I*]

The Ministry of Foreign Affairs has the honour to communicate to the Embassy of the United States of America that the Italian Government gives its approval to the above-mentioned agreement.

Rome, February 24, 1949.

MINISTRY OF FOREIGN AFFAIRS

The Embassy of the United States of America,  
Rome

**Memorandum of understanding<sup>1</sup> between the Government of the United States of America and the Government of Italy regarding war damage claims. Signed at Rome, on 29 March 1957**

With reference to Articles 78 and 83 of the Treaty of Peace with Italy the Government of the United States of America and the Government of Italy have entered into the following understanding in order to achieve settlement and payment of all American war damage claims against Italy within one year.

1. The claims to be settled by the new procedure established by this Memorandum shall be those described in the special list initialled by the American Embassy in Rome and the Italian Ministry of the Treasury and dated March 4, 1957.<sup>2</sup> Said list includes the following claims submitted through the American Embassy in Rome or directly to the Government of Italy:

- (a) The claims in which the Government of Italy has not notified the claimant of an offer or of a rejection;
- (b) The claims in which the offer by the Government of Italy has not been accepted by the claimant; and
- (c) Other claims whose inclusion in this Memorandum has been agreed upon by the two Governments.

2. For the purpose of settling all of the claims included in the above mentioned special list the Government of Italy agrees to pay the sum of nine hundred and fifty million lire (950,000,000 lire), within three months from the coming into force of this Memorandum to the Italian-United States Conciliation Commission, an autonomous international body, established pursuant to Article 83 of the Treaty of Peace. This sum is to be definitely paid by the Italian Government into a special bank account which will be opened in the name of the Joint Secretariat of the Italian-United States Conciliation Commission. If the total of the awards made to the claimants under the new procedure shall be more than or less than the sum stated in this paragraph an agreement shall be made between the two Governments for the adjustment of the difference.

3. The United States Agent and the Italian Agent shall jointly make a recommendation of the amount to be paid in each claim. This shall be done in a prompt, equitable manner using the criteria derived from experience in settling claims up to now, the evidence presented by the claimants, and, if available, findings of investigations previously made by the Italian authorities and information which may be obtained by the two Agents. The Government of Italy shall make available to the two Agents the information it has gathered in each claim, and, on the request of the two Agents, it shall undertake further investigations in particular claims. The Italian Agent shall immediately communicate each recommendation to the Italian Ministry of the Treasury. If a

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<sup>1</sup> United Nations, *Treaty Series*, vol. 299, p. 158. Came into force on 22 October 1957, the date on which the two Governments notified each other that the formalities required by their respective laws for the entry into force of the Memorandum of Understanding had been complied with, in accordance with paragraph 10.

<sup>2</sup> Not printed by the Department of State of the United States of America.

substantive objection is not received by him within 15 days thereafter, it shall be presumed that the Ministry of the Treasury approves the recommendation.

4. The United States Agent shall inform each claimant of the recommendation in his claim and ask the claimant to submit an acceptance or a rejection within 30 days.

5. The two Agents, after the expiration of the 30 days shall submit their recommendation in each claim to the Italian-United States Conciliation Commission, informing it of the claimant's acceptance or rejection or failure to reply. In each claim in which the Agents' recommendation has been accepted by the claimant, the Commission shall make an award on the basis of the recommendation and the acceptance. In each claim in which the Agents' recommendation has been rejected or unaccepted by the claimant, or in which the Agents have disagreed, the Commission shall make such award as it may deem appropriate after giving the claim due consideration.

6. The Joint Secretariat of the Italian-United States Conciliation Commission shall pay each award within 60 days by a check drawn on the bank account referred to in paragraph 2 of this Memorandum.

7. The Government of Italy shall not be obligated to accept from United States nationals any additional claims under Article 78 of the Treaty of Peace subsequent to June 28, 1957. The Government of Italy shall settle each claim presented to it by a United States national under Article 78 which has not been included in this Memorandum within one year from the presentation of the duly documented claim.

8. The claims not included within this Memorandum shall be settled by the procedure used heretofore.

9. The Government of Italy shall continue to pay its share of the expenses of the United States Agent's office as heretofore.

10. This Memorandum of Understanding shall enter into force as soon as the two Governments have notified each other that the formalities required by their respective laws have been complied with.

DONE in duplicate at Rome this 29th day of March, 1957, in the English and Italian languages, both texts being equally authoritative.

*For the Government  
of the United States of America:*

J. D. ZELLERBACH

*For the Government  
of Italy:*

Vittorio BADINI

**Exchange of notes constituting an agreement<sup>1</sup> supplementing the above-mentioned memorandum of understanding. Rome, 12 July 1960**

I

*The American Ambassador to the Italian Minister  
of Foreign Affairs*

THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA

Rome, July 12, 1960

No. 13

Excellency:

I have the honour to refer to recent discussions between representatives of our two Governments regarding the settlement and payment of certain additional war damage claims in accordance with the procedures and from the funds established by the Memorandum of Understanding of March 29, 1957 regarding war damage claims.

As a result of these discussions agreement has been reached on the terms of a Supplemental Memorandum of Understanding with regard to these matters, subject, however, to the approval of our two Governments. The English text of said Supplemental Memorandum of Understanding reads as follows, to wit:

**SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF ITALY AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING WAR DAMAGE CLAIMS**

With reference to Articles 78 and 83 of the treaty of peace with Italy and the Memorandum of Understanding between the Governments of Italy and the United States of America of March 29, 1957, the Governments of Italy and the United States of America have agreed as follows for the purpose of settling and paying certain additional war damage claims by the procedures and from the fund, including interest thereon, established by the Memorandum of Understanding of March 29, 1957:

1. There shall be settled under this Memorandum of Understanding war damage claims of nationals of the United States of America, submitted under Article 78 of the treaty of peace, which were either received by or were transmitted by claimants to the Central Department of the Treasury, General Accounting Office of the Italian Government, or Italian consulates and diplomatic missions abroad on or before June 28, 1957, which shall be agreed to and described in progres-

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<sup>1</sup> United Nations, *Treaty Series*, vol. 411, p. 312. In accordance with the provisions of the said notes, the Agreement came into force on 15 June 1961, the date on which the two Governments notified each other that the formalities prescribed by their respective laws had been complied with for its entry into force.

sively numbered special lists initialed by the American Embassy at Rome and the Italian Ministry of the Treasury.

2. War damage claims of nationals of the United States which are not included in the above-mentioned lists, shall be settled by the procedures followed before the adoption by the Governments of Italy and the United States of America of the Memorandum of Understanding of March 29, 1957.

3. If the total amount of the awards paid on claims included in the above-mentioned lists is less than or more than the sum still available from the 950 million lire referred to in the Memorandum of Understanding of March 29, 1957, plus the interest already accrued or hereafter accrued thereon, a further agreement shall be made between the two Governments for the adjustment of the difference.

4. The payment of awards on claims included in the above-mentioned lists shall be made under the shortened procedures prescribed by the Memorandum of Understanding of March 29, 1957.

5. This supplemental Memorandum of Understanding shall come into force when the two Governments have notified each other that the formalities prescribed by their respective laws have been complied with.

I have the honour to propose that if the foregoing text of said Supplemental Memorandum of Understanding meets with the approval of the Government of Italy, the present Note and your Excellency's Note in reply concurring therein, shall constitute the agreement of our two Governments thereto.

Accept, Excellency, the renewed assurances of my highest consideration.

J. D. ZELLERBACH

His Excellency Antonio Segni  
Ministry of Foreign Affairs,  
Rome

## II

*The Italian Minister of Foreign Affairs to  
the American Ambassador*

THE MINISTER OF FOREIGN AFFAIRS

Excellency:

I have the honour to refer to your Note of July 12, 1960, which reads as follows:

[*see note I*]

I have the honour to inform Your Excellency that the Government of Italy agrees to the foregoing.

Accept, Excellency, the assurances of my highest consideration.

SEGANI

Rome, July 12, 1960  
His Excellency James David Zellerbach  
Ambassador of the United States of America,  
Rome

**Rules of procedure of the Italian-United States  
Conciliation Commission***Article 1***TITLE OF THE COMMISSION**

The Commission, established by the Government of the United States of America and the Government of Italy, pursuant to Article 83 of the Treaty of Peace, shall be known as the "Italian-United States Conciliation Commission".

*Article 2***JURISDICTION**

The Commission shall have jurisdiction over all disputes between the Government of the United States of America and the Government of Italy which may arise in the application or interpretation of Articles 75 and 78 and Annexes XIV, XV, and XVII, Part B, of the Treaty of Peace, as implemented by the Memoranda of Understanding and Exchanges of Notes dated August 14, 1947, the Exchange of Notes dated February 24, 1949, and any other agreement entered into by the United States of America and Italy to the extent that said agreement refers to the above Articles or Annexes of the Treaty of Peace.

*Article 3***PLACE AND TIME OF SITTINGS**

(a) The Commission shall have its seat at Rome.

(b) Hearings and other sittings of the Commission shall be held at such places and times as the Commission may agree upon from time to time.

*Article 4***AGENTS**

Each of the two Governments shall be represented before the Commission by a duly designated Agent or Deputy Agent.

The Commission will not receive or consider any statement or document unless presented through the respective Agents, or ordered produced by the Commission.

The term "Agents", as used in these rules, shall be deemed to include the Deputy Agents.

*Article 5***SECRETARIAT**

(a) A Secretariat shall be established at the seat of the Commission, which will be subject to its direction.

- (b) The Secretariat shall have custody of the Official Registers and Records of the Commission; the original of all documents and records shall be retained by the Secretariat as the archives of the Commission.
- (c) The Secretariat shall endorse on each document presented to the Commission the date of filing, and make an entry thereof in both Registers.
- (d) The Secretariat shall furnish, in conformity with these rules or on Order of the Commission, certified true copies of any statement or document in the archives of the Commission.
- (e) All records and documentary evidence received by the Commission shall be preserved by the Secretariat in safe files of the Commission until released by an Order of the Commission duly entered on record.

*Article 6*

REGISTERS AND RECORDS

(a) Two Official Registers, one in English and one in Italian, shall be maintained by the Secretariat. The two Registers shall be identical in content and both texts shall have equal validity. There shall be entered in both Registers the name of the physical or juridical person on whose behalf each case is initiated before the Commission, the subject of the dispute, and the date of filing, together with all acts connected with the proceedings.

(b) Each dispute filed with the Commission shall constitute a separate case and shall be registered as such in consecutive order.

(c) The Secretariat shall maintain two Minute Books, one in English and one in Italian, in which shall be entered a chronological record of each session of the Commission. The two Minute Books shall be identical in content and both texts shall have equal validity. The Minutes shall be approved by the members of the Commission and signed by the Secretaries.

(d) The Secretariat shall keep any additional records which may be required by these rules or prescribed from time to time by the Commission.

*Article 7*

INSTITUTION OF PROCEEDINGS

(a) Proceedings before the Commission shall be initiated by the formal filing with the Secretariat of a Petition signed by the Agent of the claiming Government. The Petition must contain

- (i) the name and address of the physical or juridical person on whose behalf the proceedings are initiated;
  - (ii) the name and address of the legal representative, if any, of the person on whose behalf the Agent of the claiming Government initiates the proceedings, together with documentary evidence of the authority of such legal representative to act on behalf of his principal;
  - (iii) a clear and concise statement of the facts in the case; each material allegation should be set forth in a separate paragraph insofar as possible;
  - (iv) a clear and concise statement of the principles of law upon which the dispute is based;
  - (v) a complete statement setting forth the purpose of the Petition and the relief requested.
- (b) The Agent of the claiming Government shall deposit with the Secretariat at the time the Petition is filed all documentary evidence then in his possession

upon which the case is based, together with an index thereof, in conformity with the provisions of Article 9 hereof. If the Agent of the claiming Government desires the Commission to consider any other proof, a request for such consideration must be made specifically in the Petition.

(c) In connection with any dispute, the Agents of the two Governments may file with the Secretariat an Agreed Statement of Facts, signed by both, substantially in accordance with the provisions of paragraph (a) of this Article and accompanied by all documentary evidence in support of or in opposition to the said dispute. Upon the filing of such an Agreed Statement of Facts, and the approval of such agreement by the Commission, the provisions of these rules relative to pleadings, trial and proof are no longer applicable.

(d) The Petition must be filed in original and five (5) copies, together with an index of the documentary evidence presented. The original and all copies are to be signed by the Agent of the claiming Government.

(e) The Secretariat shall enter each case in the Registers of the Commission and shall return to the Agent a receipted copy of the Petition duly signed, stamped, numbered and dated. When an Agreed Statement of Facts is filed, the Secretariat shall return a receipted copy thereof to each Agent.

(f) Within two (2) days after the filing of the Petition, the Secretariat shall present a copy thereof, together with a copy of the index of the documentary evidence presented, to the Agent of the other Government and to each member of the Commission.

#### *Article 8*

##### ANSWER AND OTHER PLEADINGS

(a) Within thirty (30) days after the date of filing the Petition, as described in Article 7 hereof, the Answer signed by the Agent of the respondent Government must be filed, which Answer must contain

(i) a clear and concise statement of the facts presented in the Petition of the claiming Government which are admitted as true by the respondent Government;

(ii) a clear and concise statement of any other element of fact upon which the respondent Government is relying in its defense of the case; each material allegation should be set forth in a separate paragraph insofar as possible;

(iii) a clear and concise statement of the principles of law upon which the dispute is based.

(b) The Agent of the respondent Government shall deposit with the Secretariat at the time the Answer is filed all documentary evidence then in his possession upon which the defense of the case is based, together with an index thereof, in conformity with the provisions of Article 9 hereof. If the Agent of the respondent Government desires the Commission to consider any other proof a request for such consideration must be made specifically in the Answer.

(c) When the claiming Government desires to file a Reply to the Answer of the respondent Government, it shall within fifteen (15) days after the filing of the Answer make written request to the Commission for an Order establishing the time limit for filing the Reply. The Reply shall deal only with the allegations made in the Answer, which raise factual or legal defenses or new matter not alleged or adequately treated by the claiming Government in the Petition. No documentary evidence may be filed with the Reply, except that which refutes an element of fact presented in the Answer.

(d) When a Counter-Reply is deemed necessary by the respondent Government, it shall within fifteen (15) days after the filing of the Reply make written request to the Commission for an Order establishing the time limit for filing the Counter-Reply; but in no event shall such time limit exceed that granted to the claiming Government for the filing of the Reply. The Counter-Reply shall deal only with the allegations made in the Reply, which raise factual or legal considerations or new matter not alleged or adequately treated by the respondent Government in the Answer. No documentary evidence may be filed with the Counter-Reply, except that which refutes an element of fact presented in the Reply.

(e) Filing and distribution of the Answer and of the other pleadings shall conform with the provisions of Article 7 hereof.

(f) The presentation and filing of all documentary evidence shall be governed by the provisions of Article 9 hereof.

#### *Article 9*

##### DOCUMENTARY EVIDENCE

(a) All documentary evidence upon which either Government intends to rely must be annexed to the Petition of the claiming Government, or to the Answer of the respondent Government, to the Reply, or to the Counter-Reply, respectively.

(b) No other documentary evidence may be filed subsequently, except such evidence as the Commission may order produced.

(c) When documentary evidence upon which one of the Governments intends to rely is in the possession or custody of persons or in places subject to the jurisdiction of the other Government, the Agent of the latter Government shall insure, upon a request timely made, that such document, or a certified true copy thereof, is transmitted to the Secretariat of the Commission for inclusion in the file.

(d) Documents are exhibited in the original; if same is not possible, certified true copies will be received. Documents may be printed, typewritten, or in legible handwriting and photostatic, mimeographed or carbon copies thereof may be used.

(e) The Agent of either Government may inspect at the Secretariat of the Commission any document filed by the other Government and may obtain certified true copies thereof, at its own expense.

#### *Article 10*

##### TRIAL AND PROOF

(a) The Commission does not hear oral testimony save in exceptional cases for good cause shown and upon Order of the Commission authorizing its admission and fixing the time when and the place where it shall be received. Should oral testimony be introduced in behalf of one Government, the Agent for the other Government shall have the right of cross-examination.

(b) The Commission may order in exceptional cases officials of either Government to receive the sworn testimony of a witness taken in answer to written questions prepared by the Agent of either Government and approved by the Commission; the Order of the Commission shall name the witness whose sworn testimony is to be taken and shall specify the time when, the place where the official before whom the witness shall testify, as well as the questions to be asked.

(c) If the Agents of the two Governments have reached an agreement upon any point involved in the case, without the necessity for judicial proof, the Agents shall file with the Secretariat a declaration of such agreement, signed by both Agents, clearly stating that the particular point is not an issue in the dispute; and thereafter such agreement shall be binding on the two Governments in the case.

(d) Before giving testimony, witnesses shall take the oath in accordance with the terms of the law of the place where such testimony is to be given or in accordance with the law of the country of which they are nationals, as the Commission shall determine in each particular instance.

(e) The Commission may in its discretion

- (i) grant extensions of time for the filing of pleadings;
- (ii) appoint experts to advise it on any point in dispute;
- (iii) designate interpreters and translators;

(iv) proceed to places where the property in dispute is located, and in such instances the Agents of the two Governments shall be invited to be present.

(f) Any public document or report, printed or published by order of either of the two Governments, may be considered by the Commission without being proved if identified by the Agent of either Government in the pleadings or arguments; and such matter will be given such weight as the Commission shall deem proper in each case. Reference may be made, without the necessity of formal proof, to laws, statutes, judicial decisions and publications of recognized authorities on questions pertinent to matters regarding which the Commission is called upon to decide.

### *Article 11*

#### BRIEFS AND ORAL ARGUMENTS

(a) The Commission may request the Agents to develop their arguments orally after they have completed the submission of proof. The Agents may file a written citation of legal authorities.

(b) When both Agents have concluded the formal submission of proof in a particular case, the Agent of either Government may advise the Commission of the desire of his Government to submit a Brief; and, if the Commission does not direct otherwise, the Government requesting same shall be granted thirty (30) days within which to file such Brief. The other Government may file a Reply Brief within fifteen (15) days after the filing of the original Brief.

(c) Each Brief filed shall contain in separate parts

- (i) a concise statement of the object of the dispute;
- (ii) a complete and concise statement of the facts, based upon the evidence;
- (iii) a concise statement of the points upon which the Government relies; and
- (iv) a statement setting forth the points of law relied upon and any discussion of the evidence deemed necessary to support the statement of facts.

(d) Filing and distribution of Briefs shall conform to the requirements of Article 7 hereof.

### *Article 12*

#### LANGUAGES

(a) Pleadings and Briefs may be submitted in either English or Italian.

Supporting statements, affidavits, and documentary evidence may be submitted in any language.

(b) Oral arguments before the Commission may be made in either English or Italian.

### *Article 13*

#### DECISIONS

(a) The Decision shall contain:

- (i) a declaration of the Commission's jurisdiction;
- (ii) the names of the parties and of the persons on whose behalf the proceedings have been initiated and defended;
- (iii) the object of the dispute;
- (iv) a statement of the material facts and legal arguments;
- (v) the ruling affirming or denying, in whole or in part, the obligations of each Government party to the dispute;
- (vi) an Order regarding costs;
- (vii) the signatures of the members of the Commission concurring in the Decision and the date such Decision is adopted.

(b) The Decision shall be filed in English and in Italian, both texts being authenticated originals; it shall be deposited with the Secretariat, which shall furnish certified true copies thereof immediately to the Agents of each Government.

(c) the Decision shall be definitive and binding on the two Governments, as provided in the Treaty of Peace.

### *Article 14*

#### NON-AGREEMENT

(a) If, within three (3) months after a dispute has been referred to the Commission, no agreement has been reached, the two members of the Commission, or either of them, may issue a *Procès-verbal* of Non-Agreement, setting forth the points of agreement, if any, and the points of non-agreement. A *Procès-verbal* of Non-Agreement may be supplemented by any statement in writing which either of them may desire to make with respect to the case or any point involved therein.

(b) The *Procès-verbal* of Non-Agreement shall be deposited with the Secretariat, which shall furnish promptly certified true copies thereof to the Agents of each Government.

### *Article 15*

#### COMMISSION OF THREE MEMBERS

(a) The Agents shall notify their Governments when a *Procès-verbal* of Non-Agreement has been issued by the two members of the Commission, or either of them, in a particular dispute.

(b) The Third Member of the Commission, appointed pursuant to the procedure set forth in Article 83 of the Treaty of Peace, shall preside at all hearings and other sittings in those cases in which a *Procès-verbal* of Non-Agreement has been issued.

(c) Proceedings before the Commission of three members shall be limited to the points on which no agreement has been reached. Agreement on points previously reached by the two members shall be final and non-reviewable.

(d) The Third Member at all times shall have the right to have access to the full and complete record in any case, even though part of the record may include references to a point on which the Representatives of the two Governments have reached an agreement. The Third Member of the Commission, in his discretion, may hear additional oral argument on any point on which no agreement has been reached.

#### *Article 16*

#### DECISIONS OF THE COMMISSION OF THREE MEMBERS

(a) The Commission of three members shall decide by majority vote the points still in dispute. The Decision shall state the points upon which agreement was reached previously by the two members of the Commission and those remaining in dispute for which a Decision of the Commission of three members is required. In all other respects the Decision shall comply with the provisions of Article 13 of these rules.

(b) When a Decision shall not be reached by unanimous vote, the member in the minority shall have the right to deposit with the Secretariat a statement of the reason for his dissent.

(c) The Decision and any dissent thereto shall be communicated to the two Governments according to the provisions of Article 13 of these rules.

#### *Article 17*

#### COMPUTATION OF TIME

Whenever these rules, or an Order of the Commission, establish a certain number of days for the accomplishment of a procedural act, the date from which the period begins to run shall not be counted and the last day of the period shall be counted; and Sundays and legal holidays of either Government shall be excluded, in accordance with a list of such holidays published by the Commission.

#### *Article 18*

#### MODIFICATION OF RULES OF PROCEDURE

The Commission, whether consisting of two or three members, shall have the right to deviate from these Rules of Procedure in individual cases, either by agreement or by a ruling of the majority. These Rules of Procedure may be amended, modified or supplemented at any time by agreement of the Representatives of the two Governments.

Adopted and promulgated in Rome on the 29th day of June, 1950.

*The Representative of the United States  
of America on the Italian-United States  
Conciliation Commission*

*(Signed)* Emmett A. SCANLAN, Jr.

*The Representative of the Italian  
Republic on the Italian-United States  
Conciliation Commission*

*(Signed)* Antonio SORRENTINO

**Decisions<sup>1</sup> of the Italian-United States  
Conciliation Commission**

**CARNELLI CASE—DECISION No. 5 OF 4 MARCH 1952<sup>2</sup>**

Compensation under Article 78 of Peace Treaty—War damages sustained by property in Italy belonging to a United Nations national (the claimant)—Sale, on date prior to entry into force of Peace Treaty, of property in its damaged condition to Italian national—Retention, after sale of property, of right to claim compensation for war damages—Measure of damages—Interest—Disallowance because not correctly claimed—Procedure—Rules of Procedure—Necessity for strict compliance with—Interpretation of treaties—Rules of—Comparison of texts in various languages—Retroactive effect of Treaty provisions.

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Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre subis par des biens en Italie appartenant au réclamant, ressortissant d'une Nation Unie — Biens endommagés vendus à un ressortissant italien, à une date antérieure à l'entrée en vigueur du Traité de Paix — Persistance du droit du réclamant de se prévaloir de l'indemnité prévue pour dommages de guerre — Evaluation des dommages — Intérêts non régulièrement demandés refusés — Procédure — Nécessité d'une stricte observation du Règlement de procédure — Interprétation des traités — Règles d'interprétation — Comparaison des textes dans différentes langues — Effet rétroactif des dispositions du Traité.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy

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<sup>1</sup> The original English texts of these decisions have been taken from the *Collection of decisions of the Italian-United States Conciliation Commission established under Article 83 of the Peace Treaty with Italy*. This Collection, published in mimeographed form, in six volumes, under the auspices of the United States Representative on the Italian-United States Conciliation Commission, has been provided by the Permanent Representative of the United States to the United Nations.

Extracts from a number of these decisions may be found in: *International Law Reports*, Lauterpacht, vol. 1955, 1956, 1957, 1958 (I). See also: *American Journal of International Law*, vol. 50, 1956, p. 150; vol. 51, 1957, p. 436; vol. 53, 1959, p. 944; *Annuaire français de droit international*, 1956, p. 430; 1959, p. 313; *Revue générale de droit international public*, 1959, p. 125; *Rivista di diritto internazionale*, 1956, p. 88.

<sup>2</sup> *Collection of decisions*, vol. I, case No. 1.

pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents and evidence and the arguments and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers, and Mr. Carlos J. Warner, Agents of the United States of America.

#### STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of (Mrs.) Elena Iannone Carnelli, and the Government of the Italian Republic with regard to the application and interpretation of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947. The object of the dispute is to obtain on behalf of (Mrs.) Elena Iannone Carnelli (hereinafter referred to as the "claimant") indemnity for war damages to her interest in real and personal property. Because of its importance in the instant case, the relief requested in the Petition is quoted in full:

Wherefore, the United States of America requests that the Commission:

(a) Decide that the claimant is entitled to receive from the Italian Republic, a sum sufficient at the time of payment to make good the loss suffered, which sum is estimated to be on September 28, 1943, 185,300 lire, subject to the necessary adjustment for variation in value between 1943 and the final date of payment.

(b) Order that the costs of and incidental to this claim be borne by the Italian Republic.

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

The material facts are as follows:

The claimant was born in Italy, and by naturalization on March 18, 1932 in the State of New York became a national of the United States of America and at all times since that date has retained such nationality.

On April 3, 1937, the claimant acquired sole ownership of certain real property located on Corso Vittorio Emanuele, in the town of Nocera Inferiore, Province of Salerno, Italy, by a Deed of Gift from her father which was recorded and transcribed according to Italian law at Nocera Inferiore on 6 August 1937. The claimant also was the owner of certain furniture in the building described above, but it was admitted that the value of such personal property was nominal in comparison to the value of the real property.

Between 12 September and 28 September 1943, the property owned by the claimant was heavily damaged and partially destroyed due to military operations. In December 1943, Mrs. Olga Prota, acting on behalf of the claimant, filed a claim for war damages under Italian law with the Fiscal Office—Technical Division (Ufficio Tecnico Erariale) of the Italian Ministry of the Treasury in the province of Salerno, wherein she stated that the damage to the property owned by the claimant (in translation) "as shown by the expert technical survey prepared by Engineer Ruggiero Aniello, which is attached hereto, amounts to a total of 179,000 lire . . .".

On 5 July 1944 the claimant sold the property in its damaged condition to

Mr. Giuseppe Parola fu Romolo, an Italian national, for thirty thousand (30,000) lire, as shown by the Bill of Sale, a photostatic copy of which was submitted in evidence. The Bill of Sale was recorded and transcribed according to Italian law in Nocera Inferiore on 18 July 1944. The Bill of Sale reads in part (in translation) as follows:

The above described real property has been recorded in the Land Registry Office of Nocera Inferiore under Entry No. 3415 in the name of said Elena Iannone di Francesco, . . . That said portion of the building . . . has been almost completely destroyed by bombardment, which took place in September of last year, as a result of the war, and there still remains one storey in a hazardous condition, only one room on the second floor facing Corso Vittorio Emanuele which is cracked and damaged and should be demolished, and two inside rooms are also badly damaged.

Declarant Elena Iannone Carnelli also states that she has no interest in retaining said property, which is almost completely destroyed, since she must return to the United States of America, and has decided to sell it, reserving unto herself the right to eventual indemnities which may be paid by the State for damages caused by the bombardment . . .

The Bill of Sale further states (in translation):

It is expressly agreed upon between the parties that eventual indemnities, which may be paid by the Italian Government for war damages resulting from the bombardment in September of last year, belong and are due exclusively to the seller, Elena Iannone.

On 15 September 1947 the Treaty of Peace with Italy entered into force.

On 31 December 1948 the Embassy of the United States of America in Rome, on behalf of the claimant, submitted to the Ministry of the Treasury of the Italian Government a claim for war damages based upon Article 78 of the Treaty of Peace.

On 5 October 1949 the Ministry of the Treasury of the Italian Government advised the Embassy of the United States of America in Rome that the claim was rejected on the ground that the claimant was not the owner of the damaged property on the date that the Treaty of Peace came into force and hence was not entitled to compensation under Article 78. The Embassy of the United States did not agree that Article 78 was inapplicable in the case and on 14 October 1949 informed the Italian Government that a dispute had arisen "which, in due time, will be submitted to the Conciliation Commission established under Article 83 of the Treaty of Peace".

On 28 August 1950 the Agent of the United States of America filed a Petition on behalf of the claimant with the secretariat of the Commission, and thereafter pleadings and documents were submitted by the Agents of the two Governments as provided for under the Rules of Procedure and the Orders of the Commission.

None of the foregoing facts with regard to the ownership of the property and the occurrence of the loss is controverted or denied by the Government of the Italian Republic; and the Commission finds that sufficient evidence has been submitted to substantiate them. The only question of fact which is controverted is the evidentiary value to be given to the survey made by Engineer Ruggiero Aniello and which the claimant states was attached to the claim filed on her behalf by Mrs. Olga Prota with the Fiscal Office—Technical Division (Ufficio Tecnico Erariale) of the Italian Ministry of the Treasury in the province of Salerno in December 1943. This question will be considered later in this opinion.

It is the contention of the United States of America that the claimant is entitled to an indemnity for war damages from the Italian Government under

Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof. Paragraph 4 (a) of Article 78 reads as follows:

... In cases . . . where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in Lire to the extent of two-thirds of the sum necessary, at the date of payment, . . . to make good the loss suffered.

In paragraph 5 of the Answer the Agent of the Italian Republic states the position of his Government (in translation) as follows:

There is no doubt that a citizen of the United Nations, who was the owner of property in Italy at the moment of entry into force of the Treaty of Peace (in which for the first time there is established the ground for the international obligation of the Italian State) has the right to indemnification for the damages to which reference is made.

If, on the other hand, a national of the United Nations has legally ceased to be the owner of the property in question prior to the entry into force of the Treaty of Peace, the provisions that assure the indemnification can not find their application; there is lacking in fact the relation of ownership to the damaged goods which is an indispensable requisite for the application of Article 78.

In essence, therefore, the legal issue in this dispute is whether or not the claimant, whose property was damaged as a result of the war, is precluded from compensation under Article 78 of the Treaty of Peace because on a date prior to the entry into force of the Treaty of Peace she sold the property in its damaged condition to a third party who was not a United Nations national.

It is not disputed that the claimant is a "United Nations national", within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace; nor is there any question that, "as a result of the war," the claimant "suffered a loss by reason of injury or damage to the property in Italy". Hence it would appear that the claimant is entitled to compensation from the Italian Government under paragraph 4 (a) of Article 78 unless the defence raised by the Italian Government is valid, namely, that since the claimant was not the owner of the real and personal property in question on 15 September 1947, the date when the Treaty of Peace went into force, she can not claim compensation under Article 78 for war damages to property owned by her at the time the damage was sustained in September 1943.

In paragraph 2 of the Answer, the Agent of the Italian Republic has propounded the question of law in this dispute as follows (in translation):

... Whether the Government of the Italian Republic acted in conformity with the Treaty of Peace in refusing to take into consideration the claim based on Article 78, paragraph 4(a), on the ground that the damaged property for which indemnity has been sought had ceased to be the property of a national of the United States prior to the entry into force of the Treaty of Peace.

The answer to this question of law so clearly stated by the Italian Agent, and hence the conclusion of law which is determinative of the dispute in this case, is that the Government of the Italian Republic did not act in conformity with the Treaty of Peace when it refused to take into consideration this claim. In fact, the position taken by the Italian Government is contrary to the provisions of paragraph 9 (b) of Article 78 of the Treaty of Peace, which defines the word "owner", as used in Article 78 as follows:

9 (b) "Owner" means the United Nations national, as defined in sub-paragraph (a) above, who is entitled to the property in question, and includes a suc-

cessor of the owner, provided that the successor is also a United Nations national as defined in sub-paragraph (a). *If the successor has purchased the property in its damaged state, the transferor shall retain his rights to compensation under this Article, without prejudice to obligations between the transferor and the purchaser under domestic law.* (Emphasis supplied).

Although the word "owner" does not appear in paragraph (a) of Article 78, which is a specific provision of Article 78 fixing the responsibility of the Italian Government for the restoration to complete good order of property returned to United Nations nationals or for the payment of compensation in cases where a United Nations national has suffered a loss by reason of injury or damage to property in Italy, the Commission has no doubt that the relation between the United Nations national and the property in Italy, as described in paragraph 4 (a) of Article 78 includes the relation of ownership; and hence the absence of the word "owner" itself in paragraph 4 (a) of Article 78 by no means signifies the absence of the *meaning* of the word "owner" in this paragraph. This is quite evident from a reading of the text of paragraph 4 (a) itself.

The definition of "owner" included in paragraph 9 (b) of Article 78 was not inserted to define this word for the sake of the sole instance in which it is expressly used in Article 78, that is, in paragraph 8 of Article 78 which reads as follows:

The owner of the property concerned and the Italian Government may agree upon arrangements in lieu of the provisions of this Article.

but was inserted among the definition of terms as used in Article 78 in order that the definition might be applied in every instance throughout Article 78 in which the concept of "owner" was involved.

In defining the meaning of "owner", paragraph 9 (b) of Article 78 also determines the United Nations national in whose name the claim for compensation or indemnity must be presented to the Italian Government where there has been a change in ownership of the property. In determining the effect, if any, of a change of ownership, it is necessary to consider the meaning of the word "successor" as used in this paragraph.

In the first sentence of paragraph 9 (b) of Article 78, "successor" is used in the broadest sense of the word and includes a successor through inheritance, a successor through gift, or a successor through any other legal means of acquiring property. The second sentence of paragraph 9 (b) of Article 78 refers only to a "successor" by means of purchase. "If the successor has purchased . . . , the transferor shall retain his rights . . .", and therefore the meaning of "successor" as used in the second sentence of this paragraph is by no means identical with the meaning of "successor" as used in the first sentence of the same paragraph. Moreover, the second sentence provides the one exception to the specific requirement contained in the first sentence of paragraph 9 (b), that the "successor" who has acquired the property must be a United Nations national within the meaning of this term as defined in paragraph 9 (a) of Article 78. The exception to this specific requirement occurs where the property in its damaged state has been transferred to another through purchase; it is immaterial to the right of the seller to compensation or indemnity under Article 78 whether the purchaser of the property in its damaged state was or was not a United Nations national.

The Commission considers that the last sentence of paragraph 9 (b) of Article 78 is clear and unequivocal in its terms and that it leaves no reasonable basis for argument as to its construction. In the instant case, an Italian national purchased the property of the claimant on July 5, 1944; the property had sus-

tained heavy damages during the military operations of September 3, 1943 and was in a damaged state on the date the sale was made. Therefore, the claimant, as the transferor of property in its damaged state, has the right to compensation under Article 78, paragraph 4 (a), because it is a right specifically retained to her in paragraph 9 (b) of Article 78.

It should be particularly noted that the last sentence of paragraph 9 (b) of Article 78 reads "If the successor *has purchased . . .*" in the authentic English language version of the Treaty, "*Si le successeur a acheté . . .*" in the authentic French language version of the Treaty, and "*Se il successore ha acquistato . . .*" in the official but unauthentic Italian language version of the Treaty. In each language, the present perfect tense of the verb "to purchase" has been used. Thus it is clear from the text of the Treaty itself that at the moment the Treaty of Peace went into force, those United Nations nationals who might have sold their property in its damaged state prior to the entrance into force of the Treaty of Peace were not to lose their rights to compensation under Article 78.

Moreover, the provisions of paragraph 9 (b) of Article 78 are entirely in accordance with logic. It can not be presumed that the consideration paid by a purchaser of property in a damaged state would represent anything more than the value of the property in its damaged condition on the date the sale was made. In this case the selling price cannot be considered as representing the value of the undamaged building and land as it existed prior to the date on which the damage occurred. Since the selling price of the property in a damaged condition could not represent the value of the undamaged property, the seller would still have suffered a loss by reason of injury or damage to the property for which she had not been compensated.

The Agent of the Italian Government contends that the retroactivity of a provision of law must always be expressly established in the law itself and argues the application of this legal principle to the provisions of Article 78 of the Treaty of Peace. The retroaction of the second sentence of paragraph 9 (b) of Article 78 is clear insofar as it provides that the right to compensation under Article 78 shall be retained by one who has sold his property in its damaged state. The Agent of the Italian Republic further contends that there are no elements to fix the limits of what he describes as the retroactive operation of Article 78. If it is proper to describe Article 78 as having retroactive operation, then the limits of the rights of the claimant in this case are fixed as of the date on which the damage occurred to the property which is the subject of this claim, a date which it should be noted is subsequent to June 10, 1940. If the property had been sold before it was damaged the seller who is the claimant here would not have met the conditions prescribed in the last sentence of paragraph 9 (b) of Article 78, namely, the seller would not have sold the property in its *damaged* state and hence would have no right to compensation.

The Agent of the Italian Republic also argues that the rights of the claimant to receive compensation under Article 78 ceased to exist and are "past" and not "present" existing rights, since she sold her property in its damaged state prior to the entrance into force of the Treaty of Peace. There is here a confusion between the physical property and the rights of ownership in the physical property which the Commission cannot be induced to follow.

The Bill of Sale by which the claimant transferred her interest in the property in its damaged state to a third party provided (in translation):

It is expressly agreed upon between the parties that eventual indemnities, which may be paid by the Italian Government for war damages resulting from the bombardment in September of last year, belong and are exclusively due to the seller, Elena Iannone.

This provision of the Bill of Sale, while indicative of the intention of the buyer and the seller that the seller who is the claimant here reserved unto herself the right to claim indemnity for war damages from the Italian Government, is not determinative of her right to compensation under paragraph 4 (a) of Article 78. The right of the claimant is established by the provisions of paragraph 9 (b) of Article 78 (*supra*). Hence it is not necessary in reaching a decision here to determine the legal effect of the above-quoted reservation in the Bill of Sale.

The Agent of the Italian Government has not cited any legal authorities which support his contentions. The Agent of the United States Government has cited certain cases decided by international and Italian tribunals which it is not deemed necessary to discuss, inasmuch as those cases do not deal with an interpretation of the Treaty of Peace with Italy and inasmuch as the Commission has been guided in its decision of this point by the clear language of the Treaty itself.

The right of the claimant to receive compensation having been established, it is necessary to determine the amount. In the Petition the claimant asked "for a sum sufficient at the time of payment to make good the loss suffered, which sum is established to be on September 28, 1943, one hundred eighty five thousand, three hundred (185,300) lire, subject to necessary adjustments for value between 1943 and the final date of payment".

It appears from a study of the record that the amount of the claimant's alleged damages as of September 28, 1943 is actually one hundred and seventy nine thousand (179,000) lire rather than one hundred eighty five thousand, three hundred (185,300) lire as shown in the Petition. This is conceded by the Agent of the United States in the Brief filed at the conclusion of this case.

The Agent of the Italian Republic in the Answer originally filed in this case did not dispute the claimed amount. However, in supplemental Pleadings filed in compliance with Orders of this Commission, it is stated that according to the computation made by the Italian Government, the war damages suffered by the claimant may be valued at four hundred thousand (400,000) lire, at the 1950 rate of value. The Agent of the Italian Government has not presented any evidence in this case to show what criteria of evaluation were applied in establishing this estimate of damages of the property in question, and hence the Commission has been unable to determine the exactness of the criteria in this specific case.

The claimed amount of one hundred seventy nine thousand (179,000) lire as of September 28, 1943 is based upon the technical survey prepared by Engineer Ruggiero Aniello which in the claim for war damages (*denuncia*) filed in behalf of the claimant by Mrs. Olga Prota with the Fiscal Office—Technical Division (Ufficio Tecnico Erariale) of the Italian Ministry of the Treasury in the province of Salerno in December 1943, is identified and referred to in said *denuncia* as an attached document. The copy of the *denuncia* (without the technical survey) submitted in evidence bears the notation "Received" together with an illegible signature and the official stamp of "Ufficio Tecnico Erariale di Salerno". Pursuant to an Order of the Commission, the Agent of the Italian Government sought to obtain the original documents from the aforementioned office in Salerno but was advised by the Ministry of the Treasury on May 15, 1951 that a search revealed no record of the claim. Thereafter, the Agent of the United States submitted in evidence a letter dated February 7, 1951 from Engineer Ruggiero Aniello stating that he no longer is in possession of a copy of the technical survey of damages (*perizia*) which had been filed in 1943 with the Ufficio Tecnico Erariale di Salerno.

On the basis of available evidence, there is every reason to believe that a

technical survey of the damaged property was made by Engineer Ruggiero Aniello and that this survey was filed with the proper Italian authorities in Salerno in December, 1943. Not only is there no proof to the contrary but the Agent of the Italian Government has not maintained that these facts are not true.

The fact that the survey was made promptly by a local engineer in the town of Nocera Inferiore and thereafter submitted to and receipt acknowledged thereof by signature and the seal of the Ufficio Tecnico Erariale di Salerno, all within the period of three months after the damage occurred; that the engineer who prepared the survey, Ruggiero Aniello, is still living in the town of Nocera Inferiore and could have been called to testify under cross-examination by the Agent of the Italian Government; that no evidence casting any doubt on the making of the survey or the contents thereof was introduced in this case, all provide a sufficient basis of credibility for the Commission to find that as a result of military operations the claimant sustained damages to the building owned by her in the amount of one hundred seventy nine thousand (179,000) lire, as of September 28, 1943.

The Commission does not find that sufficient evidence has been introduced in this case to establish the quantity, condition or value of the furniture or other personal property owned by the claimant which was described in the Petition as being located in the building and partially destroyed as a result of the same military operations. It was admittedly of only nominal value.

The next question which must be resolved—and which presents certain technical difficulties—is the manner whereby the sum of one hundred seventy nine thousand (179,000) lire as of September 28, 1943, can properly be converted to 1952 values. This is necessary because paragraph 4 (a) of Article 78 of the Treaty of Peace provides that the United Nations national who has suffered a loss by reason of injury or damage to property in Italy "... shall receive from the Italian Government compensation in Lire to the extent of two-thirds of the sum necessary, *at the date of payment*, to purchase similar property or to make good the loss suffered". (Emphasis supplied.)

Various intricate formulae could possibly be used to achieve the desired results. However, after due consideration of the arguments of the Agents of the two Governments and of available statistics issued by the Institute of Central Statistics, an Italian Government Agency (which for all regions of Italy are not considered complete for that period during which military operations were conducted in Italy), the Commission believes that substantial justice will be done in this case by applying a basic co-efficient of twenty (20) in order to reflect the impact of inflation in the cost of labour and materials between September 1943 and the date of this decision.

The Commission therefore finds that the amount necessary to make good the loss suffered by the claimant at the date of this decision is one hundred seventy nine thousand (179,000) lire multiplied by twenty (20); that is three million five hundred and eighty thousand (3,580,000) lire. Under the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace, and the Agreements between the two Governments supplemental thereto and interpretative thereof, the claimant is entitled to receive as compensation two-thirds of this sum, namely, two million three hundred eighty six thousand six hundred and sixty seven (2,386,667) lire.

The second request for relief contained in the Petition filed by the Agent of the United States is for an Order regarding costs (see Statement of the Case, *supra*). The Agents of the two Governments state in the Brief and the Reply Brief that the question of the liability for costs is not involved in this dispute and no costs will be allowed in this case by the Commission.

The third request for relief contained in the Petition submitted in this case by the Agent of the United States of America is a general request for "such further or other relief as may be just and equitable" (see statement of the Case, *supra*). In the Brief submitted at the conclusion of the case, and the Commission desires to emphasize the manner in which the request was raised for the first time in this case, the Agent of the United States requests a determination by the Commission that the giving of "such further or other relief as may be just and equitable" calls for the payment to the claimant by the Italian Government "of an appropriate amount of interest". The importance attached to the question thus raised by the Agent of the United States of America is apparent from the fact that over one-third of the lengthy Brief which he has submitted in this case is devoted to a discussion of the responsibility of the Italian Government for the payment of interest on the claim (to be distinguished from the allowance of interest on the award of the Commission) at the rate of five percent (5%) to run from the date on which the claim was presented to the Italian Government or at least from three months after the date on which the claim was presented to the Italian Government.

The responsibility of Italy for the payment of interest on the principal amounts claimed by nationals of the United Nations under Article 78 of the Treaty of Peace with Italy is an important question, in view of the large numbers of claims and the large amounts of money which are involved. None of the Conciliation Commissions which have been established between Italy and United Nations Governments has had occasion to pass on this important question of interest on claims, as distinguished from interest on the awards of the Commission, and this Conciliation Commission does not deem it necessary at this time to approach the question of the responsibility of the Italian Government for the payment of interest on claims presented by nationals of the United States under Article 78 of the Treaty of Peace.

The request for interest contained in the Brief presented by the Agent of the United States must fail because the Commission does not believe that the question of interest on the claim is before it in the instant case; this is a preliminary question to any consideration of the more general question of the responsibility of the Italian Government for the payment of interest on the claim.

Article 7 (a) of the Rules of Procedure of this Commission adopted and promulgated in Rome on June 29, 1950, by the Representatives of the two Governments provides that proceedings before the Commission shall be initiated by the formal filing of a Petition signed by the Agent of the claiming Government, and that the Petition *must contain*:

- (i) the name and address of the physical or juridical person on whose behalf the proceedings are initiated;
- (ii) the name and address of the legal representative, if any, of the person on whose behalf the Agent of the claiming Government initiates the proceedings, together with documentary evidence of the authority of such legal representative to act on behalf of his principal;
- (iii) a clear and concise statement of the facts in the case; each material allegation should be set forth in a separate paragraph in so far as possible;
- (iv) a clear and concise statement of the principles of law upon which the dispute is based;
- (v) a complete statement setting forth the purpose of the Petition and the relief requested.

The fifth requisite of Article 7 of the Rules of Procedure is clear and unequivocal. There must be contained in the Petition "a complete statement setting forth the purpose of the Petition and the relief requested".

The Petition presented by the Agent of the United States of America on behalf of the claimant herein was deposited with the joint Secretariat on August 28, 1950, about two months after the promulgation of the Rules of Procedure. The relief requested in the Petition has been set out in full in the Statement of the Case, *supra*. There is no direct or indirect reference to interest in the Petition. The request for "such further or other relief as may be just and equitable" contained in the Petition is not a statement which sets forth that one of the purposes of the Petition is the obtaining of interest on the claim or that one of the measures of relief requested is the granting of interest as part of the award.

Inasmuch as the desire for clearly informing the Italian Government of the nature of the case and the relief requested by the Government of the United States was one of the reasons, if not the principal reason, for the requirement laid down in Article 7 (a) of the Rules of Procedure, including the specific requirement that the Petition shall contain a complete statement setting forth the purposes of the Petition and the relief requested, the request for "such further or other relief as may be just and equitable" contained in the Petition submitted in the instant case by no means achieves the purpose of informing the Italian Government of a request for interest.

That the Italian Government did not infer from the request for "such further or other relief as may be just and equitable" that the Government of the United States was making a request for interest appears clearly from the Answer and the supplemental Answer submitted by the Agent of the Italian Government. When the Agent of the United States for the first time raised the question of interest in the Brief by specifically requesting that interest be allowed on the claim, the Reply Brief of the Italian Government denies vigorously the responsibility of the Italian Government for interests. If the Petition had included a clear request for interest, it is probable that the same vigorous denial would have been asserted by the Agent of the Italian Government in his Answer or supplemental Answer to the Petition, and the issue would have been clearly developed by the Agents of the two Governments prior to concluding the formal submission of proof. In any event, the Agent of the Italian Government denied the responsibility of his Government for the payment of interest as promptly as he could after the Agent of the United States had informed him in the Brief that interest was being requested.

The Agent of the United States at no time requested this Commission to permit the amending of the Petition in this dispute in order to include an express request for interest. It was not until July 16, 1951, that the Commission issued an Order, as requested by the Agent of the United States, that formal submission of proof had been concluded by the Agents of the two Governments. In that Order a period of time was granted to the Agent of the United States to file a Brief in support of his Petition.

Article 11 of the Rules of Procedure of the Commission, entitled "Briefs and Oral Arguments", makes it clear that Briefs and oral arguments were not intended to include either amendments or additions to the Petitions, Answers, or any other pleadings. The request for interest contained in the Brief in this case is an addition to the request contained in the Petition and cannot be deemed to have been submitted in accordance with the Rules of Procedure of the Commission. It is, therefore, not a request which can be considered by the Commission.

Although Article 18 of the Rules of Procedure reserves to the Commission the right to deviate from these Rules in individual cases, the Commission is satisfied that the Rules of Procedure are in conformity with justice and equity as required by the express provision of Article 83, paragraph 3, of the Treaty of Peace. Therefore, no reason is perceived in the instant case for any deviation

under Article 18 of the Rules from the requirements established in Article 7 (a) of the Rules of Procedure, particularly since there is a lack of any evidence in the record that a request for interest on the claim has ever been raised between the two Governments either as a general question under Article 78 or in this specific case at any time prior to the presentation of the Brief in this case by the Agent of the United States of America.

The Commission, having reached its decision for the reasons set forth above, does not deem it necessary to consider at this time the other arguments presented by the Agents of the two Governments on the general question of the responsibility of Italy for interest on claims presented under Article 78 of the Treaty of Peace.

No evidence having been submitted that any previous payment has been made to the claimant for war damages to the property which is the subject of this claim, the Commission, acting in the spirit of conciliation,

HEREBY DECIDES:

1. That in this case there exists an international obligation of the Government of the Italian Republic to pay the sum of two million, three hundred eighty six thousand, six hundred sixty seven (2,386,677) lire under Article 78 of the Treaty of Peace for damages to real and personal property in Italy owned by Mrs. Elena Iannone Carnelli, a national of the United States of America.

2. That payment of this sum in Lire shall be made in Italy by the Government of the Italian Republic upon request of the Government of the United States of America within thirty (30) days from the date that a request for payment under this Decision is presented to the Government of the Italian Republic.

3. That the payment of this sum in lire shall be made by the Government of the Italian Republic free of any levies, taxes or other charges and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace.

4. That in this case an order regarding costs is not required.

5. That in this case the question of interest on the claim is not a question which is properly before the Commission under the Rules of Procedure.

This Decision is final and binding from the date it is deposited with the Secretariat of the Commission; and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 4th day of March, 1952.

*The Representative of the United States  
of America on the  
Italian-United States  
Conciliation Commission*

Emmett A. SCANLAN, Jr.

*The Representative of the Italian  
Republic on the  
Italian-United States  
Conciliation Commission*

Antonio SORRENTINO

**HOFFMAN CASE—DECISION No. 7 OF  
11 APRIL 1952<sup>1</sup>**

Claim for compensation under Article 78 of Peace Treaty—Loss of property in Italy belonging to a United Nations national—Theft by unknown persons during period following cessation of hostilities—Whether “as a result of the war”—Interpretation of treaties—Rules of—Absence of a sufficiently direct causal relationship between the war and the occurrence which caused the loss—Rejection of claim.

Demande en indemnité au titre de l'article 78 du Traité de Paix — Perte de biens en Italie appartenant à un ressortissant d'une Nation Unie — Vol commis après la cessation des hostilités par des personnes inconnues — Question de savoir si tel vol est considéré comme résultant "du fait de la guerre" — Interprétation des traités — Règles d'interprétation — Absence de lien de causalité suffisamment direct entre la guerre et le fait qui a causé la perte — Rejet de la demande.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents, evidence and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case.

Appearances: Mr. Stefano Varvesi, Deputy Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

#### STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of Mr. Erich W. A. Hoffmann, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947. The object of the dispute is to obtain on behalf of Mr. Erich W. A. Hoffmann (hereinafter referred to as the claimant) indemnity for the loss sustained by him in 1946 when certain of his personal property was stolen from a United States Army warehouse which at that time was located at the Bagnoli Railhead, Naples, Italy, and for such further or other relief as may be just and equitable.

The material facts are as follows:

Mr. Erich W. A. Hoffmann is a national of the United States of America

<sup>1</sup> Collection of decisions, vol. I, p. 11.

by birth; and the fact that the claimant is a "United Nations national" within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace is not in dispute.

The claimant is a Foreign Service Staff Officer and prior to January, 1946 was assigned as Vice-Consul to the Diplomatic Mission of the Government of the United States of America at Tirana, Albania. In January, 1946 a communist-dominated régime obtained control of Albania and inaugurated a series of moves against certain foreign Missions which at one time assumed dangerous proportions. This situation reached its height in March, 1946 and resulted in the issuance of instructions by the Department of State to its Chief of Mission in Tirana, Albania authorizing the sending to Italy of members of the Mission and the closing in Albania of the Diplomatic Mission of the United States of America if necessary. As a result of this situation, the claimant sent some of his personal effects to Italy for storage and safe-keeping. The American Consulate General in Naples, in March, 1946, received these personal effects and arranged for their storage in the United States Army warehouse located at the Bagnoli Railhead, Naples.

On the night of September 7, 1946 unknown persons forcibly gained entry into this United States Army warehouse, broke into and pilfered two of the storage cases containing the personal effects of the claimant. Property owned by the United States Army was also stolen. The theft was reported to the Criminal Investigation Division of the United States Army and to the American Consulate General in Naples. From the record it appears that the theft was not reported to the Italian police authorities, that none of the property was recovered, and that the thief or thieves were not apprehended. The claimant valued the property which he lost in this manner at Two Thousand One Hundred Thirty-one and 13/100 Dollars (\$2,131.13), based on his cost at the time of purchase.

On January 5, 1950 the Embassy of the United States of America in Rome, on behalf of the claimant, submitted to the Ministry of the Treasury of the Italian Republic this claim based on Article 78 of the Treaty of Peace with Italy and the Agreements supplemental thereto or interpretative thereof.

The Ministry of the Treasury of the Italian Republic stated in its letter dated August 22, 1950 that the claim could not be accepted because the loss involved resulted from the theft of personal effects deposited in behalf of the claimant in an American military warehouse and that the loss did not appear to create a right to compensation under the provisions of Article 78 of the Treaty of Peace.

The Embassy of the United States of America in its letter of March 22, 1951 informed the Ministry of the Treasury of the Italian Republic that it could not accept the position taken by the Italian authorities, and made reservation to submit the dispute to the Conciliation Commission.

On April 27, 1951 the Agent of the Government of the United States of America filed the Petition in this case. Having premised the statement of the case, the Petition cites paragraph 4(a) of Article 78 of the Treaty of Peace as establishing the right to compensation, and concludes by requesting the Conciliation Commission to:

(a) decide that the claimant is entitled to receive from the Government of the Italian Republic the sum of Two Thousand, One Hundred Thirty-one and 13/100 Dollars (\$2,131.13), subject to any necessary adjustment for a variation in values between November 8, 1949 (the date when the Affidavit of Claim was prepared) and the date of payment;

(b) order that the costs and incidental to this claim be borne by the Italian Republic; and

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

On June 6, 1951 the Deputy Agent of the Government of the Italian Republic filed an Answer in this case requesting the Commission to reject the first request contained in the Petition because the right of the claimant to compensation under paragraph 4 (a) of Article 78 of the Treaty of Peace did not exist; and to reject the second request contained in the Petition because the request regarding costs is in conflict with paragraph 4 of Article 83 of the Treaty of Peace.

On June 26, 1951 the Agent of the Government of the United States of America requested the Commission to declare that the formal submission of proof had been concluded and stated the desire of his Government to submit a Brief.

In its Order of July 23, 1951 the Commission provided for the transfer of the original Statement of Claim and all documents attached thereto from the Ministry of the Treasury of the Italian Government to the secretariat of the Commission for inclusion in the record in this case. Thereafter, the Commission declared that the formal submission of proof in this case had been concluded and established a time-limit for the Agents of the two Governments to submit Briefs.

The Agent of the Government of the United States of America filed his Brief on October 5, 1951; and the Deputy Agent of the Government of the Italian Republic submitted a Reply Brief on November 29, 1951. In their Briefs neither Agent disputes the facts; but each Agent maintains the principles of law which had been set forth in the Petition and in the Answer, each Agent, insisting on the conclusions previously formulated. The Agent of the United States of America admits in the Brief of his Government that no expenses had been incurred in Italy by the claimant in establishing this claim, but maintains that the claimant is entitled to interest at five per cent (5%) from January 5, 1950 (the date of the filing of the claim), or at least from March 5, 1950, as part of the request contained in the Petition "for such further or other relief as may be just and equitable".

The Commission declares that the right to compensation in this case must be predicated upon three requisites, and that each of these requisites must be established:

(1) That the claimant is a "United Nations national" within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace;

(2) That the claimant has suffered a loss by reason of injury or damage to property in Italy, as provided for in paragraph 4 (a) of Article 78 of the Treaty; and

(3) That the loss is "as a result of the war" within the meaning of this phrase as used in paragraph 4 (a) of Article 78 of the Treaty of Peace.

With reference to the first and second of these requisites, the facts are not contested by either Government. However, paragraph 4 (a) of Article 78 of the Treaty of Peace provides that:

. . . In cases where property cannot be returned or where, *as a result of the war*, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in Lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . (Emphasis supplied.)

In the Brief of the Government of the United States of America it is maintained that:

The loss, while it may not bear the same direct relationship to an act of war as a loss sustained as a direct consequence of military operations, . . . is nevertheless a loss attributable to the war which can properly be classified as one occurring "as a result of the war" . . . [Br., p. 9.];

and, further, that:

. . . the theft from a United States Army warehouse, performed by a presumably well organized band in the difficult times following the cessation of hostilities and in the period when criminal activities reached their highest, is a theft that, in the absence of evidence to the contrary, can be logically linked to the war so that the loss suffered thereby can be said to be one suffered "as a result of the war". [Br., p. 13.]

In support thereof, the Agent of the United States of America cites certain Italian laws and decisions of the Italian courts regarding war damages.

But these conclusions are disputed by the Agent of the Italian Republic who, in the Brief of his Government, argues in substance:

(a) That the responsibility of the Government of the Italian Republic under paragraph 4 (a) of Article 78 of the Treaty of Peace arises only in those cases in which it is shown that the loss suffered by a United Nations national is directly dependent upon an act of war; that the loss suffered by the claimant is the result of a common theft, and the fact that there was an increase in delinquency in Naples during 1946 can not give an act which is a common theft the characteristics of an act of war;

(b) That, since the theft was perpetrated on September 7, 1946, there is lacking in this case any relationship with an act of war because war operations had ceased some time before; and

(c) That paragraph 1 of Article 78 of the Treaty of Peace (to which specific reference is made in paragraph 4 (a) of Article 78) provides compensation for damages to property of United Nations nationals located in Italy on June 10, 1940, but not for damages to such property brought into Italy subsequent to that date.

The Commission observes that the phrase "as a result of the war", as used in paragraph 4 (a) of Article 78 of the Treaty of Peace, could be subject to various interpretations and therefore must be construed in the light of all the facts in a particular case. The Commission finds that there must be a sufficiently direct causal relationship between the war and the occurrence which causes the loss. The obligation assumed by Italy is the payment of compensation for a loss sustained by reason of injury or damage to property in Italy which is attributable to the existence of a state of war; and a loss sustained as a result of an occurrence in which the war was not a determinate factor can not be construed as creating an obligation under the provisions of paragraph 4 (a) of Article 78.

In this case the claimant was the victim of a felonious taking by unknown persons of his property which had been stored in Naples in a United States Army warehouse under the control of American personnel. Hypothetically, the social conditions existing shortly after the cessation of hostilities may have resulted in an increase in the frequency of theft losses in Naples, but this is not the point which must be determined in this case. The Commission holds that the requests contained in the Petition must be rejected because the loss sustained by the claimant was the result of an occurrence which does not have a sufficiently direct causal relationship to the war as to be "as a result of the war".

Having reached this conclusion, the Commission finds that it is unnecessary

to pass upon the other arguments advanced by the Agents of the two Governments, and

**HEREBY DECIDES:**

1. That the requests presented in the Petition filed on behalf of Mr. Erich W. A. Hoffmann by the Government of the United States of America are rejected; and

2. That this Decision is final and binding from the date it is deposited with the Secretariat of the Commission.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 11th day of April, 1952.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

(Signed) Emmett A. SCANLAN, Jr.

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

(Signed) Antonio SORRENTINO

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CACCAMESE CASE—DECISION No. 8 OF  
11 APRIL 1952<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—War damages—United Nations national acquired, by inheritance from Italian nationals, ownership of property, at same moment that such property was damaged—Whether entitled to receive compensation under Treaty—Rejection of claim for absence of evidence of condition of property at time of inheritance.

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Demande d'indemnité au titre de l'article 78 du Traité de Paix — Dommages de guerre — Bien appartenant à un ressortissant italien, dévolu par voie de succession et au moment même du dommage à un ressortissant d'une Nation Unie — Question de savoir si ce dernier a droit à indemnité en vertu du Traité — Rejet de la demande pour défaut de preuve de la condition du bien au moment de sa dévolution au réclamant.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 10.

pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings documents, evidence and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case.

Appearances: Mr. Stefano Varvesi, Deputy Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Charles E. Higdon, Agents of the United States of America.

#### STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of Giuseppe Caccamese, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the Agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of Giuseppe Caccamese (hereinafter referred to as the claimant) indemnity for losses suffered as a result of the war under circumstances which will be hereinafter fully described and for such further or other relief as may be just and equitable.

The material facts are as follows:

The claimant, Giuseppe Caccamese, was born at Lercara Friddi, Province of Palermo, Italy; he became a national of the United States of America by naturalization on March 30, 1928 and the fact that the claimant is a "United Nations national" within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace is not in dispute.

In his affidavit of claim the claimant states that his brother, Rosolino Caccamese, and his brother's wife, Francesco Vicari Caccamese, owned jointly certain real and personal property which was heavily damaged during an aerial bombardment on July 18, 1943. The property is described as being a building used as a hotel, restaurant and wine shop, adequately stocked and furnished, located on Via Piano Giglio near the railroad station in Lercara Friddi, Province of Palermo, Italy. In paragraph 4 of his affidavit of claim the claimant further states:

That upon the death of my brother Rosolino Caccamese, on July 18, 1943, due to the bombardment of the above described building, *wherein he happened to be*, I became the only claimant for war damages in the case and in his stead, against the Italian Government, there being no other heirs to his estate. (Emphasis supplied.)

And in paragraph 6 of his affidavit of claim the claimant further states:

That I am not able to give other particulars regarding the suffered property damages besides those already given in this affidavit, since I have not been in Italy for many years; but I have been informed by reliable persons that the described property was entirely destroyed and its contents were a total loss, and that the Italian Government has full information about this case;

On May 7, 1949 the Embassy of the United States of America in Rome, on behalf of the claimant, submitted this claim to the Ministry of the Treasury of the Italian Republic.

The Ministry of the Treasury of the Italian Republic stated in its letter

dated October 5, 1949 that the claim could not be accepted because at the time when the claimant became the owner of the property in question he acquired damaged property and therefore the loss did not appear to create a right to compensation under the provisions of Article 78 of the Treaty of Peace or under Article 3 of the Memorandum of Understanding between the two Governments dated August 14, 1947.

The Embassy of the United States of America in its letter of October 14, 1949 informed the Ministry of the Treasury of the Italian Republic that it could not accept the position taken by the Italian authorities and made reservation to submit the dispute to the Conciliation Commission.

On March 13, 1951 the Agent of the United States of America filed the Petition in this case. Having premised the statement of the case, the Petition states the issue involved as being:

Is a national of the United States who has held such nationality since March 30, 1928, and who acquired on July 18, 1943, by inheritance from Italian nationals, the ownership of certain real and personal property, *at the same moment that such property was damaged*, entitled to receive compensation under the Treaty of Peace and the agreements supplemental thereto or interpretative thereof? (Emphasis supplied.)

and concludes by requesting the Commission to:

(a) decide that the claimant is entitled to receive from the Italian Republic two-thirds of the sum necessary at the time of payment to make good the loss suffered, which sum was estimated in September, 1943 to be Five Million, Seven Hundred Fifty Thousand (5,750,000) Lire, subject to any necessary adjustments for variation in values between September 1948 and the final date of payment;

(b) order that the costs and incidental to this claim be borne by the Italian Republic; and

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

The Answer of the Italian Republic filed on April 21, 1951 maintains in substance that the evidence submitted with the Petition was not sufficient to establish that the claimant, Giuseppe Caccamese, is the sole heir of his brother, Rosolino Caccamese; that the evidence does not establish what interest in the property the claimant inherited; that the claimant is not entitled to any compensation under the Treaty of Peace because his inheritance, if any, was an interest in damaged property, and hence the claimant has not suffered a loss in Italy as a result of the war; that the inheritance, if any, includes the right to submit a claim for war damages to the Italian Government, a right which is derived from Italian domestic law and not from the Treaty of Peace; and concludes by requesting the Commission to declare the Petition inadmissible.

In its Order of July 16, 1951 the Commission granted the request of the Agent of the United States of America and allowed a period of sixty (60) days within which to file a Reply. To the Reply filed on September 25, 1951 were attached only an affidavit of and a letter from the claimant in which he states his understanding of the ownership interests in the subject property and the basis upon which he maintains a claim for war damages. The Reply contained a request that the Commission issue an Order for the Agent of the Italian Republic to produce copies of certain public records of the Province of Palermo.

Noting the insufficiency of the evidence to substantiate certain allegations made in the Petition, the Commission in its Order of October 16, 1951 denied the request contained in the Reply and ordered the Agent of the United States of America to submit:

(a) documentary evidence showing whether or not Rosolino Caccamese fu Giuseppe and his wife, Francesca Vicari fu Gaetano, died intestate on July 18, 1943 and, if such be the case, the names of all heirs-at-law of the said Rosolino Caccamese fu Giuseppe;

(b) documentary evidence showing whether or not Rosolino Caccamese fu Giuseppe died before or after the damage to the building which is the subject of this claim; or whether Rosolino Caccamese fu Giuseppe and his wife, Francesca Vicari fu Gaetano, were within the building at the time it was damaged during the aerial bombardment of July 18, 1943 and died as a result thereof at a time which can not be specified;

(c) a certified true copy of the appraisal of the damages to the property which is the subject of this claim, alleged to have been made by the Allied Military Commission in Italy in 1943, and upon the basis of which it appears that the claimant had calculated his alleged damages;

(d) any other evidence which the Agent of the United States of America may desire to submit in order to more fully document his claim.

The Commission in its Order of October 16, 1951 also provided for the transfer of the original Statement of Claim and all documents attached thereto from the Ministry of the Treasury of the Italian Republic to the secretariat of the Commission for inclusion in the record.

At the request of the Agent of the United States of America, the Commission later amended its Order of October 16, 1951 to provide for a period of ninety days (in lieu of the originally specified period of forty-five days) within which additional evidence to document this claim more fully could be submitted.

On February 15, 1952 the Agent of the United States of America informed the Commission that the claimant was unable to furnish any additional evidence and therefore requested the Commission to declare that the formal submission of proof in this case had been concluded and to permit the Agent of the United States of America to file a Brief.

On February 28, 1952 the Commission heard the arguments of the Agents of the two Governments; the Agent of the United States of America withdrew his request to file a Brief at this sitting of the Commission. Thereafter the Commission declared that the formal submission of proof had been concluded and took the case under advisement.

The Commission observes that it is the responsibility of the claimant in this case to furnish documentary evidence in support of the allegations made in the Petition. Under Article 2673 of the *Italian Civil Code*, official records regarding the ownership and inheritance of real property are public records. It has *not* been asserted by the claimant that permission to obtain copies of official documents of record has been denied by the responsible Italian authorities of the Province of Palermo; and the Commission therefore sees no justification for shifting the responsibility to furnish such documentary evidence in this case from the claimant to the Italian Government.

The claimant's request for compensation is based upon his inheritance from his brother, Rosolino Caccamese, who was an Italian national and part owner of the property in question at the time of his death. The claimant in his Affidavit of Claim states that his brother met his death while he was within the subject building, which sustained heavy damage during the aerial bombardment of July 18, 1943; but this affidavit shows that this statement is based only upon the claimant's information or belief. No evidence was introduced to establish that the claimant's brother died within this building. A death Certificate and an Act of Notoriety presented in evidence show only that the claimant's brother,

Rosolino Caccamese, died on July 18, 1943 and that the damage to the property in question occurred on the same date as a result of an aerial bombardment. Obviously, it was difficult for the claimant to obtain evidence to document this claim fully, particularly under the circumstances surrounding the death of Rosolino Caccamese.

The Commission finds that, in order to receive compensation under Article 78 of the Treaty of Peace, the claimant must prove that, as a result of the war, he (a United Nations national) has suffered a loss by reason of injury or damage to property in Italy. The claimant's brother, Rosolino Caccamese, was an Italian national; and therefore the claimant's right to compensation in this case hinges upon whether or not the claimant inherited an interest in the property in question before or after it was damaged during the aerial bombardment of July 18, 1943. The Commission further finds that the evidence presented in this case does not establish that the property involved here was in an undamaged condition at the time the claimant inherited an interest in said property.

The Agent of the United States of America argues that

In the absence of any evidence to the contrary, it can be presumed that the damage to the property and the death of the claimant's predecessor in interest occurred simultaneously.

While such a presumption of fact would fill a gap in the evidence, the Commission considers that there is no basis upon which it could entertain such presumption in favor of the claimant; and no basis for such presumption has been cited.

The Agent of the Italian Republic argues that, even assuming that the evidence were sufficient to establish that the claimant's brother, Rosolino Caccamese, met his death within the subject building, the elements of time which are here involved have a relationship to each other; and no matter how small the increment of time between the occurrence of the damage to the building and the death of the claimant's brother, each occurrence involved a successive, separate and distinct element of time. The Agent of the Italian Republic also contends that it is contradictory to assert that the claimant was the owner of the property at the time the damage occurred, since the claim itself is based on the hypothesis that the damage to the property and the death of the claimant's brother occurred simultaneously. The validity of these arguments must be recognized.

The Commission holds that the requests contained in the Petition must be rejected because the evidence submitted in this case does not establish that the property was in an undamaged condition when the claimant inherited an interest therein, and therefore that the claimant has not suffered a loss by reason of injury or damage to property in Italy for which he (a United Nations national) is entitled to compensation under the provisions of the Treaty of Peace or the Agreements supplemental thereto or interpretative thereof.

The Commission, acting in a spirit of conciliation,

HEREBY DECIDES:

1. That the requests contained in the Petition filed on behalf of Giuseppe Caccamese by the Government of the United States of America are rejected;
2. That this rejection of the requests contained in the Petition is without prejudice to any rights which the claimant may have for war damages under Italian domestic laws; and
3. That this Decision is final and binding from the date it is deposited with the Secretariat of the Commission.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 11th day of April 1952.

<i>The Representative of the United States of America on the Italian-United States Conciliation Commission</i>  <i>(Signed) Emmett A. SCANLAN, Jr.</i>	<i>The Representative of the Italian Republic on the Italian-United States Conciliation Commission</i>  <i>(Signed) Antonio SORRENTINO</i>
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WEIDENHAUS CASE—DECISION No. 9 OF  
28 APRIL 1952<sup>1</sup>

Compensation under Article 78 of Peace Treaty—War damages—Nationality of claimant—National of United States—National of one of the other United Nations at time damages occurred—Sale of property in its damaged condition to Italian nationals—Retention of right to claim compensation under Peace Treaty—Reference to decision No. 5 rendered in Carnelli case—Measure of damages.

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Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre — Nationalité du réclamant — Ressortissant des Etats-Unis — Ressortissant d'une autre Nation Unie à la date du dommage — Vente des biens endommagés à des ressortissants italiens — Persistance du droit du réclamant de se prévaloir de l'indemnité prévue par le Traité de Paix — Référence à la décision n° 5 rendue dans l'affaire Carnelli — Evaluation des dommages.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents and evidence and the arguments and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 7.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Charles E. Higdon, Agents of the United States of America.

STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of (Mrs.) Lucia Schwarz Weidenhaus, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the Agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of (Mrs.) Lucia Schwarz Weidenhaus (hereinafter referred to as the claimant) indemnity for war damages to her interest in certain real property in Italy, reimbursement for expenses incurred by the claimant in the preparation of her claim, and such other relief as may be just and equitable.

The material facts are as follows:

The Embassy of the United States of America in Rome certified that the claimant is now and has been at all times since her naturalization on July 1, 1946 a national of the United States of America. Prior to becoming a national of the United States of America, it appears that the claimant was a national of the Czechoslovakian Republic on September 3, 1943 and on the date that the loss involved here was sustained. There was submitted in evidence a Certificate of the Czechoslovak Consul General in New York, New York, certifying the foregoing facts and stating that the claimant

... was considered a Czechoslovak citizen until August 2, 1945, the date of the issuance of Constitutional Decree No. 33/45 ruling upon the question of Czechoslovak citizenship.

Czechoslovakia was one of the signatory Powers to the Treaty of Peace with Italy; and the fact that the claimant is a "United Nations national" within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace is not in dispute.

The original Statement of Claim was executed in behalf of the claimant by her legal representative, Architect Fridolino Munnich, a resident of Bolzano, Italy; and satisfactory documentary proof of the authority of such legal representative to act in behalf of the claimant in this matter was submitted in evidence.

On December 1, 1921 there was registered in the Office of Land Registry of the Province of Bolzano a Certificate of Inheritance (No. A III 373/19/18, dated May 4, 1921) showing the claimant to be the owner, by inheritance from her father, of an undivided one-sixth (1/6) interest in the real property which is the subject of this claim. In the Statement of Claim the building is described as a large three-storey building with basement. Located approximately fifty (50) metres from railroad facilities, this building suffered heavy damages on and after December 2, 1943 as a result of aerial bombardments.

On March 4, 1947 the claimant joined with her two brothers in executing a Deed which conveyed her interest in this real property to Dr. Giuseppe Parteli and Guglielmo Parteli and Virgilio Parteli. This contract, which was recorded and transcribed according to Italian law in the Province of Bolzano on May 3, 1947 under Entry No. GN 448/47, shows that the property was sold in its damaged state for a valuable consideration and reads in part as follows (in translation):

The sellers do not transfer, by reason of having transferred their share of co-ownership in the real property described above, the war damages to which they are entitled and, therefore, reserve every action and right due to them for compensation for such damages.

On September 15, 1947 the Treaty of Peace with Italy entered into force.

On November 29, 1949 the Embassy of the United States of America in Rome, on behalf of the claimant, submitted to the Ministry of the Treasury of the Italian Republic a claim for war damages based on Article 78 of the Treaty of Peace.

On October 16, 1950 the Ministry of the Treasury of the Italian Republic advised the Embassy of the United States of America that, since the claimant had sold her interest in the damaged property prior to the entrance into force of the Treaty of Peace, the claim could not be accepted because the claimant was not an "owner" within the meaning of this term as defined in paragraph 9 (b) of Article 78 of the Treaty of Peace.

The Embassy of the United States of America in its letter of October 31, 1950 informed the Ministry of the Treasury of the Italian Republic that it could not accept the position taken by the Italian authorities, and made reservation to submit the dispute to the Conciliation Commission established under Article 83 of the Treaty of Peace.

On January 29, 1951 the Agent of the United States of America filed the Petition in this case. Having premised the statement of the case, the Petition states the issue involved as being:

Is a national of the United States, who was a national of one of the other United Nations at the time the damages occurred, whose property in Italy suffered damages during the war in December 1943, and who normally has a claim for such losses under Article 78 of the Treaty of Peace, precluded from receiving compensation if the property was sold to an Italian national on March 4, 1947, i.e., . . . before the effective date of the Treaty of Peace?;

and concludes by requesting the Commission to:

- (a) Decide that the claimant is entitled to receive from the Italian Republic two thirds of the sum necessary at the time of payment to make good the loss suffered, which sum is estimated to be 3,314,230.50 lire as of October 15, 1949, subject to the necessary adjustments for variations in values between October, 1949 and the final date of payment;
- (b) Decide that the claimant is entitled to receive reimbursement of the full amount of 70,000 lire as expenses incurred in the preparation of her claim;
- (c) Order that the costs and incidental to this claim be borne by the Italian Republic;
- (d) Give such further and other relief as may be just and equitable.

The Answer of the Italian Republic filed on February 28, 1951 maintains in substance that the legal question involved in this case is the same as the legal question involved in the dispute between the two Governments regarding the claim of *Elena Iannone Carnelli* (Case No. 1), which was then pending before the Commission. The questions of fact regarding the ownership of the subject property and the nature of the damages thereto are not controverted in the Answer by the Government of the Italian Republic, which made reservation regarding the foregoing question of law and the questions involving evaluation of the damages. Pleadings and documents were submitted thereafter by the

Agents of the two Governments as provided for by the Rules of Procedure and Orders of the Commission.

In its Order of October 16, 1951 the Commission specifically requested the Agents of the two Governments to submit:

Documentary evidence of any factors which the Agents of the two Governments believe should be considered by the Commission in adjusting to present-day values the estimates of damages approved on October 15, 1949 by the Office of the Civil Engineers of Bolzano.

In compliance with this Order, the Agents of the two Governments developed the question of evaluation of the damages to the property here involved. The Agent of the United States of America filed with the Commission a new Estimate of Damages based upon official price indices, showing the sum necessary to repair the damages to the subject property as of April 1, 1951 to be Twenty-three Million, Six Hundred Seventy-Five Thousand, Four Hundred Twenty-seven (23,675,427) Lire, rather than Nineteen Million, Six Hundred Sixty-five Thousand, Three Hundred Eighty-three and seven tenths (19,655,383.70) Lire (the amount of the Estimate submitted with the original Statement of Claim). On the basis of this new Estimate of Damages, the Agent of the United States of America asserted that the loss sustained, as a result of the war, to the claimant's undivided one-sixth (1/6) interest in the subject property had increased from Three Million, Three Hundred Fourteen Thousand, Two Hundred Thirty and five tenths (3,314,230.50) lire to Three Million, Nine Hundred Forty-five Thousand, Nine Hundred Four (3,945,904.00) lire, and in support thereof submitted detailed technical data. Similarly, the Agent of the Italian Republic filed with the Commission an Estimate of Damages prepared by officials in the Ufficio Tecnico Erariale in Bolzano and technical data in support thereof.

On March 4, 1952 the Commission entered its Decision in the case of *The United States of America ex rel. Elena Iannone Carnelli vs. The Italian Republic*, Case No. 1 (Decision No. 5).<sup>1</sup> In that case the Commission held that Article 78 of the Treaty of Peace provides that those United Nations nationals whose property sustained damages as a result of the war and who thereafter sold their property in its damaged state prior to the entrance into force of the Treaty of Peace with Italy were not to lose their right to compensation under Article 78, even though the purchaser of the property in its damaged state was not a United Nations national.

As the question of law in the instant case is identical with the question of law involved in the Carnelli case, *supra*, the Commission finds that the claimant in this case has the right under Article 78 of the Treaty of Peace to receive compensation for damages suffered as a result of the war to her interest in the real property which is the subject of this claim.

At its sitting on February 28, 1952 and on March 20, 1952 the Commission heard the discussion and arguments of the Agents of the two Governments on the points of disagreement involved in the technical Estimates of Damages, and particularly on the question of depreciation. On the basis of the technical evidence submitted regarding evaluation of damages, and considering the statements made on March 20, 1952 by the Agents of the two Governments regarding their efforts to reach an agreement in this case, the Commission finds that at the date of this Decision the amount necessary to make good the loss suffered by the claimant, as a result of the war, to her undivided one-sixth (1/6) interest in the subject property is Three Million, Three hundred Forty-

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<sup>1</sup> *Supra*, p. 86.

Five Thousand (3,345,000) lire. Under the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, the claimant is entitled to receive as compensation two-thirds (2/3) of this sum, namely, Two Million, Two Hundred Thirty Thousand (2,230,000) Lire.

The Commission further finds that sufficient evidence has been introduced in this case to establish the reasonableness of the request of the claimant for payment by the Government of the Italian Republic of the sum of Seventy Thousand (70,000) lire for expenses incurred by her in Italy in establishing this claim.

No evidence having been submitted that any previous payment has been made to the claimant for war damages to the property which is the subject of this claim, the Commission, acting in a spirit of conciliation,

**HEREBY DECIDES:**

1. That in this case there exists an international obligation of the Government of the Italian Republic to pay the sum of Two Million, Two Hundred Thirty Thousand (2,230,000) Lire under Article 78 of the Treaty of Peace for damages sustained, as a result of the war, by the undivided one-sixth (1/6) interest in real property in Bolzano, Italy, which interest was owned by (Mrs.) Lucia Schwarz Weidenhaus, a national of the United States of America;
2. That in this case there also exists an international obligation of the Government of the Italian Republic to pay the additional sum of Seventy Thousand (70,000) lire under paragraph 5 of Article 78 of the Treaty of Peace for expenses incurred in Italy by (Mrs.) Lucia Schwarz Weidenhaus, a national of the United States of America, in establishing this claim;
3. That the payment of these two sums in Lire, (aggregating a total of Two Million, Three Hundred Thousand (2,300,000) Lire), shall be made in Italy by the Government of the Italian Republic upon request of the Government of the United States of America within thirty days (30) from the date that a request for payment under this Decision is presented to the Government of the Italian Republic;
4. That the payment of these two sums in lire, (aggregating a total of Two Million, Three Hundred Thousand (2,300,000) Lire) shall be made by the Government of the Italian Republic free of any levies, taxes and other charges and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace;
5. That in this case an Order regarding costs is not required; and
6. That this decision is final and binding from the date it is deposited with the secretariat of the Commission and its execution is incumbent upon the Government of the Italian Republic.

DONE in Rome, this 28th day of April 1952.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

Emmett A. SCANLON, Jr.

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

Antonio SORRENTINO

**WINTER CASE—DECISION No. 10 OF  
28 APRIL 1952<sup>1</sup>**

Compensation under Article 78 of Peace Treaty—Sequestration—State responsibility—Loss of enemy property taken by German authorities—Nationality of claimant—National of Czechoslovakia prior to 1945, date of acquisition of United States nationality—United Nations national within the meaning of Peace Treaty—Transaction between parties—Effect on case before Conciliation Commission.

Indemnisation au titre de l'article 78 du Traité de Paix — Sequestre — Responsabilité de l'Etat — Perte de biens ennemis enlevés par les autorités allemandes — Nationalité du réclamant — Ressortissant tchécoslovaque antérieurement à 1945, date de l'acquisition de la nationalité américaine — Ressortissant d'une Nation Unie au sens du Traité de Paix — Transaction entre les parties — Effet sur le différend porté devant la Commission.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents, evidence and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case.

Appearances: Mr. Stefano Varvesi, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

**STATEMENT OF THE CASE:**

This case concerns a dispute which has arisen between the Government of the United States of America, acting in behalf of Dr. Fred O. Winter, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the Agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of Dr. Fred O. Winter (hereinafter referred to as the claimant) indemnity for the loss of personal property owned by him, which property was taken in Trieste by German authorities during 1944.

The material facts are as follows:

The Embassy of the United States of America in Rome certified that the

<sup>1</sup> *Collection of decisions*, vol. I, case No. 15.

claimant is now and has been at all times since his naturalization on February 5, 1945 a national of the United States of America. Prior to becoming a national of the United States of America, it appears that the claimant was a national of the Czechoslovak Republic by virtue of his birth on October 15, 1892 at Uherske Hradiste (Moravia), Czechoslovakia, and the treaties and other arrangements made after the dissolution of the Austro-Hungarian Empire. There was submitted with the original Statement of claim a photostatic copy of an official Certificate issued at Uherske Hradiste on February 21, 1939 showing the claimant to be a citizen of the Republic of Czechoslovakia; this certificate of Czechoslovak nationality (which did not expire until ten years after the date of issuance) substantiates the claimant's statement that he was a Czechoslovak national until February 5, 1945, when he became a national of the United States of America by naturalization. Czechoslovakia was one of the signatory Powers to the Treaty of Peace with Italy; and the Commission finds that sufficient evidence has been presented to establish that the claimant is a "United Nations national" within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace.

The claimant resided at Brno, Czechoslovakia, prior to September, 1939, when conditions after the German occupation in 1938 caused him to emigrate therefrom. The dental equipment, household and other personal effects owned by the claimant in Brno, Czechoslovakia, were cleared by the Customs officials in Brno on October 2, 1939; and a photostatic copy of an Inventory prepared by the Czechoslovak Customs Office at that time was introduced in evidence. The claimant states that certain personal effects included in this Inventory were brought with him as luggage to the United States. The remainder of this property was located in a lift van marked "F W 660" (gross weight 5,005 kilograms), and forwarded to the Italian firm of Francesco Parisi, forwarding Agent, Trieste, for transhipment to the United States of America. The claimant states that there were loaded in this lift van certain items owned by him which were not enumerated in the inventory prepared by the Czechoslovak Customs officials because of restrictions against the exporting of such items imposed after the occupation of German authorities. With the outbreak of war, the claimant's lift van could not be forwarded from Trieste and was therefore warehoused in Trieste by the Forwarding Agent.

By Decree No. 1100/12409, dated May 11, 1943, the Prefect of Trieste provided that all of the transit goods stored in certain warehouses in Trieste and owned by Jews emigrating to enemy countries were to be placed under sequestration since the chattels belonging to such emigrating Jews were to be considered as enemy property. This decree, which was issued under the Italian War Laws, designated the sequestrator and fixed his powers, duties and responsibilities; and thereafter measures were taken to bring the chattels of emigrated Jews under the sequestrator's control. On January 12, 1944, the German High Commissioner in the Operation Zone "Adriatic Coastal Territory" issued his Order No. III/4/81 to storage warehousemen in the Free Port of Trieste, including the claimant's Forwarding Agent, Francesco Parisi. An unverified copy of this Order, submitted with the original Statement of Claim, reads in part as follows:

Betrifft: Wegschaffung des Umzugsgutes in Freihafen von Triest.

Der Oberst Kommissar hat aus kriegsbedingten Sicherungsgründen die Raemung des Freihafen angeordnet. Im Zuge dieser Raemung erfolgt auch die Wegschaffung des im Freihafen lagernden Unzugs-gutes. Soweit es sich bei diesem Umzugsgut um Juuedisches Vermögen handelt, ist es beschlagnahmt und dem O.K. zur Verfuegung zu halten. Das Eigentum von Nicht-guden wird vom O.K. in weitere Verwahrung genommen. Hierdurch

*entfaellt fuer die bisherigen Verwahrer, vom Zeitpunkt der Uebergabe an die beauftragten Organe des O.K., jede Naftung. Mit der Wegschaffung des Umszugsgutes habe ich Herrn Dr. Karl Schnuerch beauftragt. Die auf dem Umszugsgut zu Ihren Gunsten lastenden Spesen und Gebuehren werden nach erfolgter Verladung und Uberprufung der Rechnung in der von mir anerkanten Hoehe vergutet.*

*Der Prefekt ist von dieser Regelung bereits unterrichtet.;*

and in translation:

Removal of transit goods from Free Port of Trieste.

The High Commissioner has ordered, on security grounds, because of war conditions, the clearing of the Free Port. In the course of this clearing the transit goods stored in the Free Port will be removed. The removed goods owned by Jews are sequestered and will be held for disposal in accordance with orders of the High Commissioner. The non-Jewish property will be further held in custody by the High Commissioner. Hereby every responsibility of the present custodian ceases from the moment of delivery to the commissioned agents of the High Commissioner. I have charged Dr. Karl Schnuerch with the removal of the transit goods. The expenses and fees chargeable against the transit goods in your favour will be reimbursed in the amount recognized by me after the goods have been moved and the bill examined.

The Prefect has already been informed of this regulation.

On May 11, 1944, in compliance with the aforesaid Order, the claimant's property was delivered by the Forwarding Agent, Francesco Parisi, to German authorities, who issued on that date an official Receipt therefor; a photostatic copy of this receipt which described the claimant's lift van was introduced in evidence. Afterwards the property in question cannot be traced.

On May 7, 1949 the Embassy of the United States of America in Rome submitted to the Government of the Italian Republic the claim of Dr. Fred O. Winter based on Article 78 of the Treaty of Peace. Following the initial rejection of this claim by the Ministry of the Treasury of the Italian Republic on August 5, 1949, reconsideration was requested by the Embassy of the United States of America on August 24, 1949. Thereafter there was additional correspondence between the two Governments regarding this claim but the only fact which is noteworthy here is contained in the letter of September 2, 1950 from the Ministry of the Treasury of the Italian Republic in which it is stated that, while the claim of Fred O. Winter would receive reconsideration at an early date, the Italian Government denied the right of the United States of America to invoke the application of Article 78 of the Treaty of Peace in behalf of the claimant; this contention of the Italian Government was rejected by the Embassy of the United States of America in Rome in its letter of September 12, 1950.

On June 4, 1951 the Petition of the United States of America in this case was filed with the Commission; the Petition alleges that the failure of the Government of the Italian Republic to make its determination regarding this claim constituted in effect a rejection of the claim and that, as a result, a dispute had arisen between the two Governments for decision by the Conciliation Commission established under Article 83 of the Treaty of Peace; and with a statement of the foregoing facts as a premise, the Petition concludes by requesting the Commission to find that a dispute regarding this claim exists between the two Governments, and that the claimant is entitled to receive from the Government of the Italian Republic two-thirds of the sum necessary at the date of payment to make good the loss suffered (which amount was estimated by the claimant

to be Twenty-eight Thousand, Two Hundred Twenty-four Dollars (\$28,224.00) as of January 31, 1949), as well as such other relief as may be just and equitable.

In the Answer of the Italian Republic filed with the Commission on July 5, 1951 it is denied that a "dispute" regarding this claim exists between the two Governments within the meaning of Article 83 of the Treaty of Peace; and additional time was requested by the Italian Government to permit it to complete an investigation.

Having heard the arguments of the Agents of the two Governments on July 16, 1951, the Commission issued an Order on July 23, 1951 declaring that a dispute regarding the claim of Dr. Fred O. Winter exists between the two Governments, and granted the Italian Republic an additional period of sixty (60) days within which to complete its investigation and to file a full and complete Answer.

On October 3, 1951 the Agent of the Italian Republic filed with the Commission a statement that his Government had reconsidered the claim of Dr. Fred O. Winter and, as a result of an administrative decision made by the appropriate authorities of the Italian Government, it could be anticipated that the question in dispute between the two Governments would cease to exist and that an official communication regarding this case would be received by the Embassy of the United States of America.

On January 23, 1952 the Agent of the United States of America filed a Request for an Award with the Commission, basing his request on the fact that the time limit for filing the Answer of the Italian Republic had expired and that no official communication regarding this case had been received from the Government of the Italian Republic.

The Commission on February 28, 1952 heard the Agents of the two Governments on the Request for an Award; and at this hearing of the Commission the Agent of the Italian Republic submitted an offer in behalf of his Government in the amount of Five Million, Seven Hundred Eleven Thousand, Two Hundred Fifty (5,711,250) Lire, in full and complete settlement of this claim; after due consideration, this offer of the Government of the Italian Republic was accepted by the Agent of the United States of America.

No evidence having been submitted that any previous payment has been made to the claimant for the loss of the personal property which is the subject of this claim, the Commission, acting in a spirit of conciliation,

**HEREBY DECIDES:**

1. That, under Article 78 of the Treaty of Peace, there exists in this case an international obligation of the Government of the Italian Republic to pay the sum of Five Million, Seven Hundred Eleven Thousand, Two Hundred Fifty (5,711,250) Lire in full and complete settlement of the claim of Dr. Fred O. Winter, a national of the United States of America, for the loss in Trieste during 1944 of personal property owned by him;

2. That the payment of this sum in lire shall be made in Italy by the Government of the Italian Republic upon request of the Government of the United States of America within thirty (30) days from the date that a request for payment under this Decision is presented to the Government of the Italian Republic;

3. That the payment of this sum in Lire shall be made by the Government of the Italian Republic free of any levies, taxes or other charges, and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace;

4. That in this case an Order regarding costs is not required; and

5. That this Decision is final and binding from the date it is deposited with

the secretariat of the Commission, and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 28th day of April, 1952.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

(Signed) Emmett A. SCANLAN, Jr.

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

(Signed) Antonio SORRENTINO

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AMABILE CASE--DECISION No. 11 OF  
25 JUNE 1952<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—Evidence in support of claim—Power of Commission as to receiving and evaluating evidence—Value of Affidavits, *Atti di Notorietà*, signed statements and similar *ex parte* instruments as testimonial documentary evidence.

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Demande en indemnisation au titre de l'article 78 du Traité de Paix — Pouvoirs de la Commission en matière de recevabilité et d'appréciation des preuves — Affidavits, *Atti di Notorietà*, déclarations sous signature et autres actes *ex parte* analogues — Admissibilité en preuve.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents, evidence and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 5.

**STATEMENT OF THE CASE:**

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of (Mrs.) Norma Aida Sullo Amabile, and the Government of the Italian Republic with regard to the application and interpretation of Article 78 of the Treaty of Peace with Italy signed at Paris on February 10, 1947 and the Agreements supplemental thereto and interpretative thereof. The object of the dispute is to obtain on behalf of (Mrs.) Norma Aida Sullo Amabile, (hereinafter referred to as the claimant), compensation for the loss of certain personal property in Italy under circumstances which hereinafter will be described, reimbursement for expenses incurred by the claimant in the preparation of her claim, and such other relief as may be just and equitable.

The material facts are as follows:

The dispute in this case involves fundamentally a question of whether or not the claimant has submitted sufficient evidence to establish her claim; and, since the nature and value of the documentary evidence which was submitted are questions in dispute, it is necessary to quote portions of said evidence.

The Statement of Claim was prepared in both an English and an Italian text. On March 16, 1949 the claimant personally appeared before a duly commissioned and qualified Vice-Consul of the United States of America in Rome and acknowledged her execution of said statement of Claim; said Acknowledgment and Verification affixed to said original Statement of Claim reads in part as follows:

On this 16th day of March, 1949 before me personally came Norma Sullo Amabile, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged that he [she] executed the same, and swore to me that the facts herein stated are true to the best of his [her] knowledge, information and belief.

The claimant under these circumstances verified under oath in her Statement of claim that each of the following statements is true:

(a) that she is now and has been at all times since February 22, 1898 a national of the United States of America;

(b) that she was the *sole owner* of certain personal property (listed on the list attached to Annex 2 of the Statement of Claim), which was located in an apartment (No. 6) owned by the claimant located at Via dei Lucilli 9B, Lido di Roma (Ostia), and which sustained loss or damage for which the Government of the Italian Republic is responsible under paragraph 4 of Article 78 of the Treaty of Peace;

(c) that most of said personal property was acquired by her in the United States of America, either by gift or purchase, prior to 1931 when she established her residence in Italy, and that the remainder of said personal property was acquired by her either by gift, purchase or inheritance during the years preceding the outbreak of the war;

(d) that (in the claimant's own words)

*All of the property listed on the list attached to Annex 2 was lost or irretrievably destroyed, such loss or destruction having occurred following the time that the claimant was obligated to leave her apartment as a consequence of general orders evacuating the Lido di Roma during the course of the war. During such period the apartment was occupied by German Military Forces. (Emphasis supplied.)*

and

(e) that she estimates that the full amount necessary to make good the loss suffered is 2,291,671 lire, that the further sum of 4,000 lire represents the reasonable expenses incurred up to that date (March 16, 1949) in Italy in establishing the claim, and that the aggregate sum claimed by her, subject to any necessary adjustments for variations of value between the date of filing the claim and the date of payment is 2,295,671 lire.

There was attached to the claimant's Statement of Claim, *supra*, as Annexes the following documentary evidence in support thereof:

*Annex 1:* A certificate of the claimant's American nationality issued by the Embassy of the United States of America in Rome;

*Annex 2:* The claimant's Affidavit in English, subscribed and sworn to before a duly commissioned and qualified Vice-Consul of the United States of America in Rome on February 23, 1949, which reads in part as follows:

Before me, a Consular Officer of the United States of America, in and for the Consular District of Rome, duly commissioned and qualified, personally appeared Mrs. Norma A. Sullo Amabile, who being duly sworn, deposes and says that prior to the war she was the owner of certain personal property which was located in her home in Italy at Via dei Lucilli 9B, Lido, Rome, and that such personal property was acquired by her over a period of years most of it having been brought by her to Italy from the United States upon the establishment of her residence in Italy in 1931; that as a result of the war and more particularly as a result of the forced evacuation of her house and the fact that her house was occupied by German military forces the entire contents of the house consisting of furniture, household effects and personal property was lost or irretrievably damaged; that the claimant has, to the best of her recollection and belief, compiled a list of such personal property which she verily believes to be a correct list of such property; that such list is attached hereto as Exhibit 1 to this affidavit; that the values assigned to the various missing articles are values which in the opinion of the claimant represent the sum necessary to purchase similar property at the present time. (Emphasis supplied.)

Attached to said Affidavit, and described therein as Exhibit 1, is an unsigned, undated list in Italian of one hundred twenty (120) items of personal property, with a value (expressed both in dollars and lire) set opposite each item;

*Annex 3:* An *Atto di Notorietà* (hereinafter referred to in translation as an Act of Notoriety), in Italian, subscribed and sworn to before a Notary Public in Rome on February 16, 1949 by Persiano Angelina fu Liborio Bernardino, housewife, age 53; Rissi Maria fu Nicola, housewife, age 52; Ambrosini Giovanni di Flavio, radio technician, age 29; and Giudici Emanuele fu Francesco, Chief Inspector of Customs in Rome, age 69; all four individuals, who appear to be Italian nationals, state they are qualified to act as witnesses and are not otherwise interested in the subject-matter, and having been sworn and under the bond of the oath, separately one from the other but unanimously, attest that (in translation):

... it is of public knowledge and notorious, as well as our personal knowledge that:

Mrs. Norma Sullo Aida daughter of Salvatore, married Amabile, was sole and exclusive owner of all the furniture, fittings, furnishings, pottery, linen, clothing and every other item representing the furnishing of the house inhabited by her at the Lido di Roma, at Via dei Lucilli 9B, apartment 6, the whole of the foregoing as specified in the lists which have been submitted as annexes to the application for war damage compensation, lists which we have examined and recognize to be fully correct and truthful.

All of these items were destroyed or lost as a result of warlike causes. *In fact, the lady was forced, by the authorities, to abandon her home,* she left everything and on her return found nothing.

The lady has suffered an aggregate damage which, valued at the time such damage occurred and taking into account the depreciation caused by natural wear and tear, amounts to \$4,114.80 (equal to 2,291,671 lire). (Emphasis supplied.);

said *Atto di Notorietà* was recorded in Rome as a public act on February 21, 1949 (No. 13224, vol. No. 767) according to law;

*Annexes 4, 5 and 6:* Separate statements in Italian made by Persiano Angelina fu Libordo Bernardino (*Annex 4*), Rissi Maria fu Nicola (*Annex 5*), and Giudici Emanuele fu Francesco (*Annex 6*), three of the four individuals who executed the foregoing *Atto di Notorietà*, which repeat and supplement with certain details allegedly known to these individuals, the facts which each attested to in the aforesaid *Atto di Notorietà*; the signature only on each of these three separate statements was witnessed on February 22, 1949 as true and authentic by the Notary in Rome before whom the *Atto di Notorietà* had been acknowledged;

*Annex 7:* The claimant's Affidavit in English, subscribed and sworn to before a duly commissioned and qualified Vice-Consul of the United States of America, on February 23, 1949, which reads in part as follows:

Before me, a Consular Officer of the United States of America, in and for the Consular District of Rome, duly commissioned and qualified, personally appeared Mrs. Norma A. Sullo Amabile, who being duly sworn, deposes and says that in connexion with the presentation of her claim she has prepared a list which is attached to Annex 2 of the Claim; that that list was shown to the witnesses Emanuele Giudice, Maria Rizzi and Angelina Persiano, whose affidavits appear as Annexes 4, 5, 6 to the claim; and that when in such affidavits the foregoing witnesses refer to the list they are referring to the list in question, namely to the one attached as Exhibit I to Annex 2 of the claim.

On March 24, 1949 the Embassy of the United States of America in Rome, on behalf of the claimant, submitted this claim to the Ministry of the Treasury of the Italian Republic. The statement of claim and the documentary evidence in support thereof have been detailed above. Thereafter there was additional correspondence between the two Governments; but the only facts which are noteworthy here are contained in the letter of June 24, 1950 from the Ministry of the Treasury of the Italian Republic in which the Embassy of the United States of America was informed that (in translation):

After the usual investigation, the subject claim, transmitted by the Embassy with its note of March 24, 1949, was submitted to the (Interministerial) Commission established under Article 6 of (Italian) Law No. 908 of December 1, 1949. In its meeting of May 6, 1950, the (Interministerial) Commission expressed the following opinion:

"Considering that the personal property in question does not appear to have been sequestered and that the only evidence submitted by the claimant is an Act of Notoriety (*Atto di Notorietà*) which cannot be considered as sufficient proof, the 'Interministerial' Commission believes that valid evidence should be presented in order to establish:

- "(a) the existence and value of the property at the time damage occurred;
- "(b) the claimant's right of ownership;
- "(c) the destruction by acts of war and the extent of the damages.

"The Commission further believes that no definite opinion can be expressed concerning this claim until such time as satisfactory proof is presented on the points listed above."

This Ministry, abiding by the opinion of the (Interministerial) Commission as stated above, begs to inform the Embassy that, for the reasons expressed therein, the claim asserted by Mrs. Norma Sullo Amabile cannot be considered at the present stage. However, the case may be re-examined if and when the claimant presents sufficient proof as called for above. The Ministry requests that the claimant be advised accordingly.

On September 28, 1950 the Embassy of the United States of America informed the Ministry of the Treasury of the Italian Republic that:

The claimant is unable to obtain further evidence as to the existence, value and description of the property, with the possible exception of additional sworn statements of other witnesses. As, however, the Interministerial Commission and the Ministry of the Treasury have apparently failed to give due consideration to the sworn statements already submitted, there would be little purpose in submitting purely corroborative evidence of that character. Consequently, the Embassy considers that the claimant, in view of the nature of the property and its description, has established the basis of her claim with the evidence already submitted by her and should not be required to submit further evidence.;

and concluded by making reservation to submit the dispute to the Conciliation Commission established under Article 83 of the Treaty of Peace.

On November 21, 1950 the Petition of the United States of America was filed in this case with the Secretariat of the Commission. With the Petition there were submitted a copy of the Statement of Claim and the Annexes, *supra*, attached thereto; copies of the correspondence between the two Governments regarding this claim; a Certificate executed on February 23, 1949 by the American Vice-Consul in Rome, Italy showing that according to the records of his office Mrs. Norma Aida Sullo Amabile was born at Boston, Massachusetts on February 22, 1898, that she possesses a valid American passport and that, on the date said Certificate was made, he was satisfied as to the American nationality of the claimant; and a special form printed in 1949 in Italian by the Government of the Italian Republic and available to Italian nationals for use in preparing and submitting a claim under Italian War Damage legislation (Modulario Danni G-4, Servizio Danni di Guerra-Mod. D.).

Having premised the statement of the case with an allegation of the foregoing facts, the Petition cites paragraph 4 (a) of Article 78 of the Treaty of Peace as establishing the right to compensation and summarizes the issue involved in this case as being:

Can the Italian Government evade the obligation imposed on it to compensate United Nations nationals under Article 78 of the Treaty of Peace by disregarding as insufficient the evidence submitted consisting of uncontroverted statements by the claimant and by presumably credible witnesses concerning the existence, value and loss of the property in the absence of any showing that the facts are at variance with those alleged?

In support of the conclusions formulated in the Petition, the Agent of the United States of America argues in substance that:

(a) the claimant has submitted the only type of evidence which is available to her;

(b) the very nature of the property itself accounts for the claimant's inability

to produce other types of documentary evidence to establish the existence, ownership and value of the personal property which was lost;

(c) the Italian authorities are in a position to investigate the alleged facts in order to verify or disprove the statements made by the claimant or any of the four witnesses;

(d) should the contentions of the Italian Government prevail in this case, the result would be a denial of justice and an evasion of the obligation of the Italian Government under the Treaty of Peace;

(e) an *Atto di Notorietà* is recognized in the Italian Civil Code as having probative value;

(f) the special form which the Italian Government prepared and accepts from the Italian nationals submitting claims for household effects lost or damaged as a result of the war under Italian War Damage legislation provides that an *Atto di Notorietà* is one type of evidence which may be used to document such a claim;

and concludes by requesting the Commission to determine that the claimant has established her claim on the basis of the evidence submitted and to grant the claimant the relief requested.

In the Answer of the Italian Republic filed with the secretariat of the Commission on December 19, 1950 it is stated that the Petition raises the following questions of law (in translation);

Whether the Italian Government, for the purpose of applying paragraph 4 (a) of Article 78 of the Treaty of Peace, may consider as having probative value an *Atto di Notorietà* regarding the existence, ownership and nature of property, which however can no longer be returned in kind to the claimant, a National of the United Nations, as well as the fact of the damages and the circumstances (event of war) in which the damage occurred.

but maintains in substance that:

(1) as a general principle, an *Atto di Notorietà* does not constitute a means of proof in a true juridical sense because

(a) there is lacking the substance of evidence since the deponents are not obliged to distinguish matters regarding which they have a direct and personal knowledge from those matters regarding which their knowledge has been derived from others;

(b) the opportunity to cross-examine the deponents at the time the *Atto di Notorietà* is made does not exist;

(c) the Notary or other public official before whom an *Atto di Notorietà* is made can only verify that which took place in his presence and can not verify that the statements made in his presence under oath by the deponents are or not in fact true;

(2) since the rights, if any, of a United Nations national under Article 78 are subject to a judicial determination before the International Commission provided for under Article 83 of the Treaty of Peace, a United Nations national has the obligation of establishing his claim with documentary evidence which constitutes a means of proof in a true juridical sense;

(3) since the rights, if any, of an Italian national under Italian War Damage legislation are subject to a discretionary determination by the Italian administrative authorities, without the right of a judicial review, the Italian administration authorities may conduct an *ex officio* investigation of a claim even though certain elements of the claim have been furnished in an *Atto di Notorietà*;

and concludes by requesting the Commission to reject the Petition and to make such further Orders as are necessary.

On April 16, 1951 the Agent of the Italian Republic provided for the transfer of the original Statement of Claim and all documents attached thereto from the Ministry of the Treasury of the Italian Republic to the Secretariat of the Commission for inclusion in the record.

On August 1, 1951 the Commission recorded its ruling that the formal submission of proof in this case had been concluded by the Agents of the two Governments and granted the request of the Agent of the United States of America to submit a Brief. On September 10, 1951, the Agent of the United States of America submitted the Brief of his Government in this case; and on October 25, 1951 the Agent of the Italian Republic submitted a Reply Brief. In these Briefs each of the Agents of the two Governments maintained the principles of law which have been set forth in the Petition and in the Answer, each Agent insisting on the conclusions previously formulated; it is not necessary here to detail the legal arguments and principles cited.

While Article 11 of the Rules of Procedure of the Commission, entitled "Briefs and Oral Arguments", makes it clear that Briefs and oral arguments were not intended to include either amendments or additions to the Petition, Answer or other pleadings, there was attached to the Brief of the United States of America, as Annex A, the original of a letter bearing the signature of the claimant which it is considered necessary to set out in full in this Decision:

September 4, 1951

To: Mr. L. M. Summers,  
Agent of the United States of America,  
American Embassy,  
Rome

Dear Mr. Summers:

In re-examining the claim, submitted by me in connexion with the reading of the Brief prepared by the Agent of the United States for presentation to the Italian-United States Conciliation Commission, I noticed that in the claim it is stated that I had to leave my apartment as the result of the evacuation of Ostia. I should like to take this opportunity to correct that statement and to point out that I actually had to leave Ostia as a result of the terrific bombardments to which it was being subjected. The danger to me was aggravated by the fact that my apartment was very close to the German headquarters, which was the target of the bombardment. During my absence, according to information supplied to me by my neighbors, the apartment was broken into and occupied by German Armed Forces.

My review of the claim and my reading of the Brief indicates that in all other respects it states the facts of the case correctly.

Very truly yours,  
(Signed) Norma Sullo AMABILE

It is obvious that a correct determination of this case can not be made without considering in *all* of its aspects the full import of Annex A to the Brief of the United States of America. Even though Annex A, *supra*, was introduced after the formal submission of proof had been concluded in this case, and not in accordance with the Rules of Procedure, the Commission will

exercise its right to deviate from the Rules of Procedure in a particular case by the agreement of the two national Commissioners, as expressed in Article 18 of the Rules of Procedure, and hereby accepts in evidence Annex A of the Brief of the United States of America. The Commission will discuss the import of this feature of this case at the appropriate place in this Decision.

The Commission has noted that the rejection of the subject claim on an administrative level by the Ministry of the Treasury of the Italian Republic (its letter dated June 24, 1950, *supra*) appears to be predicated only on a rejection of the evidentiary value to be given to the *Atto di Notorietà*, which was submitted as an Annex to the Statement of Claim, without admitting or denying the truth or falsity of any of the allegations of fact contained therein. No reference was made in the letter of rejection to the fact that the Statement of Claim was submitted in the form of an Affidavit, that the claimant had sworn before a Vice-Consul of the United States of America that the facts alleged in the Statement of Claim are true, and that separate statements of three of the four witnesses to the *Atto di Notorietà* were also submitted as Annexes to the Statement of Claim. Similarly, the Answer of the Italian Republic is based primarily on its rejection of the use of an *Atto di Notorietà* as a means of proof which may be used by a claimant in establishing his claim. Nevertheless, it must be assumed that the Government of the Italian Republic carefully considered the Statement of Claim and all of the Annexes attached thereto before rejecting the subject claim, and that nothing in the Statement of Claim or in any of the Annexes attached thereto was deemed sufficient by the Italian Government to cause it to request that a field investigation be conducted by its own competent administrative agencies, although it would appear that the truth or falsity of certain allegations of fact made by the claimant in the Statement of Claim and by the witnesses whose statements are attached thereto could have been established by such an investigation.

The Commission considers that the issues raised by the pleadings of the two Governments can be summarized as follows:

(1) Are Affidavits, *Atti di Notorietà*, signed statements and similar ex parte testimonial instruments forms of evidence which can be submitted to the Conciliation Commission in disputes presented by the Agents of the two Governments to establish the ownership, loss and/or value of personal property in Italy which was not sequestered by the Italian Government, when other forms of evidence are not available to document the claim?

(2) When a national of the United States of America submits a claim for war damages to the Government of the Italian Republic, is there an obligation on the Government of the Italian Republic under the Treaty of Peace, as implemented by the Memoranda of Understanding and the Exchange of Notes dated August 14, 1947, to conduct such an investigation of the claim as may be necessary to establish or refute the material allegations made by the claimant, and thereafter to make a determination of the particular claim, even though essential elements of the claim can be established by the claimant only with documentary evidence presented in the form of ex parte testimonial instruments?

(3) What criteria will the Conciliation Commission follow in determining the evidentiary weight or probative value to be given to such Affidavits, *Atti di Notorietà*, signed statements and similar ex parte testimonial instruments?

(4) Do the documents submitted as evidence in the instant case establish the claimant's right to compensation or other relief under the provisions of Article 78 of the Treaty of Peace; and, if so, what is the amount of such compensation and the nature of such other relief?

The question of the types of evidence which can be used by claimants in establishing their claims, and the weight which is to be given to the evidence furnished in a particular case, repeatedly occur in a large number of the disputes pending before the Commission, and have been exhaustively dealt with in the arguments presented in the instant case. Therefore, for the future guidance of the Agents of the two Governments, the Commission desires to make the following observations.

Neither the Treaty of Peace nor any of the Agreements supplemental thereto or interpretative thereof makes any specific reference to the types of evidence required to establish a claim under Article 78 of the Treaty of Peace. Paragraph 3 of Article 83 provides, however, that

Each Conciliation Commission shall determine its own procedure, adopting rules conforming to justice and equity.

It must be borne in mind that a claim arising under Article 78 of the Treaty of Peace is submitted first to the Government of the Italian Republic by or on behalf of the claimant, that the claim must be in written form and must be supported by documentary evidence, and that both the investigation and the consideration of such claim by the Government of the Italian Republic are in the nature of *ex parte* proceedings.

It is only after the appropriate Italian administrative authorities have had an *opportunity* to investigate and consider a particular claim that a "dispute" arises between the two Governments which is submissible to the Conciliation Commission provided for under Article 83 of the Treaty of Peace; and, ordinarily, the basis of the "dispute" between the two Governments has been clearly drawn by the documentary evidence obtained in the course of such investigation which supports or rebuts the allegations of fact or of law which have been made in the particular case.

It is, of course, necessary that evidence regarding the circumstances which have given rise to each individual "dispute" be presented to the Conciliation Commission. The difficulties inherent in securing evidence to document claims presented to an international Commission have long been recognized, and it is seldom practicable either for the Government to submit or for the Commission to receive the oral testimony of witnesses.

The Rules of Procedure of the Conciliation Commission adopted in Rome on June 29, 1950 by the Representatives of the two Governments of necessity recognize the practical problems involved in establishing, processing and investigating a claim arising under Article 78 of the Treaty of Peace. Article 9 (a) of the Rules of Procedure clearly states that all documentary evidence upon which either Government intends to rely must be annexed to the Petition of the claimant Government, or to the Answer of the respondent Government, to the Reply, or to the Counter-Reply, respectively. Articles 7 (b) and 8 (b) of the Rules of Procedure further state that, if either Agent desires the Commission to consider any proof other than the documentary evidence which has been submitted by his Government, specific and timely request for such consideration must be made. Clearly, the Rules of Procedure contemplate that the evidence to establish all of the essential elements of a particular claim would be developed in written form.

The Agent of the Italian Republic in his Reply Brief referred specifically to paragraphs (a) and (b) of Article 10 of the Rule of Procedure, which read as follows:

- (a) The Commission does not hear oral testimony save in exceptional cases for good cause shown and upon Order of the Commission authorizing its ad-

mission and fixing the time when and the place where it shall be received. Should oral testimony be introduced in behalf of one Government, the Agent of the other Government shall have the right of cross-examination.

(b) The Commission may order in exceptional cases officials of either Government to receive the sworn testimony of a witness taken in answer to written questions prepared by the Agent of either Government and approved by the Commission; the Order of the Commission shall name the witness whose sworn testimony is to be taken and shall specify the time when, the place where, the official before whom the witness shall testify, as well as the questions to be asked.

The contention of the Agent of the Italian Republic that the last-cited paragraphs of the Rules of Procedure limit the use of sworn testimony to the two instances referred to in these paragraphs is obviously erroneous. The mere fact that the rules contained in both of these paragraphs are expressly limited to "exceptional cases" is sufficient to show that oral testimony before the Commission or replies to written interrogatories are not the only types of sworn testimony which may be used to establish or to rebut the allegations of fact made in a particular case.

Moreover, paragraph (a) of Article 18 of the Rules of Procedure specifically provides that

... Supporting statements, affidavits, and documentary evidence may be submitted in any language.

To this extent, at least, it is clear that the Rules of Procedure do not exclude the use of *ex parte* testimonial instruments.

A national of the United States of America who has suffered a loss of or damage to non-sequestered property in Italy, as a result of the war, is confronted with the problem of finding a suitable means of proof to establish the facts in such a manner as will permit him to exercise his rights under Article 78; and this problem is an extremely serious one in the absence of the property itself or of documentary evidence which antedates the occurrence of the loss or damage. Particularly in the case of loss or damage to non-sequestered personal property, it might be reasonably anticipated—and experience has proven it to be true—that the average claimant possesses little, if any, documentary evidence of the ownership, nature and value of his personal property which existed prior to the date on which the loss or damage occurred. In the absence of proof of this nature, the individual is able to support his claim for compensation under Article 78 only with his own statement of the pertinent facts and the statements of other persons, if any, who were in a position to have personal knowledge of the actual facts regarding the ownership, nature and value of the property, and the cause of its loss or damage. Greater credibility may be given to declarations of this nature when they are submitted as statements made under oath in the form of either Affidavits or *Atti di Notorietà*.

In considering the question of the right of a national of the United States of America to use Affidavits, *Atti di Notorietà*, signed statements and similar *ex parte* instruments as testimonial documentary evidence, in attempting to establish a claim under Article 78 of the Treaty of Peace, it is necessary to have a clear understanding of each of these instruments.

The "Affidavit" is a statement or declaration, made by an individual, which has been reduced to writing and acknowledged by him before a Notary Public or other public official authorized by the State or federal laws of the United States of America to administer an oath and to take an acknowledgment. An "Affidavit" should show the purpose for which it was made and

must state the place where and the public official before whom the acknowledgment was taken.

The *Atto di Notorietà* (translated literally as "Act of Notoriety") is a written certification, prepared by a Notary Public or other public official authorized by the laws of the Italian Republic to administer an oath and to execute such a certificate, of the statements or declarations made under oath and in his presence by the four persons named therein. To execute an *Atto di Notorietà*, four persons must appear before the Notary or other public official, assert that they are each qualified to act as a witness, and that they are not otherwise interested in the subject-matter; and thereafter while under oath, separately and in the presence of each other, and before said Notary or other public official, assert that it is public knowledge and notorious, as well as to the personal knowledge of each of them, that certain facts are true, which statements or declarations are then reduced to writing by the public official before whom they were made, and attested to by each of the four witnesses and by the public official.

A "Signed Statement", as this term is used in this decision, consists simply of a written instrument which an individual has declared to be his own by affixing his signature thereto in the customary manner. A "Signed Statement" is not made under the legal or moral bonds of an oath administered by any qualified public official.

It is pertinent here for the Commission to comment on the many similarities which exist between the form and use of the Affidavit in the legal practice of the United States of America and in the form and use of the *Atto di Notorietà* in the legal practice of Italy. Both an Affidavit and an *Atto di Notorietà* are in the form of an ex parte statement or declaration and, while each is used extensively in the administrative proceedings of the respective countries, neither can be used ordinarily as evidence to establish an allegation of a material fact in a controverted legal proceeding before a domestic court of law either in the United States of America or Italy. It is not disputed that a Notary or other public official only verifies as true that which has actually occurred in his presence, and does not verify that the statements made by the dependents under oath in the Affidavit or in the *Atto di Notorietà* are in fact true. Moreover, the opportunity to challenge the statements of the dependents in an Affidavit or in an *Atto di Notorietà* does not exist at the time such statements are made.

The Commission has noted particularly that the Federal laws of the United States of America provide for the criminal punishment of every person wilfully and corruptly committing perjury in an Affidavit by taking a false oath before a duly qualified and commissioned Consular Officer of the United States of America (22 U.S.C.A., Sec. 1203) and of every person knowingly and wilfully swearing or affirming falsely in any proceeding pending before an international tribunal or commission established pursuant to any agreement between the United States of America and any foreign government (22 U.S.C.A., sec. 270); similarly, the laws of the Republic of Italy provide for criminal punishment for perjury committed by a private person in a public document, for perjury in a private document, of for the use of a false document (Italian Penal Code, Articles 483, 485 and 489).

Obviously, under paragraph 3 of Article 83 of the Treaty of Peace with Italy, *supra*, the Commission is empowered to determine its own procedure and rules of evidence. It has not been the purpose of this Commission to promulgate any new principles or rules of evidence nor to derogate from those principles and rules of evidence generally recognized and accepted in international law. The Commission has noted that the arguments of the Agents of the two Governments on the admissibility of certain evidence reflect in a

large measure the fundamental differences in the domestic legal systems and customs of the two Countries. It is an essential fact to be remembered, however, that the Conciliation Commission is an international arbitral body, charged with the duty of performing those functions attributed to it by the Treaty of Peace with Italy and the Agreements supplemental thereto and interpretative thereof. Unlike a domestic court of law, the Commission is not obliged to exclude all evidence which does not meet the criterion recognized by the legal system under which a domestic court of law functions; on the contrary, the Commission has been empowered by the Treaty of Peace to employ the widest possible latitude in receiving and evaluating evidence in its search for the truth; and, in adopting such a criterion, the Commission is only conforming to the customary practice followed in international arbitral claims procedures.

No reference in the Treaty of Peace with Italy, or in the Agreements supplemental thereto or interpretative thereof, precludes acceptance by this Commission of *ex parte* testimonial instruments as evidence to document a claim. The Rules of Procedure of the Conciliation Commission not only do not preclude the use of such forms of documentary evidence, but recognize the fact that such documentary evidence will be used. International Claims Commissions have customarily adopted a liberal attitude regarding the form, submission and admissibility of evidence (unless restricted by the arbitral agreements). This Commission knows of no rule of international law which would preclude the claimant's use of Affidavits, *Atti di Notorietà*, signed statements and similar *ex parte* testimonial instruments as documentary evidence, under the applicable agreements between the United States of America and Italy; and none has been cited. It is general knowledge that non-sequestered personal property in Italy belonging to many United Nations nationals was lost or damaged as a result of the war. To accept the contention of the Agent of the Italian Republic in this case would be equivalent to denying to numerous nationals of the United States of America who sustained loss of or damage to non-sequestered personal property in Italy their rights under Article 78 of the Treaty of Peace. Therefore, in order to give effect to Article 78 of the Treaty of Peace, and more particularly to paragraph 4 (a) thereof, the Commission concludes that Affidavits, *Atti di Notorietà*, signed statements and similar *ex parte* testimonial instruments are forms of evidence which may be submitted to the Conciliation Commission to establish the elements of a claim for loss of or damage to personal property in Italy which was not sequestered by the Italian Government, when other forms of evidence are not available.

Prompted by the necessity of considering the best available evidence, other international tribunals and commissions have refused to exclude *ex parte* testimonial instruments submitted in support of international claims. The admissibility of such evidence is sometimes specifically provided in the Convention establishing the tribunal or in the Rules of Procedure governing the tribunal or commission. (See *Article VI, Agreement of August 10, 1922 between the United States of America and Germany*, pp. 1-2, *First and Second Report of Robert C. Morris, Agent of the United States before the German-United States Mixed Claims Commission, Washington, 1923*; and *Article 27, Rules of Procedure of the Italian-Mexican Claims Commission adopted December 8, 1930 under the Convention between Italy and Mexico, signed at Mexico City on January 13, 1927*, p. 516, *A. H. Feller, The Mexican Claims Commission, New York, 1935*.)

When the Convention or Rules of Procedure are silent, the international tribunal or commission itself must decide the question of the admissibility of *ex parte* testimonial instruments when this question is presented to it. The practice of admitting Affidavits as evidence, in the absence of any provision relating thereto in the arbitral Convention or in the Rules of Procedure, is

widely recognized by international legal authorities. In the book, *L'Organisation Judiciaire, La Procédure, et La Sentence Internationales*, Paris, 1937, p. 255, the French Jurist, J. C. Witenberg, says:

*D'origine anglo-saxonne, l'affidavit s'est introduit très tôt dans la procédure arbitrale internationale. Et, malgré les contestations dont il a fait l'objet, son admissibilité a fini par y être définitivement admise. On peut, actuellement, considérer cette admissibilité comme étant de coutume en droit international arbitral.* (Footnotes omitted.)

(Translation: "The affidavit, which is of Anglo-Saxon origin, was introduced very early in international arbitral procedure. And, notwithstanding the objections which have been raised against it, its admissibility has finally been completely admitted. This admissibility can now be considered as customary in international arbitral law." (Footnotes omitted.))

Also in the book, *Evidence before International Tribunals*, Chicago, 1939, p. 180, Mr. Durward V. Sandifer states that:

"International" Tribunals have uniformly declined to accept the validity of arguments against the admission of affidavits. It seems doubtful whether a tribunal would today refuse to receive affidavits for appropriate consideration unless bound to do so by a provision in the arbitral agreement. . . .

The Commission has observed, *supra*, the many similarities between the Affidavit and the *Atto di Notorietà* and has noted that questions regarding the admissibility of such ex parte testimonial instruments which have arisen before other international tribunals or commissions have involved particularly Affidavits. Applying the same criterion which permits the use of Affidavits in international arbitral claims proceedings, the Commission finds that there is no logical basis or legal principle in international law which would preclude the use of an *Atto di Notorietà* as documentary evidence to establish elements of a claim presented under Article 78 of the Treaty of Peace.

Therefore, based upon the Treaty of Peace, and the Agreements supplemental thereto and interpretative thereof, and supported by logic and authority, the Commission accepts in evidence the Affidavits, the *Atto di Notorietà* and the signed statements of witnesses, all of which were submitted in this case as documentary evidence in support of the claimant's sworn Statement of Claim. The Commission has stated, *supra*, the reason for its acceptance in evidence of the claimant's letter of September 4, 1951, which was attached to Annex A to the Brief of the Agent of the United States of America.

Although the Commission holds that it is entitled to receive in evidence and to consider Affidavits, *Atti di Notorietà* and signed statements when submitted in evidence, it must be emphasized and made very clear that the Commission has not thereby established the probative value which it will give to such ex parte testimonial instruments. The question of the evidentiary weight which the Commission will give to such documentary evidence is a separate matter which must be determined in the light of all the circumstances surrounding a particular case; this question will be considered later in this Decision.

It is the contention of the United States of America that the submission of a claim based only on ex parte testimonial instruments creates certain responsibilities on the Italian Republic under the Agreements between the two Governments. Preliminary to a consideration of any aspect of this subject, it should be observed that, under Article 78 of the Treaty of Peace, there is no presumption in favour of either the claimant or the Government of the Italian Republic. The claimant must submit sufficient documentary evidence in

support of his claim to establish the basis of his rights to assert a claim. It is obvious that the nature of the property and the circumstances surrounding the loss or damage will be determinative in most instances of the type and quantity of evidence which the claimant can furnish to document his claim but, even where the nature of the property and the circumstances surrounding a particular claim have placed a severe limitation on the claimant's means of proof, the claimant is not relieved of the obligation to submit the best available evidence in support of his claim and to make a full and complete disclosure of all the pertinent facts; where this has not been done, the Commission will be justified in drawing reasonable inferences from the non-production of evidence which it would appear could have been furnished by the claimant, or from the lack of a satisfactory explanation of the claimant's failure to provide such evidence.

When a claim under Article 78 of the Treaty of Peace is first submitted to the Government of the Italian Republic by a national of the United States of America, and it is clear from a preliminary examination thereof that the claim is neither frivolous nor fraudulent, that Government can either accept the evidence submitted in support of the particular claim or request its administrative agencies to conduct an investigation of the claim as may be necessary in order to develop evidence which will refute, limit or confirm the declarations made by the claimant. Hence, the Government of the Italian Republic, even before a disputed claim is submitted to the Commission, has the right and opportunity to challenge the declarations made by the claimant or witnesses in *Affidavits*, *Atti di Notorietà*, signed statements, or similar *ex parte* testimonial instruments. However, when there has been a failure by the respondent Government to produce any evidence or to submit any analytical argument which would refute or limit the declarations made by a claimant or witness in *Affidavits*, *Atti di Notorietà*, signed statements or similar *ex parte* testimonial instruments, the Commission will be justified in drawing reasonable inferences from such failure and in giving such instruments the evidentiary value which in its opinion appears to be warranted under all the circumstances of the case.

Paragraph 5 of Article 83 of the Treaty of Peace with Italy, which reads:

The parties undertake that their authorities shall furnish directly to the Conciliation Commission all assistance which may be within their power.

is a clear recognition that the Commission has no authority to *compel* the appearance and testimony of witnesses or to conduct an investigation of any allegation of fact made in a particular case.<sup>1</sup> The Commission must act through the Agents of the two Governments but this does not mean that the Commission, in its quest for the truth, does not have the right to rely confidently upon each of the two Governments and upon each of the Agents of the two Governments before the Commission for the highest degree of co-operation including a full and complete disclosure of the facts in each case insofar as such facts are within their knowledge or can reasonably be ascertained by them.

<sup>1</sup> On July 13, 1930, by Act of Congress, an international tribunal or Commission to which the United States of America is a party was empowered to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence. The Act of June 7, 1933 allows the Agent of the United States of America before such a tribunal or Commission to apply to the United States District Court for such a subpoena. (See U.S.C.A., Title 22, Sec. 270 to 270 g, inclusive). Where a claimant or witness resides or is to be found only outside the United States of America, the use of these statutory powers is limited.

The reason why it is the responsibility of the Government of the Italian Republic to investigate a claim of a national of the United States of America, when it is clear from a preliminary examination thereof that the claim is neither frivolous nor fraudulent, is derived from the particular relationship between the United States of America and Italy growing out of the Agreements and Supplementary Exchanges of Notes signed at Washington, D.C., on August 14, 1947 (approved by Italian Legislative Decree No. 1747 of December 31, 1947). These Financial and Economic Agreements implement certain provisions of the Treaty of Peace with Italy, and provide for the settlement of certain wartime claims, the unblocking of the Italian assets in the United States and the payment of certain claims of nationals of the United States of America, and other related matters. In one of the Notes exchanged between the two Governments on August 14, 1947, the Government of Italy undertook certain obligations "with respect to the assistance to be given to nationals of the United States of America with respect to their property in Italy"; the keynote of this obligation is expressed in the word "assistance". The Note further recites that "This assistance is directed particularly to the implementation of Article 78 of the Treaty of Peace with Italy and to Article III, paragraph 16, of the above Memorandum of Understanding". A further assurance is contained in the second paragraph of this Note, which reads:

The Government of Italy shall, as soon as possible, designate an Italian governmental agency having authority to receive and determine claims of nationals of the United States of America with respect to their properties in Italy, and to effect the restoration of such properties, or pay compensation, or both, as provided in Article 78 of the Treaty of Peace with Italy, and in accordance with the terms of Article III, paragraph 16, of the Memorandum of Understanding.

The assurance that Italy "would receive and determine claims of nationals of the United States of America" carries with it by necessity the responsibility that all such claims which are not patently frivolous or fraudulent on their face would be investigated by the Italian Government because only after making such an investigation can the claimant's rights be "determined".

Because of the foregoing reasons it is clear that, when the claim which is under consideration here was presented, the Italian Government should not have rejected the documents submitted in support of the claim as having no evidentiary value because it would appear that if all the facts alleged by the claimant were true, she had established the basis of her right to assert a claim. Admittedly, the claimant had submitted a minimum of evidence and had not made a full and complete disclosure of all the pertinent facts. Under these circumstances, the Italian Government might properly have requested the claimant to furnish additional information regarding (a) her civil status in Italy following her marriage to Prof. Dr. Gennaro Amabile of Rome, (b) the individual items of personal property acquired prior to 1931 and for the loss of which the claimant has requested compensation as the sole owner of such property, (c) the additional individual items of personal property acquired by the claimant after her marriage and evidence to substantiate the allegation of sole ownership of such additional property, (d) the date and full particulars regarding the alleged forced evacuation of the claimant from her apartment at the Lido di Roma (Ostia) and its use thereafter by German Military Forces, as well as when the claimant returned to the Lido di Roma (Ostia) and was able to resume possession of her apartment.

It would, of course, be the claimant's obligation to furnish such additional information, if available; and, in this case, it would appear that this information would be particularly within the knowledge of the claimant. When,

however, the claimant has furnished all the information which reasonably could be ascertained by her, it becomes the responsibility of the Italian Government under the Agreements between Italy and the United States of America to make a determination of the claim.

It appears from the record that the Italian Government maintains that the documents submitted by the claimant in support of the claim can not be considered as sufficient proof to establish the basis of her right to assert a claim, and therefore the administrative agencies of the Italian Government had no responsibility to investigate this claim; the Commission has disposed of these arguments, *supra*. No request for a reservation concerning any aspect of the evidence submitted by the claimant, and no evidence of any kind has been submitted by the respondent Government. Neither of the Agents requested the Commission to hear oral testimony of witnesses, subject to cross-examination, as provided for in exceptional cases under the provisions of Article 10 (a) of the Rules of Procedure. Under these circumstances, it becomes the duty of the Commission to examine carefully everything which has been received in evidence in order that the Commission may determine the weight to be accorded to such evidence and its sufficiency to support the alleged rights of the claimant under Article 78 of the Treaty of Peace.

The weight or probative value which in general has been accorded to Affidavits and other forms of ex parte testimonial instruments by other international tribunals and commissions was expressed by the British-Mexican Claims Commission, in its unanimous decision on the demurrer files by the Agent of the Mexican Government in the claim of *Mrs. Virginia Lessard Cameron (Claims Commission between Great Britain and Mexico—Decisions and Opinions of the Commissioners in accordance with the Convention of November 9, 1926, London, 1931, p. 33, at p. 35)*:

It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commission to decide according to the circumstances of a particular case. Affidavits *must and will be weighed with the greatest caution and circumspection*, but it would be utterly unreasonable to reject them altogether." (Emphasis supplied.)

The writings of international jurists on this subject also emphasize the "caution" and "circumspection" which must be exercised in evaluating such forms of evidence. In *L'Organisation Judiciaire, La Procédure et La Sentence Internationales*, *supra*, Witenberg says (p. 256):

*Il est à relever, cependant, que la force probante de l'affidavit est moindre que celle des autres modes de preuve. Surtout dans le cas où il émane de l'intéressé lui-même et dans le cas où il était possible de recourir à d'autres modes de preuve et que la partie désireuse de prouver a négligé de le faire.*" (Footnote omitted.)

(*Translation*: "It should be pointed out, however, that the probative force of the affidavit is less than that of other means of proof. Especially in those cases in which it was made by the interested party himself and those cases in which it was possible to have recourse to other means of proof and the interested party neglected to do so."

(Footnote omitted.))

Sandifer summarizes his conclusions regarding the practices of international tribunals and commissions and the probative value which they accord to affidavits in his book *Evidence before International Tribunals*, *supra*, as follows (pp. 182-183):

The tribunal may accord to them "much, little, or no weight" according to its evaluation of the testimony contained in them under the particular circumstances of the case. In determining the probative value of affidavits, the tribunal will, of course, take into account such facts as the credibility, sources of information, pecuniary interest and family ties of the affiants. It will also take into account the fact that the witness has not been subject to cross-examination, and that the opposing party may not have had an adequate opportunity for answering the allegations contained in the affidavits.

A tribunal may, if the circumstances seem to warrant, deny any probative value of affidavits, but as previously indicated it is generally held that this may not properly be done on the grounds that affidavits as such carry no evidentiary weight. (Footnotes omitted.)

Bearing in mind the principles and practices followed by international tribunals and commissions and approved by writers on the subject, the Commission has carefully examined the declarations of the claimant and of the other witnesses in the instant case.

Despite the fact that no evidence has been submitted by the respondent Government, the sum total of the evidence *now* before the Commission is substantially different from that which documented this claim when it was initially rejected on June 24, 1950 by the Italian administrative authorities or when the Petition was filed on November 21, 1950 by the Agent of the United States of America. The reason for this substantial difference is to be found in the signed letter of the claimant herself dated September 4, 1951 which was filed as "Annex A" to the Brief of the Government of the United States of America and was accepted in evidence by the Commission. Quoted in full, *supra*, this letter is the most illuminating and important document submitted in this case.

While the claimant's letter, *supra*, leaves much to be desired in its wording, its meaning is clear when viewed against the entire record in this case. To understand the full import of the claimant's signed statement of September 4, 1951, *supra*, it is only necessary to recall the sworn documentary evidence upon which this claim is predicated and to remember that the claimant had to establish that the alleged loss was "as a result of the war", within the meaning of this phrase as used in paragraph 4 (a) of Article 78, in order to be eligible to receive compensation under the Treaty of Peace.

In her Affidavit of February 23, 1949 (Annex 2 of the Statement of Claim), the claimant verified under oath that the following statement was true:

...; that as a result of the war and more particularly as a result of the forced evacuation of her house and the fact that her house was occupied by German military forces, the entire contents of the house ... was lost or irretrievably damaged; ... (Emphasis supplied.)

Again, in the Statement of Claim, the claimant verified under oath on March 16, 1949 that the following statement was true:

All of the property listed on the list attached to Annex 2 was lost or irretrievably destroyed, such loss or destruction having occurred following the time that the claimant was obligated to leave her apartment as a consequence of general orders evacuating the Lido di Roma during the course of the war. During such period the apartment was occupied by German Military Forces. (Emphasis supplied.)

Also, in the *Atto di Notorietà* of February 16, 1949 (Annex 3 to the Statement of Claim), the four witnesses named therein attested under oath that the following statement is true:

All of these items were destroyed or lost as a result of warlike causes. In fact, *the lady was forced, by the authorities to abandon her home*, she left everything and on her return found nothing. (Emphasis supplied.)

From a careful reading of the claimant's letter of September 4, 1951 *supra*, it is obvious that essential elements in each of the foregoing statements are not true. The claimant on September 4, 1951 repudiated that portion of her own sworn statements of February 23, 1949 and March 16, 1949, respectively, in which she had previously stated that she had been forced by the authorities to evacuate her apartment. Moreover, the claimant on September 4, 1951 admitted that of her own and direct personal knowledge she was unable to verify as true that portion of her previous sworn statements in which she had stated that "during such period the apartment was occupied by German Military Forces".

The claimant's letter of September 4, 1951 also impugns portions of the *Atto di Notorietà* submitted in evidence as Annex 3 to the Statement of Claim. No explanation has been offered of the circumstances which prompted the claimant on September 4, 1951 "to correct" portions of her previous sworn statements upon which the claim is based; and the Commission will not indulge in speculation.

Suffice it to say that the Commission is unable to give any credence to the evidence introduced in this case; and the claim is therefore rejected in its entirety. Moreover, the Commission suggests that the appropriate legal authorities may desire to make a determination of whether or not the laws of either of the two Governments were breached in the preparation of the sworn documentary evidence which formed the basis of the claim for compensation in this case.

Having reached the foregoing conclusions, the Commission, acting in the spirit of conciliation,

**HEREBY DECIDES:**

1. That the requests contained in the Petition filed in behalf of (Mrs.) Norma Sullo Amabile by the Government of the United States of America are rejected; and
2. That this decision is final and binding from the date it is deposited with the secretariat of the Commission.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 25th day of June, 1952.

<i>The Representative of the United States of America on the Italian-United States Conciliation Commission</i>	<i>The Representative of the Italian Republic on the Italian-United States Conciliation Commission</i>
<i>(Signed) Emmett A. SCANLAN, Jr.</i>	<i>(Signed) Antonio SORRENTINO</i>

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GETTINGER CASE—DECISION No. 12  
OF 30 JUNE 1952 <sup>1</sup>

Compensation under Article 78 of Peace Treaty—Sequestration—State responsibility—Loss of enemy property—Evaluation of damages—Power of appreciation of Conciliation Commission.

Indemnisation au titre de l'article 78 du Traité de Paix — Sequestre — Responsabilité de l'Etat — Perte de biens ennemis — Evaluation des dommages — Pouvoir d'appréciation de la Commission de Conciliation.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents and evidence and the argument and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Calros J. Warner, Agents of the United States of America.

STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of Mr. Isadore Gettinger, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the Agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of Mr. Isadore Gettinger (hereinafter referred to as the claimant) indemnity for the loss as a result of the war of certain personal property owned by him and for such further or other relief as may be just and equitable.

The material facts are as follows:

The Embassy of the United States of America in Rome certified that the claimant is now, and has been at all times since his naturalization on July 9, 1943, a national of the United States of America; and the fact that the claimant is a "United Nations national", within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace, is not in dispute.

Prior to becoming a national of the United States of America, it appears

<sup>1</sup> *Collection of decisions*, vol. I, case No. 13.

that the claimant possessed Austrian nationality; the record does not indicate when the claimant migrated from Austria to the United States of America. Following the annexation of Austria by the German Reich in March, 1938, anti-Semitic laws and measures were immediately introduced in Austria. The exodus of Jewish people which followed is a historical fact. It was under these circumstances that the claimant arranged to have his mother send to him certain of his personal effects. During August, 1939, the claimant's mother packed and shipped three trunks from Vienna, Austria, to the claimant. Each of these trunks had arrived in Italy for trans-shipment to the United States of America when the outbreak of the war made it impossible for the shipments to go forward, necessitating the warehousing of the claimant's property.

In his Affidavit of Claim, prepared on August 27, 1948, the claimant furnished certain details regarding the personal property contained in these three trunks; allegedly, this property included Oriental carpets, silverware, a stamp collection, oil paintings, linens and clothing; an evaluation set opposite each classification was expressed in dollars, the total amount being also shown in lire at the then rate of exchange of 575 lire to the dollar. The claimant stated that the silverware, carpets and other personal effects had been purchased between 1937 and 1939, and that the paintings and the stamp collection had been inherited by him in July, 1936 upon the death of his grandmother, Lea Schuldenfrei, at Vienna, Austria. Certain of these allegations in the claimant's Affidavit of Claim are supported by Affidavits of the claimant's mother and two other witnesses all of whom stated that they were present when the trunks were packed and prepared for shipment in Vienna, Austria, in August 1939. No evidence of any insurance carried by the claimant or the warehousemen was introduced in this case; this being explained, in part, by the claimant's mother in that portion of her Affidavit which reads as follows:

I was the shipper of the trunks and hereby state that at the time of shipment [1939 from Vienna] it was impossible for people of Jewish descent to take out any kind of insurance, this being the reason why there are no insurance papers now.

The firm of Danzas and Co., Forwarding Agents of Milan, stored in its warehouse for the claimant's account in September, 1940 one of these three trunks, weighing 80 kilograms, which was subsequently lost when the warehouse itself suffered heavy war damage during an aerial bombardment.

The firm of Francesco Parisi, Forwarding Agent, Trieste, stored in its warehouse for the claimant's account, prior to the outbreak of the war, the other two of these trunks, weighing 218 kilograms. By Decree No. 1100/12409 dated May 11, 1943, the Prefect of Trieste provided that all of the transit goods stored in certain warehouses in Trieste and owned by Jews emigrating to enemy countries were to be placed under sequestration since the chattels belonging to such emigrating Jews were to be considered as enemy property. This Decree, which was issued under the Italian War Laws, designated the sequestrator and fixed his powers, duties and responsibilities; and thereafter measures were taken to bring the chattels of emigrating Jews under the sequestrator's control. One of these measures was the consequent issuance of an Order to certain firms requiring them to make a written denunciation to the authorities of the transit goods owned by emigrating Jews and suspected of residing in enemy countries. A list of the property denounced as a result of this particular Order was subsequently compiled by the sequestrator, and a photostatic copy thereof was introduced in evidence in this case; on page 124 thereof there appears under the claimant's name an entry describing two of the trunks

which are the subject of this claim, and showing the residence of the claimant to be Brooklyn, New York.

On January 12, 1944 the German High Commissioner in the Operation Zone "Adriatic Coast Territory" issued his Order No. III/4/81 to the storage warehousemen in the Free Port of Trieste, including the claimant's Forwarding Agent, Francesco Parisi. Said Order has been fully set out in Decision No. 10 of the Commission (Case No. 15—*The United States of America ex rel. Fred O. Winter vs. the Italian Republic*), and is incorporated herein by reference. On March 27, 1944, in compliance with the aforesaid Order, the two trunks owned by the claimant were delivered by the Forwarding Agent, Francesco Parisi, to German authorities, who issued on that date an official Receipt therefor; a photostatic copy of this Receipt was introduced in evidence. Afterwards the claimant's property cannot be traced.

On December 11, 1948 the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic the Claim of Mr. Isadore Gettinger, based on Article 78 of the Treaty of Peace. Following the initial rejection of this claim by the Ministry of the Treasury of the Italian Republic on June 24, 1950, there was correspondence between the two Governments regarding the evidentiary value of the documentary evidence submitted; but it does not appear from the record that the Italian Government took any further action regarding this claim, after its initial rejection.

On May 29, 1951, the Petition of the United States of America in this case was filed with the Commission. The Petition alleges that the failure of the Government of the Italian Republic to make a determination regarding this claim constituted in effect a rejection of the claim, resulting in a dispute between the two Governments submissible to the Conciliation Commission established under Article 83 of the Treaty of Peace. With a statement of the foregoing facts as a premise, the Petition concludes by requesting the Commission to find that a dispute regarding this claim exists between the two Governments and that the claimant is entitled to receive from the Government of the Italian Republic two-thirds of the sum necessary at the date of payment to make good the loss suffered (which amount was estimated by the claimant on August 27, 1948 to be \$8,050 or 4,628,750 lire at the then rate of exchange of 575 lire to the dollar), as well as such other relief as may be just and equitable.

In the Answer of the Italian Republic, filed with the Commission on July 5, 1951, it is denied that a "dispute" regarding this claim exists between the two Governments, within the meaning of Article 83 of the Treaty of Peace; and additional time was requested by the Italian Government to complete an investigation.

The Commission issued an Order on July 23, 1951 declaring that a dispute regarding the claim of Isadore Gettinger exists between the two Governments, and granted an additional period of sixty (60) days to the respondent Government within which to complete its investigation and to file the full and complete Answer.

On October 3, 1951 the Agent of the Italian Republic filed with the Commission a supplementary Answer in which the Government of the Italian Republic did not deny that the claimant was the owner of the three trunks in question or that the trunks had been lost as a result of the war in Milan and Trieste; but the Agent of the Italian Republic maintains that the evidence submitted by the claimant does not establish the nature of the value of the contents of these trunks, and argues that the proper criterion to be followed in evaluating this loss would be "to take the average insurance value of one

kilogram of baggage and multiply it by the weight of the trunks lost by Mr. Gettinger"; and, based upon such a calculation, the Agent of the Italian Republic submitted an offer of six hundred thirty thousand (630,000) lire in full and complete settlement of this claim.

The Commission set this case for hearing on February 28, 1952, and on February 27, 1952 the Agent of the United States of America filed with the secretariat a statement that the settlement offer had been rejected by the claimant in a letter dated February 4, 1952. In this letter of rejection, the claimant pointed out that this claim, is for the loss "of household furnishings, silverware, oil paintings, and other items of personal property none of which ordinarily fall within the description of baggage", and that "the freight from Vienna to New York is quite considerable and items of lesser value were discarded when the cases were packed".

At the sitting of the Commission on February 28, 1952, the Agent of the United States of America stated that he was unable to submit any additional evidence regarding the contents and the value of the three trunks, but maintained his Government's position that these questions should be resolved on the basis of the evidence submitted with the Petition; while the Agent of the Italian Republic maintained that the evidence submitted has established only the weight of the trunks, but not the nature or the value of the contents thereof, it being impossible for his Government to obtain any evidence to refute the statements made by the claimant and the witnesses, since the trunks were locked when they entered Italy and were still locked when one was destroyed by aerial bombardment and the other two were removed from Italy following their seizure by German authorities.

None of the foregoing facts with regard to the ownership of the property and the occurrence of the loss was controverted or denied by the Government of the Italian Republic before the Conciliation Commission; and the Commission finds that sufficient evidence has been submitted to substantiate such facts. The only questions of fact which are controverted are the contents of the three trunks and the evaluation to be placed thereon.

Considering the evidence submitted in the light of all the circumstances surrounding this particular case, and the arguments made by the Agents of the two Governments, and attempting to determine the probative value of the evidence acting in the spirit of conciliation, as to the exact nature and value of the property lost, the Commission,

HEREBY DECIDES:

1. That, under Article 78 of the Treaty of Peace, there exists in this case an international obligation of the Government of the Italian Republic to pay the sum of one million, five hundred thousand (1,500,000) lire in full and complete settlement of the claim of Mr. Isadore Gettinger, a national of the United States of America, for the loss in Milan and Trieste during the war of personal property owned by him;

2. That the payment of this sum in lire shall be made in Italy by the Government of the Italian Republic, upon request of the Government of the United States of America, within thirty (30) days from the date that a request for payment under this Decision is presented to the Government of the Italian Republic;

3. That the payment of this sum in lire shall be made by the Government of the Italian Republic free of any levies, taxes and other charges, and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace: and

4. That this Decision is final and binding from the date that it is deposited with the secretariat of the Commission, and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 30th day of June, 1952.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

(Signed) Emmett A. SCANLAN, Jr.

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

(Signed) Antonio SORRENTINO

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MENKES CASE—DECISION No. 13 OF  
9 JANUARY 1953<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Loss of property—Sequestration—Nationality of claim—Owner naturalized “United Nations national” subsequent to date of Peace Treaty—Applicability of second part of paragraph 9 (a) of Article 78—Treatment as enemy.

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Indemnisation au titre de l'article 78 du Traité de Paix — Perte de biens — Séquestre — Nationalité de la réclamation — Acquisition par le propriétaire du statut de “ressortissant d'une Nation Unie” à une date ultérieure à celle prévue par le Traité — Applicabilité de la seconde partie du par. 9 a) de l'Article 78 — Traitement comme ennemi.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents and evidence and the arguments and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 18.

the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

#### STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of (Mrs.) Hilda Sara Menkes, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the Agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of (Mrs.) Hilda Sara Menkes, (hereinafter referred to as the claimant), indemnity for loss as the result of the war of certain personal property owned by her which was sequestered by Italian authorities on May 11, 1943, and for such other or further relief as may be just and equitable.

The material facts are as follows:

The Embassy of the United States of America in Rome certified that the claimant is now and has been at all times since her naturalization on February 20, 1945 a national of the United States of America. On the same page, but beneath the certification that the claimant is a national of the United States of America, it is asserted that the claimant was treated as enemy under the laws in force in Italy during the war.

Prior to becoming a national of the United States of America, it appears that the claimant had been a national of Austria by reason of birth on July 14, 1888 in Vienna. Following the annexation of Austria by the German Reich in March, 1938, anti-Semitic laws and measures were immediately introduced in Austria. Among the Austrian people of Jewish extraction who emigrated from that country were the claimant and her husband, Dr. Joseph Israel Menkes. Before leaving Austria, the claimant arranged for the exportation of her household goods and personal effects.

On August 14, 1950 the firm of Karl Kridtner, Freight Forwarding Agents in Vienna, furnished to the claimant certain documents from their files which were copies of the original documents required by the Austrian authorities as a prerequisite to the exportation of the claimant's personal property; prepared in Vienna in 1939, and introduced in evidence, these documents include Proof of Registration of the claimant with the police, approval of the office of Foreign Exchange for the transportation abroad by the claimant of listed personal property, a certification showing that no irregularity existed with respect to taxes and an Export Declaration filed in Vienna with the Austrian authorities by the firm of Karl Kridtner covering the shipment to the United States of America of one lift van containing the claimant's personal property. To this Export Declaration there was attached a detailed list of one hundred ninety (190) different items of household goods and personal effects prepared on September 15, 1939. The evidence establishes that the lift van containing the personal property listed on this Export Declaration was cleared by the Austrian customs officials in Vienna and was shipped in 1939 from Vienna to Trieste. With the outbreak of the war, it was impossible to trans-ship this lift van to the United States of America; and the evidence establishes that it was stored thereafter in the Free Port of Trieste in Warehouse No. 23 by the firm of Julia Intertrans, S.A., Freight Forwarding Agent.

By Decree No. 1100/12409, dated May 11, 1943, the Prefect of Trieste provided that all of the transit goods stored in certain warehouses in Trieste

and owned by Jews immigrating to enemy countries were to be placed under sequestration, since the chattels belonging to such immigrating Jews were to be considered as enemy property. This decree of sequestration was issued under the Italian War Laws and designated the sequestor and fixed his powers, duties and responsibilities. Attached to said decree was a list of the property which was to be sequestered, since such listed property was already known by the Italian authorities to belong to immigrating Jews. Shown on this list of sequestered property is the claimant's lift van stored by Julia Intertrans, S.A., under lot No. 1386 in Warehouse 23, weighing 3706.5 kilograms.

The claimant's lift van is also included in a list subsequently compiled by Dr. Bruno C. Steinkuhl, the sequestor appointed in Decree No. 1100/12409, *supra*; the claimant's lift van is enumerated at page 34 of such list and is correctly described therein except that the owner of such lift van is shown as "Dr. J. Menkes". It has been established that Dr. Joseph Israel Menkes is the husband of the claimant and his name appears in some documents introduced in evidence.

On January 12, 1944 the German High Commissioner in the operation zone "Adriatic Coast Territory" issued his Order No. III/4/81 to storage warehousemen in the Free Port of Trieste. Said order has been fully set out in Decision No. 10<sup>1</sup> of the Commission (Case No. 15—*The United States of America ex rel. Fred O. Winter vs. The Italian Republic*), and is incorporated herein by reference. On April 18, 1944, in compliance with the aforesaid Order, the lift van containing the personal property owned by the claimant was delivered to the German authorities, who issued on that date an official Receipt thereof; a certified true copy of the Receipt (which was furnished in 1946 by the firm of Julia Intertrans, S.A., to the Office of the Allied Military Government in Trieste) has been introduced into evidence. Afterwards, the claimant's property cannot be traced.

On April 27, 1950, the Embassy of the United States of America submitted to the Ministry of the Treasury of the Italian Republic the claim of (Mrs.) Hilda Sara Menkes, based on Article 78 of the Treaty of Peace. The claim was initially rejected on August 22, 1950 by the Ministry of the Treasury of the Italian Republic on the ground that the claimant had not acquired the nationality of the United States of America until February 20, 1945 and had not established that she possessed the nationality of one of the "United Nations" on September 3, 1943. Following the initial rejection of this claim, there was correspondence between the two Governments regarding whether the claimant was a "United Nations national" within the meaning of the Treaty of Peace; but it does not appear from the record that the Italian Government took any further action regarding this claim after its initial rejection.

On June 15, 1951 the Petition of the United States of America in this case was filed with the Commission. The Petition states the issue involved in this case as being:

Is an individual whose property was sequestered as enemy property by the Italian authorities under the decree of the Prefect of Trieste dated May 11, 1943 an individual treated as an enemy under the laws in force in Italy during the war within the meaning of Article 78 of the Treaty, and therefore a "United Nations national" within the meaning of that Article?

With a statement of the foregoing facts as a premise, the Petition concludes by requesting the Commission to find that the claimant is a "United Nations national" within the meaning of this term as used in Article 78 of the Treaty

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<sup>1</sup> See *Supra*, p. 111

of Peace (the claimant having been treated as enemy under the laws in force in Italy during the war when the lift van containing her personal property was sequestered by the Italian authorities on May 11, 1943), and that the claimant is entitled to receive from the Government of the Italian Republic two-thirds (2/3) of the sum necessary at the date of payment to make good the loss suffered by her, (which amount was estimated by the claimant on January 4, 1949 to be Nine Thousand, Four Hundred and 40/100 Dollars (\$9,400.40) or 5,405,230 Lire at the then rate of exchange of 575 Lire to the dollar), as well as such other relief as may be just and equitable.

In the Answer of the Italian Republic filed with the Commission on July 21, 1951, it is argued that the subject claim was expressed in proper terms of law for the first time in the letter dated May 4, 1951 from the Embassy of the United States of America in Rome to the Ministry of the Treasury of the Italian Republic, and that therefore a "dispute" regarding this claim did not exist between the two Governments within the meaning of Article 83 of the Treaty of Peace on the date that the Petition in this case was filed with the Commission; to support this argument, the Agent of the Italian Republic provided for the transfer of the original Statement of Claim and all of the documents attached thereto from the Ministry of the Treasury of the Italian Republic to the Secretariat of the Commission for inclusion in the record of this case. In the Answer additional time was requested by the Italian Government to complete its investigation and to consider further this claim.

The Commission issued an Order on August 8, 1951 declaring that a dispute regarding the claim of (Mrs.) Hilda S. Menkes exists between the two Governments, and granted an additional period of ninety (90) days to the respondent Government within which to complete its investigation and to file a full and complete Answer.

On November 27, 1951 the Agent of the Italian Republic filed with the Commission a supplemental Answer in which it is argued that the evidence presented by the claimant Government creates a reasonable doubt as to whether or not the husband of the claimant, Dr. J. Menkes, and not the claimant herself, was on the date of loss the real owner of the personal property which is the subject of this claim; and maintain further that, even if the claimant's sole ownership interest is established—and purely on a presumptive basis—the amount necessary to purchase similar property or to make good the loss suffered can be evaluated properly at Five Million (5,000,000) Lire; and that, under the provisions of paragraph 4 (a) of Article 78, the claimant would be entitled to receive only two-thirds (2/3) of such evaluation as compensation for the alleged loss of her personal property.

In its Order of February 12, 1952 the Commission granted the request of the Agent of the United States of America and allowed a period of thirty (30) days within which to file a Reply. To the Reply filed on February 26, 1952 there was attached a certification by the Embassy of the United States of America in Rome that Dr. Joseph Menkes is now and has been at all times since his naturalization on February 20, 1945 a national of the United States of America. In the Reply the Agent of the claiming Government seeks to rebut the contention of the Italian Republic that the evidence in this case does not establish that the claimant was the sole owner of the subject personal property, by pointing out that not only did Dr. Joseph Menkes state that the property in question was owned by his wife (who is the claimant here) in an Affidavit subscribed and sworn to before a duly commissioned and qualified Vice-Consul of the United States in America of Vienna on the 31st of October, 1950, but that, further, Dr. Joseph Menkes would not have any reason whatsoever to misrepresent the facts in the Affidavit since Dr. Joseph Menkes himself

became a national of the United States of America on precisely the same date as his wife.

The time limit having expired for filing a counter-Reply by the Agent of the Italian Republic, the Agent of the United States of America filed on April 2, 1952 a Request for an Award, agreeing therein to accept the Italian Government's basis of evaluation of the subject personal property, that is, to evaluate the household goods and personal effects contained in the lift van which was lost at Five Million (5,000,000) Lire.

An examination of all of the evidence introduced in this case clearly establishes, and the Commission so finds, that the claimant was the sole owner of the subject household goods and personal effects on the date of loss. The basis for the mistake made by the sequestrator in making the husband of the claimant as the owner of the subject property is clear from the evidence; the Commission considers it only natural that the claimant's husband undertook to assist his wife in expediting the clearance for export from Vienna in 1939 of her personal property, and that the claimant's husband subsequently corresponded with the various Freight Forwarding Agents who handled this shipment. However, such acts by her husband does not cloud in any way the claimant's title to the subject property.

The Commission also finds that the claimant is a "United Nations national" within the meaning of this term as used in paragraph 9 (a) of Article 78 of the Treaty of Peace; the second sentence of this paragraph reads as follows:

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

It is clear from the evidence that the lift van containing the claimant's property was sequestered on May 11, 1943 by the Decree of the Prefect of Trieste, and that this sequestration was made under the Italian War Laws. The sequestration alone of the claimant's personal property is sufficient to show that the claimant was "treated as enemy" within the meaning of this phrase as used in the second sentence of paragraph 9 (a) of Article 78; and since (Mrs.) Hilda Sara Menkes is a national of the United States of America, it follows that the claiming Government is entitled to submit a claim in her behalf under the provisions of Article 78 of the Treaty of Peace.

Having reached the foregoing conclusions, and having noted that the Agents of the two Governments are agreed that the claimant's property can be properly evaluated at Five Million (5,000,000) Lire, the Commission finds that under the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace, the claimant is entitled to receive as compensation for the loss suffered by her as a result of the war two-thirds (2/3) of this amount, namely, Three Million, Three Hundred Thirty-three Thousand, Three Hundred Thirty-three (3,333,333) Lire.

No evidence having been submitted that any previous payment has been made to the claimant for war damages to the personal property which is the subject of this claim, the Commission, acting in the spirit of conciliation,

**HEREBY DECIDES:**

1. That in this case there exists an international obligation of the Government of the Italian Republic to pay the sum of Three Million, Three Hundred Thirty-three Thousand, Three Hundred Thirty-three (3,333,333) Lire under Article 78 of the Treaty of Peace in full and complete settlement of the claim

of (Mrs.) Hilda Sara Menkes, a national of the United States of America, for the loss in Trieste during the war of personal property owned by her;

2. That the payment of this sum in lire shall be made in Italy by the Government of the Italian Republic upon request of the Government of the United States of America within thirty (30) days from the date that a request for the payment under this Decision is presented to the Government of the Italian Republic;

3. That the payment of this sum in lire shall be made by the Government of the Italian Republic free of any levies, taxes or other charges and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace;

4. That in this case an Order regarding costs is not required; and

5. That this Decision is final and binding from the date it is deposited with the secretariat of the Commission; and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and Italian, both texts being authenticated originals.

DONE in Rome, this 9th day of January, 1953.

*The Representative of the United  
States of America on the Italian-  
United States Conciliation Commission*

(Signed) Emmett A. SCANLAN, Jr.

*The Representative of the Italian  
Republic on the Italian-United  
States Conciliation Commission*

(Signed) Antonio SORRENTINO

#### BARTHA CASE—DECISION No. 14 OF 30 MARCH 1953<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Loss of property—Sequestration—Nationality of claim—Whether owner, not a United Nations national at time of damage, entitled to claim—Applicability of second part of paragraph 9 (a) of Article 78—Treatment as enemy.

Indemnisation au titre de l'article 78 du Traité de Paix — Perte de biens — Séquestre — Nationalité de la réclamation — Question de savoir si le propriétaire, qui ne possédait pas le statut de ressortissant d'une Nation Unie au moment du dommage, avait qualité pour se prévaloir des dispositions de l'article 78 du Traité — Traitement comme ennemi.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy

<sup>1</sup> *Collection of decisions*, vol. I, case No. 19.

pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents and evidence and the arguments and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

#### STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of Mr. Alexander Bartha, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of Mr. Alexander Bartha, (hereinafter referred to as the claimant), compensation for the loss of certain personal property under circumstances which will be described hereinafter, and for such further or other relief as may be just and equitable.

The material facts are as follows:

The Embassy of the United States of America in Rome certified that the claimant is now and has been at all times since his naturalization on June 4, 1945 a national of the United States of America. On the same page but beneath the certification that the claimant was treated as enemy under the laws in force in Italy during the war.

In his Affidavit of Claim prepared on December 23, 1948 the claimant asserted that the household goods and personal effects which are the subject of this claim had been acquired by him by purchase and were valued at One Thousand Five Hundred Dollars (\$1,500). The evidence establishes that the subject household goods and personal effects were packed by the Freight Forwarding Agent Aubac, Vienna, into five (5) crates marked "A.B. 61, 62, 63, 64, 65" and shipped via truck on October 26, 1939 from Vienna to Trieste. The firm of Francesco Parisi, Freight Forwarding Agent, received and stored said shipment in its warehouse in Trieste for the claimant's account. Following Italy's entrance into the war on June 10, 1940, it was impossible for the claimant's property to be forwarded to the United States of America.

With the Affidavit of Claim there was submitted a certified copy (in the German language) of the packing list which contained over one hundred (100) different household items including linens, bedding, glassware, chinaware, silverware, kitchen utensils, et cetera. A translation of said packing list, showing the claimant's valuation of each item, expressed in both dollars and lire was submitted to establish the claimant's basis of evaluation of such property.

The Italian War Law (Royal Decree No. 1415 of July 8, 1938)<sup>1</sup> entered into force with respect to the United States of America on the outbreak of the war between the two governments. Said law in effect provides (Articles 3 and 6) that a national of the United States of America or a stateless person residing

<sup>1</sup> Royal Decree No. 1415, published in *Gazzette Ufficiale* No. 211 of September 15, 1938.

in the United States of America was to be considered by Italy as a person of enemy nationality; (Article 295) that property was subject to sequestration when it was owned by an enemy national or where there was a sound basis to suspect that the property was owned by an enemy national; and (Articles 309 and 310) that the holder in Italy of property owned by an enemy national must make a written declaration thereof to the Prefect within thirty (30) days from the effective date of said law.

Subsequently other laws were enacted in implementation of the Italian War Law, *supra*. One of these was Law No. 1944 of December 19, 1940<sup>1</sup> which provided (Article II) that an Italian national who was under obligation to make delivery of stocks, valuables or other property to an enemy national was forbidden to make such delivery, and (Article IX) that violation thereof was punishable by imprisonment and fine.

By letter No. 253695/DA dated April 12, 1943, the Office of Requisitions in the Ministry of Exchange and Currencies of the Italian Government issued instructions to the "General Warehouses" in Trieste regarding the chattels of emigrating Jewish refugees which had been stored in the Free Port of Trieste. Said instructions stated that the chattels of Jews emigrating from Germany and other countries and residing in enemy countries were to be considered as property suspected of enemy ownership and therefore subject to treatment under the provisions of the Italian War Law, *supra*. The "General Warehouses" were requested to declare to the Prefect of Trieste all such chattels stored with them in accordance with Article 309 of the Italian War Law and to issue instructions to all shipping agents and private individuals operating warehouses in the Free Port of Trieste to make similar declarations of Jewish property. Said letter shows that a copy thereof was furnished by the Ministry of Exchange and Currencies to the Office of Customs of the Ministry of Finance, to the General Accounting Office of the State, and to the Prefect of Trieste.

By letter No. 254944/DA dated May 6, 1943, the Office of Requisitions in the Ministry of Exchange and Currencies of the Italian Government requested the Prefect of Trieste to sequester the chattels of Emigrating Jewish refugees which had been declared on April 22, 1943 in the "General Warehouses" in Trieste. On May 11, 1943, by Decree No. 1100/12409, issued in accordance with the Italian War Law, the Prefect of Trieste placed under sequestration said chattels and designated as Sequestrator Dr. Bruno de Steinkuehl. In the Decree of Sequestration, the powers, duties and responsibilities of the sequestrator were defined.

By circular letter No. 1100/12948 dated May 19, 1943, the Prefect of Trieste also ordered the shipping agents and private individuals operating private and public warehouses in Trieste to declare chattels in storage with them which were owned by Jews emigrating from Germany and other countries. In this circular letter it was stated that a declaration should be made by the warehousemen even in those instances where it might be questionable whether a specific lot of property was owned by a Jew who resided in an enemy country, since it was the duty of the Sequestrator to inspect the property and to determine for each lot the ownership of such property and the residence of such owner.

Three days later, on May 22, 1943, Dr. Bruno de Steinkuehl, as sequestrator, addressed a registered letter to the shipping agents and private individuals operating public or private warehouses in Trieste, which letter read as follows:

*Subject: Sequestered chattels belonging to Jews—Registered  
By Decree No. 1100/12409 of the R. Prefecture, dated the 11th instant, all*

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<sup>1</sup> Law No. 1994, published in *Gazzetta Ufficiale* No. 48 of February 25, 1941.

chattels belonging to Jews emigrated to enemy countries have been placed under sequestration in accordance with the order of the Ministry of Exchange and Currencies. The undersigned has been appointed sequestrator.

In compliance with said decree, I first of all request that you consider the above-mentioned chattels in your possession or in your custody as sequestered and they are not to be disposed of or taken away. Furthermore, I request you to let me have in due course by registered covering letter the following data:

1. Original documents related to each individual lot of goods stored with you or with the "General Warehouses" in your name (original letters, bills of lading, shipping orders, name of consignees, last address in your possession, in summary all documents suitable for identifying the individual lots in your possession). You shall make a true copy of the original of each document. This copy signed by you will be retained by the sequestrator, whereas the original will be returned to you after examination.

2. If possible, a list of the various items contained in each individual lift van, together with an approximate indication as to the value of said items, should you have had an appraisal made, either privately or officially.

3. A list of all expenses incurred by you in connexion with the goods from the time of their arrival (railroad freight charges and other expenses to be paid on delivery included) up to and including May 11, 1943/XXI, together with an indication as to further monthly expenses. This list shall be prepared separately for each individual lot of goods, and in such a manner that the following information with respect to each individual owner stands out clearly: data regarding ownership, expenses incurred up to the time of preparation of the list and any further estimated monthly expenses, and finally, wherever possible, the approximate value of the articles contained in each individual lift van.

As far as my taking delivery of the sequestered goods is concerned, you are advised that the formalities will be agreed upon between each of you individually and the undersigned, as soon as I am in possession of the information requested of you in the above-mentioned three paragraphs.

(Signed) Bruno de STEINKUEHL

After his designation on May 11, 1943, the Sequestrator quickly became involved in a great deal of work. The documents covering each lot of suspected Jewish property in the Free Port of Trieste, when omitted by the warehousemen and shipping agents, had to be examined. The Sequestrator tabulated the pertinent information regarding each lot and subsequently compiled lists of such property; a photostatic copy of the list which is pertinent here was presented in evidence in Case No. 13, *The United States of America ex rel. Isadore Gettinger vs. The Italian Republic* (Decision No. 12<sup>1</sup> of this Commission) and reference thereto has been made by the claimant Government in the Petition filed in this case; the sixth entry on page 113 of said list covers the five cases (weighing 514 kilograms) containing the subject household goods and personal effects and shows that the claimant probably was residing at that time in the United States of America.

On January 12, 1944, the German High Commissioner in the Operation Zone "Adriatic Coast Territory" issued his order No. III/4/81 to the warehousemen in the Free Port of Trieste, including the claimant's freight Forwarding Agent, Francesco Parisi, said order has been fully set out in Decision No. 10<sup>2</sup> of this Commission (Case No. 15, *The United States of America ex rel. Fred O.*

<sup>1</sup> *Supra*, p. 133.

<sup>2</sup> *Supra*, p. 111.

*Winter vs. The Italian Republic*) and is incorporated herein by reference. On March 6, 1944, in compliance with the aforesaid order, the five cases containing the property owned by the claimant were delivered by the Firm of Francesco Parisi to German authorities who issued on that date an official Receipt thereof. Afterwards, the claimant's property can not be traced.

On April 27, 1950 the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic the documented claim of Mr. Alexander Bartha, based on Article 78 of the Treaty of Peace.

On June 15, 1951 the Petition of the United States of America in this case was filed with the Commission. The Petition alleges that the failure of the Government of the Italian Republic to make a determination of this claim constitutes in effect a rejection of the claim resulting in a dispute between the two Governments submissible to the Conciliation Commission established under Article 83 of the Treaty of Peace. With a statement of the foregoing facts as a premise, the Petition concludes by requesting the Commission to find that a dispute regarding this claim exists between the two Governments; that the claimant is a "United Nations national" within the meaning of this term as used in Article 78 of the Treaty of Peace (the claimant having been treated as enemy under the laws in force in Italy during the war when the five cases containing his personal property were blocked as enemy property) and that the claimant is entitled to receive from the Government of the Italian Republic in lire the equivalent of the sum necessary at the time of payment to make good the loss suffered (which amount was estimated by the claimant on December 23, 1948 to be One Thousand, Five Hundred Dollars (\$ 1,500.00)), as well as such other relief as may be just and equitable.

In the answer of the Italian Republic filed with the Commission on July 21, 1951 it is denied that a "dispute" regarding this claim exists between the two Governments within the meaning of Article 83 of the Treaty of Peace; it is also maintained that evidence is lacking in this case not only to establish that the claimant was a "United Nations national" within the meaning of that term as defined in the second sentence of paragraph 9 (a) of Article 78 but also to establish what nationality the claimant possessed prior to the date (June 4, 1945) on which he became a national of the United States of America. The Answer of the Italian Republic concludes by requesting the Commission to reject as inadmissible the Petition in this case and subordinately to grant the Italian Government additional time to complete its investigation.

The Commission issued an order on August 8, 1951 granting an additional period of seventy-five (75) days to the respondent Government within which to complete its investigation and to file a full and complete Answer.

On October 25, 1951 the Agent of the Italian Republic filed with the Commission a supplementary Answer which it is stated that, if the Commission "considers as proven that before the damage occurred Mr. Alexander Bartha was a national of one of the United Nations or that he has been treated as enemy—purely on a hypothetical basis,—the loss sustained by the claimant can be properly evaluated at Five Hundred Thousand (500,000) Lire.

On December 22, 1951 the Agent of the United States of America filed a Request for an Award, maintaining that the evidence submitted with the Petition clearly establishes that the claimant is a "United Nations national" on September 3, 1943 or on the date of the damage, and that the evaluation of Five Hundred Thousand (500,000) Lire, *supra*, is the amount considered as necessary by the Italian Republic to liquidate this claim *only* in the event that it is determined by the Conciliation Commission that the claimant is a "United Nations national" within the meaning of that term as used in Article 78

of the Treaty of Peace. Following this statement, the Agent of the United States of America requested an opportunity to consider further the questions involved.

On June 25, 1952 the Agent of the United States of America informed the Commission that the claiming Government did not desire to submit in this case either additional evidence or a brief, and requested that the claimant's rights be determined on the basis of the pleadings.

The only issue in dispute in this case is whether the claimant is a United Nations national within the meaning of this term as used in paragraph 9 (a) of Article 78 of the Treaty of Peace. The Petition filed on June 15, 1951 by the Agent of the United States of America asserts that:

The claim is one of a number of similar claims filed by the Embassy under Article 78 of the Treaty on behalf of nationals of the United States who emigrated from Germany or Austria to the United States because of the racial persecution to which they were subjected by the Nazi régime:

and later

... that Alexander Bartha, now a national of the United States, formerly Austrian or stateless, ...

The Commission will take judicial notice of the Eleventh Regulation (enacted on November 25, 1941) of the German Reich Citizenship Law which provided that all Jews possessing German nationality and residing outside the German Reich *ipso facto* lost their German nationality (*Reichsgesetzblatt Jahrgang 1941—Teil 1, No. 133, Erste Verordnung zum Reichsbürgersetz, vom 25 November 1941*). Moreover, the Commission does not doubt that the claimant emigrated from Austria to the United States of America because of the anti-Semitic measures introduced in Austria following the annexation of Austria by the German Reich in 1938, and that he established his residence in the United States of America in 1939 or 1940. The Commission finds, however, that the record in this case is barren of any evidence to establish what nationality the claimant possessed prior to June 4, 1945, and more particularly whether the claimant was "Austrian or stateless" prior to the date on which he acquired the nationality of the United States of America.

It is the contention of the claiming Government that the claim presented in behalf of the claimant is meritorious.

... because the Italian authorities blocked the shipment of the claimant's household goods and personal effects as enemy property on May 22, 1943, the claimant, who was originally Austrian and thereafter presumably stateless, is included in the term "United Nations nationals" as used in paragraph 9 (a) of Article 78 since he is an individual who under the laws in force in Italy during the war had been treated as enemy.

The second sentence of paragraph 9 (a) of Article 78 of the Treaty of Peace reads as follows:

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

It is clear from the evidence that, acting under the Italian War Law, the competent Ministries of the Italian Government in Rome, the Prefect of Trieste, and the Sequestrator of Jewish property in Trieste issued instructions to the "General Warehouses", the private warehousemen and the shipping agents, who held in storage in the Free Port of Trieste the chattels of Jewish refugees

suspected of residing in enemy countries, that such chattels were to be considered as enemy property, subject only to the orders of the Italian authorities. The effect of these measures was to deny to the claimant any control over his property which was stored in the Free Port of Trieste.

That the firm of Francesco Parisi declared the claimant's household goods and personal effects as enemy property in accordance with Article 309 of the Italian War Law, and submitted the pertinent documents to the Sequestrator for his examination can not be doubted. The evidence establishes that the claimant's property was included on the list of Jewish property lying in private warehouses in the Free Port of Trieste, and that such list was prepared by the Sequestrator named in accordance with the Italian War Law. The Commission finds that this fact alone is sufficient to establish that the claimant's property was treated as enemy property under the laws in force in Italy during the war and to bring the claimant within the meaning of the term "United Nations nationals" as defined in the second sentence of paragraph 9 (a) of Article 78. Since Mr. Alexander Bartha is now a national of the United States of America, it follows that the claiming government is entitled to submit a claim in his behalf under the provisions of Article 78 of the Treaty of Peace.

Having reached the foregoing conclusion, and having noted that the Agents of the two Governments are agreed that the claimant's property can be properly evaluated at Five Hundred Thousand (500,000) Lire, the Commission finds that, under the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace as implemented on February 24, 1949 by the Exchange of Notes between the two Governments, the claimant is entitled to receive as compensation for the loss suffered by him Five Hundred Thousand (500,000) Lire.

No evidence having been submitted that any previous payment has been made to the claimant for war damages to the personal property which is the subject of this claim, the Commission, acting in the spirit of conciliation,

**HEREBY DECIDES:**

1. That in this case there exists an international obligation of the Government of the Italian Republic to pay the sum of Five Hundred Thousand (500,000) lire under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof in full and complete settlement of the claim of Mr. Alexander Bartha, a national of the United States of America, for the loss in Trieste during the war of personal property owned by him;

2. That the payment of this sum in lire shall be made in Italy by the Government of the Italian Republic upon request of the Government of the United States of America within thirty (30) days from the date that a request for payment under this Decision is presented to the Government of the Italian Republic;

3. That the payment of this sum in lire shall be made by the Government of the Italian Republic free of any levies, taxes or other charges and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace;

4. That in this case an order regarding costs is not required, and

5. That this Decision is final and binding from the date it is deposited with the secretariat of the Commission, and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 30th day of March, 1953.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

signed Emmett A. SCANLAN, Jr.

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

signed Antonio SORRENTINO

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#### STEINWAY AND SONS CASE—DECISION No. 15 OF 10 APRIL 1953<sup>1</sup>

Compensation under Article 78 of Peace Treaty—War damages sustained by enemy property in Italy—Evidence of ownership of damaged property—Value of evidence submitted—Affidavits and *Atti di Notorietà*—Reference to decision No. 11 handed down in Amabile case—Relevance of prior war damages claim under municipal legislation—Measure of damages.

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Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre subis par des biens ennemis en Italie — Preuve de la propriété des biens endommagés — Valeur des documents de preuve soumis — Affidavits et *Atti di Notorietà* — Rappel de la décision n° 11 rendue dans l'affaire Amabile — Pertinence d'une demande en indemnité pour dommages de guerre présentée antérieurement au titre de la législation italienne — Détermination du montant de l'indemnité.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the Pleadings, documents and evidence and the arguments and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 30.

Appearances: Mr. Stefano Varvesi, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

STATEMENT OF THE CASE:

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of Steinway & Sons, a corporation organized and existing under the laws of the State of New York, and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947, and the agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of Steinway & Sons, (hereinafter referred to as the claimant corporation) compensation for the loss as the result of the war of a grand piano plus interest on the amount fixed as such compensation at the rate of five per cent (5%) per annum from November 15, 1948, and such further or other relief as may be just and equitable.

The material facts are as follows:

The dispute in this case involves fundamentally a question of whether or not the claimant corporation has submitted evidence to document its claim; and it is therefore necessary to summarize the evidence in this Decision.

The Statement of Claim was prepared in both English and an Italian text. On October 27, 1948 a qualified officer of the claimant corporation appeared before a duly commissioned Notary Public of the State of New York and verified under oath in behalf of the claimant corporation that

(a) a request under the Treaty of Peace is made for "Reimbursement for the total destruction by Air Attack on August 15, 1943 of Steinway & Sons Grand Model D Ebon 243002, manufactured by our Branch Factory in Hamburg (Germany) and stationed at the Conservatorio di Musica Giuseppe Verdi, Milano, for servicing concerts, at time of attack";

(b) the claimant corporation was organized under the laws of the State of New York on May 8, 1876, and was the owner of said piano on the date of loss;

(c) the replacement value of said piano on that date (October 27, 1948) was Two Thousand, Eight Hundred Eighty Dollars (\$ 2,880.00) (or 1,656,000 Lire at the then rate of exchange of 575 Lire to the dollar) subject to any necessary adjustment for variation of value between the date of filing the claim and the date of payment.

Attached to the claimant corporation's original Statement of Claim was a Certificate issued by the Embassy of the United States of America in Rome that Steinway & Sons, as a juridical entity, is now and has been at all times since its incorporation on May 8, 1876, a national of the United States of America. In support of the allegations of fact made in the original Statement of Claim, there was attached thereto the following documentary evidence:

*Annex 1*; A certificate of the incorporation in the State of New York in 1876, and a copy of the By-Laws of Steinway & Sons;

*Annex 2*; A declaration dated July 11, 1944 by the Secretary of the Conservatory of Music in Milan ("Giuseppe Verdi") that concert grand piano No. 243002, K 232, trademark Steinway & Sons, was destroyed on August 15, 1943 during the air raid on that date;

*Annex 3*; An affidavit made by the President of the claimant corporation on February 7, 1947 before a duly commissioned Notary Public of the State of New York affirming that Steinway & Sons is incorporated only under the laws

of the State of New York and has no subsidiaries or affiliates; that a Branch Office and Factory of Steinway & Sons are maintained in Hamburg, Germany; that all the assets of said branch in Hamburg, Germany are owned by the claimant corporation; and that the management of said branch in Hamburg, Germany is directed by an employee whose powers and authority are derived from a revocable Power of Attorney issued by the claimant corporation.

*Annex 4;* An unsigned and unsupported statement that the replacement value of "Grand D Ebon" Steinway is Two Thousand, Eight Hundred Eighty Dollars (\$ 2,880.00), or 1,656,000 Lire at the then rate of exchange of 575 Lire to the Dollar.

On November 15, 1948 the Embassy of the United States of America in Rome submitted this claim, supported by the foregoing documentary evidence, to the Ministry of the Treasury of the Italian Republic. Thereafter there was correspondence between the two Governments, reference to which will be made only to the extent necessary to illustrate the position which each Government has taken.

In its letter of February 19, 1951, the Ministry of the Treasury of the Italian Republic informed the Embassy of the United States of America that "after the proper investigation" this claim had been submitted to the Interministerial Commission of the Italian Government established under Article 6 of Italian Law No. 908 of December 1, 1949, and that said Commission had expressed the following opinion (in translation):

The [Interministerial] Commission,

having considered the investigations which were ordered with the view of ascertaining whether the piano, which is the subject of this claim, was the property of the firm of Steinway and Sons of New York or of the firm of Ricordi;

bearing in mind that from the Fiscal Investigative Police's report dated November 30, 1950, it appears that from the information obtained it should be considered that, at the time of the damage, the piano belonged to the aforementioned firm of Ricordi & Finzi;

expresses the opinion that the claim cannot be accepted.

On August 23, 1951 the Embassy of the United States of America submitted to the Ministry of the Treasury of the Italian Republic an *Atto di Notorietà* dated June 18, 1951 as further proof that the ownership of the piano in question on the date of loss was in the claimant corporation, and requested reconsideration of the claim on the basis of this evidence. Said *Atto di Notorietà* (hereinafter referred to in translation as an Act of Notoriety), made before the Magistrate of the Court of First Instance (Pretura) of Milan and taken in the manner prescribed by Italian law, reads as follows (in translation):

Court of First Instance of Milan

Act of Notoriety

On this 18th day of June of the year 1951, in Milan, there appeared before A Magistrate Dr. Terrando Angelo, assisted by the undersigned clerk, Mr. Luigi Bruzzolo of the late Silvio, age 47, No. 14, Via Piave, Melzo, who requested that this Act of Notoriety be drawn up and that the following witnesses be heard for that purpose:

Giuseppe Albanesi of Giovanni, age 43, Milan, Via Monti 50,

Giovanni Stefanini of Enrico, age 25, Milan, Corso Ticinese 67,

Armando Farina of the late Francesco, age 35, Piazza Cincinnato 7,

Dr. Elli Bruno of the late Antonio, age 36, Piazzale Lavater 5, Milan.

The Magistrate read the formula "Aware of the responsibility which you have assumed under oath before God and men, do you swear to tell the truth, the

whole truth and nothing but the truth?" The witnesses repeated the words of formula: "I do swear."

After which they unanimously and in agreement made the following statement:

It is true, of common knowledge and of our personal knowledge that the grand piano, concert model, serial No. D274/K 232 OP No. 243002, black lacquered, trademark Steinway & Sons of New York, which was at the Conservatory of Music of Milan was destroyed in August 1943 as the result of an air bombardment together with the building in which it was located.

The aforementioned piano was the exclusive property of the firm that manufactured it, Steinway & Sons of New York, and was entrusted to the care of the firm Ricordi & Finzi of Milan, Via Dante No. 13, exclusively for concert purposes.

Read, confirmed and subscribed to

(Signed) Luigi BRUZZOLO  
 (Signed) Giuseppe ALBANESE  
 (Signed) Giovanni STEFANINI  
 (Signed) Armando FARINA  
 (Signed) Dr. Bruno ELLI

*The First Clerk*  
 (Signed) Dr. Guido MUSARRA

*The Magistrate*  
 (Signed) Dr. Angelo TERRANDO

True copy of the original  
 Milan, June 18, 1951

(Seal)  
 Unified Court of  
 First Instance, Milan

The First Clerk  
 (Signed) MUSARRA

In a letter dated March 25, 1952 the Ministry of the Treasury of the Italian Republic informed the Embassy of the United States of America that the *Atto di Notorietà* prepared on June 18, 1951, *supra*, cannot be considered as valid evidence to establish that the ownership of the subject piano was in the claimant corporation at the time of loss (in translation) "all the more so as it does not appear from this act how and why the four witnesses indicated therein have gained knowledge of what they attest".

Following the second rejection of this claim, it appears that the evidence in this case was discussed on April 24, 1952 by competent officials of the two Governments; and thereafter on April 28, 1952 the Agent of the United States of America before the Conciliation Commission addressed a letter to the Agent General of the Italian Republic (the appointment and duties of whom are provided for in Italian Presidential Decree No. 884 issued on October 20, 1949) which, after summarizing the disputed evidence concluded with the request that

In view of the sworn statement of the claimant that the piano belonged to it, the statement from the Conservatorio confirming such ownership, the lack of any evidence that it belonged to Ricordi and Finzi S/A, and the possibility for the Italian authorities to learn from the four deponents the basis of their personal knowledge that Steinway & Sons owned the piano, I trust that you will be able to persuade the Italian authorities to revise their decision and to investigate and approve the *prima facie* case now established by Steinway & Sons. Otherwise, the Agency's only recourse will be to file a Petition with the Italian-United States Conciliation Commission in compliance with the Department's instructions.

In its letter of August 28, 1952 the Ministry of the Treasury of the Italian Republic advised the Embassy of the United States of America that the claim had been resubmitted to the Interministerial Commission of the Italian Government, which at its hearing of May 21, 1952 expressed the opinion that the previous rejection must be confirmed since (in translation)

... no new concrete evidence has been submitted to prove that the piano . . . was at all times owned by Steinway & Sons.

On October 9, 1952 the Petition of the United States of America was filed in this case with the secretariat of the Conciliation Commission. With the Petition there were submitted in evidence a copy of the Statement of Claim with Annexes, *supra*, attached thereto, and copies of the correspondence between the two Governments. In addition, there was submitted with the Petition, as Exhibit H, a photostatic copy of an official Receipt issued on September 2, 1944 by the Intendenza di Finanza of Milan covering Request No. 40389 B together with a copy of the Request itself. Both the official Receipt and Request No. 40389 B attached thereto show that on September 2, 1944 the President of Ricordi & Finzi, S/A, filed with the competent office of the Italian Government a claim for war damages for the loss of the subject piano in the name and on behalf of "Steinway & Sons—Hamburg". This request was made on a special form printed in Italian and furnished by the Government to Italian nationals for use in preparing and submitting a claim under Italian Domestic War Damage Legislation, ("Modulario Danni G-3, Servizio Danni di Guerra, Mod. C"). The Receipt bears the official stamp of Intendenza di Finanza of Milan and the illegible signature of the official issuing the Receipt.

Having premised the statement of the case with the foregoing facts, the Petition cites paragraph 4 (a) of Article 78 of the Treaty of Peace as establishing the right to compensation, and summarizes the issues involved in this case as being:

Can the Italian Government evade the obligations imposed upon it to compensate United Nations nationals under Article 78 of the Treaty of Peace by disregarding as insufficient the statements by the claimant and by presumably disinterested and creditable witnesses concerning the ownership of the destroyed property merely by stating that the property belonged to a third party without furnishing any evidence whatsoever to substantiate such allegation, which allegation is contrary to all of the evidence submitted by the claimant? In other words, has the claimant established ownership of the property lost as a result of the war and hence is it entitled to the compensation provided for in paragraph 4 (a) of Article 78 of the Treaty of Peace?

In support of the conclusions formulated in the Petition, the Agent of the United States of America cites as pertinent the following extracts from Decision No. 11 of the Commission (Case No. 5—*The United States of America ex rel. Norma Sullo Amabile vs. The Italian Republic*):<sup>1</sup>

(a) . . . that Affidavits, "*Atti di Notorietà*", signed statements and similar ex parte testimonial instruments are forms of evidence which may be submitted to the Conciliation Commission to establish elements of a claim for loss or damage to personal property in Italy which was not sequestered by the Italian Government, when other forms of evidence are not available

and

(b) . . . the responsibility of the Government of the Italian Republic to investigate a claim of a national of the United States of America, when it is clear

<sup>1</sup> *Supra*, p. 115.

from a preliminary examination thereof that the claim is neither frivolous nor fraudulent, is derived from the particular relationship between the United States of America and Italy growing out of the Agreements and Supplementary Exchange of Notes signed at Washington, D.C., on August 14, 1947, . . .;

and, based on these principles, argues that

(1) an officer of the claimant corporation, a highly reputable and world-famous manufacturer of pianos, has sworn in the Statement of Claim that it was the owner of the piano in question on the date of loss,

(2) the *Atto di Notorietà* executed on June 18, 1951 by four presumably disinterested and creditable witnesses that the same piano was owned solely by Steinway & Sons, and had been consigned to Ricordi & Finzi, S/A, only for concert use, confirms the ownership interest of the claimant corporation in said piano,

(3) the allegation made by the respondent Government that Ricordi & Finzi, S/A, was the owner of this piano on the date of loss appears to be based on an assumption which is not supported by substantial evidence,

(4) documents pertaining to the consignment of the piano from the branch of Steinway & Sons in Hamburg, Germany to Ricordi & Finzi, S/A, were destroyed in Milan during the war; nevertheless, the request for compensation filed on September 2, 1944 under the provisions of Italian Domestic War Damage Legislation by the President of Ricordi & Finzi, S/A, in the name of and on behalf of "Steinway & Sons—Hamburg" is clear proof that Ricordi & Finzi, S/A, recognized that the piano in question was the property of the claimant corporation on the date of loss, and

(5) in making an investigation of this claim, the authorities of the Italian Government would have access to the records of the Request for War Damages No. 40389 B, *supra*, filed with the Intendenza di Finanza in Milan on September 2, 1944.

In the Answer filed with the secretariat of the Commission on November 17, 1952, the Agent of the Italian Republic maintains the position taken by the Italian administrative authorities with respect to this claim, and argues that (in translation):

The piano involved was manufactured by Steinway, was imported into Italy by Ricordi and Finzi, and was delivered to the Conservatory by the latter: in the absence of precise evidence to the contrary, it is to be held that Ricordi and Finzi purchased it from Steinway and became its owner, having had a relationship of deposit and not of purchase and sale with the Conservatory.

The only evidence introduced in this case by the respondent Government is a letter dated November 17, 1950 addressed to the Intendenza di Finanza in Milan by the Director of the Milan branch of Ricordi & Finzi, S/A, Mr. Luigi Bruzzolo; the letterhead of Ricordi & Finzi, S/A, shows that it was founded in 1806 and is the sales representative not only for pianos manufactured by Steinway & Sons but also for other musical instruments and radios. The position of the Government of the Italian Republic in this case is based primarily on this letter, which reads as follows (in translation):

Milan, November 17, 1950  
Via Giulini 2—Via Dante 13  
Tel. 86.132

To the Intendenza di Finanza  
Milan

At the request of an Official of the Finance Office [Intendenza di Finanza], Mr. Marcello Gaeta, I the undersigned Luigi Bruzzolo, Director of the Ricordi & Finzi Company with offices at 13 Via Dante, Milan, in connexion with the claim of the firm Steinway & Sons, Hamburg (concerning war damages) filed with the Intendenza di Finanza of Milan, through the general representative Mr. Carlo Helbig of Verona, residing in that city at Via Bezzacca 7, hereby state that the Steinway & Sons Piano Mod. K/232/243002, imported by us and consigned in deposit to the Giuseppe Verdi Conservatory of Milan, was required exclusively for concert purposes.

Said instrument was imported from Hamburg around 1941 and I can not produce the pertinent documents as our office at Piazza S. Maria Beltrade 1, was completely destroyed during the air bombardment of August 15, 1943, as appears from the Statement of Claim already filed with the competent office and from which the fact emerges that the archives also were destroyed.

I believe that the documents establishing the date of importation of the instrument in question and the statement of deposit of the piano with the G. Verdi Conservatory of Milan, where it was subsequently destroyed during the air bombardment of the same day, are attached to the relative claim prepared by Steinway & Sons of Hamburg and filed with the competent Ministry through the American Consulate in Milan.

I shall nevertheless request the General Representative of the Steinway Firm, Mr. Carlo Helbig, residing at Verona, to transmit to the Intendenza di Finanza in Milan direct, any documents which may possibly be in his possession.

Countersigned:  
(illegible signature)

In faith,  
RICORDI & FINZI, S/A  
(Signed) L. BRUZZOLO

and, based on this evidence, argues:

(1) No reference is made by Ricordi & Finzi, S/A, in its letter of November 17, 1950, *supra*, regarding the ownership interest of Steinway & Sons in the subject piano or to any relationship between Steinway & Sons and the Conservatory;

(2) The *Atto di Notorietà* prepared on June 18, 1951, *supra*, in which four witnesses swore that Steinway & Sons was the owner of the subject piano on the date of loss, does not show what relationship, if any, existed between such witnesses and the "interested parties" or how such witnesses acquired knowledge of the facts to which they have attested;

(3) Why did the Director in Milan of Ricordi & Finzi, S/A, Dr. Luigi Bruzzolo, participate only as a petitioner and not as a witness in the *Atto di Notorietà* prepared on June 18, 1951, *supra*?

(4) The obligation of the Italian Government to make a determination of a particular claim on an administrative level arises "... only after all the information that the claimant could give has been received . . ." (citing: Decision No. 11 (Case No. 5—*The United States of America ex rel. Norma Sullo Amabile vs. The Italian Republic*)<sup>1</sup> in support of this argument);

<sup>1</sup> *Supra*, p. 115.

and concludes by requesting that this claim be rejected, and by disputing—purely on a presumptive basis—the value of the piano which has been asserted by the claimant corporation.

The Agent of the Italian Republic provided for transfer of the original Statement of Claim and all documents attached thereto from the Ministry of the Treasury of the Italian Republic to the secretariat and said documents were submitted for inclusion in the record of this case.

On January 15, 1953 the Agent of the United States of America filed a Request for Award, agreeing therein to waive the request contained in the petition for interest at the rate of five percent (5%) per annum from November 15, 1948, the date on which the claim was first submitted to the Italian Government.

The Commission will limit itself on this Decision to the application of the principles previously enunciated in its Decision No. 11 (Case No. 5—*The United States of America ex rel. Norma Sullo Amabile vs. The Italian Republic*) and to resolving the arguments made by the Agents of the two Governments.

The Commission finds from the evidence submitted in this case that the claimant corporation established in the Statement of Claim and the Annexes submitted in support thereof a *prima facie* basis for its claim under Article 78; that a report of the investigation conducted in Milan by the competent agencies of the Italian Government was made on November 30, 1950 to the Italian Ministry of the Treasury (said report was not submitted in evidence); that thereafter the administrative authorities of the Italian Government rejected this claim, denying the ownership of the claimant corporation in the subject piano and asserting that said ownership at the time of loss was in the Italian firm of Ricordi & Finzi, S/A; that the claimant corporation subsequently submitted to the Italian Government an *Atto di Notorietà* made on June 18, 1951 at the request of the Director in Milan of Ricordi & Finzi, S/A, in which four witnesses affirmed the ownership of the claimant corporation in the subject property; that the Italian Government did not consider that the submission of said *Atto di Notorietà* necessitated a re-investigation of this claim, but rejected it on the ground that said *Atto di Notorietà* was not valid evidence to establish the ownership of the claimant corporation; and that the Italian Government did not disclose at any time prior to the filing of the Answer in this case the evidence upon which it relied in its rejection of this claim.

The Commission must assume that the respondent Government has submitted with its Answer all of the evidence developed in its investigation of this claim which supports its contention that the claimant corporation was not the owner of the property in question at the time of loss. The *only* evidence submitted by the Italian Government to document this contention is the letter dated November 17, 1950 from Ricordi & Finzi, S/A, which has been quoted above. Evaluating this letter either alone or in the light of all the evidence submitted in this case, the Commission finds that said letter is barren of any reference to ownership on the date of the loss.

The Agent of the Italian Republic argues that (in translation)

... in the absence of precise evidence to the contrary, it is to be held that Ricordi & Finzi, S/A, purchased it [the subject piano] from Steinway & Sons and became its owner.

Such a presumption of fact would fill the gap of evidence needed to support the contention of the respondent Government; but the Commission can find no basis for such a presumption, and none has been cited. Moreover, the documentary evidence submitted by the Italian Government destroys any basis for such a presumption; the Commission believes it unreasonable to consider that the

Director in Milan of Ricordi & Finzi, S/A, would have failed in his letter of November 17, 1950, *supra*, to assert the ownership interest of his own firm in said piano—if in fact such ownership did exist—since said letter clearly demonstrates that Ricordi & Finzi, S/A, had knowledge that two claims for war damages (one under Italian Domestic war damage legislation and the other under the Treaty of Peace) had been filed previously with the Italian Government in the name of and in behalf of "Steinway & Sons, Hamburg".

The admissibility of an *Atto di Notorietà* as documentary evidence to establish elements of a claim has been resolved in Decision No. 11, *supra*. The Director in Milan of Ricordi & Finzi, S/A, acted as the petitioner in the *Atto di Notorietà* made on June 18, 1951. The Agent of the Italian Government impugns said *Atto di Notorietà* on the ground that the Director appeared and signed said document as the Petitioner and not as a witness, and therefore he has not sworn under oath to the ownership of the subject piano. The Commission does not consider the argument to be relevant. The character of the party applying for the *Atto di Notorietà* is different under Italian Law from that of a witness, and the petitioner is not required to act as a witness nor to swear under oath that the statements made by the four witnesses under Italian Law must affirm in an *Atto di Notorietà* that is not interested in the subject matter except as a witness. Under the facts in the instant case, it is apparent why the Director in Milan of Ricordi & Finzi S/A, abstained from giving testimony as a witness in said *Atto di Notorietà*.

The Agent of the Respondent Government maintains in the Answer that the *Atto di Notorietà* does not show how the four witnesses described therein acquired knowledge of the facts to which they have affirmed, namely, that the claimant corporation was the owner of the subject piano on the date of loss. This question and any other question regarding the relationship, if any, between said witnesses and the subject matter of this dispute could have been readily ascertained by the competent authorities of the Italian Government in the course of an additional investigation of this claim. From the evidence it appears that the assertion made by the Agent of the Italian Republic that Ricordi & Finzi S/A, owned the subject piano is based merely on the letter of November 17, 1950 signed by the Director in Milan of this firm, and certainly the subsequent showing that this same individual had acted as the petitioner for the *Atto di Notorietà* made on June 18, 1951 should have been sufficient to prompt a further investigation of this claim by the respondent Government under the obligations assumed by it in the Agreement and supplementary Exchange of Notes signed at Washington, D.C., on August 14, 1947 (approved by Italian Legislative Decree No. 1747 of December 31, 1947).

As further evidence to rebut the contention of the Italian Government that Ricordi & Finzi, S/A, was the owner of the subject piano on the date of loss, there was submitted with the Petition a photostatic copy of an official Receipt issued by the Intendenza di Finanza of Milan for a previous claim; said claim was filed in the name and on behalf of Steinway & Sons by the President of Ricordi & Finzi, S/A, acting under a Power of Attorney, on September 2, 1944 under the provisions of Italian domestic war damage legislation. The letter of November 17, 1950, *supra*, was addressed to the Intendenza di Finanza of Milan and makes reference to this previous claim. The documents submitted on September 2, 1944 to the Italian Government are not in evidence in this case and no reference thereto was made in the Answer. The Commission must infer from these facts that nothing contained in any of the documents submitted on September 2, 1944 sustains the position taken by the respondent Government in this dispute. Moreover, the fact that this declaration was made to an Italian public officer long before the provisions of the Treaty of Peace could be envisaged

confirms the conviction of the Commission that the piano in question was the property of Steinway & Sons.

For these reasons, the Commission must conclude, and hereby finds, that Steinway & Sons was the owner of the subject piano at the time of loss. The fact that Steinway & Sons is a "United Nations National" within the meaning of Article 78 of the Treaty of Peace and the fact that the loss was a result of the war are not in dispute.

As far as the indemnity is concerned, the claiming Government requests that this be fixed on the basis of the "replacement value" of the subject piano, which amount was stated as being Two Thousand Eight Hundred Eighty Dollars (\$2,880.00), equal to One Million, Eight Hundred Thousand (1,800,000) Lire at the present rate of exchange of Six Hundred Twenty-five (625) Lire to the dollar. The Agent of the Italian Republic disputes this valuation and maintains in the Answer that "the present value of a piano of the type and condition of that which was destroyed is indicated to be about One Million (1,000,000) Lire".

While the model, serial number and finish of the subject piano have been established by the evidence, there is lacking in this case any evidence to establish "value". Annex 4 attached to the Statement of Claim of the claimant corporation is simply an unsigned and unsupported statement on plain paper. Similarly, the brief reference to value made in the Answer is not documented.

Under the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace, the obligation of the Government of the Italian Republic in this case must be based upon the cost as of the date of this Decision to purchase a piano similar in type, age and condition to that of the subject piano on the date of loss, that is, on August 15, 1943. Considering the probative value of the evidence submitted, and the obligation of the Government of the Italian Republic under the Treaty of Peace as implemented on February 24, 1949 by an Exchange of Notes between the two Governments, the Commission holds that the claimant corporation is entitled to receive as compensation in this case One Million, Five Hundred Thousand (1,500,000) Lire.

No evidence having been submitted that any previous payment has been made to the claimant corporation for war damages to the personal property which is the subject of this claim, the Commission, acting in the spirit of conciliation,

**HEREBY DECIDES:**

1. That in this case there exists an international obligation of the Government of the Italian Republic to pay the sum of One Million, Five Hundred Thousand (1,500,000) Lire, under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, in full and complete settlement of the claim of Steinway & Sons, a corporation organized and existing under the laws of the State of New York, for the loss in Milan as a result of the war of a piano owned by it;
2. That the payment of this sum in lire shall be made in Italy by the Government of the Italian Republic upon request of the Government of the United States of America within thirty (30) days from the date that a request for payment under this Decision is presented to the Government of the Italian Republic;
3. That the payment of this sum in lire shall be made by the Government of the Italian Republic free of any levies, taxes or other charges and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace;

4. That the request that interest be granted on the amount awarded to the claimant from November 15, 1948 was waived in the instant case by the Agent of the United States of America on January 13, 1953;
5. That in this case an order regarding costs is not required; and
6. That this Decision is final and binding from the date it is deposited with the secretariat of the Commission, and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, this 10th day of April 1953.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

Emmett A. SCANLAN, Jr.

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

Antonio SORRENTINO

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#### ARMSTRONG CORK COMPANY CASE—DECISION

No. 18 OF 22 OCTOBER 1953<sup>1</sup>

Claim for compensation under Article 78 of the Treaty of Peace—Loss of property as a result of the war—State responsibility—Illicit actions—Distinction between right of legitimate defence and right of necessity—Responsibility of Italy under Peace Treaty—Measures taken before outbreak of hostilities—Scope of responsibility of Italy under paragraph 4 (a) of the aforementioned Article. Meaning of expression “as a result of the war”—Treaty interpretation—Principles of—“Ordinary meaning” and “Natural meaning” of the words—Interpretation by reference to decision of another Conciliation Commission—Interpretation by reference to memorandum submitted at Peace Conference.

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Demande en indemnisation au titre de l'article 78 du Traité de Paix — Perte de biens du fait de la guerre — Responsabilité de l'Etat — Actes illicites — Distinction entre le droit de légitime défense et le droit de nécessité — Responsabilité de l'Italie aux termes du Traité de Paix — Mesures prises avant l'ouverture des hostilités — Portée de la responsabilité de l'Italie aux termes du par. 4 a) de l'article 78 du Traité de Paix — Signification de l'expression «du fait de la guerre» — Interprétation des traités — Principes d'interprétation — «Sens ordinaire» et «sens naturel» des mots employés — Interprétation par recours à une décision rendue par une autre Commission de Conciliation — Interprétation par recours à un mémorandum soumis à la Conférence de la paix.

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 6.

The Conciliation Commission composed of Messrs. Emmett A. Scanlan, Jr., Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Republic and José Caeiro da Matta, formerly Rector and Professor of the University of Lisbon, Counsellor of State, Third Member selected by mutual agreement of the American and Italian Governments;

On the Petition filed on November 30, 1950 by the Government of the United States of America represented by its Agents, Messrs. Lionel M. Summers and Carlos J. Warner *Versus* the Italian Government represented by its Agent, Mr. Francesco Agrò, State's Attorney at Rome in behalf of the Armstrong Cork Company.

#### STATEMENT OF FACTS:

A. The Agent of the Government of the United States, in the Petition of November 30, 1950, set forth the following:

The claimant company, as a legal person, is now and always has been since it was organised on December 30, 1891, an American national. Prior to June 10, 1940 the claimant company had purchased at Djidjelli, Algeria, 2,395 bales of cork of different types, weighing 296,305 kilos, becoming the legitimate owner thereof.

On June 3, 1940 the cork was placed aboard the vessel *Maria*, of the "Italia" Steamship Company, en route to New York and addressed to the claimant, as was stated in the Bill of Lading issued on that date. On June 6, 1940, the Italian Government, in contemplation of war, published an Order recalling all ships of the Italian merchant marine and, by virtue of that order, the vessel *Maria* interrupted its voyage, changed its course and arrived at Naples on June 9, 1940.

On June 10, 1940 Italy undertook a war of aggression. The cork was unloaded and placed in storage in the general warehouse of the "Italia" Steamship Company.

As a result of the opening of hostilities, the claimant company lost all possibility of control over the cork, as it could not have it shipped to the United States or to a more favourable market, nor take any measure designed to preserve the merchandise of which it was the owner.

The claimant Company intended to maintain the right of ownership over this merchandise as it had insured it not only when it was in transit but also when it was in storage in the warehouses of the Company at Naples as soon as it was informed of this fact.

On June 17, 1941 the "Italia" Steamship Company applied to the Ministry of Foreign Trade for authorization to proceed with the sale of the cork in order to pay itself for storage and other expenses which, in its opinion, exceeded the value of the cork. This authorization was granted by the Ministry of Foreign Trade on June 28, 1941.

On July 15, 1941 the Naples Court appointed an expert in order to establish the value of the cork and to proceed with its sale at auction; on August 21 the same Court authorized the sale to a private individual for the sum of 167,747.75 Lire and the Società "Italia" thus recovered the aforementioned expenses.

The claimant Company following the Order of June 6, 1940 suffered a loss as a result of the war and more especially as a result of the circumstances resulting from causes beyond its control brought about by the order of June 6, 1940.

In the month of August, 1948 the value of cork of similar types and of the same quantity was \$29,064.36, to which there should be added the amount which the claimant Company had advanced, i.e., 15,487.15 French Francs

(equivalent to \$278.77 at the then prevailing rate of exchange) and \$847.03 premium for the insurance covering the cork.

Basing itself on Article 78 of the Treaty of Peace with Italy and on the supplementary or interpretative agreements thereof, the Government of the United States of America requests the Conciliation Commission:

(a) to decide that the claimant Company is entitled to receive from the Italian Republic a sum sufficient, at the date of payment, to acquire property equaling the quantity of lost cork and to compensate for the loss suffered, a sum which was estimated in the month of August, 1948, to be \$30,217.16, except for variations in value occurring between the month of August 1948 and the actual date of payment;

(b) to order that the expenses with regard to this claim shall be borne by the Italian Government;

(c) to order any other or further relief that may be considered as just and equitable.

B. In his Answer of December 29, 1950, the Agent of the Italian Republic denies the responsibility of his Government and states:

(a) the claimant Company had been informed of the unloading of the cork at Naples and had been invited to take the measures it believed would be useful;

(b) legal proceedings for the purpose of obtaining the payment of a debt owed to a transport company cannot engender the Italian Government's responsibility;

(c) the defendant Government can only regret the interruption of the voyage of the vessel *Maria* and the measures which followed, as well as the judicial sale of the merchandise;

(d) the interruption of the voyage does not engender international responsibility for the Italian Government, in view of the fact that the measures were adopted before the existence of a state of war and before the date of June 10, 1940 to which express reference is made in Article 78 of the Treaty of Peace with Italy;

(e) Article 81 of the Treaty of Peace recognizes the legitimacy of the Italian carrier's claim to obtain the payment of a debt resulting from obligations which were in existence prior to the existence of a state of war and, consequently, the forced sale which followed the non-payment of the freight and storage charges cannot constitute the subject of an international claim;

(f) in the instant case there is no causal relationship between the fact of the war and the economic damage suffered by the Armstrong Cork Company;

(g) the document presented by the plaintiff Government, that is, the Order of June 6, 1940, does not establish the Italian Government's responsibility, in view of the fact that it did not have a discriminatory nature and does not constitute an act of war, as it was only a question of the simple carrying out of a maritime police measure at a date when a state of war had not yet been declared, and did not exist from an international point of view;

(h) Article 4 of the Memorandum of Understanding signed by the two Governments at Washington on August 14, 1947, considers as prewar claims all claims arising out of contracts and obligations prior to December 8, 1941;

(i) under the terms of Article 78 of the Treaty of Peace Italy's obligations of an economic nature towards nationals of the United States of America start from December 8, 1941 since a state of war did not exist between the two Governments prior to that date;

concludes by requesting that this claim be rejected, the Italian Government reserving the right to submit evidence

(a) that other firms, in a situation similar to that of the Armstrong Cork Company, were able to take measures to withdraw merchandise stored in Italian ports at the beginning of the war or to sell it on the Italian market at a just and profitable price;

(b) on the value that the Italian Government attributes to the cork in question.

On October 25, 1951, the Italian Government, in conformity with the Order of the Conciliation Commission of August 6, 1951, filed six documents and stated that these documents represented everything which the Italian Government's agencies were able to gather for the purpose of a complete clarification of the disputed case.

Following the request made on November 15, 1951, in agreement with the Order of the Conciliation Commission, the Agent of the Government of the United States of America submitted on December 29 a Brief of his Government's point of view.

The Brief reasserted the principles of law set forth in the Petition and concluded:

(a) that the claimant Company is entitled to assert this claim under the provisions of Article 78 of the Treaty of Peace and the supplementary or interpretative agreements thereof;

(b) that the claimant Company is entitled to receive two-thirds of the amount necessary to purchase similar property, that is \$30,217.16 or 18,885,274 Lire;

(c) that the claimant Company is entitled to receive 5% interest on the principal amount from November 18, 1949 or, at least, from February 18, 1950.

The Agent of the Italian Government did not submit any Counter-Reply within the time-limit established by the Conciliation Commission. After having very carefully considered the arguments maintained and the principles of law cited by the Agents of the two Governments, the two-Member Commission stated the impossibility of reaching agreement on the questions of fact as well as on the questions of law with regard to the rights, if any, of the claimant Company, on the basis of Article 78 of the Treaty of Peace and the agreements supplementary thereto and interpretative thereof.

Therefore, on May 25, 1953 the Conciliation Commission decided to appeal to the Third Member whose addition is contemplated by Article 83 of the Treaty of Peace, and to submit the dispute to him, each of the Representatives of the two parties reserving the right to transmit directly to the Third Member the questions that he may consider to be useful for the purpose of reaching a solution of the dispute.

The two Governments agreed to appoint as Third Member Mr. José Caeiro da Matta, formerly Rector and Professor of the Faculty of Law of the University at Lisbon, Counsellor of State.

#### CONSIDERING AS A MATTER OF LAW:

A. Among the problems which have called forth the meeting of the Italian-United States Conciliation Commission, completed by the Third Member, the most important one appears to be the question as to whether the responsibility of the Italian Government, as defined in paragraph 4 (a) of Article 78 of the Treaty of Peace, extends to all losses that the war has caused to a United Nations national as owner of property in Italy on June 10, 1940, or exclusively to the losses which are the consequence of acts of war. We shall see later whether the provisions of the aforementioned Article are applicable to this Petition.

It is necessary first of all to analyse certain questions arising from this Petition.

I. *Recall of ships of the Italian merchant marine by the Order of June 6, 1940.*

Following the Order of the Italian Government issued on June 6, 1940 all ships of the Italian merchant marine had to return immediately to Italian ports. The vessel *Maria* was thus forced to interrupt her voyage, change course, and she arrived at Naples on June 9, 1940. Hostilities commenced on June 10, 1940. This is the starting point of the series of actions which led to the loss suffered by the claimant Company.

Obviously, the order issued in contemplation of war was the determinant cause of the situation which faced the American corporation, the Armstrong Cork Company, with regard to the cork, its rightful property. The facts which occurred and the ensuing loss were the result, direct or indirect, of the Order of June 6, 1940. It is not the case to invoke the generally accepted doctrine according to which, in case of external war, a State may be induced to hold in its ports all national or foreign commercial ships (among so many others, Albrecht, Basdevant, Alberic, Rolin) for the simple reason that Italy was not yet at war; war against France and Britain was declared on June 10, 1940, and against the United States much later, on December 11, 1941.

The instant case involves a fact which occurred prior to the existence of a state of war. And prior to the declaration of war it is the peacetime obligations which control (Fauchille, *Manuel de Droit International Public*, n. 1028).

But it must be pointed out that if Italy was still at peace, nevertheless she may not escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law.

One must consider as illicit actions (as has been stated by Strupp (*Das Wölkerrechtliche Delit*, 1920), producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects have suffered damage to demand reparation, all actions of a State which are in contradiction with any rule whatsoever of international law.

Are we confronted by actions which are only the application of maritime police rules, as has been alleged by the Italian Government? Or, on the contrary, is there the injury to a right?

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.

And in the case under discussion the international responsibility of the State would be direct, in view of the fact that it would arise out of an action performed by the Italian Government.

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 necessity which very often is only an expedient created in order to legalize the arbitrary. In the instant case, therefore, and in agreement with the great majority of writers, the Italian State is obligated to indemnify. We shall see whether the way that has been adopted is the one which is most in accordance with the law and the provisions of the Treaty of Peace.

II. *Can the Order of June 6, 1940 be considered as a war measure?*

This Order was issued four days before the outbreak of hostilities: it was on June 10 that there occurred the passage from the state of peace—normal juridical régime—to the state of war—extra-juridical régime.

Therefore, legally, it is the date of June 10 which fixes the time from which the Italian Government can be considered responsible, as a result of the war, for the damages caused to the Allied and Associated Powers or to their nationals.

Whatever the relationship between the measure adopted by the Italian Government on June 6, and the declaration of war, under the strictness of principles, the responsibility of the State is not therein involved with respect to the provisions of the Treaty of Peace. It is very reasonable to assume that the purpose of the measure taken by the Italian Government was to avoid the capture, seizure or sinking of ships of the Italian merchant marine located in the Mediterranean.

And one cannot invoke, as was done by the United States of America, the Italian War Law, approved by Royal Decree of July 8, 1938 which could have been applied even prior to the existence of a state of war, because, according to Article 3, its application depended upon the publication of a Royal Decree. Now, this Decree was published only on June 10. Therefore, a measure taken before the war cannot be considered to be a war measure. And one could argue, together with the Italian Government, and also in accordance with a large part of legal literature, that ships are not automatically considered as being in a state of war as a result of the application of the War Law: a specific order of mobilization or of war operation would be necessary. When the vessel *Maria* arrived at the port of Naples it had not been the subject of any measure on the part of the military authorities (control, sequestration, etc.).

### *III. Interference of the Italian authorities in the actions pertinent to the sale of the cork.*

Here too there are two viewpoints, one opposed to the other: the American Government claims to see in the authorization accorded by the Ministero per gli Scambi e Valute for the sale of the cork the proof of the Italian control over the merchandise, and at the same time the act giving rise to the loss. According to the Italian Government, authorization is an action which, by its nature, excludes all responsibility of the authority granting it: it is a question of a permission, not an imposition. The authorization was necessary even in normal times, in peacetime. The documents which have been produced and the observations which have been made are not sufficient to invalidate this viewpoint.

B. Let us come back now to the question which was set forth above and which has been considered to be the essential question: the application of the provision of Article 78, paragraph 4 (a) of the Treaty of Peace to the instant case. In case the Italian Government's responsibility could be admitted in the light of the principles, could that responsibility come under the Treaty of Peace? This is what matters with regard to the solution of this claim in view of the fact that the Decision of the Conciliation Commission, completed by the Third Member, must be limited to the specific terms of the Petition.

Article 78, paragraph 4 (a) is worded as follows:

The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a *result of the war*, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

Thus the problem hinges on the phrase *as a result of the war*. It has been stated that, in the instant case, the letter of the Treaty is so clearly stated and so formal that any interpretation appears to be useless, even dangerous.

We all know the rule which is very frequently quoted: "It is not permitted to interpret that which does not require interpretation", and "when a document is worded in clear and precise terms, when its meaning is manifest and does not lead to anything absurd, there is no reason to deny the meaning which such document naturally presents." This comes from Vattel. It is the theory of the ordinary meaning, so frequently invoked in arbitral and judicial proceedings, but its drawback is that it postulates as an established fact that which remains to be proved: it takes as a starting point of the research that which, normally, should be the result thereof.

As has been stated by Professor Hyde, in his noteworthy study on the interpretation of treaties (*International Law, Chiefly as Interpreted and Applied by the United States*, 1945, vol. II, p. 4470) "... one must reject as unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty by reference to their so-called 'natural meaning' ...". This could not, at best, be treated other than as a presumption *juris tantum* which can be rebutted.

One must always follow the methods of logical interpretation in determining the content of the legal rule, especially in cases like that of Article 78, paragraph 4 (a) of the Treaty, where the text is very far from revealing the intention behind it. The wording adopted can give rise to different interpretations as regards the extent of Italy's economic obligations towards United Nations nationals.

It must first of all be stated that we can only agree with the viewpoint of the Government of the United States of America that an interpretation of the Treaty of Peace contained in a decision of other Conciliation Commissions is in no way binding for the Italian-United States Conciliation Commission. This does not prevent one from analysing the arguments formulated in similar cases, which have been the subject of discussion and decision by other Conciliation Commissions, such as the Pertusola case,<sup>1</sup> submitted to the Franco-Italian Conciliation Commission, and to which the Agent of the Italian Republic has made special reference. Moreover, the American Government, in the Memorandum of October 1, 1953, has extensively discussed the decision of the Franco-Italian Conciliation Commission on this question.

We shall not follow all this lengthy discussion, which is not necessary in our case. We shall limit ourselves to pointing out the conclusions arrived at by the two parties.

In order that the right to compensation of United Nations nationals against the Italian Government may be invoked, it is necessary, according to the decision of the Pertusola case:

1. that these nationals have suffered a loss;
2. that there exist a link of causality between the loss and the war;
3. that the loss be in connexion with the property located in Italy;
4. that this property have been owned by the United Nations national on June 10, 1940;
5. that this property suffered injury or damage;
6. that the loss to be made good be the consequence of said injury or damage.

And since one must exclude an intentional redundancy on the part of the legislator, as would be the case in speaking of a loss suffered by reason of damage, the expression on damage must mean an act due to the state of war touching the property.

According to the letter and the spirit of Article 78, paragraph 4 (a), that

<sup>1</sup> Volume XIII of these *Reports*.

which has to be indemnified is not the loss caused by the state of war to the United Nations national as owner of property in Italy, but the loss resulting to him from a damaging act, from an injury by which said property has been stricken as a result of the state of war.

War damage is said to be damage caused by acts of war. The American party does not admit this conclusion: even if it were accepted that the damage presupposes a specific act as the cause of a loss, there is nothing to show that this specific act must be an act of war, either because the phrase war damages does not appear in paragraph 4 (a) of Article 78, or because the wording used was proposed by the American Delegation and, in contrast with Italian and French legislation, American legislation has never adopted the continental expression acts of war. And the statement made was curiously weakened by saying that it is *above all and first of all* as a result of acts of war that the state of war injures *property*.

The comparative study which was attempted of the expressions adopted in other articles of the Treaty has not brought forth any elements for the solution of the problem; the terminology of the Treaty, which was not submitted to the technical competence of the Legal and Drafting Commission, lacks all scientific precision and no attention was given to the problems of concordance (Vedovato, *The Treaty of Peace with Italy*, 1947, page XXIII). Alongside incomplete provisions there are some superfluous provisions. One must not forget that there existed the necessity of reaching an agreement between the victorious Powers whose interests were often divergent on several political, military and economic questions.

An imperfect analysis of the sources led to erroneous conclusions in the Pertusola case.

The attitude taken by the Italian Government at the Peace Conference and which is revealed by the Memorandum presented at the time is the proof that Italy clearly recognized that her obligation to indemnify was larger than that which resulted from acts of war. It should be added that the expression war damages is not a technical expression with the same content in all countries: it is a general concept with a large variety of meanings, not necessarily limited to damages due to acts of war.

The error committed in the Pertusola case is due to the desire to interpret according to the continental technique the provision of a Treaty the origin of which is Anglo-Saxon: it is also due to the desire to assert a theoretical, abstract conception of causality in the interpretation of the Treaty, discarding the normal doctrines of causality. Besides, as was stated in the reasoning in the Pertusola case, "the question whether in a specific case, a loss has been suffered by reason of injury or damage caused to property in Italy, which in other words is whether the damage has a sufficiently direct causal connexion with the war for the Italian Government to be obligated to compensate, is a question of interpreting a concept set by the Treaty which does not, in this connexion, refer to any national legislation on compensation for war damages".

C. I have just set forth in their general lines the opposite viewpoints on the interpretation of Article 78 of the Treaty of Peace and I have done this for the simple reason that the two parties have considered this interpretation as if it were at the base of the decision to be made. Nevertheless, this analysis was not necessary, in my opinion. The claim of the Armstrong Cork Company is not admissible inasmuch as it finds no basis in Article 78, paragraph 4 (a) of the Treaty. Not by virtue of the interpretation that has been given to the so much disputed expression *du fait de la guerre, as a result of the war*, but for the following reasons:

(a) the act chargeable to the Italian Government, that is, the Order issued on June 6, 1940, is prior to the declaration of war. Consequently, there is not involved, legally, an act or measure of war, whatever the meaning that may be

attributed to this expression, notwithstanding the fact that the Order had been issued in contemplation of war. War did not yet exist, not only in the relations of Italy with the United States of America, but also in the relations with all the other Powers. One could not apply the law of war, the provisions of the treaty, to a country which was at peace. It was only on June 10, 1940 that war was declared on France and Great Britain.

Article 78, in paragraph 1, took expressly, as a starting point, the date of June 10, 1940.

In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

(b) After war was declared, no measure was taken with regard to the case under discussion which can be considered, in international law, a war measure (control, sequestration, etc.) The evidence produced and the observations made could in no way lead to such a conclusion. If the initial action, which is fundamental, cannot come under the provisions of the Treaty of Peace and if, as has been held, the actions performed must be considered as being strictly linked together (I would say: like a complex fact), how could the subsequent, secondary actions, the consequence of the former, and performed, moreover, in harmony with ordinary Italian law, be considered as actions of war according to the Treaty? We would have the cause action outside of the Treaty and the effect actions within the same Treaty. The acts which have been committed are normal legal acts. The procedure which was followed flows from legislation which had been in force for a long time. The legal intervention of the Italian authorities (administrative or judicial) in no way alters the nature of the actions performed. The juridical concept of Acts of State is not involved.

There can be no doubt in this connexion. But if there were any doubt, the rule should be invoked according to which the debtor party must profit from the benefit of the doubt and also that, in case of doubt, restrictive interpretation is necessary (Podestà Costa, *Manuel de Droit International Public* 1947, pp. 197, 198; Charles Rousseau, *Principes Généraux du Droit International Public*, vol. I, 1944, pp. 678 et seq.).

(c) This case cannot be included within the framework of the Treaty of Peace.

**DECIDES:**

I. The Petition submitted by the Agent of the Government of the United States of America, in behalf of the Armstrong Cork Company, under Article 78 of the Treaty of Peace, is rejected.

II. This decision is final and binding.

This decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, at the seat of the Commission, Via Palestro, this 22nd day of October, 1953.

*The Representative of the  
United States of America  
on the  
Italian-United States  
Conciliation Commission*

Emmett A. SCANLAN,  
Jr.

*The Third Member of  
the Italian-United States  
Conciliation Commission*

José Caeiro da  
MATTA

*The Representative of the  
Italian Republic  
on the  
Italian-United States  
Conciliation Commission*

Antonio SORRENTINO

**STATEMENT OF THE UNITED STATES MEMBER FOR HIS  
DISSENT IN THE DECISION OF THE ITALIAN-UNITED  
STATES CONCILIATION COMMISSION ADOPTED ON  
OCTOBER 22, 1953 IN THE DISPUTE CAPTIONED  
THE UNITED STATES OF AMERICA  
EX. REL. ARMSTRONG CORK COMPANY  
VS. THE ITALIAN REPUBLIC**

According to the Decision of the Neutral Third Member, the two Governments were in agreement that the dispute in this case turned on the interpretation of the phrase "as a result of the war" which is to be found in paragraph 4 (a) of the Treaty of Peace. The Third Member was not in agreement with this premise and this case has been resolved on the ground that

(a) the act chargeable to the Italian Government, that is, the order issued on June 6, 1940, is prior to the declaration of war;

(b) after war was declared no measure was taken with regard to the case under discussion which can be considered in international law a war measure (control, sequestration, etc.).

The Italian-United States Conciliation Commission composed of two Members in its Decision filed on April 11, 1952 in the case captioned *The United States of America ex rel. Erich W. Hoffman vs. The Italian Republic*,<sup>1</sup> stated that

The Commission observes that the phrase "as a result of the war", as used in paragraph 4 (a) of Article 78 of the Treaty of Peace, could be subject to various interpretations and therefore must be construed in the light of all the facts in a particular case. The Commission finds that there must be a sufficiently direct causal relationship between the war and the occurrence which causes the loss. The obligation assumed by Italy is the payment of compensation for a loss sustained by reason of injury or damage to property in Italy which is attributable to the existence of a state of war; and a loss sustained as a result of an occurrence in which the war was not a determinate factor can not be construed as creating an obligation under the provisions of paragraph 4 (a) of Article 78. (Emphasis supplied.)

There can be no question, therefore, that before the Conciliation Commission can apply the phrase "as a result of the war" in a particular case, there must be a finding of facts. In the present Decision, it is important to note, no finding of facts has been made. Irrespective of the statements made in the pleadings and in the briefs, it is the responsibility of the Conciliation Commission to evaluate the evidence or the lack thereof.

It is obvious that the evidence to establish what happened to this cargo of cork after the M/v *Maria* arrived in the harbour of Naples at 11.40 on June 9, 1940, by the very nature of the circumstances surrounding this loss, had to be produced by the respondent Government. The claiming Government has the right to have reasonable inference drawn from the failure of the Italian Government to produce evidence which would explain certain occurrences.

In the Decision of the Third Member, the defences raised by the Italian Government are summarized, but it is pertinent here to point out, as the Third Member did not do, that no evidence to substantiate any of the allegations of fact made in the Answer was submitted by the respondent Government. This lack of supporting evidence was recognized by the Conciliation Commission

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<sup>1</sup> *Supra*, p. 97.

of two Members, and in the Order of August 6, 1951 it was specified that the Agent of the Italian Republic should submit certain documentary evidence to which reference will be made later. Nevertheless, essential evidence regarding material facts in this case was not produced.

Now what are the issues and the facts on which the United States Member considers this case should have been resolved?

With regard to the first ground, there is no doubt—and the Third Member himself states—that the order issued by the Italian Government to the Italian Merchant Marine was issued in *contemplation* of Italy's declaration of war. Nor is there any doubt that the Italian Government, when it issued the order of June 6, 1940, knew or could have known that Italian ships were carrying cargoes which would be discharged in Italy and that a loss to the owners thereof would be the result. The opinion of the Third Member holds that the order of June 6, 1940 was the immediate and direct cause of the loss of the Armstrong Cork Company but concludes nevertheless that, since said order was issued four days before the declaration of war on June 10, 1940, the Italian Government is not responsible under Article 78 of the Treaty of Peace. In my opinion, however, the fundamental question in this case is whether the non-returnability of property of a United Nations national was caused by any action or failure to act by the Italian Government caused by the existence of a state of war and after June 10, 1940, whether the action or failure to act occurred after June 10 or not.

With regard to the second grounds, I should like to make the following observations.

According to the opinion of the Third Member, all of the subsequent actions which affected the cork in question and which resulted in its loss are merged into the order issued by the Italian Government on June 6, 1940, and the Third Member considers as normal legal acts all actions subsequent to June 6, 1940; such acts are described as the "consequence" of the order of June 6, 1940 rather than as a separate series of events. With this concept of the facts the United States Member is not in agreement, believing that in this case there were actions taken after Italy's declaration of war by the Italian Government with respect to the claimant's property which could have fixed the liability of the Italian Government under Article 78 of the Treaty of Peace.

Among the evidence which the Agent of the Italian Government was directed to produce by the Commission's Order of August 6, 1951 were the following:

3. (c) a certified true copy of the original Order issued to the *SS Maria* to discharge at Naples the cargo of cork owned by the Armstrong Cork Company, and evidence of the date on which said Order was given,

(d) evidence of the date on which the cargo of cork owned by the Armstrong Cork Company was completely unloaded from the *SS Maria* and warehoused in the port of Naples,

(e) a certified true copy of the original Declaration of "completed voyage" of the *SS Maria* at the port of Naples, and evidence of the date on which said Declaration of "completed voyage" was made;

as well as evidence on the basis of which it was stated in the Answer of the Italian Republic that

4. (a) 'The Company owning the cargo was advised, also officially, of the discharge of the goods that had taken place and was invited to provide therefor'.

The evidence specified above, which the Conciliation Commission of two Members believed essential to a determination of this case, as never submitted by

the Italian Government. It is true, nevertheless, that the Italian Government requested the Società Anonima di Navigazione "Italia" to furnish such evidence and quoted verbatim the provisions of the Commission's Order of August 6, 1951, in its request to said company.

In reply to the Italian Government the "Italia" stated in its letter of October 10, 1951 that the only document which had been discovered in the archives of their Branch Offices in Naples and Trieste, and in the records of the Head Office in Genoa (in translation) ". . . from which some useful information may be obtained in connexion with the matter in question . . ." was the "General Report of Voyage No. 11 of the M/v *Maria*". Said report of Voyage No. 11 contains no entry of any kind *after 11.40 hours on June 9, 1940* when the M/v *Maria* arrived in the harbour of Naples. The owner and operator of the M/v *Maria*—the Società Anonima di Navigazione "Italia"—in the letter of October 10, 1951 made no reference to the order given the M/v *Maria* to unload the cargo of cork in Naples, no reference to any declaration of "completed voyage", and no reference to any notice to the Armstrong Cork Company that its property had been landed at Naples. The M/v *Maria* carried at least 2,300.4 metric tons of cargo when the vessel arrived in Naples on June 9, 1940 and there is no evidence in this record to show what happened to the M/v *Maria* or its cargo after 11.40 hours on June 9, 1940.

Is it not unusual that the "Italia" was unable to furnish this information? But is this unusual fact not explained in that portion of the same letter which reads as follows:

As the [Italian] Ministry [of the Treasury] is certainly aware, the orders relating to changes in course of merchant ships, in the days that preceded Italy's entrance into the war, were sent out by the competent Ministries of the Navy, and of the Merchant Marine. Therefore, a search with regard to the matter in question should be made in the archives of these Departments. (Emphasis supplied.)

If the owner and operator of the M/v *Maria* thought that a search of the archives of the Ministry of the Navy and of the Merchant Marine might explain "the matter in question", is not the Conciliation Commission entitled to draw some reasonable inference from the failure of the Italian Government to fulfil its obligation, under the Treaty of Peace and the Agreements between the two Governments supplemental thereto and interpretative thereof, to make such search of these archives? And should cognizance not be taken of the fact that military considerations at the outbreak of the war enshroud with secrecy ships' movements, the loading and unloading of cargo, and the conversion of merchant ships to military uses? Certainly the Conciliation Commission has a right to evaluate such a statement as that made by the owner and operator of the M/v *Maria* in the light of common knowledge of what transpires when a maritime nation declares war on other maritime powers.

Is it not also pertinent to a determination of this case that after it was landed at Naples, this cargo of cork was subject to the provisions of the Italian domestic legislation which prohibited the exportation of cork even from customs-free storage? Cork was a critical and strategic material during the war and this limitation on the claimant's ability to remove the cork was not the result of the order of June 6, 1940 but of the order issued in the port of Naples to off-load the cargo of the M/v *Maria* after her arrival in that harbour at 11.40 on June 9, 1940.

Since the cork was in Naples, it is pertinent here to point out that on February 12, 1941 the Italian Government requested that the Consulates of the United States of America at Palermo and Naples be moved to a place as far north as Rome, or further north, and to a place that was not on the sea-coast; that, due

to subsequent developments, the President of the United States of America on June 14, 1941 issued an Executive Order freezing immediately all German and Italian assets in the United States; that on June 17, 1941 by Royal Decree No. 494 the Italian Government blocked property and credits in Italy owned by nationals of the United States of America; and that on June 19, 1941 the Italian Government requested that all American Consular establishments in Italy be promptly closed. These international developments are important since the evidence establishes that the first step taken to sell the cork was a request made on June 17, 1941 by the Società Anonima di Navigazione "Italia", Naples Office, to the Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) for "authorization to sell the cork . . .". On June 28, 1941 the Italian Ministry in Rome authorized the sale of the cork. Thereafter, on July 15, 1941 proceedings were instituted in the Italian court at Naples which resulted in the actual sale of the cork on August 21, 1941.

There is no evidence that any measure was taken by the Italian Government, by the Società Anonima di Navigazione "Italia", or by the Italian court at Naples to give the owner of the cork notice of any of these proceedings or to protect its ownership rights.

In the Decision of the Third Member it is stated that "the documents which have been produced and the observations which have been made are not sufficient to invalidate . . ." the contention of the Italian Government that "authorization is an action which, by its nature, excludes all responsibility of the authority granting it". With this conclusion I must take exception.

Where an authorization is required by the Italian Government, there must exist some degree of control, if only by virtue of the power to grant or deny the authorization. Without the authorization of the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) I am convinced that the sale of the cork would not have taken place.

There is no reference in the Answer or in any document submitted by the Italian Government as evidence in this case of the precise role played by the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) in the sale of this cork.

The Italian-United States Conciliation Commission in its Decision filed on June 25, 1952 in the case captioned *The United States of America ex rel. Norma Sullo Amabile vs. The Italian Republic*<sup>1</sup> stated that:

The Conciliation Commission has no authority to compel the appearance and testimony of witnesses or to conduct an investigation of any allegation of fact made in a particular case. The Commission must act through the Agents of the two Governments but this does not mean that the Commission, in its quest for the truth, does not have the right to rely confidently upon each of the two Governments and upon each of the Agents of the two Governments before the Commission for the highest degree of co-operation, *including a full and complete disclosure of all the facts in each case insofar as such facts are within their knowledge or can reasonably be ascertained by them.*

In view of this right to rely (customary in international arbitrations), the answer to the question why the Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) was required to authorize the sale of the cork in the instant case should have been resolved by the production in evidence of file No. 2625241/DA of the former Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) referred to in the Memorandum of

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<sup>1</sup> *Supra*, p. 115.

the "Italia" submitted in evidence by the Agent of the Italian Government on October 25, 1951.

The authorization referred to by my colleagues as being "necessary even in normal times, in peace time" is an authorization for foreign exchange transactions. But the power of the former Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) was not limited during the war solely to foreign exchange transactions. In Decision No. 14 of this Conciliation Commission in the case captioned *The United States of America ex rel. Alexander Bartha vs. The Italian Republic*, a finding of fact was made that:

By letter No. 254944/DA dated May 6, 1943, the *Office of Requisitions in the Ministry of Exchange and Currencies of the Italian Government* (*Ministero per gli Scambi e per le Valute*) requested the Prefect of Trieste to sequester the chattels of emigrating Jewish refugees which had been declared on April 22, 1943 by the 'General Warehouses' in Trieste. (Page 3.)

Again, in the case of *The United States of America ex rel. Henry Fischer, Jr. and Chester T. Heldman vs. The Italian Republic*, evidence exists showing

... that the 235 bales of wool which had been unloaded from the S.S. *Perla* in Trieste in July 1940 had been *requisitioned* on November 12, 1940 by the Prefect of Trieste by *order of the former Italian Ministry of Foreign Exchange and Commerce* (*Ministero per gli Scambi e per le Valute*). (Order dated October 23, 1953.)

It can be seen, therefore, that the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) did exercise some degree of control in cases of this type, to say the least.

In the considerations of law in the Decision of the Third Member it is stated that

... the most important one appears to be the question as to whether the responsibility of the Italian Government, as defined in paragraph 4 (a) of Article 78 of the Treaty, extends to all losses that the war has caused to a United Nations national as owner of property in Italy on June 10, 1940, or exclusively to the losses which are the consequence of acts of war...

It is interesting to note that this question as phrased bears a marked similarity to the question propounded by Judge Bolla in the Decision handed down on March 8, 1951 by the Franco-Italian Conciliation Commission in the Pennaroya-Pertusola Case.)<sup>1</sup> However, the United States Government has never taken the broad, theoretical position that the Italian Government is responsible for "all losses that the war has caused to a United Nations national". It is respectfully submitted that the phrasing of the question in this manner does not correctly represent the interpretation of the Government of the United States of America of the phrase "as a result of the war" which is found in paragraph 4 (a) of Article 78 of the Treaty of Peace. The United States proposal of the provision which subsequently became paragraph 4 of Article 78 as presented to the Paris Peace Conference is to be found on page 114 of the Department of State's publication No. 2868 entitled *Paris Peace Conference—1946—Selected Documents*, and contains the following definition:

#### 4—U.S. Proposal

(d) As used in this Article the phrase "as a result of the war" includes the consequences of any action taken by the Italian Government, any action taken by any of the belligerents, any action taken under the Armistice of September 3rd, 1943 and any action or failure to act caused by the existence of a state of war.

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<sup>1</sup> Vol. XIII of these *Reports*.

The observations of the Italian Government on the draft Treaty of Peace made in Paris in August 1946 were based on this proposal and there can be no question that this definition was recognized by the Italian Government as being the interpretation placed on the phrase "as a result of the war" by the United States Government. Due to the give and take necessary among the Allied and Associated Powers in hammering out the Treaty of Peace with Italy, this definition did not find its way into the final text, but the fact remains that the meaning attributed to the phrase "as a result of the war" by the United States Government before the Italian-United States Conciliation Commission at all times has been consistent with its proposed definition of this term as submitted to the Paris Peace Conference.

In the opinion of the United States Member, there is in this case a sufficiently direct causal relationship between the war and occurrences which caused the loss; the war was a determinate factor in the issuance by the Italian Government of its order of June 6, 1940; the war was a determinate factor in the series of events which occurred after the M/v *Maria* arrived on June 9, 1940 in Naples where the cargo of cork was subsequently off-loaded. As has been seen, the Società Anonima di Navigazione "Italia", when requested by the Italian Government to submit a copy of the original order to the M/v *Maria* to discharge its cargo at Naples, and a copy of the declaration of "completed voyage", if any, was unable to comply with the request and clearly indicated in its statement that a search for such evidence should be made in the archives of the Ministries of the Navy and of the Merchant Marine, and that such archives possibly contained the information which the Italian Government had requested it to submit.

The consequence of the off-loading of the claimant's cargo of cork was that it was subsequently lost as a result of developments over which the claimant corporation had no control. The consequence of the Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) authorization of the sale of the cork was that the cork was sold and the claimant corporation lost its property. This is the type of case in which the most important elements in the case are available only to the respondent Government. In the instant case there is nothing in the record which would indicate that the necessary evidence could not have been produced by the Italian Government. The question of fact in this case was a determining factor in the dispute submitted to the Third Member and in my inability to concur with the Decision of the Third Member. I feel that in this case the documentary evidence submitted by the claimant Government placed a responsibility on the Italian Government and that in cases of this type the clear purpose of Article 78 of the Treaty of Peace to restore the property of United Nations nationals within the meaning of the language used therein will be realized only when the respondent Government produces the documentary evidence which it would appear could be reasonably produced before this Conciliation Commission, or makes a satisfactory explanation as to why such evidence cannot be produced. This is absolutely necessary where the interpretation of the phrase "as a result of the war" is dependent upon a finding of fact that there was "a sufficiently direct causal relationship between the war and the occurrence which causes the loss".

It is for these reasons that I have set out my observations on the foregoing aspects of the Decision in this case.

DONE in Rome this 26th day of October, 1953.

Emmett A. SCANLAN, Jr.

*Representative of the United States of America on  
Italian-United States Conciliation Commission*

BEAUMONT CASE (THE *EILENROC II*)—DECISION No. 19 OF  
26 OCTOBER 1953 <sup>1</sup>

Compensation under Article 78 of Peace Treaty—War damages—Destruction in Italian territorial waters of ship belonging to a national of United States of America, seized by Italian military forces in French territorial waters—Reference to Decision No. 2 handed down by Anglo-Italian Conciliation Commission in Grant-Smith case—Option between Article 75 and 78 of Peace Treaty—Applicability of Article 78—Whether ship must have been in Italian territory at date specified in said Article—Interpretation of treaties—Measure of damages.

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Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre — Destruction dans les eaux territoriales italiennes d'un navire appartenant à un ressortissant des Etats-Unis d'Amérique, saisi par les forces militaires italiennes dans les eaux territoriales françaises — Invocation de la décision n° 2 rendue par la Commission de Conciliation anglo-italienne dans l'affaire « Grant Smith » — Option entre l'article 75 et l'article 78 du Traité de Paix — Applicabilité de l'article 78 — Question de savoir si le navire devait avoir été sur le territoire italien à la date visée par cet article — Interprétation des traités — Evaluation des dommages.

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The Italian-United States Conciliation Commission established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Emmett A. Scanlan, Jr., Representative of the United States of America, after due consideration of the relevant articles of the Treaty of Peace and the pleadings, documents and evidence and the arguments and other communications presented to the Commission by the Agents of the two Governments, and having carefully and impartially examined same, finds that it has jurisdiction to adjudicate the rights and obligations of the parties hereto and to render a decision in this case which is embodied in the present award.

Appearances: Mr. Francesco Agrò, Agent of the Italian Republic; Mr. Lionel M. Summers and Mr. Carlos J. Warner, Agents of the United States of America.

STATEMENT OF THE CASE

This case concerns a dispute which has arisen between the Government of the United States of America, acting on behalf of Mrs. Helene M. E. Beaumont and the Government of the Italian Republic in regard to the interpretation and application of Article 78 of the Treaty of Peace with Italy signed at Paris on February 10, 1947 and the Agreements supplemental thereto or interpretative thereof. The object of the dispute is to obtain on behalf of Mrs.

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<sup>1</sup> *Collection of decisions*, vol. I, case No. 4.

Helene M. E. Beaumont (hereinafter referred to as the claimant) compensation for the loss of the motor cruiser *Eilenroc II* under the circumstances which will be described hereinafter, reimbursement for expenses incurred by the claimant in the preparation of her claim, and such further or other relief as may be just and equitable.

The material facts are as follows:

The Embassy of the United States of America in Rome certified that the claimant is now and has been at all times since her naturalization on September 26, 1941 a national of the United States of America, and the fact that the claimant is a "United Nations national" within the meaning of this term as defined in paragraph 9 (a) of Article 78 of the Treaty of Peace is not in dispute.

The claimant was the owner of Villa Eilenroc, Cap d'Antibes, (A.M.), France. On June 28, 1938 the claimant purchased a new 40-foot motor cruiser which she named *Eilenroc II*; said motor cruiser was built by the Cris-Craft Corporation of Algonac, Michigan and was powered by two twelve cylinder Scripps engines, 316 H.P. each. In 1940 when the claimant left Southern France, she placed a certain Elizabeth Landreau in complete charge of both the Villa Eilenroc and the motor cruiser *Eilenroc II*.

On May 8, 1943 an Italian Naval Officer attached to an Italian Anti-Submarine Group seized the *Eilenroc II* as enemy property. The *Procès-verbal* of Seizure reads as follows (in translation):

On this 8th day of May, 1943, at nine o'clock, in the port of Golfe Juan, the undersigned, instructed to exercise the right of inspection by Captain of Corvette, Lorenzo Janin, Commander of the 2nd Anti-Submarine Group, went aboard the pleasure type motor cruiser *Eilenroc* which was in the custody of the guardian Elizabeth Landreau, a French national.

Having noted that the ship's papers are missing and in consideration of the fact that, according to the statement made by said guardian, it appears that said motor cruiser is of enemy nationality, it has been seized.

In order to justify the seizure, a written statement by the guardian attesting to the ship's enemy nationality, has been placed in a duly sealed envelope.

Furthermore, an inventory has been drawn up including, over and above the indications relating to the ship's papers, a list of the members of the ship's crew as well as of the valuables and nautical instruments.

This *Procès-verbal* has been drawn up of the foregoing in four copies one of which has been handed to the guardian of the captured vessel who, after hearing it read, has signed it together with the undersigned.

*The Guardian of the motor boat  
representing the owner*

(Signed) Elizabeth LANDREAU

*Officer charged with the inspection  
Sea Lieutenant*

(Signed) Luigi DE FERRANTE

Captain of Corvette

(Signed) Lorenzo JANIN

In its *note verbale* No. 41/40955/223 of December 10, 1946 the Italian Ministry of Foreign Affairs in reply to an inquiry made on behalf of the claimant by the Embassy of the United States of America in Rome stated that (in translation):

. . . following investigations carried out in this matter, it appears that the motor boat *EilenRoc* was sunk by the Germans in the waters of Porto Maurizio (Italy).

On September 15, 1947 the Treaty of Peace with Italy entered into force.

On December 27, 1948 the Embassy of the United States of America in Rome presented to the Ministry of the Treasury of the Italian Republic the claim of Mrs. Helene M. E. Beaumont for the loss of the motor cruiser *Eilenroc II* based upon paragraph 4 of Article 78 of the Treaty of Peace.

In its letter of October 5, 1949 the Ministry of the Treasury of the Italian Republic simply stated that Article 78 of the Treaty of Peace was not applicable under the facts of the instant case. Upon request the Italian Ministry of the Treasury in its letter of February 21, 1950 clarified the previous rejection by making known its contention that Article 78 did not apply because the motor cruiser *Eilenroc II* had been removed from French territory and that if there was any obligation on the Italian Republic in the instant case, such obligation could be determined only under Article 75 of the Treaty of Peace.

On April 4, 1950 the Embassy of the United States of America in Rome informed the Ministry of the Treasury of the Italian Republic that it could not accept the position taken by the Italian authorities with respect to the claim and made reservation to submit the dispute to the Conciliation Commission established under Article 83 of the Treaty of Peace.

On September 14, 1950 the Agent of the United States of America filed the Petition in this case. Having premised the statement of the case, the Petition asserts that since the *Eilenroc II* was destroyed during the war restitution cannot be made by the Italian Government and hence Article 75 of the Treaty of Peace would not be applicable; that since the *Eilenroc II* cannot be returned the claimant has a right to request compensation under paragraph 4 (a) of Article 78 of the Treaty of Peace; that the *Eilenroc II* is included within the meaning of the term "property" as this term is used in Article 78 of the Treaty of Peace; and concludes by requesting that the Conciliation Commission:

- (a) Decide that the claimant is entitled to receive from the Italian Republic two-thirds of a sum sufficient at the time of payment to purchase similar property, which sum was estimated to be in October 1948 when the claim was prepared, the equivalent in lire of \$32,000, as well as the entire sum of 150,000 lire representing the reasonable expenses incurred by the claimant in Italy up to October 1, 1948 in establishing her claim, subject to any necessary adjustment for variation of values between October 1948 and the final date of payment;
- (b) Order that the costs of and incidental to this claim be borne by the Italian Republic;
- (c) Give such further or other relief as may be just and equitable.

In the Answer filed with the Secretariat of the Conciliation Commission on October 14, 1950, the Agent of the Italian Republic maintains the position taken by the Italian authorities and asserts that the issue in dispute is (in translation):

. . . whether or not Article 78 of the Treaty of Peace is applicable to damages suffered by a national of one of the Allied and Associated Powers as a result of the destruction in Italy of a vessel captured during the war by Italian armed forces in a port of one of the Allied and Associated Powers,

and concludes by making a request for a reservation of (in translation) "every other aspect of the substance of the dispute". In support of his contention that the Petition should be rejected, the Agent of the Italian Republic argues in the Answer:

- (a) that the return of property taken from the territory of one of the United Nations is governed by Article 75 of the Treaty of Peace;

(b) that the Treaty of Peace does not specify that compensation is payable under Article 78 of the Treaty of Peace for property taken from the territory of one of the United Nations when such property cannot be returned by Italy because the property itself had been destroyed during the war;

(c) that the physical existence in Italy *on June 10, 1940* of the claimant's property is an indispensable prerequisite to the application of Article 78 of the Treaty of Peace;

(d) that paragraphs 4 (a) and 9 (c) of Article 78 can be interpreted only in the light of and in a manner consistent with the first paragraph of Article 78 of the Treaty of Peace;

(e) that "property", as this term is defined in paragraph 9 (c) of Article 78, does not apply to vessels forcibly seized and taken to Italy during the war and that the use in said paragraph of the expression "after June 10, 1940" refers to measures of control taken by the Italian authorities with respect to vessels found in Italian territorial waters *on June 10, 1940* and not to vessels found or forcibly brought into Italian territorial waters *after June 10, 1940*.

In compliance with an Order issued by the Conciliation Commission on November 3, 1950 that the respondent government should submit a full and complete Answer to the Petition, the Agent of the Italian Republic submitted on December 23, 1950 a supplemental Answer dated December 21, 1950 in which it was declared that (in translation):

the (Italian) Government values the motor boat *Eilenroc II*, lost as a result of the war, at Five Million (5,000,000) Italian Lire.

In compliance with an order issued by the Conciliation Commission on February 13, 1951, the Agent of the Italian Republic provided for the transfer from the Italian Ministry of the Treasury to the secretariat of the original Statement of Claim and all documents attached thereto as well as the technical data on the basis of which the Italian Ministry of Merchant Marine had made its evaluation of the claimant's motor cruiser; and on March 14, 1950 said documents were included in the record of the case.

In its Order of April 13, 1951 the Conciliation Commission granted the request of the Agent of the United States of America and allowed a period of sixty (60) days within which to file a Reply. To the Reply filed on June 26, 1951 was attached additional documentary evidence to support the claimant's evaluation of the *Eilenroc II* and to show that the calculation by the Italian Ministry of Merchant Marine was made "on unsupportable assumptions and is in many respects inaccurate".

On July 30, 1951 the Conciliation Commission recorded its ruling that the formal submission of proof in this case had been concluded and established time limits for the submission of Briefs.

On September 5, 1951 the Agent of the United States of America submitted the Brief of his Government which maintains that both the question of whether Article 78 of the Treaty of Peace is applicable under the facts in the instant case, and the question of compensation to which the claimant is entitled under paragraph 4 (a) of Article 78 are disputed issues in this case. It is not necessary here to detail the legal argument and principles cited in the Brief except to note that the Agent of the United States of America maintained the principles set forth in the Petition and concluded by requesting the Conciliation Commission to determine:

(1) that the claimant is entitled to maintain the claim under Article 78 of the Treaty of Peace with Italy and the agreements supplemental thereto or interpretative thereof;

(2) that the claimant is entitled to receive as the sum necessary to purchase similar property two-thirds of the lire equivalent of at least \$32,000 or 20,000,000 lire;

(3) that the claimant is entitled to the sum of 150,000 lire constituting the reasonable expenses incurred in Italy in establishing the present claim;

(4) that the claimant is entitled to interest on the principal amount at the rate of 5% dating from December 27, 1948 or at least from February 27, 1949.

The Agent of the Italian Republic did not submit a Reply Brief within the time-limit established in the order of July 30, 1951 but submitted in lieu thereof a request that the Conciliation Commission sit to hear the oral arguments of the Agents of the two Governments, and permit him at that time to submit a written citation of legal authorities.

In its Order of October 23, 1951 the Conciliation Commission granted the Agent of the Italian Republic an additional period of thirty (30) days within which to submit a Reply Brief.

In a letter filed with the Secretariat on November 30, 1951 the Agent of the Italian Government waived the right to file a Reply Brief and states that (in translation):

Indeed, all the questions of law which have been raised in the Beaumont case are presently under decision by the Anglo-Italian Conciliation Commission (*Gin and Angostura* case).<sup>1</sup>

Since it is to be expected that the Decision in question will be considered binding as a precedent by one or the other of the Agents of the two Governments involved in the present dispute, the undersigned does not deem it advisable to change the west of the legal arguments developed in his Answer (arguments which are the same as those made in the *Gin and Angostura* case), and only reserves the right to make his own examination, and possibly his own critical remarks on the Decision to be made, at the time of the discussion of the Beaumont dispute before the Honourable Conciliation Commission.

In the Request for an Award dated December 11, 1951 and filed with the secretariat on December 12, 1951, the Agent of the United States of America took note of the statement made on November 30, 1951 by the Agent of the Italian Republic that the questions of law involved in this dispute are the same as those pending on that date before the Anglo-Italian Conciliation Commission but maintained that, although entitled to the greatest respect, the Decision of the Anglo-Italian Conciliation Commission in the *Gin and Angostura* case could not be considered as binding on the Italian-United States Conciliation Commission for the determination of the issues in the present dispute.

On January 10, 1952 the Agent of the United States of America filed a Request to submit certain additional evidence including a photostatic copy of a letter dated November 13, 1951 from the Chris-Craft Corporation showing the cost of purchasing on that date a motor cruiser similar to the *Eilenroc II*.

On March 4, 1952 the Anglo-Italian Conciliation Commission, with Dr. Plinio Bolla of Switzerland sitting as the neutral Third Member, handed down its Decision No. 2 in a dispute arising out of a claim submitted by Margaret Grace Grant-Smith, a British national, under Article 78 of the Treaty of Peace for the loss of the yacht *Gin and Angostura*,<sup>2</sup> and judicial notice of this Decision has been taken by this Conciliation Commission.

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<sup>1, 2</sup> *Supra*, p. 13.

At the sitting of the Conciliation Commission of March 14, 1952 the Conciliation Commission:

(a) stated that the legal question in this case was under review in the light of Decision No. 2 handed down by the Anglo-Italian Conciliation Commission on March 4, 1952, and invited the Agents of the two Governments to attempt an agreement on an evaluation of the motor cruiser involved in this dispute;

(b) granted the request filed by the Agent of the United States of America on January 10, 1952, *supra*, and directed the inclusion in the record of the evidence referred to in such request;

(c) accepted a written statement submitted by the Agent of the United States of America in which the question of interest on the claim which had been raised in the Brief submitted on September 5, 1951 was withdrawn in the light of Decision No. 5 of the Commission (Case No. 1—*The United States of America ex rel. Elena Iannone Carnelli vs. The Italian Republic*).<sup>1</sup>

At the sitting of the Conciliation Commission of March 20, 1952 the Commission granted the Agents of the two Governments further time in order that the possibilities of reaching an agreement on the questions of evaluation might be further explored.

On April 10, 1953 the Agent of the United States of America filed with the Secretariat a Notice that the two Governments had been unable to reach an agreement on the evaluation of the claimant's motor cruiser and requested the Conciliation Commission to issue a Decision in this case. Copies of correspondence between the Agents of the two Governments regarding this question were submitted for inclusion in the record and it has been noted that the Agent General of the Italian Republic stated in a letter dated June 5, 1952 that (in translation):

The Ministry of the Treasury has informed me that it does not deem it opportune to resubmit the question of the evaluation of the motor vessel *Eilenroc II* to the Interministerial Commission (of the Italian Government) and awaits the Decision in this case which will be made by the Italian-United States Conciliation Commission.

It is the contention of the United States of America that the claimant is entitled to compensation from the Italian Government under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof. Paragraph 4 (a) of Article 78 reads in part as follows:

... In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered...

It is not disputed that the claimant was at all times pertinent here a national of the United States of America; that the *Eilenroc II* was in French territorial waters when it was seized as enemy property on May 8, 1943 by Italian naval forces; that the *Eilenroc II* was sunk in Italian territorial waters in the course of military operations and that the *Eilenroc II* cannot be returned to the claimant by the Italian Government.

Even though *Eilenroc II* was lost in Italian territorial waters and hence at the time of the loss was "in Italy" during the period taken into consideration by Article 78, the Agent of the Italian Government maintains that Article 78 of

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<sup>1</sup> *Supra*, p. 86.

the Treaty of Peace cannot be applied because the facts in the instant case are within the scope of Article 75. The essence of this argument is that since *Eilenroc II* was seized in French territorial waters the French Government alone had the right under Article 75 to present a claim to the Italian Government for the return of said motor cruiser and that any such claim should have been presented within six months after the Treaty of Peace entered into force (September 15, 1947).

The evidence in this case establishes that even before the Treaty of Peace with Italy entered into force, the claimant invoked the assistance of *her* Government in an attempt to learn the fate of the *Eilenroc II* and that on December 10, 1946 the Italian Ministry of Foreign Affairs informed the Embassy of the United States of America in Rome that on investigation had established that the claimant's motor cruiser had been sunk in Italian territorial waters. It is obvious that since the claimant was not a French national she would not have been entitled to the diplomatic protection of the French Government in seeking redress from Italy for the loss sustained. The Italian Government has never maintained that there was ever any possibility of salvaging the claimant's motor cruiser after the war, and the French Government has never expressed an interest in the subject matter of this dispute.

The Agent of the Italian Republic maintains that all the provisions of Article 78 of the Treaty of Peace must be applied and interpreted in the light of and in a manner consistent with the first paragraph of Article 78 and that the existence of the claimant's property in Italy on June 10, 1940 is an indispensable prerequisite to granting the claimant relief requested.

The argument of the Agent of the Republic of Italy assumed an obligation under Article 78 to return "property" only if it was in Italy on June 10, 1940, cannot be supported either by the wording used in the Treaty of Peace or by logic or authority. Prior to the declaration of war between the two Governments on December 11, 1941 a national of the United States of America legally might have shipped to Italy for sale or trans-shipment certain types of property; even after December 11, 1941 a national of the United States of America might lawfully have acquired property in Italy by inheritance. Additional examples are not required to illustrate the points that a national of the United States of America may have acquired ownership of property in Italy after June 10, 1940 and it is not surprising that there is lacking in Article 78 any provision which shows an intent—either expressed or implied—to limit Italy's obligation to return such property.

The date of June 10, 1940 is also referred to in paragraph 2 and paragraph 9 (c) of Article 78 and an examination of these two paragraphs demonstrates the lack of foundation of the Italian argument.

Paragraph 2 of Article 78 requires the Italian Government to

... nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty...

Clearly the obligation here is for Italy to nullify any such measure taken during the period that Italy was at war, and is immaterial whether the United Nations property was in existence in Italy on June 10, 1940 or was brought into or acquired in Italy after that date.

Paragraph 9 (c) of Article 78 defines the term "property" as used in said Article of the Treaty of Peace as follows:

"Property" means all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as all

rights or interests of any kind in property. Without prejudice to the generality of the foregoing provisions, the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment, which were either owned by the United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after June 10, 1940, while in Italian waters, or after they had been forcibly brought into Italian waters, either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany.

The second sentence of this definition not only applies to all seagoing and river vessels which were in Italian territorial waters on June 10, 1940 but also to those vessels which were forcibly brought into Italian waters after that date. Clearly in this instance too, the date of June 10, 1940 refers to the date of Italy's entrance into the war following which measures were taken by Italy to bring the vessels of United Nations and their nationals under the control of the Italian authorities.

The claimant Government asserts and the respondent Government denies that *Eilenroc II* was property within the meaning of this term as defined in paragraph 9 (c) of Article 78 *supra*. The reference to seagoing and river vessels which was included in the second sentence of paragraph 9 (c) of Article 78 eliminates the basis of the argument by the Agent of the Italian Republic that this case must be governed exclusively by Article 75 of the Treaty of Peace. It is not necessary to the Conciliation Commission in reaching its decision in this case to determine the broader question of whether the Italian Government is responsible under Article 78 of the Treaty of Peace for property other than seagoing and river vessels removed during the war from the territory of one of the United Nations occupied by forces of the Axis Powers; and this more delicate question has been left aside in the instant case as was done in a similar dispute before the Anglo-Italian Conciliation Commission (see Decision March 4, 1952 in the *Gin and Angostura* case).<sup>1</sup>

In the instant case the *Eilenroc II* was seized on May 8, 1943 by the Italian naval forces. How or when the vessel was brought to Italy has not been established by the evidence but there can be no doubt that in Italy the *Eilenroc II* was under the control of the Italian Navy and was not at the free disposal of the claimant. It was the obligation of the Italian Government to account for and to return the motor cruiser when it was established that the *Eilenroc II* had been seized by Italian naval forces, and this the Italian Government has not been able to do since the motorcruiser was lost during the war.

The Conciliation Commission holds that the conclusive fact in the instant case which fixes the liability of the respondent Government under Article 78, and more particularly under paragraph 4 (a) and 9 (c) thereof, is that the *Eilenroc II* was sunk in Italian territorial waters; proof of this fact alone establishes that the claimant's property was in Italy and could not be returned after the war.

As far as the indemnity is concerned, the claimant Government has requested that this be determined on the basis of the amount necessary today to purchase similar property and has submitted with the Petition a letter dated September 8, 1948 from the Chris-Craft Motor Boat Sales Corporation in which the replacement value of a new 40-foot express cruiser fitted with two 316 H.P. Scripps engines and delivered in Cannes, France is quoted at Thirty-Two Thousand

<sup>1</sup> *Supra*, p. 13.

Dollars (\$32,000), equal to Twenty Million (20,000,000) Lire at the present rate of exchange of Six Hundred Twenty-Five (625) Lire to the Dollar.

The Agent of the Italian Government disputes this valuation and upon order of the Conciliation Commission submitted in evidence an evaluation of the claimant's motor cruiser prepared under the direction of the Italian Ministry of the Merchant Marine; an examination of this data reveals that the actual cost in the fall of 1950 to build and equip in Italy a boat similar to the motor cruiser in question would be approximately as follows:

	<i>Lire</i>
Hull—without cabin and motors . . . . .	9,000,000
Addition for cabin . . . . .	1,000,000
Cost of 2 gasoline engines, 316 H.P. each, installed . . .	10,740,000
<b>TOTAL</b>	<b>20,740,000</b>

The evaluation made in this manner by the competent Italian authorities shows only relatively small difference from the cost of replacement quoted by the Chris-Craft Corporation in September 1948. But the competent Italian authorities maintain that from the foregoing figures there should be allowed an amount for depreciation equivalent to 48.7 per cent on the basis that thirteen (13) years (1938 to 1950 inclusive) depreciation had occurred. Having calculated an allowance for depreciation in this manner, the competent Italian authorities have maintained that a further reduction should be made and predicate such reduction on the following assumptions (in translation):

- (a) that the motor cruiser was found without inventory and therefore presumably with only the fixed equipment;
- (b) that the presumable speed, based on the data above, was around 24-25 knots and not 30 as indicated;
- (c) that there does not exist a market for this type of vessel whose value depreciates rapidly with time;
- (d) that it must be presumed, considering the international situation of the times, that it was found in a condition of abandon and imperfect efficiency since it lacked an inventory.

The evaluation of Five Million (5,000,000) Lire placed on the claimant's motor-cruiser by the Italian Government was arrived at in this manner and reflects these considerations.

In the Reply the Agent of the United States of America submitted additional evidence to support the claiming Government's contention that the *Eilenroc II* was a private pleasure craft which had been in the water less than three months during 1938 and 1939; that a sailor-watchman had been employed by the claimant to provide continuous maintenance; that the hull was mahogany; that the motor cruiser was powered by special gasoline engines and could easily develop a speed of 32 knots; that the hull and engines were in perfect condition and that all its fittings and equipment were aboard when it was seized by an officer of the Italian Navy on May 8, 1943; that only the installation of batteries (which had been stored at Villa Eilenroc) was necessary in order to permit the officer to remove the *Eilenroc II* to the Italian Naval operating base; that the seizure and removal was accomplished in a matter of hours and that the Italian Naval officer in charge thereof failed to prepare an inventory of the fittings and equipment on board the claimant's motor cruiser because to have done so at the time would have delayed the officer's departure from Cap d'Antibes (A.M.).

On March 14, 1952 the Agent of the United States of America filed with the secretariat a letter dated November 13, 1951 in which the Chris-Craft Corpora-

tion acknowledged that while they no longer built a motor cruiser identical to the *Eilenroc II* one of their new models was similar and quoted a price thereon of \$44,300.00 for delivery in Marseilles, France of a 42-foot motor cruiser powered by two 350 H.P. Scripps engines. It should be noted that while this letter reflects an increase in price from those quoted in 1948, the quotation of \$44,300.00 is based on a slightly larger motor cruiser equipped with more powerful engines than the subject of this claim.

Considering the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace and the technical and other evidence contained in the record of this case; and considering the lack of evidence to substantiate certain assumptions made by the Italian Ministry of Merchant Marine and the inability of the Agents of the two Governments to reach agreement on the question of evaluation, the Conciliation Commission finds that at the date of this decision the amount necessary in Italy to purchase a motor cruiser similar to the *Eilenroc II* in hull, engines, equipment, age and condition is Sixteen Million Seven Hundred Fifty Thousand (16,750,000) Lire.

Under the provisions of paragraph 4 (a) of Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, the claimant is entitled to receive as compensation two-thirds (2/3) of this sum, namely, Eleven Million One Hundred Sixty-six Thousand, Six Hundred Sixty-seven (11,166,667) Lire.

The Commission further finds that sufficient evidence has been introduced in this case to establish the reasonableness of the request of the claimant for payment by the Government of the Italian Republic of the sum of One Hundred Fifty Thousand (150,000) Lire for expenses incurred in Italy in establishing this claim. No evidence having been submitted that any previous payment has been made to the claimant for the motor cruiser which is the subject of this claim, the Commission acting in the spirit of Conciliation,

**HEREBY DECIDES :**

1. That in this case there exists an international obligation of the Government of the Italian Republic to pay the sum of Eleven Million One Hundred Sixty-six Thousand, Six Hundred Sixty-seven (11,166,667) Lire under Article 78 of the Treaty of Peace in full and complete settlement of the claim of Mrs. Helene M. E. Beaumont, a national of the United States of America, for the loss in Italian territorial waters during the war of a motor cruiser owned by her;
2. That in this case there also exists an international obligation of the Government of the Italian Republic to pay the additional sum of One Hundred Fifty Thousand (150,000) Lire under paragraph 5 of Article 78 of the Treaty of Peace for expenses incurred in Italy by Mrs. Helene M. E. Beaumont in establishing this claim;
3. That the payment of these two sums in Lire, (aggregating a total of Eleven Million Three Hundred Sixteen Thousand Six Hundred Sixty-seven (11,316,667) Lire shall be made in Italy by the government of the Italian Republic upon request of the Government of the United States of America within thirty (30) days from the date that a request for payment under this Decision is presented to the Government of the Italian Republic;
4. That the payment of these two sums in Lire, (aggregating a total of Eleven Million Three Hundred Sixteen Thousand, Six Hundred Sixty-seven (11,316,667) Lire shall be made by the Government of the Italian Republic free of any levies, taxes, or other charges and as otherwise provided for in paragraph 4 (c) of Article 78 of the Treaty of Peace;

5. That in this case an Order regarding costs is not required;
6. That in this case the question of interest on the claim was withdrawn by the Agent of the United States of America at the sitting of the Conciliation Commission on March 14, 1952;
7. That this decision is final and binding from the date it is deposited with the secretariat of the Commission, and its execution is incumbent upon the Government of the Italian Republic.

This Decision is filed in English and Italian, both texts being authenticated originals.

DONE in Rome this 26th day of October, 1953.

*The Representative of the  
United States of America on the  
Italian-United States  
Conciliation Commission*

Emmett A. SCANLAN, Jr.

*The Representative of the  
Italian Republic on the  
Italian-United States  
Conciliation Commission*

Antonio SORRENTINO

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WEISS CASE—DECISION No. 20  
OF 25 NOVEMBER 1953<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Damage sustained as result of act of war by property in Italy after its requisition by Italian authorities—Nationality of owner—National of another of the United Nations on 3 September 1943 or on date on which damage occurred—Determination of amount of compensation.

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Indemnisation au titre de l'article 78 du Traité de Paix — Dommage causé par fait de guerre à des biens en Italie après leur réquisition par les autorités italiennes — Nationalité du propriétaire — Ressortissant d'une autre Nation Unie à la date du 3 septembre 1943 ou à la date du dommage — Détermination du montant de l'indemnité.

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The Italian-United States Conciliation Commission established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Alexander J. Matturri, Representative of the United States of America.

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<sup>1</sup> *Collection of decisions*, vol. II, case No. 27.

I. On February 8, 1952 the Agents of the United States, Lionel M. Summers and Carlos J. Warner, submitted to this Commission a Petition on behalf of Abraham and Perl Weiss requesting the Commission to decide that the failure on the part of the Italian authorities to act favourably on the claim of Abraham and Perl Weiss constitutes in effect a denial of their claim, to decide that the claimants are entitled to compensation under Article 78 of the Treaty of Peace, and to grant interest of 5% per annum from November 5, 1948 on the amount of compensation.

In support of the Petition the Agents of the United States set forth the following facts:

Since January 7, 1946, the claimants have been nationals of the United States of America. Prior to that time and on September 3, 1943, the claimants were nationals of Poland. When emigrating from Poland in 1940 the claimants shipped eight parcels containing books, household effects and personal clothing to Trieste for eventual trans-shipment to the United States. The claimants insured the eight parcels for the value of 20,000 zlotys against loss during transit between Warsaw and Trieste.

The property was sent from Trieste to Genoa and then on to Milan in 1940 and, on October 24, 1944 was requisitioned by Italian authorities and was thus lost to the claimants.

On November 5, 1948 the Embassy of the United States of America in Rome submitted to the Italian Government on behalf of the claimants a claim based on Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof. On June 4, 1949 and again on August 9, 1949, the Italian Government rejected the claim on the grounds that the claimants did not possess the nationality of the United States as of September 3, 1943, or as of the date the damage occurred. The Embassy expressed its disagreement with the viewpoint of the Italian authorities. On August 16, 1950, the Italian authorities requested proof of the Polish nationality of the claimants as of September 3, 1943.

On January 16, 1951, the Embassy submitted certain documents showing that the claimants were nationals of Poland prior to acquiring the nationality of the United States.

As the Italian authorities had taken no action on the claim for more than a year thereafter, the Agents of the United States submitted a Petition based on this claim to the Conciliation Commission, maintaining that the silence of the Italian authorities was an implicit denial of the right of the claimants to compensation and that a dispute had therefore arisen between the two Governments.

II. On April 16, 1952, the Agent of the Italian Republic, Stefano Varvesi, submitted the Answer, denying the existence of a dispute and declaring that the Italian authorities were at that time conducting an investigation of the existence and amount of the property subject of the claim.

After several extensions of time, the Agent of the Italian Republic submitted a second Answer on February 2, 1953, in which he set forth the more recent opinion of the Italian Administrative authorities that the claimants are United Nations nationals and are entitled to compensation because the property was destroyed by an act of war in April 1945 and he set forth also the amount of compensation considered sufficient by the administrative authorities;

III. On February 6, 1953, the Agent of the United States informed the Commissioner that he found unacceptable the evaluation of the damages made by the Italian administrative authorities;

On March 24, 1953, the Agent of the Italian Republic submitted the report of the appraisal conducted by the Italian administrative authorities;

On June 18, 1953, the Agent of the United States waived the request contained in the Petition for interest on the amount of compensation;

The Italian-United States Conciliation Commission,

Whereas the Italian Government has abandoned its original defence, according to which the right of the claimants to receive compensation was denied on the grounds that they were not nationals of the United States on September 3, 1943 or on the date on which the damage occurred, since it appeared that, prior to acquiring the nationality of the United States, the claimants were in possession of the nationality of another of the United Nations (Poland);

Whereas the Italian Government now recognizes that compensation is due to the Claimants under Article 78, so that the only question remaining to be settled by the Conciliation Commission is the amount of compensation;

Having examined the documents in the record;

Having noted particularly the insurance policy dated March 28, 1940, in the amount of 20,000 zlotys, equal to \$4,000 (1940 values) as well as the inventory of the property attached thereto;

Having seen the appraisal made by the Italian administrative authorities on the basis of the inventory prepared on January 18, 1945 by the recipient of the property following the requisition on July 6, 1944;

Whereas said appraisal does not take into account all of the property lost by the claimants (e.g., the books);

Whereas under Article 78 of the Treaty of Peace the Italian Government is obligated to compensate the claimants to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered;

Whereas the present value of the property which was lost may be calculated to be 2,550,000 lire;

Considering the expenses incurred in Italy in the establishment of the claim;

Acting in the spirit of conciliation.

DECIDES:

1. The claimants, Abraham and Perl Weiss, are entitled to receive from the Government of the Italian Republic the total sum of 1,900,000 lire, including the expenses of preparation of the claim, in full settlement of their claim under Article 78 of the Treaty of Peace with Italy, such sum to be paid within thirty (30) days from the date on which a request for payment is presented by the Government of the United States of America to the Government of the Italian Republic.

Rome, 25 November 1953.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

BACHARACH CASE—DECISION No. 22  
OF 19 FEBRUARY 1954<sup>1</sup>

Claim for compensation under Article 78 of the Treaty of Peace—War damages sustained by property in Italy belonging to stateless persons who acquired status of “United Nations nationals” after 3 September 1943—Applicability of second part of paragraph 9 (a) of the aforementioned Article—Meaning of expression “treated as enemy”—Interpretation of treaties—Ordinary meaning of words.

Demande en indemnisation au titre de l'article 78 du Traité de Paix — Domages de guerre subis par des biens en Italie appartenant à une personne apatride ayant acquis le statut de “ressortissants des Nations Unies” à une date ultérieure au 3 septembre 1943 — Applicabilité de la seconde partie du par. 9 a) de l'article 78 du Traité — Signification de l'expression “traitées comme ennemis” — Interprétation des traités — Sens ordinaire des mots employés.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy under Article 83 of the Treaty of Peace, and composed of Messrs. Antonio Sorrentino, Representative of the Italian Republic, and Alexander J. Matturri, Representative of the United States of America.

On the Petition filed November 20, 1951 by the Government of the United States of America represented by its Agents, Messrs. Lionel M. Summers and Carlos J. Warner, *versus* the Italian Government represented by its Agent, State's Attorney Francesco Agrò in behalf of Mrs. Hilde Gutman Bacharach.

\* \* \*

(1). In his Petition, the Agent of the United States of America has made the following statement of facts:

The claimant has been a national of the United States of America since December 3, 1946; prior to that date and on September 3, 1943 she was a stateless person of German origin, as she had lost her German nationality, at least under the 11th Regulation of November 25, 1941 of the Nationality Law of the Reich, if not earlier. The claimant, who had emigrated to Italy from Nürnberg in the month of March, 1934, settled in Turin, and in 1938 married Mr. Max Bacharach and established her residence in Milan. Following the coming into effect of Royal Decree No. 1381 of September 7, 1938, which prohibited the residence in Italy of foreign Jews, Mr. and Mrs. Bacharach moved first to France and later to the United States. The claimant's property, packed in seven cases, was stored in Milan with the forwarding firm of Luciano Franzolini. These cases, while in storage there, were completely destroyed as a result of the aerial bombardment of Milan which occurred on August 12-13, 1943.

<sup>1</sup> *Collection of decisions*, vol. II, case No. 22.

On May 29, 1930 the Embassy of the United States of America in Rome, in behalf of the claimant, filed with the Ministry of the Treasury a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto and interpretative thereof. In view of the fact that no action was taken on the claim by the Italian authorities, it was submitted to the Italian-United States Conciliation Commission by the Agent of the United States of America who requested the Commission to decide that the claimant was entitled to receive compensation for the damages resulting from the destruction of the aforementioned seven cases.

(2). On December 21, 1951 the Agent of the Italian Government filed an Answer in which he denied the admissibility of Mrs. Bacharach's claim, on grounds that the claimant had never been treated as enemy in Italy during the war, and he maintained that neither the German racial laws, nor law decree no. 1381 of September 1938, nor the anti-semitic laws of the Italian Social Republic could be invoked in order to establish the claimant's right to file a claim under Article 78, paragraph 9 (a), second paragraph.

(3). The respective arguments of law were developed by the two Agents in the Briefs submitted by them.

The Agent of the Government of the United States of America pointed out:

(a) that the claimant, stateless by virtue of the German nationality laws, was considered as enemy in Italy under the Italian War Law of July 8, 1938;

(b) that the Italian Government's anti-semitic legislation established a régime according to which Jews were in fact regarded as enemies of the Italian State;

(c) that this was even more evident in the anti-semitic laws of the Republic of Salò, laws which must be considered as being in force in non-liberated Italy, and therefore laws in Italy within the meaning of Article 78 of the Treaty of Peace.

The Agent of the Italian Government, in his turn, contended:

(a) that Mrs. Bacharach was not treated as enemy under the laws in force in Italy during the war, because no specific and concrete discriminatory measure was taken against her;

(b) that the anti-semitic legislation of 1938 and thereafter, insofar as it would be applied against a foreign Jewess, was in actual fact never carried out against the claimant and that in any event this legislation does not decree a treatment as enemy and hence cannot be brought within the intention of paragraph 9 of Article 78 of the Treaty of Peace;

(c) that the so-called laws of Salò could not concretely be applied against the claimant (who was no longer in Italy) or against her property (which had already been destroyed) and that moreover the acts of the Italian Social Republic cannot be considered as "laws in force in Italy during the war".

#### CONSIDERATIONS OF LAW:

It is not disputed that, as the claimant acquired the nationality of the United States of America only on December 3, 1946, she cannot be considered to be a United Nations national within the meaning of Article 78 paragraph 9, letter *a*, first paragraph, of the Treaty of Peace.

The dispute involves the applicability of the second part of the cited provision which reads textually as follows:

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

The Commission cannot accept the argument of the Agent of the United States of America that the word "treated" in the English version and the word "*traitées*" in the French version were intended by the framers of the Treaty to mean merely "considered" or "regarded", which are, at the best, secondary or tertiary meanings of the words "treat" and "*traiter*". The Commission agrees with the Italian Agent that the more common meaning of the words "treat" and "*traiter*" is "to act towards someone or something in a given manner". Moreover, the verb form used in the English version is the compound form "have been treated"; if the meaning "considered" or "regarded" had been intended by the framers of the Treaty, would it not have been more suitable to use the form "were treated", indicating continued action, rather than the more decisive, more concrete past perfect? The verb tense used in the English version supports the argument of the Italian Agent that the notion of concrete specific action is implicit in the verb "treated".

The Commission fails to perceive any reason why the framers of the Treaty would have used the words "treated" and "*traitées*" if they had intended to mean "considered". To adopt the construction urged by the Agent of the United States of America would be to extend the ordinary meaning of "treated" and "*traitées*" beyond reasonable limits.

To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals.

Mrs. Hilde Gutman Bacharach left Italy after the enactment of Royal Decree Law No. 1381 of September 7, 1938, and in compliance with same, and therefore a long time before the outbreak of war; her property, which remained in Italy, was neither then nor later subjected to sequestration or to other measures of control.

Even admitting that said decree law forced the claimant to leave Italy and therefore was a measure taken against her, it is certain that the measure did not constitute "treatment as enemy". The racial legislation enacted, beginning in 1938, by the Fascist régime was certainly inhuman and barbarous, but it was not legislation enacted within the framework of a state of war, as the term is used in international law (State, or national of a State, with which one is at war). Article 78 refers to enemy with a more definite meaning, that is, in the sense that an individual received the same treatment he would have received had he been a national of one of the States with which Italy was at war.

The Agent of the Government of the United States of America refers also to the provisions of Art. 3 of the Italian War Law which declares that stateless persons residing in enemy countries are considered enemy nationals; but this provision contains an abstract statement which is not sufficient in itself alone to constitute treatment as enemy; this provision could become important only in the event that it were the basis for any restrictive measure that may have been taken against the claimant or her property, which does not seem to be the case.

Finally, neither do the racial laws of the Salò Republic have any bearing on the claimant and this is so because, assuming, without here deciding, that the laws of the Salò Republic were "laws in force in Italy during the war", the laws of the Salò Republic were never applied either to the claimant or to her property. The claimant was outside of Italian territory at the time of the Salò Republic and her property had already been destroyed (August 12-13, 1943) at the time of the promulgation of the laws and programs of the Salò Republic (beginning November 18, 1943). Therefore, concrete treatment as enemy under the laws of the Salò Republic was impossible as regards the claimant and her property.

## DECIDES:

1. The Petition filed by the Agent of the United States of America in behalf of Mrs. Hilde Gutman Bacharach, under Article 78 of the Treaty of Peace, is rejected.
2. This decision is final and binding.

Rome, February 19, 1954.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

FATOVICH CASE—DECISION No. 24  
OF 12 JULY 1954<sup>1</sup>

Compensation under Article 78 of Peace Treaty—War damages—Aerial bombardments—State responsibility—Responsibility of Italy for loss or damage sustained during the war by enemy property located in ceded territory—Evidence—Existence and ownership of property and damages suffered—Evaluation of amount of damages—Interest—Principles on which granted—Interest for delay in settlement of claims on administrative level—Interest as part of damages—Necessity for either prior agreement to allow interest or early notice of intention to claim it—Reference to decisions of other international tribunals—Request for interest not contained in claim for compensation originally submitted to Italian Government denied.

Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre — Bombardements aériens — Responsabilité de l'Etat — Responsabilité de l'Italie pour perte ou dommage subi pendant la guerre par des biens ennemis situés sur un territoire cédé — Preuve de l'existence et de la propriété des biens ainsi que des dommages subis — Evaluation des dommages — Intérêts — Principes sur la base desquels ils sont alloués — Intérêts pour retard dans le règlement des réclamations sur le plan administratif — Intérêts faisant partie de l'indemnité — Nécessité soit de l'accord préalable de l'Etat défendeur de payer des intérêts, soit d'une demande expresse d'intérêts présentée à ce dernier dès l'origine de la réclamation — Invocation de décisions d'autres tribunaux internationaux — Rejet d'une demande d'intérêts non incluse dans la demande d'indemnité présentée originairement au Gouvernement italien.

<sup>1</sup> *Collection of decisions*, vol. II, case No. 35.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Alexander J. Matturri, Representative of the United States of America, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace which was submitted on August 18, 1950, to the Italian Ministry of the Treasury by Joseph Fatovich through the Embassy of the United States of America in Rome.

It is not denied that Joseph Fatovich is a national of the United States of America, and hence a "United Nations national" within the meaning of Paragraph 9 (a) of Article 78 of the Treaty of Peace. In his claim he requested compensation for loss of personal property and damage to real property located in Zara, formerly under Italian sovereignty, but now under Yugoslav sovereignty by virtue of the Treaty of Peace with Italy which came into effect on September 15, 1947.

Initially, in December 1952, the Italian authorities rejected the claim on grounds that Yugoslavia had paid a lump sum to the United States of America for war damages suffered by United States nationals in Yugoslavian territory. However, the Embassy of the United States of America in Rome pointed out to the Italian authorities, by letter dated January 27, 1953, that the agreement of July 19, 1948, between the United States of America and Yugoslavia did not provide for compensation for war damages to United States nationals and, in any event, did not affect Italy's obligation under Article 78 of the Treaty of Peace with Italy.

No further action was taken by the Italian authorities with respect to the claim and, on May 26, 1953, the Agent of the United States of America submitted the Petition in this case to the Conciliation Commission, on grounds that, in the absence of any indication by the Italian authorities of a change of position the rejection of the claim in December 1952 had given rise to a dispute between the two Governments.

It is not disputed by the Italian Agent that Italy is responsible for loss or damage sustained during the war by property belonging to United Nations nationals located in ceded territory, nor is it disputed that Zara was ceded by Italy to Yugoslavia under the Treaty of Peace. Moreover, on July 2, 1953, the Italian Agent submitted a statement to this Commission in which it is declared that the Italian Government abandoned the grounds upon which this claim was originally rejected and that an investigation by Italian authorities had been ordered to determine the veracity of the elements of the claim as presented by Joseph Fatovich.

The Italian Agent requested and was granted more than six months for the completion by the Italian Government of the investigation of the claim and for the submission of the full and complete Answer of the Italian Government. On February 19, 1954, however, the Italian Government informed the Commission that it had proved impossible for the Italian Government to conduct an investigation of the claim and he requested the Commission to reject the Petition for lack of evidence, or, in the alternative, to order such investigative measures as might appear suitable to the Commission in order to ascertain the existence and ownership of the property, as well as the cause and amount of the damage.

The claim submitted by Joseph Fatovich on August 18, 1950, requests compensation for four items of loss or damage:

I. Damage, as the result of aerial bombardment of Zara, to a four-storey building containing a general store and storage rooms on the ground floor

and four apartments on the upper three floors. Temporary repairs were made by the claimant, to prevent further damage by the elements, immediately upon his return to Zara after the cessation of hostilities. No permanent repairs were made by the claimant.

While in an affidavit dated August 22, 1949, the claimant declares that he spent approximately one million lire on these temporary repairs, in an earlier affidavit, executed on September 3, 1948, and submitted with a separate claim under Article 78 of the Treaty of Peace, the original of which was filed by the Italian Agent in the record together with the original of the claim that is the subject of the Petition in this case, the claimant declares instead that he spent 100,000 Yugoslav dinars for temporary repairs shortly after hostilities ceased.

In support of his request for compensation for unrepaired damages to the real property the claimant submitted an appraisal compiled by an architect at Zara in October 1945, from which it appears that damages to the structure itself amounted to 654,600 lire and damages to the interior of the building amounted to 219,270 lire, values of 1945.

II. Destruction as a result of aerial bombardment of furniture, household effects and clothing contained in the claimant's own apartment on the top floor of the building.

During the war, the claimant submitted a list, undersigned by four witnesses, enumerating the items lost and their value, to the Italian authorities at Zara, requesting compensation for war damages. On October 29, 1944, the Italian authorities at Zara stated that no action had been taken on the claim. The total amount claimed at that time for loss of furniture, household effects and clothing was 387,500 lire, values of 1944.

III. Destruction as a result of aerial bombardment of fixtures and furniture contained in the store and in the storage-rooms on the ground floor of the building.

There is no evidence of the existence of value of such items which ante-dates an affidavit dated August 22, 1949, in which the claimant declares that several showcases, shelves, benches, storage bins and a safe, the whole valued at 400,000 lire as of the time of purchase, were destroyed.

IV. Destruction as a result of aerial bombardment of the stock of merchandise contained in the store. The stock consisted of items of wearing apparel, such as stockings, sweaters, underclothes; notions, such as ribbons, needles, lace, scissors, razors, razor-blades, combs; tableware and kitchenware.

During the war, the claimant submitted a list, undersigned by four witnesses, enumerating the items of merchandise destroyed, together with their values, to the Italian authorities at Zara, requesting compensation for war damages. On October 29, 1944, the Italian authorities stated that no action had been taken on the claim. The total amount claimed at that time for the loss of the stock of merchandise was 743,753 lire, values of 1944.

In addition to the claimant's affidavits, the appraisal of 1945 concerning damages to the real property (item I above) and the two claims for war damages to personal property dated 1944 (items II and IV above), there is also a copy of a decision by a Yugoslavian War Damage Claims Commission dated January 23, 1946, from which it appears that a claim made by Joseph Fatovich in the amount of 4,051,210 Yugoslavian dinars for the loss of the stock of merchandise was recognized as a valid claim, but was reduced in amount to 1,088,000 Yugoslavian dinars, that is, by more than 75 percent.

I. In view of the existence in the record, apart from the claimant's affidavits made after the Treaty of Peace, of claims for war damages, which bear the official date of 1944, of the architect's appraisal of real property damages dated in 1945, and of the above mentioned decision of a local Yugoslavian Claims Commission concerning the stock of merchandise, this Commission concludes that there is sufficient evidence of the existence, ownership and damage or destruction of the property referred to in items I, II and IV above. Although there is no evidence of the existence or destruction of the fixtures and furniture contained in the storage rooms (item III), except for various affidavits of the claimant executed at the time of preparation of this claim, the Commission believes that the claimant's statements may be accepted regarding item III, insofar as they concern existence, ownership and destruction, also because the possession and operation of a store of the type described above necessarily implies the existence therein of suitable showcases, counters and storage receptacles.

Therefore, it becomes the Commission's task to evaluate the amount of the damages sustained by the claimant.

The Petition submitted by the Agent of the United States of America sets forth an evaluation of 34,051,000 lire at current prices. That amount is obtained by totaling the various items (I through IV) set forth above, as follows:

*Lire*

I.	1,000,000—already expended for temporary repairs
	654,600—structural damage repairs
	219,270—internal damage repairs
	<hr/> <u>1,873,870</u>
II.	387,500—household and personal effects
III.	400,000—store fixtures and furniture
IV.	<u>743,753</u> —stock of merchandise
	<u>3,405,123</u> —or, in round figures, 3,405,100 lire

This total is then multiplied by the coefficient of 10, such coefficient representing, according to the Agent of the United States, the coefficient of revaluation of the figures of 1944 and 1945 necessary to bring them into line with current prices. The result is 34,051,000 lire.

First of all, it is to be noted that included in the revalued total of 34,051,000 lire is the amount of 10,000,000 lire, ten times the amount alleged spent by the claimant immediately after the cessation of hostilities for necessary temporary repairs to the building (item I). Under no circumstances could the Commission consider justified the revaluation at today's prices of an amount actually disbursed in 1945 or 1946. Article 78 of the Treaty of Peace cannot be interpreted so as to charge Italy with responsibility for the inflation of its currency, and hence the sum of money expended by a claimant for which he presumably received fair value is not subject to revaluation. Moreover, as pointed out above, the figure of 1,000,000 lire, stated by the claimant himself to be approximate, appears to be an exchange into Italian currency of the amount of 100,000 Yugoslav dinars referred to by the claimant in his affidavit of September 3, 1948. In view of the fact that Yugoslav sovereignty had been established *de facto* in the city of Zara at the time hostilities ceased, it is more probable that the money paid out for temporary repairs was Yugoslav rather than Italian currency, and the exchange rate of 10 Italian lire to 1 Yugoslav dinar, applied by the claimant, is greatly exaggerated. In fact, the Commission has been made aware that, although there was no official exchange for the years 1945-1946, an approximate exchange rate of 3 lire to 1 dinar more nearly reflects the actual

conditions of the time. Hence, converted into lire at three to one, the amount of 100,000 dinars would equal 300,000 lire, which was expended by the claimant, immediately after hostilities, for temporary repairs and which is therefore not subject to revaluation at today's prices.

Secondly, it is to be noted that, whereas the Agent of the United States of America applies the allegedly "modest" coefficient of 10 as the coefficient of revaluation of the losses calculated in lire in 1944 and 1945, without adducing any evidence whatsoever in support of the correctness of such coefficient, the correct coefficients of revaluation are in reality considerably lower. In fact, according to the official statistics of the Italian Central Institute of Statistics for the year 1952 (the most recent available statistics), the coefficients of revaluation, based on the index of wholesale prices, are as follows: 1944 = 1; 1945 = 2.4; 1952 = 6.12.

Therefore, the coefficient of revaluation for 1944 values is 6.12; the coefficient of revaluation for 1945 prices, where 1945 equals 1, is 2.55.

Applying these coefficients of revaluation to the alleged losses and damages calculated in 1944 and in 1945, and taking into account only the amount actually expended for the temporary repairs to the real property, the total amount of the claim should be 9,851,637 lire, using current values and accepting fully the ex parte evaluations made by the claimant for each item.

However, the Commission is unable to accept the evaluations made by the claimant, because it is quite apparent that the values assigned by the claimant are exaggerated. For instance, in the claim for compensation for the loss of the furniture contained in the claimant's apartment, presented to the Italian authorities at Zara during the war, the claimant listed a roomful of furniture for a dining room, whereas it appears clearly from the architect's plan of the apartment and from the claimant's own sworn statement describing his home that no dining room existed. Moreover, an inordinate amount was claimed for "various carpentry and mechanical tools", without further specification, whereas the claimant's business was that of a retail merchant. Also, although there were only two beds in his home, claimant alleged the loss of no less than one-hundred sheets, sixty of which were double-bed size.

Additional indication of the exaggerated values placed on his property by the claimant is to be found in the fact that the local Yugoslav War Claims Commission decided that the actual value of the lost merchandise amounted to 1,088,000 dinars, approximately 25 percent of the amount of 4,051,210 dinars alleged by the claimant.

Taking into consideration the indications of exaggeration in the values asserted by the claimant but concluding that the claimant did suffer serious losses and damages as a result of the war, the Commission finds that the values of the property lost or damaged at Zara are as follows:

	<i>Lire</i>
I. Damages to real property:	
(a) Expended for temporary repairs following hostilities . . . . .	300,000
(b) Permanent repairs . . . . .	1,760,000
II. Destruction of household effects, furniture and clothing . . . . .	376,380
III. Destruction of fixtures and furniture in store and storage rooms . . . . .	250,000
IV. Destruction of merchandise . . . . .	1,000,000

The probable age and condition of the various items lost or damaged were considered arriving at the above figures, so that the total value of the claimant's damages at current values amounts to 3,686,380 lire. Of this amount, the

Italian Government is responsible for the payment of two-thirds, in accordance with Paragraphs 7 and 4 (*a*) of Article 78 of the Treaty of Peace.

\* \* \*

II. The Petition submitted on May 26, 1953 by the Agent of the United States of America also requests this commission to grant interest on the principal amount to be awarded to the claimant, at the rate of 5% per annum, from August 18, 1950, the date on which the claim was first presented to the Italian Ministry of the Treasury through the Embassy of the United States of America in Rome.

The Answer of the Agent of the Italian Republic in this case maintains that the request for interest is inadmissible because Article 78 of the Treaty of Peace does not provide for it.

As a request for interest on the amount of the claim has been made in many other disputes pending before this Commission, as well as in the instant case, it is necessary for the Commission to examine the question thoroughly.

Once before (Case No. 1, Elena Iannone Carnelli, decided on March 4, 1952, Decision No. 5),<sup>1</sup> a request for interest was rejected, but on procedural grounds, because it was contained in the Brief of the claiming Government and not in the Petition; in the instant case that difficulty does not exist because the request for interest is specifically set forth in the Petition, that is, in the manner prescribed by the Rules of Procedure. The request for interest on the claim of Joseph Fatovich raises a question which is properly before the Commission under the Rules of Procedure.

The Briefs of the Agents of the two Governments in the above mentioned Case No. 1, Elena Iannone Carnelli, discussed fully the question of the responsibility of the Italian Government for the payment of interest on the claims of nationals of the United States under Article 78 of the Treaty of Peace, but the Commission does not deem it necessary to decide here the question as propounded, of the responsibility of the Italian Government under international law for the payment of interest, whether such interest be considered as an element of the compensation provided for by Article 78 of the Treaty of Peace, or whether such interest be considered as a measure of damages resulting from delay by the Italian Government in the investigation and settlement of claims under Article 78, for the reason that in this case there is lacking a necessary condition precedent to the right to make the request, as will be seen immediately. In fact, assuming, without however deciding, that the Italian Government might be responsible for the payment of interest on claims of nationals of the United States of America under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, it is the opinion of the Commission that, in the absence of any agreement by Italy to pay interest on claims, such hypothetical responsibility does not arise unless and until an express request for interest has been made either by the claimant himself or by the Government of the United States of America on his behalf.

In the instant case, the request for interest was made for the first time in the Petition submitted to this Commission (May 26, 1953); it was not made, instead, in the claim submitted on the administrative level (August 18, 1950). Therefore, it does not seem admissible that a request for interest which was not included in a claim on the administrative level may be presented on the judicial level.

In this connexion, it must be considered that neither in Article 78 nor in any other provision of the Treaty of Peace with Italy is there any reference to

<sup>1</sup> *Supra*, p. 86.

interest, either as part of the compensation or as a measure of damages for delay in the fulfilment by Italy of her obligation thereunder. Nor is there any reference to interest on claims under Article 78 in the provisions of the bilateral Agreements between the United States and Italy of August 14, 1947, commonly known as the Lombardo Agreement; although by its terms the Italian Government confirmed its obligations under Article 78 of the Treaty of Peace, Italy did not assume any obligation for the payment of interest. Nor is there any reference to interest on claims contained in the Exchange of Notes between the two Governments dated February 29, 1949. Finally, in the Rules of Procedure adopted and promulgated by the Representatives of Italy and the United States on this Commission on June 29, 1950, no reference is made to interest on claims within the jurisdiction of the Commission.

Moreover, the Agent of the United States has not produced any evidence that interest on claims under Article 78 was ever the subject of diplomatic negotiations between the two Governments.

Therefore, in none of the texts of the Agreements between the two Governments governing claims against Italy for damages to property of nationals of the United States is there any provision for the payment of interest, or any other indication that Italy would be held responsible for the payment of interest.

The foregoing does not completely exclude the possibility of a responsibility for interest based on other principles and rules (a question which is not decided here). The foregoing references to the Treaty and subsequent Agreements are made for the sole purpose of showing that there is no evidence available to this Commission that interest on claims was ever requested in a general way from Italy or that the Italian Government ever assumed such an obligation or that the Italian Government was in any other way made aware that interest would be considered to be a part of its responsibility.

In view of the absence of any provision for interest in the agreements or negotiations concerning claims under Article 78, it is the opinion of this Commission that 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.

The claim which is the subject of the present dispute, and which was presented to the Italian Government on August 18, 1950, through the Embassy of the United States of America at Rome, requests compensation for damage to and loss of certain real and personal property. The claim contains no mention whatsoever of a request for interest on the amount of compensation requested, and there is no prior contract for interest involved.

After the Italian Government had denied its responsibility to pay compensation to the claimant in this case, the Embassy of the United States of America, by letter dated January 27, 1953, advised the Italian authorities that it considered that a dispute had arisen which would be submitted to this Commission. No reference to interest was made in such letter.

It does not follow from what has been said that the right to interest may be denied because this Commission finds any line of conduct on the part of the claimant of his Government tending to show an intention not to demand it. Such a presumption would be unjustified; it is entirely possible that there was every *intention* to demand interest, by the claimant and the Government of the United States, but the decisive point is that interest was not expressly demanded.

It would be manifestly unfair to a Government against which a claim is brought by another Government to hold the respondent Government responsible

for interest when it was never advised that the individual claimant or his Government demanded interest.

If interest were to be demanded as part of the "compensation" provided for under Article 78 of the Treaty of Peace, that is, as part of the damages suffered by nationals of the United Nations as a result of injury or damage to their property in Italy, it would be unjust not to have advised the Italian Government, either in the Treaty or in subsequent negotiations, or in the claim itself, that interest would be demanded as part of the compensation, because the Italian Government would have the right to know that interest would be one of the elements in fixing the amount of compensation. When, instead, interest is demanded as a punitive measure based on alleged delay in the settlement of claims on the administrative level, there is all the more reason for requiring that Italy be advised of the claim for interest based on such delay. When a debtor is aware that interest is accruing against him for every day which passes without payment of the principal, he is much more likely to exert every effort to insure that the principal debt is paid as quickly as possible. The Italian Government was never made aware that interest would be requested for delay in fulfilment of its obligations under the Treaty, and this Commission cannot bring itself to hold that, regardless of lack of notice to the Italian Government, the responsibility for interest has existed in this case since August 18, 1950, the date on which the instant claim was first presented to the Italian Government.

The question of notice of demand for interest as a condition precedent to the responsibility for the payment of interest on claims was not argued by either of the Agents of the two Governments. The Commission's own investigation, however, has revealed the existence of decisions of other international tribunals which accord with its position.

As high an authority as the Permanent Court of Arbitration has expressed its opinion in the Russian Indemnity Case, decided on November 11, 1912.<sup>1</sup> This same case is the source of an extensive quotation in the Brief of the Agent of the United States in Case No. 1, Elena Iannone Carnelli, in support of his argument that the Italian Government is responsible for the payment of interest in the present dispute; but, in a part of the opinion not quoted by the learned Agent of the United States, the Court was equally of the opinion that:

... Equity requires, as its theory indicates and as the Imperial Russian Government itself admits, that there shall be notice, demand in due form of law addressed to the debtor, for a sum which does not bear interest. The same reasons require that the demand in due form of law *shall mention expressly the interest*, and combine to set aside responsibility for more than simple interest.

It is seen from the correspondence submitted, that the Imperial Russian Government has expressly and in absolutely categorical terms demanded payment from the Sublime Porte of the Principal and "interest", by the note of its Embassy at Constantinople, dated December 31, 1890/January 12, 1891. Diplomatic channels are the normal and regular means of communication between States in their relations governed by international law. This demand for payment is, therefore, regular and in due form. (Emphasis supplied.) (Scott, *The Hague Court Reports*, 1916, p. 298 at p. 317.)

Although the authority of the Permanent Court of Arbitration would be sufficient to sustain the opinion of this Commission, it is not out of place to cite one of the decisions under the Venezuelan Arbitrations of 1903 which are the source of frequent citations by the Agent of the United States in his Brief

<sup>1</sup> Volume XI of these *Reports*, p. 421.

in the Carnelli Case. The Belgian-Venezuelan Commission dealt with a claim of the Belgian Government against the Venezuelan Government arising under the Universal Postal Convention of 1897, of which both Governments were signatory nations. Here, even though the Article itself (Article 33) of the Postal Convention provided for the payment of interest, the award of interest was not allowed by the Commission (Filtz, Umpiro)<sup>1</sup> on the chief ground that no demand for interest had been made in the claim (Ralston, *Venezuelan Arbitrations of 1903, 1904*, pp. 270-271). Thus, even though the Postal Convention which constituted the law between the parties provided for the granting of interest on claims, the Commission required an express reference in the claim to the interest element, and, when no request had been made for interest, disallowed the claim for interest.

At page 42 of his Brief in the Carnelli Case, the Agent of the United States cites five cases decided by International tribunals in support of his argument that interest begins to run from the date on which the claim is filed against the respondent Government. The following observations are made on each of these five cases in order to show that they can be distinguished from the instant case and cannot be deemed to affect the decision herein which concerns only the requirement of notice of the request for interest.

In two of the five cases cited by the Agent of the United States, interest was indeed awarded from the date of the filing of the claim, but the tribunal rendering the decision pointed out that interest was demanded in the claim itself (*Alliance Case*,<sup>2</sup> American-Venezuelan Commission, Ralston, *Venezuelan Arbitrations of 1903*, p. 29 at p. 30, where it is indicated that the claim filed contained a request for interest at the rate of 1% per month; *De Garmendia Case*,<sup>3</sup> American-Venezuelan Commission, *ibid.*, pp. 10-11, where it is indicated that for items 1 and 2 of the claim, interest had been requested at the rate of 3% for the first item and at the legal rate for the second item, at the time the claim had been filed). In the *Macedonian Case*, an arbitration between the United States and Chile by the King of Belgium (reported in Moore, *International Arbitrations*, vol. II, p. 1149), the terms of the Arbitration Convention, under which Chile and the United States agreed to submit all questions to the arbitration of the King of Belgium include expressly the question of interest, so that the consent of the defendant Government to have the interest question decided exists in that case.

As for the *Lord Nelson Case* decided by the American-British Claims Arbitral Tribunal on May 1, 1914, under the special agreement of August 18, 1910, between Great Britain and the United States of America, the two Governments agreed upon certain Terms of Submission on July 18, 1911, Article IV of which provides that:

The Arbitral Tribunal, if it considers equitable, may include in its award in respect of any claim interest at a rate not exceeding 4 percent per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and that of the confirmation of the schedule in which it is included. (Whiteman, *Damages in International Law*, vol. II, pp. 1958-1959).

The Two Governments thus expressly accepted responsibility for interest on claims.

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<sup>1</sup> Volume IX of these *Reports*, p. 328.

<sup>2</sup> *ibid.*, p. 140.

<sup>3</sup> *ibid.*, p. 122.

The fifth, the *Cervetti Case*,<sup>1</sup> cited by the Agent of the United States for the proposition that interest begins to run from the date of the claim, indicates that the Italian legation did not include a request for interest in claims which were presented to the Venezuelan Government before being presented to the international commission. The dispute was submitted to a neutral Umpire who decided that, even though the universally recognized rule required that a debtor be notified that his debt was overdue and even though the rule has even more weight with relation to claims against Governments,

... It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the Royal Italian Legation to the Venezuelan Government or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government ... (Ralston, *Venezuelan Arbitrations of 1903*, p. 663.)

The Umpire did not discuss the arguments of the Venezuelan Commissioner that a request for interest is necessary and based on equity, as without it the debtor cannot be supposed to know that interest is demanded, and that when it is a question of unliquidated sums, it is impossible to establish the fact that interest has accrued since the amount actually owed was not known. While his opinion is entitled to great weight, the Umpire in the *Cervetti Case* has provided no reason, other than a general reference to "the conduct of past mixed commissions" (*oc. cit.*, p. 663), for the granting of interest when it was not requested in the claim, and in his opinion even went so far as to express the somewhat contradictory opinion that the requirement of notice was stronger when the debt of a Government was involved than when the debt of a private individual was involved. Therefore, this Commission prefers to rely upon the considered and well-reasoned opinion of the Permanent Court of Arbitration in the Russian Indemnity Case and on the decision of the Umpire on the Belgian-Venezuelan Commission in the Postal Claim Case.

This Commission's investigation has failed to unearth a single decision by an international tribunal, aside from the *Cervetti Case*, in which interest on compensation for war damage to property was accorded, where it was not provided for in the agreement governing the tribunal or where it was not expressly requested in the claim filed either directly with the respondent Government or with the international tribunal itself.

The Agent of the United States has also cited in his Brief in the *Carnelli Case* the Administrative Decision No. III of the Mixed Claims Commission, United States and Germany. That decision, establishing the types of claims against Germany on which interest would be granted, was rendered on December 11, 1923, at the outset of the Commission's work. Claims of nationals of the United States against Germany under the Treaty of Berlin of August 25, 1921, and under the subsequent agreement between the United States and Germany of August 10, 1922, which provided for the creation of the Mixed Commission, were first brought to the notice of Germany when they were presented to the Commission by the Agent of the United States. And in each of the claims so presented to the Commission, interest was formally and expressly requested. The Second Report of Robert C. Morris, Agent of the United States, addressed to the Secretary of State and dated April 10, 1923, lists and describes the forty claims which had been thus far filed with the Commission. In the Agent's summary descriptions of the nature of these forty claims, thirty-eight of the

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<sup>1</sup> Volume X of these *Reports*, p. 492.

summaries specifically mention that interest was requested at the time the claim was filed. Moreover, the Agent of the United States sent a notice of claim to the Joint Secretariat and to the Agent of Germany for each claim which was to be filed with the Commission. The notice consisted of a standard form which included spaces for the name of the claimant, the nature of the claim, and its amount, with the words added: "with interest, if any" (Exhibit B to the Second Report of Robert C. Morris, Agent of the United States, at page 56 of *First and Second Reports of Robert C. Morris, Agent of the United States before Mixed Claims Commission, United States and Germany*, Washington, 1923). In this manner, the German Government was fully apprised and officially informed in writing, even before the claim itself was filed, that interest was being requested as part of the award.

Hence, prescinding from the question whether Administrative Decision No. III of the Mixed Claims Commission, United States and Germany, may be authority for the responsibility of a respondent Government for the payment of interest on certain types of claims, it could not be maintained that the decision is authority for the proposition that the responsibility for interest arises despite the fact that no notice has been given to the respondent Government that interest on the principal amount of the claim is being requested.

Therefore, in view of what this Commission considers to be equity and justice to a debtor Government, as well as the sounder opinion of other international tribunals, the request for interest contained in the Petition in this case will not be granted because of the absence of notice to the Italian Government on or before August 18, 1950, that interest was claimed.

No evidence having been submitted that any previous payment has been made to the claimant for war damages to the property which is the subject of the claim presented to the Italian Government on August 18, 1950, the Conciliation Commission

HEREBY DECIDES:

1. The claimant, Joseph Fatovich, is entitled to receive from the Government of the Italian Republic, two-thirds of 3,686,380 lire, or 2,457,587 lire, representing two-thirds of the current value of losses and damages suffered as a result of the war by claimant's property located in Zara, territory ceded by Italy.
2. The sum of 2,457,587 lire is to be paid within thirty (30) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.
3. The request contained in the Petition for interest on the amount awarded is denied.
4. This decision is final and binding, and its execution is incumbent upon the Government of the Italian Republic.

Rome, July 12, 1954.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

**BATCHELDER CASE (THE KIRINKUOISKA AND THE THELE)—  
DECISION No. 25 OF 26 JULY 1954<sup>1</sup>**

Compensation under Article 78 of Peace Treaty—War damages sustained by enemy property—Loss of movable property located in ceded territory—Loss of two yachts in Italian territory after requisition by Italian authorities—Determination of existence of dispute—Evidence of loss or damage—Burden of proof—Request for interest denied on basis of Decision No. 35 handed down in Fatovich case.

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Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre subis par des biens ennemis — Perte de biens mobiliers situés sur un territoire cédé — Perte de deux yachts en territoire italien après leur réquisition par les autorités italiennes — Détermination de l'existence du différend — Preuve de la perte ou du dommage — Fardeau de la preuve — Demande d'intérêts rejetée sur la base de la décision n° 35 rendue dans l'affaire Fatovich.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy pursuant to Article 83 of the Treaty of Peace and composed of Antonio Sorrentino, Representative of the Italian Republic, and Alexander J. Matturri, Representative of the United States of America, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

This dispute arose out of the claim of George Lewis Batchelder against the Italian Government, under Article 78 of the Treaty of Peace and Agreements supplemental thereto or interpretative thereof.

The claim was submitted to the Italian Ministry of the Treasury through the Embassy of the United States of America in Rome on November 2, 1949. It requested compensation for the loss of household furnishings and other personal property and for the loss of two yachts. The household furnishings and other personal property were located in the Villa Flora at Lussinpiccolo, a town situated along the Dalmatian coast of the Adriatic Sea. The two yachts were first seized by Italian Naval authorities in Adriatic ports and were later destroyed as a result of the war in Italian territorial waters.

On July 27, 1953, the Italian Ministry of the Treasury advised the Embassy that, with regard to the property removed from Villa Flora at Lussinpiccolo, the Italian Government was not responsible on the grounds that Lussinpiccolo had never been Italian territory, and that the two yachts might have been nationalized pursuant to Yugoslav domestic law, so that further evidence on the fate of the two yachts was necessary.

On September 22, 1953, the Embassy advised the Ministry of the Treasury that it could not agree with the viewpoint of the Italian Government and requested re-examination of the claim. On December 22, 1953, the Embassy

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<sup>1</sup> *Collector of decisions*, vol. II, case No. 36.

submitted to the Italian authorities additional documentation tending to show that one of the yachts had been sunk at Zara as a result of the war.

As the Italian authorities did not notify the Embassy of any modification of their original position, the Agent of the United States of America submitted the case to this Commission by Petition dated February 4, 1954, requesting the Commission to decide that the Italian Government is responsible for the loss of the claimant's household furnishings and personal property at Lussinpiccolo, for the loss of the motor yacht *Kirinkuiska* sunk at Zara as a result of the war, and for the failure to return the sailing yacht *Thele*, sequestered as enemy property at Lussinpiccolo; to decide that the claimant is entitled to receive, in lire, two-thirds of \$185,743, values as of March 24, 1949, the date on which the claim was prepared; and to grant interest on the amount to be awarded to the claimant at the rate of 5% per annum from March 24, 1949.

The Answer of the Agent of the Italian Government indicates that the Italian authorities have come to recognize that Lussinpiccolo was formerly under Italian sovereignty and was included in the part of Italian territory ceded to Yugoslavia under the Treaty of Peace, so that, under paragraph 7 of Article 78, the provisions of Article 78 are, in principle, applicable to the property of nationals of the United Nations located at Lussinpiccolo.

However, the Italian Agent argues in his Answer that, on the one hand, there is no certain proof of the existence of ownership of the household furnishings and other personal property located at Villa Flora at Lussinpiccolo, and that, on the other hand, the evidence submitted by the claimant himself proves that the loss of that property cannot be attributed to an event of war.

With regard to the two yachts, the Italian Agent raises no preliminary objections, in view of Decision No. 19 of this Commission in Case No. 4, *The United States of America ex rel. Helene M. E. Beaumont vs. The Italian Republic*.<sup>1</sup> He states, instead, that there is no evidence that the loss of the two yachts was caused by an act of war.

The Italian Agent does raise a preliminary objection, however, with regard to the question whether there exists a dispute between the two Governments, as required by Article 83 of the Treaty of Peace under which this Commission is established.

The Italian Agent states that the alleged dispute is based on a presumption of the rejection of the claim because of the protracted silence of the Italian Government, whereas the Italian authorities have twice expressed an opinion.

After setting forth evaluations of the two yachts, based on the cost of new yachts, and after denying the admissibility of the request for interest, the Italian Agent concludes by requesting that the Petition be declared inadmissible because of the lack of a dispute or, in the alternative, that the Petition be rejected unless additional proof can be secured by the Commission concerning the loss of the yachts as a result of the war.

I. In view of the fact that there exists a communication of the Italian Ministry of the Treasury, dated July 27, 1953, which takes a position with regard to the claim of George Lewis Batchelder, and that it is in relation to said decision that the dispute has arisen, the Commission holds that the Petition of the Agent of the United States of America is admissible and that therefore it is not necessary in the instant case to examine and decide the question whether delay in the decision of a claim on the administrative level can constitute a presumption of its rejection, so that a dispute may be considered to have arisen within the meaning of Article 78 of the Treaty of Peace.

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<sup>1</sup> *Supra*. p. 174.

II. As the Italian Government now admits that Lussinpiccolo was in Italian territory, Article 78 would be applicable to injury or damage as a result of the war to personal property located in that town belonging to the claimant, a national of one of the United Nations. However it is necessary for the claimant, or the Government claiming on his behalf, to submit proof that such loss occurred as a result of the war or, at least, to submit sufficient evidence of a causal connexion between the war and the loss that the burden of rebuttal would be shifted to the Italian Government. In the instant case, an examination of the evidence submitted by the claimant leads to the conclusion that there is in the record neither proof that the loss was caused by the war nor evidence sufficient to oblige the Italian Government to prove the contrary.

Two documents were submitted by the claimant in support of the claim for compensation for the loss, as a result of the war, of household effects and other personal property which were in Villa Flora at Lussinpiccolo. One is his own affidavit of claim which reads as follows, in the pertinent part:

6. I left Lussinpiccolo in June 1945 with my wife Pia C. Batchelder who is the owner of Villa Flora at Lussinpiccolo in or about which the articles listed in Exhibit A were located. I have been informed by persons who left Lussinpiccolo during September 1946 and since that date that all of the furnishings and contents of the Villa listed in Exhibit A were confiscated and carried away by the Yugoslav Army and Government officials and that none of the property can be traced or recovered. See letter from Joe Cattarinich dated September 23, 1946 (Exhibit J). I am also informed that the land and buildings known as Villa Flora in Lussinpiccolo have been confiscated by the Yugoslav Government.

The second document is the letter of Joe Cattarinich referred to by the claimant in his affidavit quoted above. Said letter is dated September 23, 1946 and bears a return address in Venice, Italy. The pertinent part of the letter reads as follows:

Few days ago arrived from Lussinpiccolo the wife of Guido Tebaldi and she told that Tito's regular army or better to say the yugoslav army stole or removed everything from your house, furniture and all personal silver and pictures and everythirg that was in the house. One of the army's captain made a payment receipt to himself for the furniture of the room near the bath and for the sewing machine so to show to the authority that may have asked a receipt. Anna Con-sulich who has your power of attorney protested to the judge and to the president of the district of Lussin but her action and the action of the judge and president of the district were not taken in consideration by the army and they took every-thing as if it would have been their owen. . . [sic]

Another document submitted by the claimant is an Act of Notoriety dated February 19, 1951, and executed at Bordighera, Italy, in which four witnesses state under oath that the personal property located in the Villa Flora at Lussinpiccolo belonged to the claimant. Prescinding from the value of this document as proof of ownership, it makes no statement whatsoever concerning the facts surrounding the loss of property.

Now it appears from the two documents quoted above that both the claimant and the writer of the letter, Mr. Cattarinich, are making statements concerning facts which are not within their own personal knowledge but which are at most a repetition of what they have heard other people say. The facts involved are in their nature susceptible of being proved by witnesses who speak from their own knowledge. The statements quoted above rest on the veracity and competency of some other, unidentified persons. Apart from any question whether the loss of property in circumstances such as are alleged here constitutes a loss

"as a result of the war", the Commission must reject the claim for household effects and other personal property located at Lussinpiccolo, for the reason that the claimant has failed to make even a *prima facie* case with regard to the loss of such property or to the causal connexion between the war and the loss. On the basis of the evidence in the record, the Commission is unable to find as a fact that there actually was a loss of the property in question or that the loss, if any, occurred "as a result of the war".

III. With regard to the two yachts, the evidence in the record as to their loss in Italian territory as a result of the war is deemed sufficient by the Commission to entitle the claimant to compensation.

They were seized by the Italian Navy, subsequently requisitioned and placed at the disposal of the Italian Government. They were sunk in the waters of the Port of Zara as a result of an air bombardment.

IV. The sum necessary to make good the loss suffered by the claimant through the destruction of his two yachts at Zara, formerly Italian territory which was ceded to Yugoslavia under the Treaty of Peace, is held by the Commission, acting in the spirit of conciliation, to be fifty million (50,000,000) lire. Under paragraph 4 (a) of Article 78 the claimant is entitled to receive two-thirds of that amount, or 33,333,333 lire.

V. The request contained in the Petition filed on February 4, 1954, for interest at 5% per annum from March 24, 1949, on the amount awarded to the claimant is denied for the reasons set forth in Decision No. 24, dated July 12, 1954, in Case No. 35, *The United States of America ex rel. Joseph Fatovich vs. The Italian Republic*.<sup>1</sup>

The Conciliation Commission, in consideration of the foregoing and having noted the sworn statement of the claimant dated May 7, 1954 and deposited with the Commission on June 16, 1954, in which the claimant states that he has neither applied for nor received any compensation from the Government of Yugoslavia for the loss of the two yachts here involved,

**DECIDES:**

1. The claimant, George Lewis Batchelder, is entitled to receive from the Government of the Italian Republic the amount of thirty-three million three hundred thirty-three thousand three hundred and thirty-three (33,333,333) lire in full settlement of his claim under Article 78 of the Treaty of Peace.

2. The sum of 33,333,333 lire is to be paid within thirty (30) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.

3. The request for interest is denied.

4. This decision is final and binding and its execution is incumbent upon the Government of the Italian Republic.

Rome, July 26, 1954.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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<sup>1</sup> *Supra*, p. 190.

**SHAFER CASE—DECISION No. 27  
OF 6 DECEMBER 1954<sup>1</sup>**

Compensation under Article 78 of Peace Treaty—State responsibility—Requisition of property belonging to a United Nations national—Losses and damages sustained as result of requisitioning of property—By Italian authorities—By Allied military forces—Meaning of expressions “Acts of war” and “as a result of the war”—Treaty interpretation—Principles of—“Linguistic analysis”—*Travaux préparatoires*—Causal relationship between damage and war—Intention to use requisitioned property for war purposes.

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Indemnisation au titre de l'article 78 du Traité de Paix — Responsabilité de l'Etat — Réquisition de biens appartenant à un ressortissant d'une Nation Unie — Pertes et dommages subis du fait d'une réquisition effectuée — Par les autorités italiennes — Par les forces militaires alliées — Signification des expressions « Actes de guerre » et « du fait de la guerre » — Interprétation des traités — Principes d'interprétation — « Analyse linguistique » — Travaux préparatoires — Lien de causalité direct et étroit entre le dommage et la guerre — Intention d'utiliser les biens réquisitionnés à des fins de guerre.

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The Italian-United States Conciliation Commission established by the Government of the United States of America and the Government of Italy under Article 83 of the Treaty of Peace, and composed of Mr. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, and Mr. Emil Sandström, former Justice of the Swedish Supreme Court, of Stockholm, Third Member chosen by mutual agreement of the United States and Italian Governments.

On the Petition filed on June 15, 1951 by the Agent of the Government of the United States in behalf of Mrs. Giuditta Grottanelli Shafer *versus* the Government of Italy.

**STATEMENT OF FACTS :**

On January 5, 1950 the Embassy of the United States in Rome submitted to the Ministry of the Treasury of the Italian Republic on behalf of Mrs. Giuditta Grottanelli Shafer a claim based on Article 78 of the Treaty of Peace with Italy and the agreements supplemental thereto or interpretative thereof for losses and damages sustained in Italy during the war.

By letter dated April 18, 1951 the Ministry of the Treasury rejected the claim, alleging that it did not fall under Article 78 of the Treaty.

The Agent of the United States Government subsequently filed a Petition with the Conciliation Commission, whereupon the Agent of the Italian Government filed the Answer of the Italian Republic on July 23, 1951.

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<sup>1</sup> *Collection of decisions*, vol. II, case No. 17.

On October 26, 1951 the Agents of the two Governments filed with the Commission a Declaration of Agreement which reads as follows:

The Agent of the Italian Republic and the Agent of the United States of America under Article 10, paragraph (c) of the Rules of Procedure of the Italian-American Conciliation Commission, declare that they agree that:

1. Giuditta Grottanelli Shafer, hereinafter referred to as the claimant, is now and has been at all times since April 29, 1941, a national of the United States of America.
2. The claimant is the one-half owner of certain real property known as Palazzo Ravizza et Via Pian dei Mantellini 18, Siena, which has been operating for sometime as a *pensione*.
3. During the war the Italian authorities requisitioned a handwrought iron fence which surrounded the premises, the claimant receiving 1,200 lire as payment in compensation therefor.
4. During the war the Italian authorities requisitioned certain copper kitchen utensils forming part of the equipment of the Palazzo Ravizza, the claimant receiving 700 lire as payment in compensation thereof.
5. The Palazzo Ravizza was requisitioned and occupied by the Allied Forces from August 15, 1944 until January 10, 1946 during which time both the real property and certain of the personal property contained in the Palazzo Ravizza sustained damage.
6. Paragraph IV of the Answer filed on behalf of the Italian Republic states (in translation):

“Very brief observations concerning the evaluation of the damages:  
“Mrs. Grottanelli requested an indemnity of 1,940,683.40 lire, of which 508,966 lire is for the iron railing, 176,700 lire for the copper utensils, and 1,255,017.40 for damages as a consequence of requisition of the *pensione*.  
“An official investigation, however, has determined, considering present costs, the value of the iron railing to be 430,000 lire, the copper utensils to be 120,000 lire, and the damages as a consequence of the requisition of the *pensione* to be 915,490.60 lire.  
“It must further be taken into consideration that at the time of requisition 1,200 lire were paid for the railings and 700 lire for the copper utensils, which figures, brought up to date on the basis of a revaluation rate of 50, should be considered as payments respectively of 60,000 lire and 35,000 lire on account toward the indemnity, so that the damage is reduced to 370,000 for the railing and 85,000 for the utensils.  
“Giuditta Grottanelli’s share of all this is half, that is, 185,000 lire for the railing, 42,500 for the utensils and 457,745.30 for the remaining damages.”
7. Although the claimant considers that the Answer of the Italian Republic sets too low a value on the losses and damages sustained and although the claimant further considers that the use of the quotient “50” for the purpose of revaluing the payments previously made in connexion with the requisition of the property is improper, she has advised the Agency of the United States, through her Attorney in Fact in Italy, that she is willing in the interests of a prompt conclusion of the case, to accept the sums offered if it should be decided that the Government of the Italian Republic is liable in the premises.
8. The claimant has incurred the reasonable expenses of 21,554 lire in establishing her claim prior to its submission to the Ministry of the Treasury and that she has not incurred any further expenses since that date.

In view of the foregoing, the Agent of the Italian Republic and the Agent of

the United States of America do hereby agree that the only issues involved are the following:

1. Is the Government of the Italian Republic responsible under Article 78 of the Treaty of Peace and the agreements supplemental thereto and interpretative thereof for losses and damages sustained by a United Nations national as a result of the requisitioning of property by Italian authorities during the war, not due to special measures not applicable to Italian property?

2. Is the Government of the Italian Republic responsible under Article 78 of the Treaty of Peace and the agreements supplemental thereto and interpretative thereof for losses and damages sustained as a result of the requisitioning of property by Allied military forces during the war or do such claims fall under the provisions of paragraph 2 of Article 76<sup>1</sup> exclusively?

Stefano VARVESI

Lionel M. SUMMERS

*Deputy Agent of the  
Italian Republic*

*Agent of the United  
States of America*

October 25, 1951

In subsequent proceedings, the Agent of the United States Government, in view of the reduction of the issues to pure questions of law, requested the Commission to enter and record a ruling that the formal submission of proof had been concluded and to advise the Agent of the Italian Republic of the desire of the Government of the United States to submit a Brief.

In accordance with Article 11 of the Rules of Procedure, the Commission, by Order of February 12, granted periods of time to the Agents for submission of a Brief and Reply Brief respectively.

The Agent of the United States Government deposited his Brief on March 20, 1952, and the Agent of the Italian Government his Reply Brief on April 26, 1952, both arguing their views at length. Those views will be set forth in the Considerations of Law insofar as necessary.

In the *procès-verbal* of December 21, 1953, it was stated that discussion in chambers had revealed the disagreement between the Representatives of the two Governments on the Commission with regard to important questions of interpretation of the Treaty of Peace with Italy, and it was decided that recourse should be made to the Third Member in order to resolve the questions of interpretation of the Treaty of Peace and to secure a final decision of the dispute.

The Governments, by common consent, appointed Mr. Emil Sandström, former Justice of the Supreme Court of Sweden, as Third Member of the Commission.

#### CONSIDERATIONS OF LAW:

##### A. *The requisition of the iron fence and of certain copper utensils*

The claim is disputed by the Agent of the Italian Government on grounds which can be summarized in the following way.

<sup>1</sup> Paragraph 2 of Article 76 provides: ". . . The Italian Government agrees to make equitable compensation in lire to persons who furnished supplies or services on requisition to the forces of Allied or Associated Powers in Italian territory and in satisfaction of non-combat damage claims against the forces of Allied or Associated powers arising in Italian territory."

The Petition was based on Article 78, paragraphs 1 and 4 (a). The conditions required for application of paragraph 4 (a) were not fulfilled, however. That paragraph requires that there be involved a loss by reason of injury or damage. To speak of a loss by reason of damage is tautological and therefore only the word "injury" is capable of giving meaning to the phrase, when it is interpreted not as a synonym for damage, that is, not as an effect but as a cause of the latter, i.e., as a damaging act, as an injurious event. In connexion with the condition that the loss must be as a result of the war, the conclusion must be that the loss is meant to be an effect of an act of war. As to the meaning of the expression "act of war", Article 2 of Italian Law No. 1543 of October 26, 1940 could be quoted: "An act of war, for the purpose of compensation, is considered to be an act done by national, allied or enemy armed forces, connected with the preparation for and the operations of war; and also an act which, although not connected with the preparation for and the operations of war, has been occasioned by same." However, Article 78 did not limit the responsibility of the Italian Government merely to acts and damages of war alone, in the sense set forth above, but it also extended it to actions of authorities which caused damage. It must be a question of measures taken by authorities as a result of the war, and the meaning of this expression is explained in paragraph 4 (d), in the sense that the loss or the damage must be due to special measures applied to property of Allied nationals which were not applicable to Italian property. The causal relation between damage and war exists only when the measure was applied because of the enemy nationality of the owner. The iron railing and the copper pots were not requisitioned because they belonged to an American national. This fact was unknown to the authorities. The requisition was brought about by a shortage of such materials and it affected all property of that nature, in an absolutely objective manner. Therefore, the war was the occasion, the environment which produced the cause; it was not the efficient cause of the damage. For the reasons set forth, the Italian Government is not responsible under Article 78.

In the Reply Brief, The Agent of the Italian Government adds, as a reason for the inapplicability of Article 78, that the laws, on which the requisitions were founded and which were enacted in 1939 and 1940, deprived the owners of their ownership, transforming their title into a title to the corresponding indemnity, and that, because Mrs. Shafer was not the owner on June 10, 1940 and because she acquired American nationality only in 1941, she is not entitled to claim under Article 78.

Taking up this last argument first, the Commission desires to point out that in the Declaration of Agreement of the Agents of the two Governments the only issues involved were set forth, and that, insofar as concerns the requisitions now being considered, the issue was phrased as whether the Government of the Italian Republic is responsible under Article 78 of the Treaty of Peace for losses or damages sustained by a United Nations national as a result of the requisition of property by Italian authorities *during the war*, not due to special measures not applicable to Italian property. In drafting their Agreement, the Agents must have considered and clearly stated that the time of requisitioning was not a point at issue. For that reason, and because the Agent of the United States Government has not had an opportunity to answer the point now raised by the Agent of the Italian Government, the Commission holds that, according to Article 10, paragraph (c) of the Rules of Procedure, the argument is not admissible.

As to the rest of the arguments of the Agent of the Italian Government the Commission is in agreement with his views insofar as he maintains that the loss must be a result of the war also in the case where the property cannot be

returned, but the Commission cannot follow the arguments of the Agent any further.

The linguistic analysis of Article 78, paragraph 4 (a), from which he starts, is untenable. The provision in question deals with an obligation in addition to the one provided for in paragraph 1. According to the first sentence of paragraph 4 (a), the property to be returned shall be restored to complete good order. There follow, in the second sentence, provisions for the situation in which the property is not returned in such good order, either because the return is impossible or the property can be returned only in an injured or damaged state. That part of the sentence which begins with the words "or where" envisages this latter situation. It cannot be said to contain a redundancy if one keeps in mind that the stress is on a loss by reason of *damage to property* in Italy, loss being the abstract word for detriment to one's fortune, and "damage to property" indicating the nature of the loss which is taken into account. Even less is it possible to take the word "injury" as the only one to guide the interpretation. The words "injury" and "damage" are co-ordinated as alternatives and they have equal weight. Neither is there any reason to see in the fact that the word "injury" was inserted in the original text anything other than the usual Anglo-Saxon habit of using synonyms in legal documents in order to prevent an interpretation more restrictive than has been intended. Consequently, if the interpretation of the language does not lead to a limitation of the responsibility envisaged in Article 78 to "acts of war", there might be another reason for such an interpretation; namely, in the fact that paragraph 4 (a) of Article 78 had its origin in a proposal submitted by the Representative of the United States to the Committee of Economic Experts which assisted the Council of Foreign Ministers and that in the Report of June 5, 1946, of this Committee to the Conference of the Council of Foreign Ministers, one reads: "The Representative of the United States believes that where, as a result of acts of war the property itself cannot be restored or has been damaged, the interested party should be completely indemnified in lire." (See Decision No. 95, Pertusola-Penarroya Case, French-Italian Conciliation Commission, March 8, 1951.)<sup>1</sup>

However, independently of the question whether the United States Representative actually used that wording, it is questionable if anything is gained by substituting the concept of "acts of war", which also requires interpretation, for the expression "as a result of the war" used in the Treaty provision. In any case, one would certainly then have to take into consideration, and also with greater reason, the definition of the expression "as a result of the war" contained in the American proposal:

As used in this Article, the phrase "as a result of the war" includes the consequences of any measures taken by the Italian Government, of any measures taken by any of the belligerants, of any measures taken under the Armistice of September 3, 1943, and of any action or failure to act caused by the existence of a state of war. (See Decision No. 95, Pertusola-Penarroya Case, French-Italian Conciliation Commission, March 8, 1951.)

On the whole, the fact that the phrase "acts of war" was used frequently during the negotiations of the treaty and in different Articles, does not permit an interpretation to the effect that such phrase is to be substituted for the one which was contained in the original proposal and which was preserved, that is, "as a result of the war".

That expression, which is very general, must be deemed to include, as was

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<sup>1</sup> Vol. XIII of these *Reports*.

contemplated also by the proposing party, at least administrative measures taken by the authorities for sustaining and increasing the war effort.

In this connexion, there remains to be considered whether the fact that the Treaty in Article 78, paragraph 4 (d), deals with such measures of a special kind, namely discriminatory measures, can have the effect of limiting, through interpretation, the scope of Article 78, paragraph 4 (a) to apply only to "acts of war" and to exclude administrative measures. It might have been a plausible argument that, by interpreting paragraph 4 (a) to include administrative measures in general, paragraph 4 (d) would thereby become superfluous. That, however, is not the case. Paragraph 4 (a) is limited to compensation for a loss which refers only to the substance of the property, whereas paragraph 4 (d) envisages a more general compensation for loss or damage due to special discriminatory measures applied to enemy property during the war, i.e., all kinds of damage caused by such measures with the exception of loss of profit.

Paragraph 4 (d) has a function, then; but when it is only a question of damage to property, the case is covered by paragraph 4 (a).

In these circumstances, there is no reason to adopt the view that paragraph 4 (d) is the only provision which concerns administrative measures.

The conclusion is that paragraph 4 (a) must be interpreted as it stands.

This does not mean that the responsibility of the Italian Government under paragraph 4 (a) is unlimited and includes any damage to property of the United Nations or their nationals which occurred during the war.

The provision was certainly not intended to be a kind of "all-risk" insurance during the war for property belonging to the United Nations and their nationals. The limitation is to be found in the conditions required as to the cause and effect relation between the war and the damage.

It is for the Conciliation Commission to establish these conditions as the cases arise.

In the instant case, it is to be noted that Royal Law Decree No. 1805 of December 13, 1939, enacting rules for the census of scrap and manufactured non-installed copper, and for the collection of same, invoked in its preamble the necessity because of the war, and gave the General Commissariat of War Manufactures wide powers with regard to the items declared. And in Law No. 408 of May 8, 1940, concerning the declaration and collection of fences of iron or other metal, it was provided that the Agency of Scrap Distribution to which such goods were to be delivered should keep them at the disposal of that same Commissariat, which was authorized to issue rules for the purchase, stock-piling and distribution of the material subject to being declared, as well as all other necessary regulations for implementing the law.

Even if the shortage of metals created by the war in Germany was taken into consideration at the time of promulgation of those laws, it is natural, besides being corroborated by the text of the laws themselves, that an important purpose was also to provide material for possible Italian participation in the war and that, after Italy's entry into the war, this became the paramount purpose of the measures taken under the laws.

The requisitions under review took place during the war and, in view of what has been said, there has been established a sufficiently direct and close relation of cause to effect between the war and the loss suffered by the claimant to state that the loss was as a result of the war and that there is a claim under Article 78, paragraph 4 (a).

#### B. *The requisition by the Allied Forces of the Palazzo Ravizza*

With respect to this requisition, the Agent of the Italian Government argues that the Italian Government is not responsible because the damages caused to

the *pensione* while it was occupied by the Allied Forces were not caused by acts of war but resulted from abuse or bad use of requisitioned property. He further points out that, due to the undertaking of the Italian Government in Article 76, paragraph 2, of the Peace Treaty, the claimant has the right to receive compensation for non-combat damage caused by the Allied troops in Italy, but that such remedy is not on the international level but instead under Italian domestic law.

It is true that, in theory, it can be said that damages caused by troops, even though they are officers, in occupied premises, are due to their misuse of the premises. In practice, however, it is unavoidable that premises so occupied become damaged. Such damage must be considered therefore to be a direct effect of the requisition of the premises.

The fact that Article 76 contains provisions for non-combat damage claims against the forces of Allied or Associated Powers arising in Italian territory cannot be interpreted to exclude a claim under Article 78, which does not contain any exception to this effect.

In view of what has been said under A, the claim must be considered as justified in principle.

For the reasons set forth above, the Commission

DECIDES:

1. The claim is justified under both headings.
2. The claimant is entitled to receive from the Government of the Italian Republic the sum of 706,799.30 lire, which sum includes 21,554 lire for expenses incurred in establishing her claim.
3. This Decision is final and binding.

This Decision is filed in English and in Italian, both texts being authentic originals.

DONE in Rome at the seat of the Commission, 68 via Palestro, this 6th day of December 1954.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Third Member*

Emil SANDSTRÖM

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STATEMENT OF THE ITALIAN REPRESENTATIVE OF THE REASONS  
FOR HIS DISSENT FROM THE DECISION RENDERED BY THE  
ITALIAN-UNITED STATES CONCILIATION COMMISSION IN THE  
“GIUDITTA GROTTANELLI SHAFER” CASE

I cannot agree with this decision which to my mind affirms an interpretation which broadens the scope of paragraph 4 (a) of Article 78, above all in relation to paragraph 4 (d).

The field of application of the two provisions concerned, respectively, true and proper war damages and administrative measures, which were also the cause of damage. With regard to the latter, Italy's responsibility arises only if these measures had a discriminatory nature, that is, if they did not concern

Italian nationals as well. The limitations of a general nature do not give rise to responsibility, even though they may directly or indirectly be based on the war.

The criterion of differentiation adopted by the majority of the Commission does not appear to me to be satisfactory: it is not in the different consequences that the distinguishing element can be found but in the diversity of the cause of the damage.

10 January 1955.

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

FELDMAN CASE—DECISION No. 28 OF  
6 DECEMBER 1954<sup>1</sup>

Compensation under Article 78 of the Treaty of Peace—Loss of property after confiscation and sequestration—Owner naturalized “United Nations national” subsequent to 3 September 1943—Applicability of second part of paragraph 9 (a) of the aforementioned Article—Meaning of “treated as enemy”—Reference to other decisions of the Commission—Interpretation of treaties—By reference to *ratio legis*—State responsibility—Measure of damages.

Indemnisation au titre de l'article 78 du Traité de Paix — Perte de biens après confiscation et mise sous séquestre — Propriétaire ayant acquis le statut de « ressortissant des Nations Unies » à une date ultérieure au 3 septembre 1943 — Appliquabilité de la seconde partie du paragraphe 9 a) de l'article 78 du Traité — Signification de l'expression « traitées comme ennemis » — Invocation d'autres décisions de la Commission — Interprétation des traités — *Ratio legis* — Responsabilité de l'Etat — Détermination du montant de l'indemnité.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy under Article 83 of the Treaty of Peace, and composed of Mr. Alexander J. Maturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, and Mr. Emil Sandström, former Justice of the Swedish Supreme Court, of Stockholm,

<sup>1</sup> *Collection of decisions*, vol. II, case No. 23.

Third Member chosen by the United States and Italian Governments by mutual agreement.

On the Petition filed on December 20, 1951, by the Agent of the Government of the United States in behalf of Jack Feldman *versus* the Italian Government.

**STATEMENT OF FACTS:**

The facts of this case must be examined against the background of a series of legislative and administrative acts effected in Italy, either in view of the war or during the war.

By Royal Decree of July 8, 1938, a law was enacted in Italy which gave certain powers to the authorities in case of war (War Law). Article 3 defined those persons who were to be considered as enemies. Paragraph 3 of the Article defined as enemy subjects "stateless persons who may at any time have been in possession of the nationality of an enemy State or were born of parents who are or may have been in possession of enemy nationality or who reside in enemy territory". Article 295 contained in its first two paragraphs the following provisions:

Property belonging to the enemy State which is not subject to confiscation under Articles 292 and 293, and property belonging to persons of enemy nationality can be sequestered.

Sequestration under the preceding paragraph may also be ordered in the case of property in respect to which there is reason to suspect that it belongs to enemy nationals, even though it appears to be owned by persons of a different nationality.

According to Article 296 sequestration was to be decreed by the Prefect. Other provisions were made for the appointment of a Sequestrator (Article 296), and, *inter alia*, for the sale of the sequestered property.

On April 12, 1943, the Ministry of Exchanges and Currencies wrote to the Director of the "Magazzini Generali" (General Warehouses) at Trieste, a letter which stated, *inter alia*:

This Ministry has been informed that numerous lots of household goods owned by Jews emigrated from Germany or other countries who now reside in enemy countries, are lying in the Free Port of Trieste.

Since it has been agreed with the interested Administrations—also for the purpose of clearing the port areas which are exposed to air attacks—to consider the goods as of suspected enemy ownership and, therefore, to subject them to the regulations of the War Law in force—the "Magazzini Generali" is invited to denounce the household effects lying in its depots to the Prefecture under Art. 309 of the War Law.

A similar request shall be made by this Office to the Forwarding Agents and to private persons who operate warehouses in the Free Port.

Copies of the foregoing letter were sent, according to an annotation thereon to the Ministry of Finance, General Direction of Customs, and the Royal Prefecture of Trieste, among others.

On May 6, 1943, the Ministry of Exchange and Currencies wrote as follows to the Prefecture of Trieste:

With reference to letter No. 1/1609/43 of April 22, 1943, with which the Presidency of the "General Warehouses" of Trieste has furnished the Prefecture the list of lots of household effects which were stored in its warehouses owned by Jews going to enemy countries you are requested to order, in the execution of what has been ordered by the Ministry of Finance and by the undersigned,

1. the sequestration of such lots;
2. the identification of the goods by the sequestrator, specifying for each lot the addressee who presumably is the owner, and the summary contents of the packages.

This Ministry awaits to be informed of the orders given in this respect by the Prefecture.

Accordingly, on May 11, 1943, the Prefect of Trieste issued a Decree, Article 1 of which was worded as follows:

There are hereby subjected to sequestration the cases and trunks containing chattels belonging to emigrated Jews mentioned in the attached list bearing the number of this Decree, now in the custody of the respective forwarding firms and deposited in the local "Magazzini Generali".

Mr. Bruno de Steinkuhl was appointed Sequestrator under the Decree.

The preamble stated that the Decree was being issued on the basis of the War Law and of laws subsequently enacted which established additional rules with respect to the treatment of enemy property during the war, and "considering that the chattels belonging to emigrated Jews and deposited in the local 'Magazzini Generali' are to be considered as enemy property".

In addition to the action taken with respect to property deposited in the "Magazzini Generali", the Prefect, acting under the instructions contained in the third paragraph of the letter dated April 12, 1943, from the Ministry of Exchanges and Currencies, wrote the following letter on May 19, 1943, to the private warehouses in Trieste:

The Firm is invited to submit to this Prefecture as soon as possible, and not after May 25—written on the forms (four copies) which will be furnished—the lots of household effects owned by Jews emigrated from Germany or other countries, and presently residing in enemy countries, which lots are lying in private warehouses or areas operated directly by your Firm, the General Warehouses having already denounced those lots which are lying in its depots. The denunciation shall be made even in the case where it does not appear for certain that the effects belong to persons of the Jewish race, and that the latter's residence presently is in an enemy country, it being the duty of the Sequestrator to proceed to an identification of the effects, and to specify, for each lot, the addressee and presumable owner and the place of his residence.

The greatest accuracy and promptness are recommended to avoid disciplinary measures.

Although appointed Sequestrator, under the Decree of May 11, 1943, only for the cases and trunks containing chattels belonging to emigrated Jews which were deposited in the local "Magazzini Generali", Mr. Bruno de Steinkuhl addressed a circular letter, dated May 22, 1943, to the private warehouse firms in which, referring to the afore-mentioned Decree, he informed them that "all household effects owned by Jews who had emigrated to enemy countries had been placed under sequestration pursuant to an Order of the Ministry of Exchanges and Currencies", and that he had been appointed Sequestrator. "In compliance with such Decree", the firms were invited, first of all, to consider "the above-mentioned effects" in their possession as sequestered and not to be disposed of or taken away, and they were further requested to give him certain information about each individual lot deposited with each of them. The letter ended:

As regards my taking into custody the sequestered property, you are informed that the formalities will be established by each one of you individually together

with the undersigned, as soon as the information referred to in the three points above is made known to me.

No concrete steps to implement the Prefect's Decree of May 11, 1943, and letter of May 19, 1943, were taken by the Sequestrator, other than to prepare a list of the Jewish property lying in some of the private warehouses.

Following the surrender of Italy on September 3, 1943, the German High Commissioner for the Adriatic Zone issued an Ordinance on October 1, 1943 in which he declared that the exercise of the civil and public authority was to be exclusively controlled by him in that zone, and that the laws which had been in force there would remain in force provided that they did not conflict with the provisions for the security of the territory, or that they were not expressly modified.

Subsequently, on January 12, 1944, the Commissioner issued an Order which reads, in translation, as follows:

The High Commissioner has ordered, on security grounds, because of war conditions, the clearing of the Free Port. In the course of this clearing the household goods stored in the Free Port will be removed. The removed goods owned by Jews are sequestered and will be disposed of in accordance with orders of the High Commissioner. The non-Jewish property will be taken into custody by agents of the High Commissioner. Hereby every responsibility of the present custodian ceases from the time of the delivery to the commissioned agent of the High Commissioner. I have charged Dr. Karl Schnureich with the removal of the household goods.

The expenses and fees charged for the household goods in your favour will be reimbursed with the amount recognized by me after the goods have been handed in and have been examined.

Meanwhile, the Government of the Salò Republic, which was established in northern Italy by the Fascist Régime after its fall in Rome and after the Armistice of September 3, 1943, had enacted a certain legislative programme under which it was declared that those belonging to the Jewish race were aliens and during the war belonged to enemy nationality.

\* \* \*

The claimant, Jack (Jacques) Feldman, who was born in Odessa on February 2, 1881 and who, after the first world war, established his residence in Germany where a passport was issued to him by the Government in Exile of the Ukrainian Republic, moved to Czechoslovakia in 1932. Shortly after Germany had established the Protectorate of Bohemia and Moravia, the claimant left the country for the United States of America and, in connexion with his departure, the German authorities issued to him a "*Fremdenpass*". The claimant has resided in the United States since December 1939 and has been a United States national since February 27, 1945.

On his departure from Czechoslovakia the claimant sent to Trieste seven cases, containing household and personal effects, for trans-shipment to the United States. Before the end of the year 1939 the seven cases arrived at Trieste and were deposited in the warehouse of Fratelli Uccelli. They could not, however, be shipped to the United States and therefore remained at Trieste in the aforementioned warehouse.

Pursuant to the Order dated January 12, 1944, of the German High Commissioner for the Adriatic Zone, the claimant's property was confiscated on June 7, 1944 by the German authorities and is no longer traceable.

On November 10, 1950, the Embassy of the United States of America in

Rome submitted to the Ministry of the Treasury of the Italian Republic, on behalf of Jack Feldman, a claim based on Article 78 of the Treaty of Peace with Italy and the agreements supplemental thereto or interpretative thereof, for losses and damages sustained in Italy during the war.

As no reply was received, the Agent of the United States Government filed a Petition with the Italian-United States Conciliation Commission on December 20, 1951, in which the claimant's right to bring a claim was based on the fact that he was an individual treated as enemy under the laws in force in Italy during the war because of

- (1) having been considered as enemy under the War Law as amended;
- (2) having had his property subjected to blocking in accordance with the Decree of the Prefect of Trieste of May 11, 1943, and the Prefect's Order of May 19, 1943;
- (3) Being qualified as enemy under the laws of the Salò Republic which were in force in northern Italy;
- (4) being treated as enemy by the sequestration and subsequent confiscation of his property under the Order of January 12, 1944 of the German High Commissioner which had a *de facto* force in the Adriatic Zone.

Deeming it established that the claimant has suffered a loss as a result of the war for which the Italian Government is responsible, the United States Agent requested that the Commission:

- (1) Decide that the claimant is entitled to receive from the Italian Republic in lire the equivalent of two-thirds of the sum necessary at the time of payment to make good the damages and losses suffered which sum was estimated to be \$8,072 as of October 31, 1948, subject to any adjustment for the variation of values between October 1948 and the final date of payment.
- (2) Order that the costs of and incidental to this claim, including the necessary expenses of the prosecution of this claim before the Commission, be borne by the Italian Republic.
- (3) Give such further aid or other relief as may be just and equitable.

In his answer, the Agent of the Italian Government denied the admissibility of the claim on the grounds that the claimant was never treated as enemy under the laws in force in Italy during the war and that therefore Article 78, paragraph 9 (a), second part, of the Treaty of Peace is not applicable to him.

On the merits of the case, the Italian Agent noted that the value of the property might equitably be estimated to be only 800,000 lire.

The National Representatives in the Commission having been unable to agree, the two Governments, by common consent, appointed Mr. Emil Sandström, former Justice of the Supreme Court of Sweden, as Third Member in the Commission.

The Agents of the two Governments have argued the case before the full Commission.

As far as necessary, their arguments are summarized in the following considerations of law.

#### CONSIDERATIONS OF LAW:

As to the admissibility of the claim, Article 78 requires that the claimant be a "United Nations national".

It is agreed that the claimant does not fulfil this requirement by reason of his United States nationality, because in order to qualify under paragraph 9 (a), first part, of that Article, he should have had this status on September 3, 1943,

the date of the Armistice with Italy, and this claimant did not acquire United States nationality until February 27, 1945.

The question then is whether the second part of paragraph 9 (a) is applicable. This part reads as follows:

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

The first point to be examined in this respect is whether for the application of this second part of Paragraph 9 (a), it is required that the claimant have been treated as enemy before September 3, 1943. In the opinion of the Commission this is not necessary.

It is to be noted that the second part was drafted as a separate provision without reference to the first part. If it had been intended to establish the same limitation in the second part as in the first part, there would have been greater reason to have mentioned the date of September 3, 1943 because in the text of the second part of Paragraph 9 (a) reference is made to the "laws in force in Italy during the war".

Nor does the *ratio legis* for the limitation contained in the first part apply to the second part. The *ratio legis* of the first part is not that the Italian Government is not to be held responsible for damages which may have occurred after the Armistice. It is, instead, a limitation on the number of potential claimants, obviously so limited because it was not considered equitable that the number of potential claimants should have been increased after the date of the Armistice, since such increase could only be brought about by intentional acts of the individual themselves (e.g. naturalization, or organization of a corporation, in one of the victorious States).

The situation is different under the second part where the qualification as United Nations national coincides with the damaging treatment as enemy.

Under these circumstances it is necessary to examine whether the claimant has been treated as enemy under such conditions as to engender the responsibility of the Italian Government.

In previous Decisions of the Commission it has been stressed that the expression, "have been treated as enemy", envisages something more than that a person has been considered as enemy under the laws in force. In Decision No. 22 of February 19, 1954, in the Hilde Gutman Bacharach Case,<sup>1</sup> this is expressed in the following way:

To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority . . . , and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals.

Such action has been deemed by the national Representatives on the Commission, in cases similar to the one under consideration, to have taken place not only when the lift-van containing the property was sequestered (Decision No. 13, of January 9, 1953, Hilde Menkes Case),<sup>2</sup> but also when the warehouse firm had delivered to the Sequestrator appointed by the Prefect's Decree of May 11, 1943, a list of Jewish property lying in the private warehouse, and that property, including the claimant's property, was included in the list of Jewish property drawn up by the Sequestrator (Decision No. 14 of March 30, 1953, Alexander Bartha Case).<sup>3</sup>

<sup>1</sup> *Supra*, p. 187.

<sup>2</sup> *Supra*, p. 137.

<sup>3</sup> *Supra*, p. 142.

It is true that in the case under review there is no evidence that such a list was delivered by Fratelli Uccelli to the Italian authorities prior to the Armistice, and it is true that the claimant's name is not included among those listed by the Sequestrator.

On the other hand it cannot be overlooked that by the letter of the Ministry of Exchange and Currencies of April 12, 1943, its Order to the Prefect of Trieste by letter of May 6, 1943, and by the Prefect's circular letter of May 19, 1943, to the private warehouse firms, including Fratelli Uccelli, action had been taken by the Italian authorities which was directed toward the sequestration of Jewish property in the port of Trieste, and that thereby for all practical purposes the claimant had lost control over his property, even if at the time of the Armistice the measures had not been completed by a formal sequestration decree with regard to the specific property involved in this claim.

This final measure was taken almost immediately after the Armistice the formal sequestration by the Order of the German High Commissioner then exercising the civil authority in the area.

That these last-mentioned measures were taken under a régime which had replaced the regular Italian Government and which was not recognized by it does not alter the fact that these measures were taken in pursuance of the policy upon which the regular Government had previously embarked under the authority of the Italian War Law and which was followed by administrative measures.

Without prejudice to the question whether, in general, in order to entitle a person to claim under Article 78, paragraph 9 (a), second part, account can be taken of acts performed by the authorities in that area of Italy occupied at the time by the Germans, it must be held, under the circumstances of this case, that Feldman had been treated as enemy under the laws in force in Italy during the war.

The Commission consequently finds the claim admissible.

As to the merits, the only objection made by the Agent of the Italian Government is with respect to the amount of the Claim.

The Commission estimates, *ex aequo et bono*, as the value of the cases lost, the sum of 1,500,000 lire, which the claimant is entitled to receive without the reduction of one-third, in accordance with paragraph 1 of the Exchange of Notes of February 24, 1949.

The Commission, therefore:

**DECIDES:**

1. The claim is admissible.
2. The claimant is entitled to receive from the Government of the Italian Republic, under Article 78, paragraphs 1 and 4 (a) of the Treaty of Peace and paragraph 1 of the Exchange of Notes of February 24, 1949, the amount of one million five hundred thousand (1,500,000) lire for the loss which he has suffered.
3. This Decision is final and binding.

This Decision is filed in English and in Italian, both texts being authentic originals.

DONE in Rome at the seat of the Commission, 68 via Palestro, this 6th day of December 1954.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Third Member*

Emil SANDSTROM

STATEMENT OF THE ITALIAN REPRESENTATIVE OF THE  
REASONS FOR HIS DISSENT FROM THE DECISION  
 RENDERED BY THE ITALIAN-UNITED STATES CONCILIATION  
 COMMISSION IN THE "JACK FELDMAN" CASE

In view of the importance of the general principles declared by the Commission, I consider it necessary to set forth here my reasons for dissenting.

Article 78 of the Treaty of Peace subjects the obligation of the Italian Government to compensate for damage to two pre-requisites: one concerns an objective condition (cause of the damage) while the other concerns the subjective condition of the injured individual (possession of nationality of one of the United Nations). With regard to the former there existed no dispute inasmuch as the Italian Government has always admitted that confiscation by German military authorities in territories occupied by such authorities constitutes war damage which must be compensated under the aforementioned Article 78 (paragraph 4). The disagreement had to do instead with the existence of the subjective condition.

Paragraph 9 (a) of Article 78 entitles those who were in possession of the nationality of one of the United Nations on the date of the Armistice (September 3, 1943) to avail themselves of the provisions contained in that Article. Feldman—it is agreed—did not meet these conditions. But the second part of paragraph 9 (a) was invoked in his favour: it places "individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy" on the same level as nationals of the United Nations.

The first problem which the Commission was to solve was therefore the following: should the limitation of time contained in the first part of the provision (possession of the nationality of one of the United Nations *ante* September 3, 1943) have been considered to be applicable also to the second part? The majority of the Commission has denied this, but I believe this solution to be the result of an examination of the question which was not profound.

It should immediately be clearly stated that the problem involved here does not tend to limit the Italian Government's responsibility to damages which occurred prior to September 3; it appears to me that the majority of the Commission did not clearly understand the distinction between the subjective conditions which entitle one to file a claim and the act which was the cause of the damage; to permit only those who fulfilled the subjective condition prior to a certain date to request application of Article 78 does not mean that compensation for damages which occurred subsequently is excluded.

This clarification having been made, it is necessary to see whether the fact that the second part of paragraph 9 (a) does not repeat the date contained in the first part means that this (second) part does not include the same time indication. If the task of the interpreter is to search for the correct meaning of the provision even beyond the mere literal expression, it seems to me that the necessity of considering the limitation as implicit appears from two considerations of a logical nature.

The first is this: the criterion of treatment as enemy is a substitute for actual nationality: it should be ruled out that the subsidiary element can have a time extent greater than that of the principal element; therefore, the date of the Armistice with Italy must indicate the limit beyond which the acquisition of nationality, or the facts that are placed on the same level as such acquisition, are no longer relevant for the purpose of entitling one to claim.

More decisive, perhaps, is the second consideration, which is derived from

the situation in which Italy found itself after the Armistice and which was obviously borne in mind by the drafters of the Treaty.

By means of the equalization being discussed it is evident that the conquering Powers intended to protect those whose property had been subjected to restrictive measures on the basis of their apparent United Nations nationality and, above all (and this is the predominant purpose of the provision), corporations and associations, established under Italian law, but subjected to war measures in view of the fact that United Nations nationals had interests in such corporations and associations.

Now, with the Armistice, the possibility ceased, *de facto* and *de jure*, for the Italian Government to adopt measures of this nature and therefore the logical necessity of considering the date as implicit in the second part of paragraph 9 (a) appears to be clear.

The contrary opinion, expressed by the majority of the Commission, can have practical importance in only two possible fact situations, and it should be ruled out that it was intended to protect these at the time the Treaty was drafted.

After the Armistice and the declaration of war on Germany, the Italian Government subjected to war measures only Germans or Italian companies in which German interests were predominant.

According to the theory accepted by the decision, it would be possible to apply Article 78 in such cases, which is manifestly absurd.

It can be objected, it is true, that in practice the Germans will not be able to invoke Article 78 in their favour, since the remedy granted by this Article can be exercised only by the States and therefore only by the Powers which won the war, but an obstacle of fact does not eliminate the conceptual difficulty in accepting this solution.

On the other hand, it cannot be ruled out *a priori* that, in accordance with that interpretation, German nationals who later have acquired or will acquire the nationality of one of the United Nations for any reason whatsoever may be able to use Article 78; and also that the Government of any of the latter may demand the application of article 78 in favour of corporations subjected at the time to measures of war because of German ownership, but in which nationals of the United Nations also possess interests.

The second case in which the theory of the majority of the Commission can find application is that of measures of war applied in Italian territory by the self-styled Fascist Government of Salò or by the German occupation authorities; but since the equalization which is the subject of discussion obviously finds its basis in a responsibility for actions done (unlike damage which is compensable in relation to its objective existence), it would be in clear contrast with the preamble of the Treaty to burden Italy, co-belligerent of the United Nations, with the consequences of voluntary actions performed by the common enemy.

The second point of the Decision also finds me dissenting strongly.

In order to have treatment as enemy for the purpose of equalization with United Nations nationals it is necessary that there exist measures concretely adopted in application of laws in force in Italy during the war.

No proof of the existence of these prerequisites is provided by the Decision.

In previous cases (Menkes Decision) there was a sequestration by the Italian authorities on the basis of the Italian War Law; or (Bartha Decision) an actual act of execution against property by the Sequesterator appointed under Italian law. But here there is none of all this; the Decision cites orders which were given by agencies of the Italian Government, but which remain in the field of the generic and the abstract and which were not made concrete by any positive act which specifically affected Feldman's property.

In my opinion, this should have been considered sufficient to deny treatment as enemy. The majority justifies the opposite conclusion by the fact that the German High Commissioner, who at that time exercised civil power in the Zone of Trieste, confiscated the property shortly after the Armistice, so that in this fact must be found the continuation of the policy initiated by the Italian Government against Jews whose household effects were in Trieste. But it is evident that *proof* of the existence of a measure adopted according to the Italian War Law is being replaced by a mere supposition that the German authority intended to apply Italian law, a supposition which is, moreover, contradicted:

(a) by the fact that no reference to Italian law was contained in the order of the German Command, which instead made reference to exigencies of war of the German Army;

(b) by the fact that the Italian War Law provided for the sequestration of enemy property but not confiscation as well, which was instead applied by the German Command;

(c) (by the fact) that confiscation was the measure provided for by the laws of the German Reich against Jewish property and that the German Command obviously took his inspiration from these laws, also in view of the particular régime applied to Trieste which was then considered by the Germans to be almost a part of the Reich.

By this it is not denied that confiscation is a cause of damage which is compensable within the meaning of Article 78, but only that it constitutes at the same time an action which concretizes treatment as enemy. Not having kept these two concepts accurately separated led the majority of the Commission to a solution which does not seem to me consistent with Article 78 of the Treaty of Peace.

Rome, January 10, 1955.

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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MACANDREWS AND FORBES CO. CASE—DECISION No. 29  
OF DECEMBER 1954<sup>1</sup>

Compensation under Article 78 of Peace Treaty—State responsibility—Sale of enemy property after sequestration—Measure of damages—Request for interest rejected.

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Indemnisation au titre de l'article 78 du Traité de Paix — Responsabilité de l'Etat — Vente de biens ennemis après séquestre — Détermination du montant de l'indemnité — Demande d'intérêts rejetée.

<sup>1</sup> *Collection of decisions*, vol. II, case No. 33. The Collection does not indicate the exact date of the decision.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy under Article 83 of the Treaty of Peace, and composed of Mr. Alexander J. Matturri, representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, and Mr. Emil Sandström, former Justice of the Swedish Supreme Court, of Stockholm, Third Member, chosen by the two Governments by mutual agreement.

On the Petition filed on March 4, 1953, by the Agent of the Government of the United States in behalf of the MacAndrews & Forbes Co. *versus* the Italian Government.

#### STATEMENT OF FACTS:

The MacAndrews & Forbes Co., incorporated on May 7, 1902 under the laws of the State of New Jersey with its registered office in Camden, New Jersey, during the season of 1939/1940 purchased a quantity of about 20,000 quintals of green licorice root, which was cured, dried and stacked for storage at the Company's Corigliano Plant awaiting export to the claimant's factory in Camden. Of this quantity there remained in 1941 about 8,200 quintals or 820 metric tons of *dried* root.

On May 31, 1941 the Prefect of Cosenza ordered the blocking of the lot; forbidding its sale in the absence of express orders of the same Prefecture.

After execution of this Decree and after the appointment, at the request of the Ministry of Agriculture and Forests, of a custodian for the lot, the Ministry of Finance by note dated September 13, 1941 pointed out the advisability of the Prefect's appointing a Commissioner for taking the goods into custody and for their sale at the market price in favour of the producers of the category. The custodian was appointed commissioner by Decree of the Prefect dated September 24, 1941.

An inventory having been made of all property belonging to the claimant in Italy, including the licorice root, the Prefect of Cosenza by Decrees dated February 24, 1942 ordered the sequestration of the licorice root in one Decree and the sequestration of the rest of the property in another Decree. Under the first decree, the appointment of the commissioner was revoked and Avv. Italo Le Pera was appointed sequestrator. The Decree instructed the sequestrator to sell the licorice root and to deposit the proceeds in the Banca d'Italia in the account "*Istambi beni nemici*" (Foreign Exchange Institute—Enemy property).

The Commissioner had already sold 175.24 quintals and the Sequestrator now proceeded to sell the remaining quantity which brought the quantity sold, including what had been sold by the Commissioner, up to 7,764.56 quintals.

On November 27, 1945 the Prefect of Cosenza revoked the sequestration Decree and gave directions for returning to the claimant the property formerly under sequestration. The restitution was performed on January 3, 1946 and included a sum of Lire 4,270,866.45, of which an amount of Lire 3,880,000 corresponded to the net proceeds of the sale of the licorice root.

The Embassy of the United States of America in Rome submitted on December 10, 1948 to the Ministry of the Treasury of the Italian Republic on behalf of MacAndrews & Forbes Co. a claim under Article 78 of the Treaty of Peace with Italy for loss sustained as a result of the sequestration and sale by the Italian authorities of 776.456 metric tons of dried licorice root.

The claim was rejected, the Ministry of the Treasury confirming its rejection

of the same claim which had previously been presented to the Italian authorities directly by the claimant.

Thereupon, the Agent of the United States Government filed the Petition contending that the claimant is entitled to compensation under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, since the licorice root had been sold and could not be returned to the claimant, and requesting that the Commission

(a) Decide that the claimant is entitled to receive from the Italian Republic two-thirds of the sum necessary to purchase 705.3 metric tons of dried licorice root (the quantity calculated on a quantity of 820 metric tons sequestered, with the deduction of 114.7 metric tons which quantity could have been bought for the amount of 3,880,000 lire returned to the claimant at the time of the restitution), which sum was estimated on November 4, 1948 to be 57,129,300 lire, subject to the necessary adjustment for variations of values between November 4, 1948 and the final date of payment.

(b) Grant interest at the rate of 5% per annum on the amount awarded from September 15, 1947, the date of the filing of the original claim, to the date of payment.

(c) Order that any necessary expenses which may be incurred for the prosecution of this claim before the Commission be borne by the Italian Republic.

(d) Give such further and other relief as may be just and equitable.

The Italian Government Agent having deposited his Answer, the Agent of the Government of the United States submitted a Reply in which the sum claimed under (a) was increased to 74,761,800 lire, according to an appraisal as of May 27, 1953.

The Italian Government Agent has submitted a Counter-Reply.

By *procès-verbal* of December 14, 1953, it was stated that discussion in chambers had revealed the disagreement between the Representatives of the Governments with regard to questions both of fact and of law in this case, and it was decided that recourse should be had to a Third Member in order to resolve the dispute in its entirety.

The Governments appointed by common consent Mr. Emil Sandström, former Justice of the Supreme Court of Sweden, as Third Member of the Commission.

The Agents of the two Governments have argued the case before the Commission.

Their arguments are summarized, as far as necessary, in the following legal considerations.

#### CONSIDERATIONS OF LAW:

On the question of principle whether the claimant is entitled to compensation under Article 78, the defence can be summarized in the following way:

The sale was ordered because the goods were considered to be perishable as regards both the state of transformation and the conditions of preservation in which they were at the time. The lack of restitution therefore was not the result of an act of war but of a measure of the authorities and, as Article 78, paragraph 4 (a), requires a causal relation with a specific act of war within the technical meaning of the term, this paragraph would not be applicable to the instant case.

While stressing that other paragraphs of Article 78 had not been invoked in the Petition, the Agent of the Italian Government alleged that the sale was not ordered because the goods were enemy-owned.

The Agent of the United States Government, who in his Petition had based the claim on the fact that the licorice root had not been returned to the claimant relying on Article 78, paragraph 4 (a), contested in his Reply the limiting interpretation which the Italian Government attempted to give to paragraph 4 (a), since nowhere in Article 78 is there any limitation in the sense that the cause of the damage must be an act of war. He further contended that the claimant's dry licorice roots had been sequestered as enemy property under the Italian War Law and that such sequestration was patently as a result of the war. Therefore, while the right to compensation clearly exists under paragraph 4 (a) it could very well also exist under paragraph 4 (d), and the dispute had not been confined to the application only of paragraph 4 (a).

In his Counter-Reply, the Agent of the Italian Government maintained that the applicability of paragraph 4 (d) could not be considered in this dispute. He further alleged that the sequestration was not the cause of the damage and that the question in dispute is whether the sale was or was not an act of good administration.

Even accepting the presentation of the issue as proposed by the Agent of the Italian Government, it must be held that the Italian Government is responsible.

The Commission cannot sustain the Italian Agent's contention that the sequestration and the sale were effected because the goods were perishable.

The facts of the case lead to a different conclusion.

In a report on his administration dated December 4, 1943, the sequestrator wrote as follows with reference to the blocking of the goods:

Upon information of the "Federazione Nazionale Industriali Prodotti Chimici" the Ministry of Corporations, by an urgent Government mail communication No. 5273 dated May 12, 1941, directed the local agency to make inquiries in order to ascertain the availability of the lots of licorice root pertaining to the above-mentioned company, and eventually to adopt measures for the blocking of the goods, pending further dispositions intended to guarantee that the product was to be employed in favour of the national industry which needed it for the production and export of the juice.

According to the same report, the letter in which the Ministry of Agriculture and Forests requested the Prefect of Cosenza to appoint a custodian indicated the reason for the request as being "to secure the prompt utilization and valorization of the product".

The preamble of the Decree of February 24, 1942, which ordered the sequestration of the property other than the licorice root belonging to the claimant, reads as follows:

Having seen Article 296 of the War Law approved by Royal Decree No. 1415 of July 8, 1938; having seen Decree No. 566 of June 10, 1940, which ordered the application of that law in view of the occasion for taking advantage of the power granted by Article 295 of the aforesaid law.

The preamble of the Decree of the same date concerning sequestration of the licorice roots first mentions the Decree appointing the custodian and a letter of the General Accounting Office of the State "by which the sequestration of the above-mentioned licorice root was ordered". The preamble then continues as follows:

Having seen Decree No. 566 dated June 10, 1940 ordering the application of that law; in view of the occasion for taking advantage of the power provided by Article 295 of the aforesaid law.

It is obvious that the intention was to mention here, as in the other Decree, Article 296 of the War Law but that this part was omitted by mistake.

However, Article 5 of the Decree provides:

The sums recovered from the sale of the quantity of licorice referred to in Article 2 of the present Decree must be deposited by the sequestrator with the Banca d'Italia in the account "*Istcambi beni nemici*" (Foreign Exchange Institute, Enemy Property), in accordance with Law No. 1994 of December 19, 1940 in the manner indicated in circular No. 152200 of February 21, 1941.

In the inventory it is declared that the stacks of dried licorice root were in "a fair state of preservation". No other examination of the condition of the goods was made and, before the sale, there was nowhere any reference to the licorice root being in a bad state.

Both parties have relied on expert opinions to support their contentions about the perishability of the licorice root.

The Claimant relies upon affidavits of William Sidney Gall and Robert Thompson Sime who have been in the service of the claimant. They describe how green licorice root bought by the claimant in both Italy and Greece has been cured, dried and stacked for storage, and they testify that with this method it has been possible to preserve the licorice root for years, in Greece during the entire period of the war, without deterioration. The only thing necessary would have been supervision, such as that for which the claimant had arranged.

The Agent of the Italian Government relies on a report of Prof. Berna of the General Direction of Agricultural Production, who denies that it is possible to assure the preservation of dried licorice root for several years in the open air on the fields of Corigliano by the method used by the claimant.

In weighing the value of these opinions, it must be kept in mind that, according to other evidence, it is at least doubtful whether the claimant's method of storing licorice roots is used in Italy by others than the claimant, and that consequently, there are here in opposition, on the one hand, the findings of experience and, on the other hand, more theoretical considerations. The Commission attributes more weight to the former.

Taking all of these circumstances into consideration, the Commission finds that the sequestration and sale took place not because of the perishability of the goods but because of their character as enemy property.

Therefore, there can be no doubt that the sale of the licorice root gives rise to a claim for compensation under Article 78, paragraph 4 (a).

In view of this conclusion, there is no need to examine the question of admissibility of the claim under paragraph 4 (d) of the same article.

As to the amount of compensation, the Agent of the Italian Government denies that it should be calculated for 705.3 metric tons of dry licorice root, on the ground that the quantity of root mentioned in the Decree of Sequestration was not previously weighed but merely estimated to be about 820 tons. The only permissible method of calculating would be to take as a basis the quantity actually sold (776.456 metric tons), deduct the number of tons (114.7) equal to the amount in cash which was returned, and arrive at a result of 661.756 metric tons.

The Agent of the Italian Government further disputes the value, as estimated by the claimant.

The Conciliation Commission agrees with the objection of the Italian Agent with regard to the calculation of the quantity of licorice root. The quantity on which the amount of the loss must be calculated is 661.756 metric tons.

With regard to the compensation to be awarded, the Agent of the Italian Government contends that the claimant replaced the licorice root in question some years ago and that the economic damage suffered is therefore represented by the sum which was expended at that time.

In this respect he relies on a passage in the Petition wherein it is stated that "the licorice in question represented its [the claimant's] total stock of raw material in Italy and had to be replaced after the war at many times the original cost".

The contention of the Italian Agent is not justified in the opinion of the Commission, because the passage in the Petition upon which he relies is merely a general statement and not a statement of a specific fact and therefore there is no proof of the actual replacement of that specific lot of merchandise.

According to Article 78, paragraph 4 (a), the compensation must be two-thirds of the sum necessary at the date of payment to purchase the above-mentioned quantity of 661.756 metric tons of dry licorice root.

To arrive at that sum, the Commission adopts the method of calculation used by the claimant and against which no specific objection has been made.

The Commission finds that two and one-half tons of green root are required to produce one ton of dried root, and that the current market price of green root is 29,010 lire per metric ton.

To the price thus obtained must be added the expenses of transportation to the Corigliano plant, cleaning, curing, baling or stacking, with necessary protection from the weather. Such expenses have been declared by the claimant to be, as of October, 1948, 13,500 lire per metric ton of dry root, and, as of May, 1954, 25,375 lire per metric ton of dry root. The elements of such expenses have not been specified in detail, but in the circumstances of the case the Commission finds that 20,000 lire per metric ton can be granted for that item.

The cost of one ton of dry licorice root must therefore be computed as follows:

	Lire
Price of 2½ tons of green root . . . . .	72,525
Expenses of processing per ton of dry root . . . . .	20,000
<b>TOTAL</b>	<b>92,525</b>

For the quantity of 661.756 metric tons, the compensation should therefore be based on a total value of 61,228,974 lire.

The request under (b) of the Petition is rejected, in accordance with Decision No. 24 of July 12, 1954, in the Joseph Fatovich case.<sup>1</sup>

With respect to the request in the Petition under (c), the claimant has waived it.

For the reasons set forth above, the Conciliation Commission

#### DECIDES:

1. The claim is admissible, under Article 78, paragraph 4 (a) of the Treaty of Peace;
2. The claimant is entitled to receive from the Government of the Italian Republic the amount of 40,819,316 lire, equal to two-thirds of the sum of 61,228,974 lire.
3. This Decision is final and binding.

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<sup>1</sup> *Supra*, p. 190.

This Decision is filed in English and in Italian, both texts being authentic originals.

DONE in Rome at the seat of the Commission, 68 Via Palestro, December 1954.

*The Third Member*  
Emil SANDSTRÖM

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

*The Representative of the  
Italian Republic*  
Antonio SORRENTINO

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ROSASCO CASE (THE *UNIONE*)—DECISION No. 50  
OF 19 MAY 1955<sup>1</sup>

Compensation under Article 78 of the Treaty of Peace—State responsibility—Loss of requisitioned ship—Requisition for use—Requisition of title—Measure of damages—Request for interest denied.

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Indemnisation au titre de l'article 78 du Traité de Paix — Responsabilité de l'Etat — Perte d'un navire requisitionné — Réquisition pour usage — Réquisition du titre de propriété — Détermination du montant de l'indemnité — Demande d'intérêts rejetée.

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The Italian-United States Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Republic and José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member selected by mutual agreement of the United States and Italian Governments.

On the Petition filed on November 24, 1952, by the Agent of the Government of the United States of America *versus* the Italian Government in behalf of the Società Anonima Genovese Armamento e Rappresentanze and/or Harold W. Rosasco and William E. Rosasco, Heirs of A. T. Rosasco.

I. THE FACTS:

1. In 1939 Mr. A. T. Rosasco stipulated a contract for the construction of the motor ship *Unione* (known first as "new construction, No. 255") with

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<sup>1</sup> *Collection of decisions*, vol. II, case No. 31.

the OTO and FIAT Companies which were to build the hull and engines respectively.

2. A. T. Rosasco made a declaration in April 1941 before one Grondona, notary at Genoa, that he had stipulated the construction contract on behalf of SAGAR, owner of the ship.

3. Thereafter, in 1941, OTO and FIAT, on the grounds of Decree-Law No. 494 of June 17, 1941, contested Rosasco's declaration, maintaining that, as Mr. Rosasco was a national of the United States, the contract and the declaration should be declared null and the vessel acknowledged to be the property of OTO and FIAT.

4. During the legal proceedings, the plaintiff companies petitioned for a judicial attachment of the motor ship and the President of the Tribunal of Genoa granted the request, appointing Dr. Angelo Costa as judicial trustee.

5. The law-suit was then protracted for a long period of time and was finally settled by a compromise dated April 3, 1951.

6. Independently of that litigation, the motor vessel was requisitioned for temporary use, on January 24, 1942, because of exigencies of the Ministry of the Navy, under Law No. 1154 of July 13, 1939.

7. The ship was sunk by German armed forces on or about June 18, 1944 at the entrance to the port of La Spezia.

8. The Ministry of the Navy, on August 27, 1945, ordered the requisition of the title of the vessel as of January 24, 1942, date of the requisition for use, under Article 12 of Law No. 1154 of July 13, 1939, as amended by Article 2 of R.D.L. No. 1601 of December 22, 1941 and by Article 1 of R.D. No. 127 of February 2, 1943.

9. In the aggregate, for requisition for use and requisition of title, the Italian Government has paid, for the motor ship *Unione*, the sum of 101,646,624.39 lire.

10. In two separate claims, dated February 12 and September 9, 1948, respectively, the latter conditioned upon the rejection of the former, Harold W. and William E. Rosasco, the heirs of A. T. Rosasco, who had died in the meantime, and the SAGAR Company requested restitution of the motor ship *Unione* under Article 78 of the Treaty of Peace.

11. The claims, following a long investigation and after having been submitted several times to the competent Interministerial Commission for consideration, were rejected by the Italian Government.

12. The pertinent communication was made by the Italian Government to the Embassy of the United States in Rome on March 5, 1952, and, subsequent to this communication, the Agent of the Government of the United States of America, by Petition filed on November 24, 1952, submitted the case to the Conciliation Commission for decision.

13. Discussion in chambers revealed the disagreement between the Representatives of the two Governments, and the Commission therefore decided to appeal to the Third Member in order that the issues raised by the instant case might be settled.

14. Both Governments nominated Prof. José de Yanguas Messia, of Spanish nationality, as Third Member for the examination of the Rosasco-SAGAR Case.

## II. PRINCIPLES OF LAW INVOLVED

1. The American Petition requests restitution and restoration to good order of the motor ship, under paragraphs 2 and 4 (a) of Article 78, or, in the alternative, compensation payable under the same para. 4 (a) in the event that restitution cannot be made.

2. On the Italian side, it is contended instead that SAGAR suffered no damage as a result of the sinking of the motor ship *Unione*, in view of the fact that at that time it had already lost title thereto as a result of a measure taken by the Italian Government, and that consequently it is not entitled to invoke either paragraph 2 or paragraph 4 (a).

If the requisition of title had not been ordered effective as of January 1942, the claim should certainly have been accepted on the mere consideration of the ownership as of June 10, 1940 and of the act of war of June 18, 1944; but as such requisition was ordered, one cannot prescind from it, confining oneself to a statement that it is irrelevant, because, by virtue thereof, the Italian legal system, which up until January 1942 had recognized SAGAR as owner of the motor ship *Unione*, as of that date replaced the title with the right to receive a corresponding indemnity.

3. The Hon. Agent of the Government of the United States, in his Brief of February 12, 1954, stated that the transfer of title of the motor ship *Unione* to the Italian Government, precisely as such, constituted a measure contemplated by the aforementioned paragraph 2 of Article 78, a measure which the Italian Government is obligated to cancel, under Article 78, like all measures, including requisition, seizure or control, taken by it, between June 10, 1940 and September 15, 1947, against property of United Nations nationals. The requisition of the vessel by the Italian Navy for its own use, effected on January 24, 1942, and the subsequent requisition of title on August 27, 1945 are measures which fall within the meaning of this word as used in paragraph 2, Article 78, of the Treaty. For the purposes of the Italian defence, the assertion that the claimants are not entitled to invoke Article 78 because of the requisition of title is completely groundless because such requisition of title constitutes *per se* one of the measures which the Italian Government is obligated to cancel.

## III. RELIEF REQUESTED BY THE AGENT OF THE UNITED STATES OF AMERICA

The United States of America requests that the Commission

(a) Order the Italian Republic to raise, restore to good order (bearing two-thirds of the expenses) and return the motor ship *Unione*, free of all encumbrance, within a time-limit of twelve months.

(b) Order payment to the claimants of the equivalent in lire of \$1,126,980, as compensation for damages suffered by the claimants as a result of the non-fulfilment of obligations imposed on the Italian Republic by the Treaty, within a reasonable time after a claim for restitution has been duly made.

(c) In the event that the motor ship *Unione* cannot be returned, decide, in lieu of (a) and (b) above, that the claimants are entitled to receive from the Government of the Italian Republic two-thirds of the sum necessary, at the time of payment, to make good the losses and damages suffered, which sum, on September 23, 1952 was estimated to be 2,200,000,000 lire, less the sum of 101,646,€24.39 lire already paid by the Italian Government to the owners of the vessel.

(d) Order that the Italian Republic be charged with the reasonable expenses of 2,000,000 lire already incurred in the preparation of the claim, and with the expenses which might be incurred during the proceedings before this Commission.

(e) Grant 5% interest per annum on the amount due to the claimants, running from February 12, 1948, the date on which the claim for restitution of the vessel was presented.

(f) Grant any other and further relief that may be deemed fair and equitable.

\* \* \*

The Italian-United States Conciliation Commission,  
Having heard the Hon. Agents of the two Governments,  
Having examined the record of the case,  
Having reached agreement on setting aside the questions of principle,  
Whereas the motor ship *Unione* cannot be raised, restored to good order  
and returned,  
Acting by way of conciliation, unanimously

**DECIDES:**

1. The Government of the Italian Republic, retaining title to the wreck, shall pay the sum of four hundred and twenty-five million (425,000,000) lire to Messrs. Harold W. and William E. Rosasco as compensation under the provisions of Article 78, Paragraph 4 (a), of the Treaty of Peace for the loss of the motorship *Unione*.

2. No payment is due from the Government of the Italian Republic for damages which may have been due to the delay following the request for restitution of the motor ship *Unione*.

3. The request for interest on the total amount of the award is denied, in accordance with Decision No. 24 of this Commission in the Case of Joseph Fatovich.<sup>1</sup>

4. The Government of the Italian Republic shall pay to the claimants named in paragraph 1 above the sum of two million (2,000,000) lire, representing the expenses incurred by the claimants in Italy in preparing the claim under Paragraph 5 of Article 78 of the Treaty of Peace.

5. The total of the sums specified in paragraphs 1 and 4 above (425,000,000 plus 2,000,000 lire), or 427,000,000 lire, shall be paid, free of any levies, taxes or other charges, within a period of forty-five (45) days following the request for payment to be submitted to the Government of the Italian Republic by the Government of the United States of America.

6. This Decision is final and binding; its execution is incumbent upon the Italian Government.

Rome, May 19, 1955.

*The Third Member*

José DE YANGUAS MESSIA

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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<sup>1</sup> *Supra*, p. 190.

ZNAMIECKI CASE—DECISION No. 51  
OF MAY 1955<sup>1</sup>

Claim for compensation for war damages—Loss of property—Claimant's right of ownership—Whether damaged property belongs to claimants, nationals of United States—Evidence—Evaluation of—

Demande en indemnité pour dommages de guerre — Perte de biens — Droit de propriété — Question de savoir si les biens endommagés appartiennent aux réclamants, ressortissants des Etats-Unis — Preuve — Moyens de preuve—Appréciation par la Commission.

The Italian-United States Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Republic and José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member selected by mutual agreement of the United States and Italian Governments;

On the Petition filed on February 25, 1952 by the Agent of the Government of the United States of America *versus* the Italian Government in behalf of Andrew A. Znamiecki and Sophie Irene Znamiecki Chace.

In this claim the two parties in interest are children of Mrs. Sophie Daniszewski Pietrabissa and of Mr. Alexander Znamiecki, who were divorced on April 25, 1939. Mrs Sophie Daniszewski was remarried on June 1, 1939 to Mr. Franco Pietrabissa.

On March 9, 1944, fifteen cases, which had been deposited by Mr. Francesco Pietrabissa, an Italian national, in his name in the warehouse of the Otto & Rosoni Company in Rome, were destroyed as the result of an air raid.

Following the destruction, Mrs. Pietrabissa informed the Otto & Rosoni Company that four of the fifteen cases belonged to the United States nationals, Andrew and Sophie Znamiecki, her children by her first marriage.

The evidence exhibited is:

1. Sworn statement of the two claimants, dated August 1949, when both claimants were of age (Exhibit A of the Petition).
2. Sworn statement of Alexander Znamiecki, father of the claimants, dated August 1, 1949 (Annex 3 to Exhibit A of the Petition).
3. Act of Notoriety dated August 21, 1944, executed immediately after the destruction of the property and prior to the end of hostilities (Annex 6 to Exhibit A of the Petition).
4. Sworn statement of Sophie Daniszawski Pietrabissa, mother of the claimants, dated October 22, 1949 (Exhibit C of the Petition).

<sup>1</sup> Collection of decisions, vol. II, case No. 28. The Collection does not indicate the exact date of the decision.

5. Minutes of the oral testimony given under oath on January 21, 1954, by an employee of the Otto & Rosoni Company, the forwarding firm.

6. The notarized statements of Mr. Manlio de Santi and of Mr. Ho Jozef Zadja.

7. Letters of Mr. Edoardo Masi and Mr. Carlo Coraggia.

The question raised by this case reduces itself to an evaluation of the evidence which has been produced.

The Commission decides that the evidence submitted does not prove the allegation of the claimants. The statements numbered 1, 2 and 3 attest that the four cases involved here belonged to Andrew and Sophie Znamiecki. On the other hand, it is stated in the notarized statement of Mr. Manlio de Santi that "in the document containing the property settlement in connexion with the dissolution of the marriage, signed by both parties, Mr. Alexander Znamiecki has expressed his consent to the transfer of his share in the residential co-operative at No. 2/4, Aleja Szucha Street, together with the apartment located in this co-operative, in which there was furniture of Mrs. Pietrabissa, to his former wife, Mrs. Janina-Zofia Pietrabissa; as also to the cession of title to the house in Zakopane under the name 'Jaworowy', to Mrs. Pietrabissa where also was her furniture, under the condition that, on coming of age of the children of the divorced parties, Andrew and Zofia Znamiecki, the share in the residential co-operative and the house 'Jaworowy' in Zakopane will become their property. The apartment in the co-operative building at No. 2/4 Aleja Szucha Street and the house in Zakopane were to be administered by Mr. Franco Pietrabissa together with his wife as the owner." Mr. Zadja made a similar statement.

The transfer which Mr. Alexander Znamiecki made to his children, according to these statements referring to the property settlement at the time of dissolution of the marriage, concerned the transfer of that share of the title which he possessed in the residential co-operative in Szucha Street and of the Zakopane house; no mention is made therein with regard to the ownership of the furniture. On the contrary: mention is made of the transfer to Mrs. Pietrabissa of his share of the title to the residential co-operative and of the house called "Jaworowy" at Zakopane, where Mrs. Pietrabissa's furniture was located, upon the condition that, when they came of age, the children, Andrew and Sophie Znamiecki, would become owners of the residential co-operative and of the "Jaworowy" house. No reference to the furniture except to say that it belongs to Mrs. Pietrabissa.

In his notarized statement, Mr. de Santi adds: "it is also known to me that attorney Tomaszewsky, at the end of June or the beginning of July of the year 1939, took steps for the purpose of carrying out the formalities in the Council of Ministers, indispensable for the transfer of the title of the property in Zakopane to Mrs. Janina-Zofia Pietrabissa, who, after her second marriage, became an alien; but this transfer was not effected until the outbreak of the war. These formalities were essential to the recording of the title in the mortgage records." The sentence refers specifically only to the real property.

The letter of Mr. Masi does not make any distinction with regard to the ownership of the cases and is confined to a statement that he had visited the site of the bombardment several times for the purpose of effecting salvage searches which, although careful, were fruitless because of the violence of the incendiary bombs. The same thing must be said about the letter of Mr. Coraggia.

As for the Act of Notoriety, it is not the direct knowledge of the notary but only an attestation of the statements of witnesses from which can be inferred as certain the single fact of the destruction.

Finally, the oral testimony of an employee of the Otto & Rosoni Company indicates that, before the destruction of the cases, he did not know at all that some of them were owned by Americans and that he received this information after the destruction without being able to recall exactly in what manner. He states: "We had many telephone calls full of anxiety and grief and Mrs. Pietrabissa was out of her mind with anxiety but I can't say exactly. It must have been about March or April."

The Conciliation Commission, by majority vote considers, therefore, that there do not exist sufficient elements in the evidence presented to be able to grant the Petition on behalf of Andrew and Sophie Znamiecki, and

Takes note of the declaration made during the discussion by the Hon. Italian Representative, in the name of his Government, according to which Mr. and Mrs. Pietrabissa will be able to submit an appropriate claim, as Italians, to the competent authorities in Italy, in order to obtain compensation for the damages in question under domestic Italian laws, even if the time-limit established for such claims has expired, and

DECIDES:

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.

Rome, May, 1955.

*The Third Member*

José DE YANGUAS MESSIA

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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DISSENTING OPINION OF THE REPRESENTATIVE OF THE UNITED STATES OF AMERICA  
IN CASE NO. 28, THE UNITED STATES OF AMERICA EX. REL. ANDREW A. ZNAMIECKI  
AND SOPHIE IRENE ZNAMIECKI CHACE VS. THE ITALIAN REPUBLIC

The Representative of the United States of America considers it necessary to set forth the reasons which compel him to refrain from agreeing with the decision of the Third Member and of the Italian Representative in this case.

The question in this case is a simple question of fact: did Andrew Znamiecki and Sophie Znamiecki Chace, nationals of the United States of America, own the contents of four cases destroyed on March 9, 1944?

There is not a particle of evidence, nor is any cited in the Decision, that they did *not* own the property for which claim was made.

The Decision itself makes abundantly clear that the two documents of Mr. De Santis and Mr. Zadja which describe the property settlement entered into at the time of the divorce between the parents of the claimants do not refer to personal property but refer only to *real* property. The real property is not in question here.

Although those two documents in no way help us to decide whether or not

the children owned certain of their divorced parents' *personal* property they are cited in the Decision as if they vitiate the documents which refer to the ownership of the personal property by the children ("On the other hand, . . .", etc.) The United States Representative cannot subscribe to the theory that evidence which is irrelevant to the question in the case should affect in any way the evaluation of the relevant evidence.

On the positive side, it is true that there is no documentary evidence antedating the deposit in the warehouse or the destruction from which it can be inferred with certainty that the contents of four of the cases belonged to the children. On the other hand, there is no reason why there should be. First, the children had left for the United States on the eve of the war, and Mr. and Mrs. Pietrabissa were living in Rome, so it was entirely natural for objects belonging to the children to be put in a warehouse, together with his own and his wife's property, by the step-father, the new head of the family, especially as he is Italian himself, and as a member of the Italian diplomatic service, accustomed to the warehousing of household effects. Secondly, and even more conclusively, Italy and the United States were at war, so that if property deposited in a warehouse in Rome had been declared to be owned by Americans, it would have been subject to sequestration as enemy property, under the Italian War Law.

But even though there is no documentary evidence regarding the American ownership which antedates the loss of the property, this fact alone would not defeat the claim. It has been recognized by this Commission (Decision<sup>1</sup> No. 11, Case No. 5, *The United States of America ex rel. Norma Sullo Amabile vs. The Italian Republic*, June 25, 1952) that any statement sworn or unsworn, which concerns the ownership or loss of personal property, although it may have been made after the loss, may be accepted in evidence, with the right reserved to the Commission to weigh such evidence.

It is worthy of note that the Decision in the instant case reaffirms implicitly the principle announced in the Decision on the Amabile Case, accepting in evidence the sworn and unsworn statements regarding the Znamiecki claim.

However, my two colleagues on the Commission give that evidence no weight at all. It is as if eight different people had said nothing at all about the ownership of the four cases here in question.

The eight persons are the two claimants, the mother, the divorced father, and four residents of Rome, each of whom has sworn that the Znamiecki children were the owners of the cases in question.

To deny any value to their sworn statements, in the absence of conflicting evidence, is to say that they are all guilty of perjury. With this, I cannot agree.

The Decision does not even discuss the sworn statements. Instead, it discusses the two irrelevant documents mentioned above which concern the real property and it discusses two letters (those of Mr. Masi and Mr. Coraggia) which are completely irrelevant in that they make no statement concerning ownership.

Even if one wished to reject the affidavits of the two claimants on grounds that they are the parties directly interested in the claim, and even if one wished to reject the affidavit of the mother, for some other supposition (without any explanation, the mother's affidavit is not even listed in the Decision), there would still remain the affidavit of the father, divorced from the mother and not living with the children, with no interest in the claim, who testifies that under the property settlement made at the time of the divorce, the children were given the "entire contents of the apartment".

<sup>1</sup> *Supra*, p. 115.

I shall not comment on the value of the Act of Notoriety in which four Italian residents of Rome swore before an Italian notary that four of the cases deposited in the warehouse were owned by the claimants, except to note that it was executed on August 21, 1944, long before the Treaty of Peace was signed and hence long before it was known that the American children would have had any right to receive compensation for the loss.

Apart from the sworn statements, the record contains the minutes of the oral testimony, under oath, of an employee of the warehouse. The Decision points out that the witness states that the warehouse firm was not advised of the American ownership of some of the cases prior to their destruction. The Decision does not point out, however, that Rome was then occupied by the German Army, that the Italian War Law was still applicable to American property in Rome, and that therefore the childrens' property if declared as American property, was subject to sequestration. Nor does the Decision point out that, shortly after the destruction, the claimant's mother notified the warehousing firm, by letter dated May 17, 1944, that "my children American citizens" had suffered damages, along with the ex-Ambassador of Poland at Rome (some of whose property had also been deposited by Mr. Pietrabissa). A copy of that letter of May 17, 1944, was presented to the Commission by the employee of the warehousing firm. Moreover, the employee of the warehousing firm did not testify that the American children did not own the property, but testified instead that the firm was notified immediately after the loss of the property that some of it belonged to the American children of Mrs. Pietrabissa.

The evidence, from 1944 through the affidavits of 1949 up to the oral testimony of the employee of the firm, all tends, in my opinion, to prove ownership by the claimants of the property for which claim is made.

The United States Representative recognizes the necessity of examining with caution *ex parte* Statements, both sworn and unsworn, but he is convinced that, from all of the testimony in the record of this case, as well as from the circumstances surrounding the deposit and the destruction, and from the absence of any evidence to the contrary, it can be inferred that Andrew A. Znamiecki and Sophie Irene Znamiecki Chace were the owners of the contents of four cases destroyed in Rome as a result of the war. In any event, he cannot accept, as a conclusive presumption, that *ex parte* declarations, especially when they have been made under oath, are untruthful, which is the underlying assumption of the Decision of the majority in this case.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

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MERGÉ CASE—DECISION No. 55  
OF 10 JUNE 1955<sup>1</sup>

Nationality—Dual nationality—Right of a United Nations national, possessing also Italian nationality, to claim under paragraph 9 (a) of Article 78 of Peace Treaty—Absence in the Treaty of provisions concerning cases of dual nationality—Law to be applied—General principles of Internal Law governing cases of dual nationality—Test of dominant or effective nationality—Treaty interpretation—Principles of—Intention of the draftsmen—The spirit of the Treaty.

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Nationalité — Double nationalité — Droit d'un ressortissant d'une Nation Unie, possédant également la nationalité italienne, de se prévaloir des dispositions de l'article 78, paragraphe 9 a), du Traité de Paix — Absence, dans le Traité, de dispositions concernant le cas de double nationalité — Droit applicable — Principes généraux du droit international régissant le cas de double nationalité — Critères admis par la Commission pour établir la nationalité dominante ou effective — Interprétation des traités — Principes d'interprétation — Intention des rédacteurs — Esprit du Traité.

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The Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Prof. José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member chosen by mutual agreement between the United States and Italian Governments,

On the Petition filed by the Agent of the Government of the United States of America on August 28, 1950 *versus* the Government of the Italian Republic in behalf of Mrs. Florence Strunsky Mergé.

#### I. THE FACTS

On October 26, 1948, the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic on behalf of Mrs. Florence Strunsky Mergé, a national of the United States of America, a claim based upon Article 78 of the Treaty of Peace with Italy for compensation for the loss as a result of the war of a grand piano and other personal property located at Frascati, Italy, and owned by Mrs. Mergé.

As the Italian Ministry of the Treasury had rejected the claim on the grounds that Mrs. Mergé is to be deemed, under Italian law, an Italian national by marriage, the Agent of the United States of America, on August 28, 1950, submitted to this Commission the dispute which had arisen between the two Governments with respect to the claim of Mrs. Mergé.

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<sup>1</sup> *Collection of decisions*, vol. III, case No. 3.

Following the Answer of the Italian Agent, the Conciliation Commission issued an Order on September 27, 1951, by which the dispute was limited to the consideration of the problem of Mrs. Mergé's dual nationality, and all other questions regarding the right to compensation were reserved for subsequent consideration.

The following facts relating to the two nationalities, Italian and United States, possessed by Mrs. Mergé are revealed by the record:

Florence Strunsky was born in New York City on April 7, 1909, thereby acquiring United States nationality according to the law of the United States.

On December 21, 1933, at the age of 24, Florence Strunsky married Salvatore Mergé in Rome, Italy. As Mr. Mergé is an Italian national, Florence Strunsky acquired Italian nationality by operation of Italian law.

The United States Department of State issued a passport to Mrs. Mergé, then Miss Strunsky, on March 17, 1931. This passport was renewed on July 11, 1933, to be valid until March 16, 1935.

Mrs. Mergé lived with her husband in Italy during the four years following her marriage until 1937. Her husband was an employee of the Italian Government, working as an interpreter and translator of the Japanese language in the Ministry of Communications. In 1937 he was sent to the Italian Embassy at Tokyo as a translator and interpreter.

Mrs. Mergé accompanied her husband to Tokyo, travelling on Italian passport No. 681688, issued on August 27, 1937 by the Ministry of Foreign Affairs in Rome. The passport was of the type issued by the Italian Government to employees and their families bound for foreign posts.

After her arrival in Japan, Mrs. Mergé on February 21, 1940 was registered, at her request, as a national of the United States at the American Consulate General at Tokyo.

Mrs. Mergé states that, when hostilities ceased between Japan and the United States of America, she refused to be returned to the United States by the United States military authorities, having preferred to remain with her husband.

On December 10, 1948, the American Consulate at Yokohama issued an American passport to Mrs. Mergé, valid only for travel to the United States, with which she travelled to the United States. She remained in the United States for nine months, from December, 1946, until September, 1947. The American passport issued to her at Yokohama and valid originally only for travel to the United States, was validated for travel to Italy, and the Italian Consulate General at New York, on July 31, 1947, granted Mrs. Mergé a visa for Italy as a visitor, valid for three months.

On September 19, 1947, Mrs. Mergé arrived in Italy where she has since resided with her husband.

Immediately after returning to Italy, on October 8, 1947, Mrs. Mergé registered as a United States national at the Consular Section of the American Embassy in Rome. On October 16, 1947, Mrs. Mergé executed an affidavit before an American consular officer at the American Embassy in Rome for the purpose of explaining her protracted residence outside of the United States. In that affidavit she lists her mother and father as her only ties with the United States, and states that she does not pay income taxes to the Government of the United States.

On September 11, 1950 Mrs. Mergé requested and was granted by the Consular Section of the American Embassy at Rome a new American passport to replace the one which had been issued to her on December 10, 1946, by the American Consulate at Yokohama and which had expired. In her application for the new American passport, Mrs. Mergé states that her "legal residence"

is at New York, New York, and that she intends to return to the United States to reside permanently at some indefinite time in the future.

So far as the record indicates, Mrs. Mergé is still residing with her husband in Italy.

## II. THE ISSUE

It is not disputed between the Parties that the claimant possesses both nationalities. The issue is not one of choosing one of the two, but rather one of deciding whether in such case the Government of the United States may exercise before the Conciliation Commission the rights granted by the Treaty of peace with reference to the property in Italy of United Nations nationals (Articles 78 and 83).

The Commission, completed by the Third Member, called upon to decide this case, notes that the problem raised has the importance of a question of principle, also because of the frequency with which it is presented, in view of the difference between the municipal laws (conflict between the principles of *jus sanguinis* and *jus soli*; diverse regulation of acquisition and loss of nationality by the woman who marries an alien, cases of automatic reacquisition of original nationality, etc.). The Commission has therefore deemed it advisable to take up the examination of the complex problem of dual nationality in all its aspects.

### (1). *Position of the Government of the United States of America:*

(a) The Treaty of Peace between the United Nations and Italy provides the rules necessary to a solution of the case. The first sub-paragraph of paragraph 9 (a) of Article 78 states:

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

All United Nations nationals are therefore entitled to claim, and it is irrelevant for such purpose that they possess or have possessed Italian nationality as well.

(b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interests of United Nations nationals in their property in Italy.

(c) The principle, according to which one State cannot afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses, cannot be applied to the Treaty of Peace with Italy because such principle is based on the equal sovereignty of States, whereas this Treaty of Peace was not negotiated between equal Powers but between the United Nations and Italy, a State defeated and obliged to accept the clauses imposed by the victors who at that time did not consider Italy a sovereign State.

### (2). *Position of the Italian Government:*

(a) The text governing cases of dual nationality is not the first sub-paragraph of paragraph 9 (a) of Article 78 but the second sub-paragraph of the same paragraph: only in cases of treatment as enemy can the Italian national who is also a United Nations national request application of Article 78.

(b) A defeated State, even when it is obliged to undergo the imposition of the conqueror, continues to be a sovereign State. From the juridical point of view, the Treaty of Peace is an international convention, not a unilateral

act. In cases of doubt, its interpretation must be that more favourable to the debtor.

(c) There exists a 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 made.

### III. INTERPRETATION OF THE TREATY OF PEACE

#### (1). *The letter of the Treaty of Peace (Paragraph 9 (a) of Article 78):*

The first problem to be confronted by the Commission is that concerning whether this provision does or does not govern the problem of dual nationality.

(a) *First sub-paragraph of the definition:* ““United Nations nationals” means individuals who are nationals of any one of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.”

In reality, the importance of this provision is confined to two points only (1) to explain the phrase, ““United Nations nationals”, used in the preceding paragraphs of Article 78 itself—doubtless for the sake of brevity, by specifying that by such phrase it is intended to indicate “individuals who are nationals of *any* of the United Nations, or corporations or associations organized under the laws of *any* of the United Nations;” (2) to require possession of such nationality of *any* of the United Nations on the date of the coming into force of the Treaty of Peace and on September 3, 1943, that is, when the Armistice was signed. Neither one of these two conditions refers to dual nationality.

Can it nevertheless be considered to be implicitly contained in the letter of the text? The same question was discussed during the Venezuelan Arbitrations (1903-1905). One of the claimants, Mrs. Brignone,<sup>1</sup> a widow, possessed dual nationality, Italian and Venezuelan. The Italian Commissioner based his argument on the text of the Protocol. Mrs. Brignone, he stated, is Italian according to Italian Law. It does not matter that she is also Venezuelan. Article 4 of the Protocol of February 13, 1903, speaks of “Italian claims, without exception”. To exclude claims of Italian nationals because they simultaneously possess another nationality is to introduce an exception not contemplated by the text and is an infraction of the provisions of the Protocol. The Umpire did not accept this argument, nor did he follow a literal interpretation. He faced openly the problem of dual nationality.

The fact that there exists in the Treaty of Peace which we are discussing an apposite definition of persons who can invoke the benefits of Article 78 obligated its drafters even more to insert explicitly in the text all the cases which it was desired to include within its contents. Therefore, it is clear that, in the first sub-paragraph, no reference, direct or indirect, is made to dual nationality. This is the surest indication that the problem did not enter the minds of the drafters of the Treaty. If it had, it seems most probable that it would have been included in the definition, even more so inasmuch as this legal situation has previously given rise to numerous controversies and arbitrations on the international level.

(b) *Second sub-paragraph of the definition:* If dual nationality is not governed by the first sub-paragraph, is it perhaps governed by the second?

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<sup>1</sup> Volume X of these *Reports*, p. 542.

Let us recall that in this second sub-paragraph, the term "United Nations nationals" includes all individuals, corporations or associations which, "under the laws in force in Italy during the war have been treated as enemy".

Notwithstanding every effort of interpretation, one cannot arrive at the conclusion that such paragraph was drawn up with the intention of regulating specifically the dual nationality which interests us. Not only: far from referring concretely to such cases, the paragraph cited is applicable to other, different cases, such as those, above all, concerning corporations owned by United Nations nationals organized in Italy and those of stateless persons, but not to cases in which the Italian nationality of individuals comes into play.

In fact: by the Italian War Law of July 8, 1938, it was established that, for the purpose of such law, he who, being a national of an enemy State, at the same time possessed Italian nationality or that of another State, must be considered to be an enemy national. However, by the new Law of December 16, 1940, which was in force from January 30, 1941, until the end of the war, consideration as enemy nationals was limited to those cases only in which the individual possessed at the same time the nationality of an enemy State and that of another foreign State.

The possibility of application of the provision contained in the law of 1938 lasted only the short time from the beginning of hostilities on June 10, 1940, to January 30, 1941, date on which the new law took effect, but the provision was never applicable to United States nationals as the United States did not enter the war until December 1941. Logically, it is not possible to deduce from this text a general rule to resolve the problem of dual nationality.

(c) *Conclusion from Paragraph 9 (a)*: The conclusion to be reached from what has been said is that neither the first nor the second sub-paragraph of paragraph 9 (a) of Article 78 contains a definition specifically referring to dual nationality and therefore capable of being a governing rule for those cases.

*(2). The spirit of the Treaty of Peace:*

If cases of dual nationality do not appear to be specifically settled by the letter of the Treaty of Peace, is it perhaps possible to infer from the spirit of the Treaty that its drafters intended to protect United Nations nationals even though they possess Italian nationality?

The United Nations nationals expressly protected by the Treaty of Peace certainly are entitled to compensation for property damaged or lost in Italy.

The Commission considers that the provision can not be extended to cases not contemplated in the Treaty.

The clauses of the Treaty must be strictly followed, even when they constitute a derogation from the general rules of international law. Article 78, in fact, constitutes a derogation when it declares the Italian Government responsible, in every case, and without reference to the cause, for the restitution to United Nations nationals in good order of their property and, in the event that that is not possible, for the payment of compensation, free of any type of tax, in the amount of two-thirds of the sum necessary, as of the date of payment, for the purchase of similar property or to make good the loss suffered. And this provision, in all the cases contemplated by the Treaty, is indisputably and undisputedly applicable.

The United Nations obviously could have inserted in the Treaty, in the same manner, a specific rule to govern cases of dual nationality, apart from or even in conflict with the generally recognized rules of international law, and such an obligation would have been legally binding on the Italian Government. However, they did not do so; and it is a universally admitted principle, in international law as in domestic law, that any contractual obligation—

and the Treaty, by its nature, is such—must be performed only within the limits of what has been agreed.

(3). *Principle of equality:*

Finally, let us see if the Treaty of Peace between the United Nations and Italy lacks the principle of legal equality and hence can have applied to it no principle of international law which is based on the equality between sovereign States.

To admit this argument it would be necessary that the Treaty of Peace not be a treaty. Prof. Rousseau writes and underlines: "Those between contracting parties at least one of which is not a direct subject of the *Jus Gentium* cannot be classified as treaties" (translated from Spanish) (Rousseau, *Droit International Public*, Paris, 1953, p. 17). Liszt says: "The capacity to conclude treaties derives from sovereignty. Nevertheless, the custom exists of conceding to semi-sovereign States the right to conclude treaties, on condition that they do not have a political character (especially, commercial treaties)" (Liszt, *Derecho Internacional Publico (traducción española)* Barcelona 1929, p. 225). A treaty of peace, essentially political by nature, is subject to this rule.

The defeated State can, in the peace treaty itself, accept limitations, more or less temporary, on the exercise of its sovereignty. Such acceptance, however, as a manifestation of intention, presupposes possession of a personality on the international level as a subject of the *Jus Gentium*. The armistice is only an agreement of a military nature which recognises a situation of fact, leaving the juridical settlement for the subsequent treaty of peace.

Without the consent and the signature of the defeated State a treaty of peace does not exist. It may be a unilateral regulation on the part of the victor, but it is not a treaty of peace, Dupuis says:

Whether one looks at it from the point of view of natural law or from the point of view of positive law, the fact that force intervened to dictate a treaty or a law is unable, of itself, to invalidate the treaty or the law. The State which accepts a treaty under the pressure of force is bound by the consent given. If it agrees reluctantly, it agrees, with full knowledge, in order to avoid the force, in order to avoid a worse evil or in order to obtain some advantage of which a refusal would deprive it. If force has a weight in its decision, it is not the only fact in that decision. If it did not agree, it would remain under a regime of force and of force only . . . The object of treaties is to replace the instability of force with the stability of conventions. (translated from French) (Dupuis, *Recueil des Cours de l'Académie de Droit International de la Haye*, 1924, vol. 2, pp. 346-7).

The inequality of every treaty of peace following a victory exists and is manifested, not in the capacity of the international subjects which conclude it, but rather in the very contents of the treaty. This inequality, consequence of the victory, has been translated into numerous clauses of the Treaty which we are discussing, and likewise could have been manifested—but it was not—by the express regulation of dual nationality within paragraph 9 (a).

#### IV. PRINCIPLES OF INTERNATIONAL LAW

As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law.

In this connexion two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality.

(1). *The Hague Convention of 1930:*

The two principles just mentioned are defined in this Convention: the first (Article 4) within the system of public international law; the second (Article 5) within the system of private international law.

Article 4 (approved in plenary session by 29 votes to 5) is as follows:

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

The same Convention, in Article 5, indicates effective nationality as the criterion to be applied by a third State in order to resolve the conflicts of laws raised by dual nationality cases. Such State

shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be most closely connected.

This rule, although referring to the domestic jurisdiction of a State, nevertheless constitutes a guiding principle also in the international system.

Certain of the replies sent by the Governments to the Preparatory Committee of the Hague Conference, charged with drawing up the Bases for Discussion, are interesting and are helpful to our study.

The Government of the United States, in its reply, set forth an instructive historical datum. It concerned a letter dated August 8, 1882, which the then Secretary of State of the United States, Mr. Frelinghuysen sent to a member of Congress, Mr. O'Neill, with regard to a young man born in the United States of German parents and desirous of going to Germany to pursue his studies:

The young man referred to, under the Constitution of the United States, having been born in this country, is, while subject to the jurisdiction of the United States, a citizen of the United States notwithstanding the fact of this father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father's origin —Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he can not claim the rights secured to him by the 14th amendment to the Constitution. It is proper, therefore, that I should add, in the interest of young Mr. J, that it will be perilous for him to visit Germany at present. (143, MS. Dom. Let. 270; Moore, *Digest of International Law*, vol. III, p. 532)

To clarify the concept, there is added in the aforesaid reply the following comment, which connects the letter with the concrete aspect of protection:

In any case, it is considered necessary to view the afore-mentioned statements as referring to the right of the interested parties to the protection of the Government of the United States abroad, rather than as referring to the strictly legal question of their nationality. (translated from Spanish) (*Bases for Discussion of the Preparatory Committee, Reply of the United States of America*, vol. I, p. 27).

The Government of the United States added with reference to the principle of effective nationality:

There exists presently no established rule which permits a determination, in the case of an alien who possesses the nationality of two other States, of which one is the nationality that must be recognized by the United States. . . . There would

appear to be no obstacle to the regulation of this question by international agreement, and we consider that the domicile of the interested party should be taken into consideration in order to determine his nationality. (translated from Spanish) (op. cit., p. 32)

The Italian Government, in its Reply, declared itself in favour of the nationality which is accompanied by habitual residence (op. cit., p. 33)

The Hague Convention, although not ratified by all the Nations, expresses a *comunis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted.

(2). *Precedents:*

Uniformity of precedents in this field does not exist, but it can be stated that the *ratio* of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles. We shall cite a few by way of example.

(a) The principle which bars diplomatic protection of the individual who is a national of the State against which the claim is made was applied by the United States-British Claims Commission established under the Treaty of Washington of May 8, 1871, in the Alexander Case between Great Britain and the United States (Moore, *International Arbitrations*, 1898, vol. III, p. 2529). Instead, the same Commission decided the Halley Case, between the same Powers, in another way (Moore, op. cit., p. 2239).

(b) In the Venezuelan Arbitrations, the British Agent himself, in the Mathison Case,<sup>1</sup> maintained the view that, if a claimant were both a British subject and a Venezuelan national, his claim could not be heard by the Commission (Ralston, *Venezuelan Arbitrations* of 1903, 1904, p. 429 *et seq.*). The principle of effective nationality was instead applied in the following cases: Miliani,<sup>2</sup> Italy vs. Venezuela (Ralston, op. cit., pp. 754-761); Stevenson,<sup>3</sup> Great Britain vs. Venezuela (Ralston, op. cit., p. 438 *et seq.*); Massiani,<sup>4</sup> France vs. Venezuela (Ralston's *Report* of 1902, Washington, 1906, p. 211, 224).

(c) The case of Baron Canevaro, Italian *jure sanguinis* and Peruvian *jure soli*, is typical of those decided in favour of the effective nationality. The case having been submitted to the Permanent Court of Arbitration at the Hague, the motive which—according to the decision of May 3, 1912<sup>5</sup>—caused the Peruvian nationality to prevail for the purposes of the disputed claim was the previous conduct of Canevaro, who was a candidate for election to the Senate where only Peruvian nationals are admitted and who had requested the Government of Peru, as its national, to grant authorization to perform the functions of Consul General of the Netherlands (*Revue générale de droit international public*, 1913, pp. 328-33).

(d) The Franco-German Mixed Arbitral Tribunal applied the principle of effective nationality in the case of *Mrs. Barthez de Monfort vs. Treuhander* (Decision of July 10, 1926).<sup>6</sup>

(e) The Franco-Mexican Claims Commission (1924-1932) examined the problem of dual nationality in 1928 in the George Pinson Case.<sup>7</sup> The decision

<sup>1</sup> These *Reports*, vol. IX, p. 485.

<sup>2</sup> *ibid.*, vol. X, p. 584.

<sup>3</sup> *ibid.*, vol. IX, p. 385.

<sup>4</sup> *ibid.*, vol. X, p. 159.

<sup>5</sup> *ibid.*, vol. XI, p. 397.

<sup>6</sup> *Annual Digest*, 1925-1926, case No. 206.

<sup>7</sup> These *Reports*, vol. V, p. 327.

is based on the fact that the French nationality of Pinson was proved, but not the Mexican nationality, so that, in reality, contrary to Mexico's claim, there did not exist a case of dual nationality.

Nevertheless, it is important to examine the reasoning of the President of the Commission, Mr. Verzijl, who states that the Mexican argument was based on the theory, generally enough admitted in the *jus gentium*, according to which a State is not permitted to take advantage of its right to provide diplomatic protection in the event that the nationals to be protected simultaneously possess the status of nationals of the State against which the right of protection is to be exercised. Mr. Verzijl continues:

While recognizing the well-foundedness of that theory for the cases in which the person in question is effectively considered and treated as a national by each of the two States in the case, and this by virtue of legal rules which do not overstep the bounds set out for them by public or customary international law, I nevertheless believe I must make certain reservations with regard to its admissibility in the case in which one or the other of these two conditions might not be fulfilled. (translated from French) (*La réparation de dommages causés aux étrangers par des mouvements révolutionnaires. Jurisprudence de la Commission franco-mexicaine des réclamations. 1924-1932*, Paris, A. Pedone.)

Although the word "effectively" seems to refer to the principle of effective, in the sense of dominant, nationality, this is not so, because the case which Prof. Verzijl is considering is not that of choosing one of two nationalities but only that of ascertaining that each one of the two contesting States effectively considers and treats the person in question as its national.

(f) The International Court of Justice, in its Advisory Opinion of April 11, 1949, refers to "The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national" (International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1949, p. 186).

The same International Court, in the interval between the meeting of this Commission in Paris and the meeting in Rome, issued a decision in the Nottebohm Case (*Lichtenstein vs. Guatemala*) which is not a case of dual nationality; but it is interesting for our purposes to note what is set forth in the reasoning of the decision in regard to the problem of dual nationality when such problem arises because of the simultaneous possession of the nationality of two States involved in the dispute:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc. (*Reports of Judgments, Advisory Opinions and Orders*, 1955, p. 22, Nottebohm Case).

### (3). Legal literature :

(a) The institute of International Law, during its meeting at Cambridge in 1931, discussed an excellent report of Professor Borchard. It was entitled "Diplomatic Protection of Citizens Abroad". Its purpose was explained by

Borchard himself: "This report shall be confined to a study of the conditions for protection when a formal international request for damages can be submitted, either through diplomatic channels or before an international tribunal in conformity with the existing or appropriate rules of law" (translated from Spanish) (*Annuaire de l'Institut de droit international*, Session de Cambridge 1931, vol. I, p. 274).

Borchard's proposal was to make a compilation of the existing positive law, so as to avoid uncertainties and controversies. Therefore, he refused (*Annuaire*, 1931, vol. II, p. 203) to accept an amendment of Mr. Politis, supported by Messrs. de la Barra and James Brown Scott, in favour of the admissibility of diplomatic protection whenever there had been a change of nationality, because it meant an innovation. And this faithfulness of Mr. Borchard in adhering to the existing law and in not accepting any innovation was precisely the cause of the suspension of the discussion and its postponement to a later meeting (*Annuaire*, 1931, vol. II, p. 212).

Within the framework of positive law and of simple compilation within which the Yale Professor kept himself, there is to be noted this assertion of his: "It is a well established rule of international law that a person who possesses two nationalities cannot demand that one of the countries of which he is a national appear as defendant before an international tribunal" (translated from Spanish) (*Annuaire*, 1931, vol. I, p. 289).

Of the members of the XIXth Commission consulted by Borchard, only one, Prof. Kraus, proposed a change in wording, formulated as follows: "The protection of international law can be exercised in favour of individuals as well as of legal persons who possess the nationality of the protecting State if, according to the law of the defendant State, they do not simultaneously or exclusively possess the nationality of the latter State" (translated from Spanish) (*Annuaire*, 1931, vol. I, p. 481).

In the plenary discussion (*Annuaire*, 1931 vol. II, pp. 201 *et seq.*), no comment was made on the principle declared in this respect by Mr. Borchard. It should be noted that jurists representing the most varying legal systems in the world participated in the meeting.

(b) The writers of treatises on international law recognize the two principles which we are expounding. Two excellent contemporary authors, Rousseau and Battifol, attest their existence in books of recent publication date.

Rousseau writes: "In case of dual nationality, the claimant State in general refuses to protect a person against a State of which he is simultaneously a national; a claimant is not protected against his own State" (translated from Spanish) (Rousseau, *Droit international public*, Paris, 1953, p. 353).

In the same order of ideas, Battifol says: "Nevertheless, a positive limit is recognized to this liberty of the States (in the field of nationality): States may not exercise diplomatic protection on behalf of their nationals against other States which consider the latter as their own nationals" (translated from Spanish) (Battifol, *Droit international privé*, 2nd edition, Paris, 1955, p. 87).

However, both authors also mention the theory of effective nationality (Rousseau, op. cit., p. 364; Battifol, op. cit., p. 92).

The same theory, on the other hand, has not only been recognised but has also been adopted by jurists of such universal authority as A. de la Pradelle and Basdevant.

La Pradelle defends effective nationality even when the nationality of the defendant State is involved (*Dictionnaire Diplomatique*, under the heading *Nationalité*), and Basdevant, in an interesting comment on the Venezuelan Arbitrations of 1903-1905, emphasizes and explains the idea which predominates in those decisions according to which "the conflict between two nationalities

must be resolved by giving prevalence to the law with which the real nationality of the person in question corresponds" (translated from French) (*Conflits de nationalités dans les arbitrages vénézuéliens, Revue de droit international*, 1909, p. 41 et seq.).

#### V. CONSIDERATIONS OF LAW

(1). The rules of the Hague Convention of 1930 and the customary law manifested in international precedents and in the legal writings of the authors attest the existence and the practice of two principles in the problem of diplomatic protection in dual nationality cases.

The first of these, specifically referring to the scope of diplomatic protection, as a question of public international law, is based on the sovereign equality of the States in the matter of nationality and bars protection in behalf of those who are simultaneously also nationals of the defendant State.

The second of the principles had its origin in *private* international law, in those cases, that is, in which the courts of a third State had to resolve a conflict of nationality Laws. Thus, the principle of effective nationality was created with relation to the individual. But decisions and legal writings, because of its evident justice, quickly transported it to the sphere of *public* international law.

(2). It is not a question of adopting one nationality to the exclusion of the other. Even less when it is recognized by both Parties that the claimant possesses the two nationalities. The problem to be explained is, simply, that of determining whether diplomatic protection can be exercised in such cases.

(3). A prior question requires a solution: are the two principles which have just been set forth incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other? If the reply is in the affirmative, the problem presented is that of a choice; if it is in the negative, one must determine the sphere of application of each one of the two principles.

The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally. The principle according to which a State cannot protect one of its nationals against a State which also considers him its national and the principle of effective, in the sense of dominant, nationality, have both been accepted by the Hague Convention (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949 and the Nottebohm Decision of April 6, 1955). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible.

(4). The International Court of Justice, in its recent decision in the Nottebohm Case, after having said that "... international law leaves to each State to lay down the rules governing the grant of its own nationality", adds: "On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connexion with the State which assumes the defence of its citizens by means of protection as against other States." ... "Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connexion with the State which has made him its national." (Judgment of April 6, 1955, p. 23.)

For even greater reason, this theory must be understood to be applicable

to the problem of dual nationality which concerns the two contesting States, in view of the fact that in such case effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.

(5). The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty.

(6). The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole of the period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947). In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. 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.

(7). It is considered that in this connexion the following principles may serve as guides:

(a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

(b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

(c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

(d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

(8). United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United Nations nationals" under the Treaty, even if their prevalent nationality was the nationality of the third State.

(9). In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1930) with international custom and generally recognized principles of law in the matter of nationality, will reacquire its force.

#### VI. DECISION

Examining the facts of the case in bar, in the light of the aforementioned criteria, especially paragraph 6, in relation to paragraph 7 (c), the Commission holds that Mrs. Mergé can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

Inasmuch as Mrs. Mergé, for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf.

The Italian-United States Conciliation Commission, having noted the statement made during the deliberations by the Italian Representative in the name of his Government, according to which Mrs. Mergé, as an Italian national, will be able to submit a suitable claim to the competent Italian authorities, under domestic law, for the damages in question, even though the time-limit for such claims has expired, unanimously,

#### DECIDES:

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.

Madrid, June 10, 1955.

*The Third Member*

JOSÉ DE YANGUAS MESSIA

*The Representative of the  
United States of America*

J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

**MAZZONIS CASE—DECISION No. 56  
OF 10 JUNE 1955<sup>1</sup>**

Claim for compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Criteria adopted by Commission in order to establish prevalent nationality—Reference to Decision No. 55 handed down in Mergé Case.

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Demande en indemnité au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Critères admis par la Commission pour établir la nationalité dominante — Référence à la Décision n° 55 rendue dans l'affaire Mergé.

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The Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Prof. José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member chosen by mutual agreement between the United States and Italian Governments.

On the Petition filed by the Agent of the Government of the United States on March 1, 1951 *versus* the Government of the Italian Republic in behalf of Mrs. Winifred Cecil Mazzonis.

#### I. THE FACTS

On July 26, 1949, the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic, on behalf of Mrs. Winifred Cecil Mazzonis, a national of the United States of America, a claim based upon Article 78 of the Treaty of Peace for compensation for the loss as a result of the war of an automobile and other personal property located in Italy and owned by Mrs. Mazzonis.

As the Italian Ministry of the Treasury had rejected the claim on the grounds that Mrs. Mazzonis was an Italian national under Italian law, the Agent of the United States of America, on March 1, 1951, submitted to this Commission the dispute which had arisen between the two Governments with respect to the claim of Mrs. Winifred Cecil Mazzonis.

Following the Answer of the Italian Agent, the Conciliation Commission issued an Order on May 28, 1951, by which the dispute was limited to the consideration of the problem of Mrs. Mazzonis' dual nationality, and all other questions regarding her right to compensation were reserved for subsequent examination.

The following facts relating to the nationality status of Mrs. Mazzonis are revealed by the record:

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<sup>1</sup> *Collection of decisions*, vol. III, case No. 9.

Winifred Cecil was born in New York City on August 31, 1907, thereby acquiring United States nationality according to the law of the United States.

On November 26, 1942, at the age of 35, Winifred Cecil married Paolo Mazzonis in Turin, Italy. As Mr. Mazzonis was an Italian national, Winifred Cecil acquired Italian nationality by operation of Italian law, notwithstanding the fact that at the time of her marriage she was a national of a country then at war with Italy.

Mrs. Mazzonis, who had visited Italy for long periods prior to her marriage and who had remained in Italy at the outbreak of war between the United States and Italy, took up her residence with her husband at or near Turin following their marriage. She remained there after the war had ended and continued to reside with her husband in Italy until his death on June 8, 1948.

Shortly after her husband's death, Mrs. Mazzonis went to the United States for a brief period and on November 30, 1948 she returned to Italy for the purpose of settling the estate of her deceased husband.

In September 1949, Mrs. Mazzonis returned to the United States where she has since continuously resided.

## II. THE LAW

In its Decision in Case No. 3, *The United States of America ex. rel. Florence Strunsky Mergé vs. The Italian Republic*,<sup>1</sup> the Conciliation Commission has discussed at length the positions of the two Governments, as well as the interpretation of the Treaty of Peace and the principles of international law with reference to the right of the United States of America to bring before this Commission claims of its nationals who possess or formerly possessed Italian nationality, as well.

The Commission, therefore, refers to the principles established by that Decision and particularly to Paragraph 7 (c) of the Considerations of Law, wherein it is stated:

With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

Examining the facts of the instant case in the light of the aforementioned principles, the Commission holds that Mrs. Mazzonis, by reason of her conduct as it appears from the record, cannot be considered to have been dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because, apart from the fact that she married a national of a country then at war with her own country, thus acquiring the nationality of an enemy country, the family did not have its habitual residence in the United States, but in Italy where her husband's professional life was located, even after the end of hostilities when the family would have been able to move to the United States. If her husband had not died in 1948, Mrs. Mazzonis would presumably still be living in Italy.

Inasmuch as Mrs. Mazzonis, for the foregoing reasons, cannot be considered to have been dominantly a United States national, within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government on her behalf.

The Commission, therefore, unanimously,

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<sup>1</sup> Decision No. 55, *supra*, p. 236.

DECIDES:

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.

Madrid, June 10, 1955.

*The Third Member*

José DE YANGUAS MESSIA

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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PALUMBO CASE—DECISION No. 120  
OF MARCH 1956<sup>1</sup>

Claim for effective restitution of property—Requisition of apartment under Italian legislation—Whether constitutes measure that can be nullified under provisions of paragraph 2 of Article 78 of Peace Treaty—Scope of obligations under said provisions—Treaty interpretation—Reference to *ratio legis*—Reference to decisions of another Conciliation Commission—Meaning of expression “free of any encumbrances and charges of any kind”—Meaning of expression “as a result of the war”—Absence of direct link of causality between the war measure and the damage—Measure of a general and non-discriminatory nature—Rejection of claim.

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Demande en restitution d'un bien — Restitution effective — Réquisition d'un appartement en application de la législation italienne — Question de savoir si cette réquisition constitue une mesure annulable en vertu des dispositions du paragraphe 2 de l'article 78 du Traité de Paix — Portée des obligations découlant de ces dispositions — Interprétation des traités — Recours au *ratio legis* — Recours à des décisions rendues par une autre Commission de Conciliation — Signification de l'expression «libres de toutes hypothèques et charges quelconques» — Signification de l'expression «du fait de la guerre» — Absence de lien de causalité direct entre la mesure de guerre et le dommage — Mesure de caractère général et non discriminatoire — Rejet de la demande.

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The Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace, composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio

<sup>1</sup> *Collection of decisions*, vol. III, case No. 142. The Collection does not indicate the exact date of the decision.

Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Georges Sauser-Hall, *Emeritus* Professor of International Law at the University of Geneva, Third Member chosen by mutual agreement between the United States and Italian Governments,

On the Petition filed by the Agent of the Government of the United States of America on January 25, 1955, *versus* the Government of the Italian Republic in behalf of Mr. Francesco Palumbo Corsaro,

Having seen the *Procès-verbal* of Non-Agreement dated April 1, 1955, signed by the Representatives of the two Governments, in which no mention is made of any specific points on which agreement has or has not been reached,

Having heard the Agents of the two Governments during the oral discussion of February 23, 1956,

Having considered the facts set out below, on which there is no disagreement between the High Parties to this dispute:

A. Francesco Palumbo Corsaro (hereinafter referred to as the claimant) who is of Italian origin, emigrated to the United States of America where he was naturalized on January 7, 1919. Claimant is domiciled in New York and has resided at 240-242 via Messina, Catania, since 1951, but was unable to return to Italy in the years immediately following 1939 because of the war; and was therefore unable to attend to his business, and the property of which he was the owner, in Italy.

B. Claimant is the owner of property which includes a six-room apartment located at Via delle Acacie No. 10, Catania, and upon his return found that said apartment had been requisitioned since June 18, 1945 under Articles 2 and 3 of the Decree of the Lieutenant of the Realm No. 415 of December 28, 1944, by the Housing Commissioner in Catania in behalf of Dr. Carmelo Mazza, a surgeon-physician. Dr. Mazza had previously lived in that apartment but had been forced to vacate same because it has been struck by a bomb; and he and his family had been rendered homeless.

Dr. Mazza undertook to have the most urgent and indispensable repair work carried out, at his expense, in the claimant's apartment, and a note to that effect is made in the requisition decree giving Dr. Mazza the right to use this apartment as living quarters for himself and family upon the payment of rental, which was the subject of a subsequent decree.

C. The owner filed a separate claim with the Italian Government under Article 78, paragraph 4 (a) of the Treaty of Peace, in order to receive compensation for the war damages he had suffered; action was taken, compensation was duly paid and said claim is therefore not a part of this dispute.

D. As he desired to recover full control over his apartment, claimant resorted to legal action versus Dr. Mazza, before the competent Italian Magistrate, directed at obtaining the nullification of the legal extension of the lease resulting from the requisition; and the eviction of the tenant; but his request was rejected by decision dated July 20, 1952, as the Court had ascertained that the claimant was also the owner of several other apartments which were fully suited to the needs and requirements of an individual living alone; and, furthermore that he did not intend to establish his domicile in Italy or to sever his connexions with his interests in the United States.

E. Following the failure of his legal action, it was the claimant's intention to hold the Italian Government responsible for the non-restoration of his apartment. He argued that said apartment had become vacant and liable to requisitioning only because it had been damaged as the result of an act

of war, that the Decree of the Lieutenant of the Realm No. 415 of December 1944 had been enacted to ensure living quarters to individuals who had been rendered homeless as the result of war operations, and that Italy was responsible under the Treaty of Peace to restore all legal rights and interests of United Nations nationals.

This claim was espoused by the Government of the United States of America and filed with the Italian Ministry of the Treasury, who rejected it by decision dated April 10, 1953. Subsequently, by Petition dated January 25, 1955, the Agent of the United States of America decided to place the Francesco Palumbo Corsaro Case before the Conciliation Commission.

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*Considerations of Law:* Having considered that the Agent of the United States of America bases his Petition on paragraphs 1 and 2 of Article 78 of the Treaty of Peace, which read as follows:

Article 78, paragraph 1: "In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists."

Article 78, paragraph 2: "The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of any encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connexion with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940 and the coming into force of the present Treaty. . . ."

1. It is the contention of the Agent of the United States of America that the obligation undertaken by Italy under the above provisions imply the restoration of an apartment free of all encumbrances or charges resulting from requisition, even if this measure was adopted in the application of a law directed at ensuring living quarters to individuals who had been deprived of their homes, and, in support of his theory, he cites the arguments of a number of decisions handed down by the Italian-United States Conciliation Commission and by the Italo-French Conciliation Commission, chiefly Decision No. 107 of September 15, 1951 concerning the Heirs of H.R.H. the Duc de Guise,<sup>1</sup> the scope of which will be examined later. He concludes by requesting that the Commission decide that the Italian Government is obligated to re-establish Francesco Palumbo Corsaro, a national of the United States of America, in his full right to regain possession of his apartment located at Via Acacie No. 10, Catania, and to nullify the measure of requisition in behalf of Dr. Mazza.

2. The Italian Government opposes this request on the grounds that the limitations to the owner's rights of control over his property are not the result of the war measures contemplated in the afore-mentioned articles of the Treaty of Peace, said to have been adopted by the Italian Government; that in the instant case the Italian Government has not adopted any measure of seizure, sequestration or control against the claimant's property.

He contends that the requisition of an apartment, under Italian law in the struggle against the lack of housing, is in the nature of a general measure which is applied regardless of the owner's nationality and which concerns

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<sup>1</sup> Volume XIII of the these *Reports*.

Italian owned property as well as the property of United Nations nationals and other aliens, and which cannot, therefore, give rise to any claim based on the Treaty of Peace.

Some of the decisions of the Conciliation Commission cited by his Opponent appear to him to be non-pertinent while the others, if correctly interpreted, support his theory. The Agent of the Italian Government concludes by stating that his Government cannot be obligated to restore the *quo-ante* status by nullifying the order of requisition, which would lead to the eviction of Dr. Mazza and his family from the apartment in which they are at present living and which Dr. Mazza has rendered habitable at his expense.

3. The Commission must take notice of the fact that the disputed points of law between the two Governments are focused on the question as to whether or not the implementation of Decree No. 415 of the Lieutenant of the Realm of December 28, 1944 must be considered as one of the measures which the Italian Government is obligated to nullify under Article 78, paragraph 2 of the Treaty of Peace, as it is admitted, and there is no disagreement on this point, that the measures specified in the Treaty constitute only an example and are not to be considered as a limitation.

4. In order to determine whether or not a measure of requisition comes under the requirements of Article 78, paragraph 2, of the Treaty of Peace obligating Italy to nullify such measure, the whole of the *ratio legis* of the provision should be considered. This provision is the result of the economic war which has gradually developed more and more since World War I and which has empowered the victorious nations, under all treaties of peace putting an end to hostilities (Treaty of Versailles and others) as well as under the Treaty of Peace drawn up at the conclusion of World War II, to force upon their opponents the cancellation of all measures taken during the war against property considered to be enemy owned, with the consequent obligations of restoration of all legal rights and interests of the former enemies, of restitution in kind, and, possibly, payment of indemnities in the amounts required by the treaties of peace.

It is the underlying concept which is found in all parts of treaties of peace dealing with property, rights and interests of United Nations and their nationals in the countries with which they have been at war and which must not be lost sight of in doubtful cases, when deciding whether a measure adopted by the Italian State engages the responsibility of said State and falls under the provisions of the Treaty of Peace.

5. *Ratione temporis*, it cannot be denied that the measure of requisition taken against the claimant's apartment was adopted within the space of time specified in the Treaty of Peace, that is, June 10, 1940 through September 15, 1947, the date of the coming into force of the Treaty; the Decree No. 415 of the Lieutenant of the Realm was in fact enacted on December 28, 1944 and the requisition decree is dated January 18, 1945.

But this coincidence of time is not sufficient to bring about the application of Article 78, paragraph 2 of the Treaty of Peace; a true and proper measure of the economic war directed against a national of the United States must be involved.

The Agent of the plaintiff Government has tried to establish the above fact by contending that Decree No. 415 was not a general law of the Italian State, that it was implemented immediately at Catania and that it was implemented in the remainder of Italy only at a later date; that, further, it was a temporary law as Article 14 thereof limited its duration to one year after the cessation of the state of war; he concludes by stating that the requisition

was in fact a special measure directed against a United States national. He further points out that the decisions of the Italian courts which have applied said Decree show that this action was justified by the events of war, that requisition was "the result of the very serious lack of available housing caused by the operations of war" (Tribunal of Trento, Decision of November 3, 1945, in the Bregoli and Beltrami Case, *Giurisprudenza Italiana* 1946, I, 2, 258); the same point of view is shared by Italian qualified legal writings.

The Agent of the plaintiff Government draws the conclusion that one is undoubtedly faced with a war measure which, even though not preceded or accompanied by seizure, sequestration or control of enemy property, is none the less contemplated by Article 78, paragraph 2 of the Treaty of Peace which obligates the Italian Government to nullify "all measures" resulting from the war, when the conditions of time are fulfilled, and to return the property free of all encumbrances and charges to which it may have become subject as a result of the war. In his opinion, the requisition made in behalf of Dr. Mazza is one of the charges that should be lifted.

6. The Commission finds that it cannot share this view. It is apparent from the very text of Decree No. 415 that there exists no connexion with the economic war, as Article 2, paragraph 1 of said law reads (in translation):

The Housing Commissioner may requisition for use the lodgings available in the commune in order to assign them under a lease to those who are in absolute need thereof and are resident in the commune or have been moved to it by order of the authorities, giving priority to those who were deprived of their dwelling because of the destructions caused by war operations or because of racial or political persecutions.

This provision, which is of a legislative nature, was enacted following the housing crisis and simply accords a preference to the victims of the events of war and of political and racial persecutions, regardless of nationality. This law, although the military situation prevailing at the time prevented its immediate implementation throughout Italy, was nevertheless a general law concerning Italian nationals, neutrals and enemy nationals, but not specifically directed against the latter whose property was not made the subject of discrimination thereunder.

7. The rules that must be observed in the subject claim are those contained in the first and second sentences of Article 78, paragraph 2. It is established therein that the Italian Government shall restore to the United Nations and their nationals their property, rights and interests free of all encumbrances and charges of any kind to which they may have become subject as a result of the war, and that all administrative measures adopted by the Italian Government in this connexion during the war shall be nullified.

8. The scope of this provision has given rise to disagreement between the Agents of the two Governments concerned, and this Commission, while appreciating the controversial legal arguments of the parties, believes it should refer to the two legal principles laid down several times in the past in the decisions of the Franco-Italian Conciliation Commission (Decision No. 33 of August 29, 1949 in the Guillemot-Jacquemin Case, and Decision No. 95 of March 8, 1951 in the Società Mineraria e Metallurgica di Pertusola Case),<sup>1</sup> that is:

(a) that the responsibility of the Italian Government under Article 78 of the Treaty of Peace can only be engaged when it is proved that there exists

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<sup>1</sup> Volume XIII of these *Reports*.

a direct link of causality between the measure adopted during the war by the Italian Government against nationals of the United Nations considered as enemies, and the resulting damage to the property, rights and interests of said nationals;

(b) that the obligations of the Italian State do not include payment of compensation for damages or nullification of the charges imposed on the property of United Nations nationals in cases where said damages or charges are the result of measures adopted under a general legislation, and are devoid of any character of specific war measure adopted against certain property, rights and interests in Italy.

With reference to the first principle, the Commission must first of all take notice of the fact that neither the Italian Government nor any of its administrative agencies has subjected the claimant's property to any economic war measure whatsoever. Claimant's title to the property has been and is recognized; it has not been subjected to any measure of seizure, sequestration or control. The obligation to restore "free of all encumbrances and charges to which they may have become subject as a result of the war" (paragraph 2 of Article 78) requires a few words of comment.

That the drafters of the Treaty of Peace have placed "all charges of any kind" and "*hypothèques*" or encumbrances on the same level clearly indicates that they intended to give consideration only to the limitations brought to the assets or to the control of enemy property by measures specifically directed against said property. This is always manifestly the case where a "*hypothèque*" is involved which is at all times a positive guarantee encumbering a specific piece of real property created for equally specific credits; the expression "all charges of any kind" covers all forms of restriction on property invariably resulting from special measures adopted against property owned by enemy nationals as such, but not from special measures adopted during the war which are not specifically directed against enemy owned property, even though they are measures of a nature that can also be taken against enemy property. A contrary interpretation would result in removing property owned by the United Nations and their nationals in Italy from the jurisdiction of a large part of Italian legislation enacted during the war to counteract the effects of the war, even though there does not exist an unquestionable link of causality between these measures and the limitation of the owner's rights or the charges he has had to bear.

Nevertheless, the Agent of the plaintiff Government has not succeeded in establishing an adequate link of causality between the limitations brought to the claimants' right of control over his apartment and the war measure of which he alleges to be the victim. Inasmuch as, during the proceedings, the Commission has failed to find any evidence that measures of such a nature were adopted against the claimant, it would be necessary, in order to establish the Italian Government's responsibility and the resulting obligation to restore the apartment free of requisition, to give the expression "as a result of the war" a meaning so broad as to become incompatible with the spirit of the Treaty of Peace.

The Italian-United States Conciliation Commission, as well as the Italo-French Conciliation Commission have had several occasions in the past to affirm that Article 78, paragraph 1 of the Treaty of Peace which places on the Italian Government a general obligation to restore legal rights and interests of the United Nations and their nationals in Italy and to return all property owned by said nationals in Italy certainly does not have the purpose of according them the benefits of some kind of general insurance against risks arising out of the war.

The Commission maintains that it is insufficient to establish an indirect relationship of causality between the existence of a state of war and the requisition of the claimant's apartment by the Italian authorities. The link between cause and effect is too distant to make one believe that the efficient cause producing a limitation of the claimant's rights of control over his apartment is as a result of the war, when the requisition measures contemplated by Italian legislation are aimed at protecting the civilian population against the consequences of the war and not to make the conduct of the economic war more effective.

It is deemed advisable to point out, nevertheless, that the claimant's rights have received due consideration under Article 2, paragraph 2 of Decree No. 415 of the Lieutenant of the Realm of December 28, 1944, which reads textually (in translation):

The Housing Commissioner may de-requisition the assigned lodging whenever it is proved that it is absolutely necessary for the owner or former tenant to occupy it without delay, provided that another dwelling be assigned to the assignee.

In view of the fact that claimant could not produce this proof his civil legal action directed at obtaining the eviction of Dr. Mazza from his apartment failed. Therefore, the state of war was not in itself the determinant factor in keeping the requisition measure in existence, but the fact that the claimant was the owner of other apartments which he could use as living quarters was also given due consideration.

Lastly, if one considers that under the Italian legislation relating to the extension of leases (Decree No. 669 of the Lieutenant of the Realm of October 12, 1945 and subsequent laws) the tenant had the right to stay in the apartment he had rented, and that even if said apartment had neither been bombed or requisitioned, the claimant's legal position would be the same as the one in which he stands today, it is evident that his impossibility to regain complete control over his apartment is not the direct consequence of the measures adopted against his property as a result of the war and that Article 78, paragraph 2 of the Treaty of Peace is not applicable in this case.

Coming to the second principle it is important to note that the requisitioning of Mr. Palumbo Corsaro's apartment is the consequence of legislative measures generally applicable in Italy, irrespective of nationality, in order to mitigate, in so far as possible, the lack of available housing brought about by the destructions caused by the war, the massive flow of refugees abandoning the localities in which active warfare was being waged and by individuals fleeing from political and racial persecutions.

The Commission does not wish to affirm undoubtedly by the above that whenever a measure of a general and non-discriminatory nature was taken by Italy during the war this condition is sufficient in itself to make Article 78, paragraph 2, of the Treaty of Peace inapplicable; or rather that whenever a provision aiming at weakening the enemy's resistance or increasing Italy's war effort is involved this measure shall not give rise, notwithstanding its non-discriminatory character, to an action for restitution, nullification or indemnification if it was adopted against enemy property, rights and interests. This second theory, which was applied in a previous case, to wit, the Grottanelli Shafer Case involving requisition of metals regardless of the nationality of the owners or holders thereof (Decision No. 27 of the Italian-United States Conciliation Commission of December 6, 1954)<sup>1</sup> could in no way be invoked in the instant case.

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<sup>1</sup> *Supra*, p. 205.

The requisition of living quarters is in fact of an entirely different nature. In this case there are not only involved measures of a general and non-discriminatory nature which, even if adopted during the war, are not directed against enemy property, but they are measures of assistance inspired by a spirit of solidarity and humanity and are not intended to harm the enemy nor do they contribute to strengthen the war effort of a belligerent State.

These measures have no other purpose than to alleviate the sufferings caused by the war in providing, even though inadequately, a roof over the heads of civilians whose homes were destroyed by military operations or dispersed by political and racial persecutions.

The above interpretation would be further allowed under the provision of Article 78, paragraph 4 (d) of the Treaty of Peace regarding compensation to be paid by the Italian Government to United Nations nationals who have suffered injury or damage as a result of special measures adopted against their property during the war, because one should not consider as losses those concerning the substance of the property referred to in Article 78, paragraph 4 (a), but those losses which are the result of administrative measures, of a discriminatory treatment adopted against enemy-owned property. It is specifically stated in Article 78, paragraph 4 (d) that the special measures which justify payment of compensation are only those which are adopted against property owned by enemy nationals "and which are not applicable to Italian property". If the aforesaid measures concerned both, enemy-owned property and Italian-owned property at the same time, their scope was of a general and non-discriminatory nature thereby excluding the payment of compensation to United Nations nationals. The principles of interpretation by analogy permit us to conclude that if limitations on property, rights and interests, irrespective of the nationality of the owner, do not give rise to the right to receive compensation, they should neither give rise to the right of cancellation in all cases where the general and non-discriminatory measures are of a civil character and do not have a direct and adequate relationship with the acts of war.

9. The Commission is of the opinion that the various judicial decisions cited by the Agent of the Government of the United States of America have certain peculiarities which are not to be found in the instant case. In the three cases involving the lifting of sequestration of living quarters before the Italo-French Conciliation Commission, the Commission ruled that in order to oblige the Italian Government to make restitution free of all encumbrances and charges, it was necessary that said Government had previously seized or sequestered, or placed under control, or had taken possession of the subject living quarters in some other manner. Now, in one of the cases cited, the Italian Government had not adopted any war measure, and the occupation of the premises by third parties was the result of a lease stipulated by the owner before the war, subsequently renewed by his attorney during the war, and finally obligatorily extended under Italian legislation; claim for restitution of the premises was rejected (Decision No. 33 of August 29, 1945, Guillemot-Jacquemin Case).<sup>1</sup> The other two cases cited by the Agent of the United States of America involve real property sequestered by the Italian Government because enemy-owned. In one of the cases the Sequestrator himself had renewed and amended the leases and these measures were to be subject to cancellation together with the lifting of sequestration; and the property was therefore restored free of all leases (Decision No. 85 of September 18, 1950,

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<sup>1</sup> Volume XIII of these *Reports*.

Ottoz Case).<sup>1</sup> The last case involved real and personal property sequestered by the Italian Government because enemy owned and subsequently requisitioned by reason of public policy on August 29, 1947, by the President of the Sicilian Region for setting up offices and services in the sequestered building. When the property was requisitioned, sequestration was legally lifted but this was not followed by the material restoration of the building and the personal property it contained to the owners who were French nationals. The property had been requisitioned but it was encumbered by a measure of sequestration which continued to exist *de facto*; Italy intended to return the property encumbered by a right of use and occupancy for an indefinite duration which constituted a true and proper charge, similar to a positive and permanent right and therefore in contrast with Article 78, paragraph 2 of the Treaty of Peace; the requisitioning of living quarters in favour of refugees or persecuted individuals was not here involved; furthermore, no court had taken judicial notice of the fact, as in the instant case, that the Sicilian authorities had found it impossible to establish elsewhere the offices and services of the President of the Region. Also in this case restoration of requisitioned property, but placed under a sequestration which in fact had never been lifted, was obligatory because a special measure directed against enemy property was involved; and the Commission so ruled (Decision No. 107 of September 15, 1951, Heirs of H.R.H. the Duc de Guise Case).<sup>2</sup>

The case concerning Mr. Palumbo Corsaro's apartment distinctly differs from the Ottoz and Duc de Guise cases in that the claimant's property was never made the subject of a previous measure of sequestration, seizure or control, nor of any other measure that could have permitted the Italian Government to gain control over said property; it follows that the Italian Government cannot be obligated to make restitution; the claim filed with the Italian Government directed at obtaining the lifting of the sequestration measure which was adopted in behalf of Dr. Mazza finds no support in the Treaty of Peace, as a general legislative measure is here involved which was applicable to all property in Italy and which was taken against the property of a United States national at a time, namely on the date of the requisition decree, when the American title to the property was in all likelihood unknown to the Italian authorities.

In view of the above considerations, the majority Commission

DECIDES:

1. That the Petition filed by the Agent of the Government of the United States of America in behalf of Mr. Francesco Palumbo Corsaro, a United States national, is rejected.
2. This Decision is final and binding.

DONE in Rome, at the seat of the Commission, Via Palestro 68, March, 1956.

*The Third Member*

Georges SAUSER-HALL

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

DISSENTING OPINION OF THE REPRESENTATIVE OF THE UNITED STATES OF AMERICA IN THE CASE OF THE UNITED STATES OF AMERICA EX REL. FRANCESCO CORSARO PALUMBO VS. THE ITALIAN REPUBLIC

If the decision of the Third Member in this case had been based on grounds acceptable to the Representative of the United States of America, I would certainly have joined with my two esteemed colleagues in affixing my signature to it.

For it is my opinion that Decree No. 415 of December 28, 1944, under which the claimant's apartment was requisitioned by the Italian authorities in order to provide a shelter for a family which would otherwise have been homeless, was not intended to assist the Italian war effort against the Allied and Associated Powers, but was instead intended to repair, to the extent possible, some of the human suffering which had taken place as a result of the war in Italy. The very fact that the claimant's apartment was requisitioned as late as June 10, 1945, at a time when hostilities had already ceased, would indicate that this requisition was not a measure contemplated by Paragraph 2 of Article 78 of the Treaty of Peace, and was therefore not a measure which Italy is now obligated to annul under the terms of the Treaty.

The Representative of the United States of America would have been pleased to sign a decision rejecting the Petition of the Agent of the United States, if the ratio of the decision had been limited to the statement of the Third Member (No. 8 of the Considerations of Law) that the implementation of Decree No. 415 was "inspired by a spirit of solidarity and humanity and . . . not intended to harm the enemy nor . . . contribute to strengthen the war effort of a belligerent State".

However, the quoted statement is almost lost in the lengthy exposition of the motives of the Third Member's decision. The Third Member chose to base his decision on two general grounds which are totally unacceptable to the Representative of the United States as a matter of logic and as a matter of interpretation of this treaty. The two reasons advanced by the Third Member for rejecting the Petition of the Agent of the United States on behalf of Francesco Corsaro Palumbo are as follows: (a) Decree No. 415, permitting requisitioning of living quarters, was not a result of the war; and (b) a measure taken by the Italian Government which affects enemy property must have been taken *because* the property was *enemy* property in order to bring the claim under the provisions of Paragraph 2 of Article 78.

I maintain (a) that the requisition of housing under Decree No. 415 was a direct result of the war. No possible interpretation can be given to the word "result" in the above context which would exclude the requisition of housing rendered necessary by the operation of belligerent States within Italian territory.

I maintain (b) that a measure taken by the Italian authorities during the war need not have been taken against property *because* it was *enemy* property in order to constitute a measure which must now be annulled under Paragraph 2 of Article 78. Paragraph 2 does not distinguish, in requiring nullification of "all measures" taken by the Italian Government against United Nations property, between measures taken because the property was *enemy-owned* and measures taken against property generally, whether *Italian-owned* or *enemy-owned*. The Grottanelli Shafer Decision (No. 27)<sup>1</sup> of this Commission specifically so decides, and goes even further by maintaining that, if property

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<sup>1</sup> *Supra*, p. 205.

taken under a non-discriminatory measure cannot be returned to the owner, the Italian Government is responsible under Paragraph 4 (a) to pay compensation for the loss of the property.

While the Shafer Case can be distinguished, as the Third Member has pointed out in No. 8 of the Considerations of Law, from the instant case, on grounds that the requisition of scarce metal early in the war was clearly designed to strengthen the Italian war effort, whereas the requisition of housing after the cessation of hostilities was not so designed, the motive of the decision from which I am now dissenting, to the effect that the measure must have been directed against enemy property *as such* is in direct contrast with the reasoning of the Grottanelli Shafer Decision.

Moreover, no analogy can be drawn from Paragraph 4 (d). Paragraph 4 (d) was originally drafted by the French Delegation in the negotiations for the Treaty of Peace in order to provide 100% compensation for damages due to discriminatory measures, as opposed to a smaller measure of compensation under Paragraph 4 (a) for damages due to the non-return of property taken under general, non-discriminatory measures of the Italian Government during the war. A study of the negotiations leading to the text of the present Article 78 would lead to the rejection of the inferences drawn by the Third Member in this decision from the language of Paragraph 4 (d).

The Third Member's decision attempts, finally, to deny the applicability to the instant case of the principles announced in the Duc de Guise Decision<sup>1</sup> of the Franco-Italian Conciliation Commission on the grounds that the sequestration of the building in that case continued to exist *de facto*, although it had been cancelled *de jure* and a measure of requisition had been taken against the building because of the lack of other available buildings. The Representative of the United States must confess that he cannot conceive of the continued existence, *de facto*, of the sequestration measures in the Duc de Guise case, and he ventures to suggest that no Italian jurisdictional organ would have viewed the situation as the continuation *de facto* of a sequestration under the War Law of 1938.

It might be added, in this connexion and in support of what has been said above regarding the causal relation between the requisition and the war, that the Third Member has not attempted to explain how the requisition of the building in the Duc de Guise case was considered by the Franco-Italian Conciliation Commission to be "result of the war", whereas the requisition of the apartment in this case has not been considered to be a "result of the war". In both cases, the property was requisitioned because the war had caused a shortage of similar buildings.

For the foregoing reasons, the Representative of the United States of America cannot sign the Decision rejecting the Petition of the Agent of the United States in this case, and he furthermore takes exception to all statements contained in the decision which declare or imply that a measure, in order to be subject to nullification by virtue of Paragraph 2 of Article 78, must have been taken against United Nations property only for the reason that the property was owned by an enemy of Italy.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

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<sup>1</sup> Vol. XIII of these *Reports*.

**TREVES CASE—DECISION No. 144  
OF 24 SEPTEMBER 1956<sup>1</sup>**

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

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

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

**CONSIDERATIONS OF FACT:**

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

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

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

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<sup>1</sup> *Collection of decisions*, vol. IV, case No. 95

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONSIDERATIONS OF LAW:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> *Supra*, p. 212.

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

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

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

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

<sup>1</sup> Volume XIII of these *Reports*, Decisions Nos. 176 and 201.

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

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

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

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

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

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

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

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

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

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

**DECIDES:**

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

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

2. This Decision is final and binding.

Rome, September 24, 1956.

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

*The Third Member*  
Plinio BOLLA

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

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

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

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

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

<sup>1</sup> *Infra*, p. 272.

<sup>2</sup> *Infra*, p. 283.

<sup>3</sup> Volume XIII of these *Reports*, Decisions Nos. 47, 95, 121.

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> Volume XIII of these *Reports*, Decision No. 144.

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

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

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

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

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

Rome, October 11, 1956.

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

LEVI CASE—DECISION No. 145 OF  
24 SEPTEMBER 1956<sup>2</sup>

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

<sup>1</sup> *Supra*, p. 187.

<sup>2</sup> *Collection of decisions*, vol. IV, case No. 96.

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

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The Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between Italy and the Allied and Associated Powers, and composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Plinio Bolla, former President of the Swiss Federal Court, Third Member chosen by mutual agreement between the United States and Italian Governments, on the Petition of the Government of the United States, represented by its Agent, Mr. Carlos J. Warner and subsequently represented by its Agent, Mr. Edward A. Mag at Rome, on behalf of Mr. and Mrs. Vittorio Leone Levi and Amalia Sacerdote Levi, residing at Maine Road 785, Vineland, New Jersey, *versus* the Government of the Italian Republic, represented by its Agent, State's Attorney, Prof. Dr. Francesco Agro at Rome.

#### CONSIDERATIONS OF FACT:

A. Mr. and Mrs. Vittorio Leone Levi and Amalia Sacerdote Levi (hereinafter Mr. and Mrs. Levi), Italian nationals of Jewish origin who were domiciled in Turin, took refuge in the United States following the racial persecution, and were naturalized as American nationals by decree dated April 15, 1946 of the Court of Cumberland County (Common Pleas) at Bridgeton (New Jersey).

They were the owners in Turin, Italy of the following real property:

1. a house used for dwelling purposes at via Massena 92;
2. one half of a house used for dwelling purposes at via Bossolasco 6;
3. one half of a house used for dwelling purposes at via Bossolasco 8;
4. an apartment located on the first floor of a building in piazza Solferino 3.

Before they left Italy, Mr. and Mrs. Levi lived in the house at via Massena and were the owners of the furniture located therein.

The property owned by Mr. and Mrs. Levi in Italy was confiscated following the Legislative Decree of the Head of the Government dated January 4, 1944, No. 2, published in the Official Gazette No. 6 of January 10, 1944, which reads as follows:

The Duce of the Italian Social Republic, Head of the Government;

Having considered the urgent necessity to make provisions;

Having seen Law Decree No. 1728 of November 17, 1939 containing provisions relating to the protection of the Italian race;

Having seen Law Decree No. 739 of February 9, 1939 regarding the rules implementing and completing the provisions referred to in Article 10 of Law

Decree No. 1728 of November 17, 1938 in connexion with the limitations imposed on the real property owned and the industrial and commercial activities carried out by Italian nationals belonging to the Jewish race;

Having heard the Council of Ministers;

DECREES:

Art. 1. Italian nationals belonging to the Jewish race . . . cannot, in the territory of the State:

(a) . . .

(b) be the owners of land or buildings and related items

(c) own stocks, valuables, credits and participation rights, whatever the nature, nor can they be the owners of other real property, whatever the nature,

Art. 7. Real property and related items, personal property, industrial and commercial enterprises and any other source of profit in the territory of the State owned by Italian nationals belonging to the Jewish race . . . shall be confiscated on behalf of the State and given to E.G.E.L.I. for administration.

Art. 8. The decree of confiscation shall be issued by the Chief of the Province who has jurisdiction over the territory where the individual property is located.

Art. 13. The sale of the property confiscated under Article 7 shall be effected by E.G.E.L.I.

Art. 15. The sums collected under the preceding Article 14 shall be paid in to the State as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damages to persons rendered homeless by enemy air attacks.

Art. 21. This decree shall come into force on the same day on which it is published in the Official Gazette of Italy.

The house at via Massena was in addition requisitioned in behalf of the German Standortkommandatur of Turin, by Decree No. 1811 of July 20, 1944 of the Chief of the Province of Turin. Following this requisition, the furniture was seriously damaged and many items of furnishing and of clothing were looted.

The house at via Bossolasco 6 suffered damages as a result of the air bombardments which began on November 20, 1942. The house at via Bossolasco 8 was damaged by the air displacement caused by the explosion of a bomb which fell on July 2, 1944. The building at via Solferino 3 suffered damages during the air raids of November 18 and 20, 1942.

At the conclusion of hostilities, the furniture owned by Mr. and Mrs. Levi, that still existed, was returned to the claimants' attorneys on July 4, 1945 by the Istituto di San Paolo of Turin, E.G.E.L.I. Section.

The real and personal property owned by Mr. and Mrs. Levi in Turin was entered on the roles of the special progressive tax on property, under which heading they paid various sums in the global amount of 192,630 lire. Other sums, under the same heading, are still claimed from Mr. and Mrs. Levi by the Italian fiscal authorities.

By note dated June 13, 1950 addressed to the Embassy of the United States of America in Rome, the Ministry of Foreign Affairs of the Italian Republic, recognized the applicability, under the Italian-U.S. Agreements, of paragraph 6 of Article 78 of the Treaty of Peace to the special progressive tax on property

and to the special proportional tax on the property of companies and corporations. Said paragraph 6 reads as follows:

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

B. On February 19, 1951 the Embassy of the United States of America, requested the Ministry of the Treasury of the Italian Republic that, in application of Article 78 of the Treaty of Peace:

(a) Mr. and Mrs. Levi be compensated for the losses suffered by their property in Italy as a result of the war,

(b) the sums paid for the purposes of the special progressive tax on property be reimbursed,

(c) it be recognized that the property owned by Mr. and Mrs. Levi was exempt from this tax.

C. By letter dated June 26, 1953 the Ministry rejected this claim and espoused the following opinion rendered by the Interministerial Commission:

The Commission,

Considering that the American nationals Levi Vittorio Leone and Amalia Levi née Sacerdote submitted a claim under Art. 78 of the Treaty of Peace to obtain compensation for damages sustained by their real and personal property, as well as reimbursement of the extraordinary tax on patrimony paid in 1947 and of the costs of the claim;

Considering that the claimants, Italian nationals who acquired American nationality on April 15, 1946, are not therefore entitled to invoke the application of Art. 78 of the Treaty of Peace since they did not possess the nationality of one of the United Nations on September 3, 1943, or American nationality at the time of damages which occurred in the period 1942-1944;

That it does not appear that the claimants were treated as enemy under Italian war laws in that the measures taken against only part of their property were adopted in application of racial laws, which also applied to Italian nationals, and not by virtue of war laws which, moreover, did not apply to the claimants who were then Italian nationals;

Expresses the opinion that the claim of Mr. Leone Vittorio Levi and his wife Amelia Sacerdote is to be rejected.

D. On May 20, 1954 the Agent of the United States of America on the Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between the Allied and Associated Powers and Italy, filed a Petition with the Joint Secretariat on behalf of Mr. and Mrs. Levi. The Petition concludes by requesting that the Commission:

(a) Decide that the claimants have been treated as enemy under the laws in force in Italy during the war within the meaning of paragraph 9 (a) of the Treaty of Peace in view of the fact that during the war and after all Jews were declared to belong to enemy nationality, concrete measures were taken against property belonging to them under Italian anti-Semitic legislation and property belonging to them was requisitioned as Jewish property by Decree No. 1181 issued on July 7, 1944 by the Head of the Province of Turin;

(b) Order that the claimants are entitled to receive from the Italian Government the entire amount (in view of the Exchange of Notes of February 24, 1949) necessary to make good the loss suffered by them through damage to their property, which loss was estimated as of the date of the filing of the claim, February 19, 1951, to be 1,073,335 lire plus the sum of 91,730 lire, the reasonable costs incurred in preparing the claim;

(c) Order the Italian Government to exempt under paragraph 6 of Article 78 of the Treaty the claimants and their property from the Extraordinary Progressive Patrimonial Tax and to reimburse the claimants for the sum of 192,630 which they paid as Extraordinary Progressive Patrimonial Tax before the claim was submitted;

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

The Petition invokes Article 78 of the Treaty of Peace, and more specifically: (a) paragraph 4 thereof concerning Italy's obligation to indemnify, under certain conditions and to a certain extent, the losses and damages suffered during the war by property owned in Italy by the United Nations nationals; (b) paragraph 6 thereof, cited above, regarding the exemption of United Nations nationals from certain taxes, levies or imposts of a special nature.

According to the Agent of the United States, the claimants, now United States nationals, were formerly United Nations nationals within the meaning of paragraph 9 of Article 78 of the Treaty of Peace, because they were treated as enemies under the laws in force in Italy during the war. This treatment consisted in the sequestration and confiscation of their real and personal property located at via Massena 92. These concrete measures were taken because the property involved was Jewish-owned; and in compliance with the anti-Semitic legislation of the Salò Republic. The first Assembly of Republican Fascism, which was the legislative authority of the Republic of Salò and which effectively controlled that part of Italy which had not yet been liberated by the Allied Forces, issued a policy for the programme of action; point 7 thereof affirmed:

Individuals belonging to the Jewish race are aliens. During the war they belong to enemy nationality.

While the United States have no intention of extending an *ex post facto* recognition to the Republic of Salò, it contends that the above mentioned provisions of law of the Republic of Salò were laws in force in Italy during the war within the meaning of paragraph 9 (a) of Article 78 of the Treaty of Peace. In this connexion the United States Agent cites the Decision of January 17, 1953 issued by the Italo-French Conciliation Commission in the Mossé-Goldschmit Case.<sup>1</sup>

E. In his Answer of June 30, 1954, the Agent of the Italian Government denied that Mr. and Mrs. Levi were treated as enemies under the laws in force in Italy during the war, in view of the fact that the anti-Jewish law enacted by the so-called Italian Social Republic could not be considered as law. This Republic was either an Agency of the German Reich, through which the Reich operated as an occupying power within the limits of international lawfulness proper to an occupying power, or a *de facto* legal system, or it was not even a *de facto* legal system nor a Government of insurgents but the transient rise of a faction to the nominal holding of power. The so-called Italian Social Republic can be considered as a system only in the event that

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<sup>1</sup> Volume XIII of these *Reports*, Decision No. 144.

one excludes from that system the essential constituent element of the characteristic of legality or at least of juridicity. But even if the system were admitted, there is a very considerable difference between a system and a State. The acts performed by these Governments cannot have any legal value until such time as said Governments, when the stage of violent insurrection is over, are constituted and organized as a stable power in a certain territory and precariously replace the previous lawful Government. But when the so-called *de facto* Government is conquered and wiped out in a very short time, its acts cannot acquire legal importance except within the limits permitted by the system of the lawful State. Furthermore, any "law" is generally a political act; and it is certainly so whenever a law is enacted in execution of a political policy programme of the insurgent. Now, the anti-Jewish "law" of 1944, enacted by the Italian Social Republic, was not of an "impersonal nature" nor was it in the nature of an administrative routine; therefore it must be considered as a "non-law", and hence radically null. The Mossé-Goldschmidt decision which has been referred to does not deal with the capacity of the Italian Social Republic to enact laws but with the question of charging a State with international responsibility for acts and facts performed within the national territory by an illegal group.

The Agent of the Italian Government has therefore requested that the claim be declared inadmissible and in any event rejected.

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

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

The Agents confirmed their contentions, arguments and conclusions.

The Agent of the Italian Government set forth several new arguments. He contended that the time-limit of September 3, 1943, specified in the first paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace, should be valid also for the second paragraph, and thus, under the terms of this second paragraph, treatment as enemy could have occurred only prior to September 3, 1943; that this treatment has not occurred in the instant case. Furthermore, according to the Italian Agent, in accordance with the opinions rendered by the Italian-United States Conciliation Commission (Decision dated February 19, 1954, Bacharach Case)<sup>1</sup> "to be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one) and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals"; these conditions, he adds, do not occur in the case of Mr. and Mrs. Levi.

#### CONSIDERATIONS OF LAW:

1. Article 78 of the Treaty of Peace affirms the principle, in paragraph 1, that "Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists".

<sup>1</sup> *Supra*, p. 187.

The following paragraphs 2 and 6 derive from this principle a certain number of corollaries which they specify by charging the Italian Government with the obligations of returning property, of paying compensation and expenses, of annulling measures or transfers, of exempting from taxes. Paragraph 7 broadens the territorial scope of the principle affirmed in paragraph 1. Paragraph 8 admits the possibility of deviating from the system established by Article 78, through agreements entered into between the owner of the property and the Italian Government. Paragraph 9 gives a definition of the expressions "United Nations nationals" (letter (a)), "owner" (letter (b)) and "property" (letter (c)).

Letter (a) of paragraph 9 is composed of two sub-paragraphs. According to the first, "United Nations nationals" means individuals who are nationals of any one of the United Nations, or corporations or associations organized under the laws of any one of the United Nations, at the coming into force of the present Treaty, provided that said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy". Under the second sub-paragraph "The term 'United Nations nationals' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy".

The Agent of the United States contends on the other hand that Mr. and Mrs. Levi must be considered as "United Nations nationals" within the meaning of the Treaty of Peace because they were treated as enemies under the legislation in force in Italy during the war. The Agent of the Italian Republic denies that the legislative enactments of the Italian Social Republic can be considered as laws in view of the fact that the State alone can enact laws and that the Italian Social Republic was not a State—even less the Italian State; the Italian Agent further denies that, in the application of the legislation of the Italian Social Republic against Mr. and Mrs. Levi there has been a material conduct on the part of the Italian authority of the nature that would justify the claimants being placed on the same level as enemy nationals; in any event such conduct would have occurred after September 3, 1943 and is therefore irrelevant with regard to the Treaty. This is the subject of the dispute.

2. With regard to the time-limit of September 3, 1943 this is mentioned in the first paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace, while the second paragraph makes no reference thereto. The Agent of the Italian Government contends that the regulation should be understood to be included in the second paragraph in view of the fact that the second paragraph only serves as a clarification of the first.

In actual fact, the two paragraphs deal with essentially different questions. The first, in order to avoid fraudulent manoeuvres which may have been made at a time subsequent to the Armistice, establishes a time-limit after which any change in the *status civitatis* must be considered as irrelevant in the application of the Treaty of Peace: physical persons shall not be considered as "United Nations nationals" unless they possessed this status on September 3, 1943, nor will companies and associations be considered as "United Nations nationals" unless they were established under the laws of one of the United Nations prior to September 3, 1943. The second paragraph of paragraph 9 (a) draws a similarity between "United Nations nationals" and physical persons, companies and associations that never were such nationals, but were treated as enemies under the legislation in force in Italy during the war; as the facts on which this similarity depends (legislation and treatment in Italy) are completely foreign to the initiative of the physical person, company or asso-

ciation affected thereby (an initiative which would have further represented a phenomenon of self mutilation) the drafters of the Treaty of Peace had no reason to guard against fraudulent manoeuvres subsequent to the Armistice and directed at obtaining a more favourable treatment in the application of the Treaty of Peace to come, by the insertion of a time-limit.

On the other hand one cannot consider as applicable, in the sphere of the second paragraph, the time-limit of September 3, 1943, for the very reason that the second paragraph establishes, at least implicitly, a different time-limit with the proposition "during the war". In order that the similarity intended by the Treaty may have its effect, it is sufficient that a person, whether physical or moral, have been treated as enemy under the legislation in force in Italy *during the war*, without letting the letter or the spirit of the Treaty authorize a distinction according to whether such a treatment occurred before or after September 3, 1943, which is not the date of the end of the war.

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

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

3. Coming to the other defensive arguments of the Agent of the Italian Government, it should be first of all recalled that after the Armistice with

<sup>1</sup> *Supra*, p. 212.

the Allies, announced the evening of September 8, 1943, the German forces became *de facto* the masters of Italy from the Alps to the south of Naples. They did not however take over the direct Government of this part of the country. Hitler had Mussolini liberated from imprisonment on September 12, 1943 and reinstated him in power. On September 28, 1943 Mussolini took over the duties of Provisional Head of the State pending a Constitution (established but never convened) and in that capacity he jointly covered the offices of Head of the Government and Minister of Foreign Affairs; the seats of the Government were established in northern Italy and Mussolini himself took up residence in the vicinity of Salò; thus the Republic of Salò was born with the officially adopted name of Italian Social Republic. When Mussolini was shot (April 28, 1945) and the German forces in Italy surrendered unconditionally (April 29/May 2, 1945) the Italian Social Republic ceased to exist (*Encyclopedie Italiana*, Appendice 1938-48, vol. II, pp. 102, 373, 686). For nineteen months, and therefore not transiently, there were thus, *de facto*, two Italys, each claiming to be the lawful one. Each had its territorial base. At the outset the Italian Social Republic was more extended and had a larger population, but the territory controlled by it in the peninsula became gradually increasingly smaller. Also the Italian Social Republic, which cannot be considered as an Agency of the German Reich, had its Government, a local one but one which aimed at losing this quality and which exercised legal powers with effective extrinsicability by means of appropriate agencies; these agencies carried out a legislative, jurisdictional and executive activity; the legislative enactments had the force of law for all citizens subjected to that system, and were enforced, as far as was permitted by the presence of foreign troops, by the war fought by these troops in the territory of the peninsula, by the civil war, by the deepening of internal contrast in the Italian spirit which was to give rise to the phenomenon of resistance. The Italian Social Republic specifically enacted laws, let alone the Jewish persecution, for the repression of the enemies of the new régime, for the punishment of the "traitor" fascists, for the establishment of a new Fascist army, for the establishment of a General Confederation of Labour; it also enacted laws in the technical and artistic fields and on the socializing of enterprises (*Encyclopedie Italiana*, loc. cit. vol. II, p. 102).

4. As is clearly indicated by the letter of the provision, the second paragraph of paragraph 9 (a) of Article 78 intended that the obligations imposed on Italy with regard to "United Nations nationals" were to be valid also on behalf of physical and legal persons who, *ope legis*, had been treated as enemies in Italy during the war. For the purposes of the text of Article 78, Italy must be here considered as the entire Italian territory recognized as such by the Treaty itself (cf. Decision dated March 16, 1956 of the Franco-Italian Conciliation Commission on the interpretation of Article 78, paragraph 7),<sup>1</sup> and therefore also that part of the territory which was actually controlled by the Italian Social Republic, excepting those portions ceded to France or Yugoslavia in compliance with the Treaty, or those destined to constitute the Free Territory of Trieste. The only matter of importance in the minds of the drafters of the Treaty was therefore focused on the laws which had actually been in force in that part of Italy where the treatment had occurred and which had brought about that treatment; they did not and could not give any consideration to the legality of said laws vis-à-vis the Italian system as it existed prior to the Armistice and, later, in force in southern Italy. Likewise they could give no consideration to the fate that said laws would suffer in the legal system of post-war Italy.

<sup>1</sup> Volume XIII of these *Reports*, Decisions Nos. 176 and 201

There are no grounds for assuming that the second paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace, intended to give an *ex post facto* recognition, for some reason or other, to the Italian Social Republic or render an opinion in favour or against the lawfulness of the so-called Salò legislation and thus clearly exceed the limits of the problems it was intended to solve. In order to obtain the specific purpose of the provision it would have sufficed that the enforcement, at the desired time, of the discriminatory legislation of Salò were considered as a condition of fact of the right accorded by the Treaty to the physical or legal persons, victims of such discrimination, to avail themselves of the privileges accorded to United Nations nationals against Italy.

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

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

5. There remains to be seen whether or not Mr. and Mrs. Levi were the victims of an effective conduct on the part of the Italian authority permitted by the laws of the Italian Social Republic and directed at placing them on the same level as enemy nationals.

The answer can only be in the affirmative. Mr. and Mrs. Levi had their property confiscated in Turin in application of Decree No. 2 of the Duce dated January 4, 1944. Certainly, no provision of this decree rules that Italian nationals belonging to the Jewish race, as far as their property is concerned, shall be considered or treated as enemies under the Italian War Law. But the second paragraph of paragraph 9 (a) of Article 78 does not require an abstract statement of similarity to enemy persons, and even less to persons having a specific enemy nationality; it is sufficient that the effective treatment ("*traitées*", "*treated*") intended by the law and applied by the Italian authority was that meted out to enemy persons. As regards enemy property, the Italian War Law provides conservatory seizure; the Decree of January 4, 1944 orders confiscation on behalf of the State, that is, not only administration by E.G.E.L.I. but the sale and the transfer of the price collected "to the State as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damages to persons rendered homeless by enemy air attacks". In other words, Italian nationals belonging to the Jewish race were doubtlessly considered to be responsible for certain war damages caused by the enemy and therefore, in actual fact, considered as enemies. The Decree

of the Duce of January 4, 1944 thus only gave material form to the principle No. 7 set before the First Assembly of Republican Fascism: "individuals belonging to the Jewish race are aliens. During the war they belong to enemy nationality", and confirmed a practice already followed, as is shown in a decree contained in the records of the case dated December 28, 1943 of the Head of the Province of Brescia; this decree placed under sequestration the property of Mr. Vittorio Coen by invoking the War Law and "having seen that the Jews are considered as subjects of an enemy State".

6. It must therefore be admitted that Mr. and Mrs. Levi had the status of "United Nations nationals" within the meaning of the second paragraph of paragraph 9 (a) of the Treaty of Peace. Wherefrom Mr. and Mrs. Levi derive their active right to claim under Article 78, paragraph 4 (a) of the Treaty itself (and subsequent Italian-U.S. Agreements related thereto). Italy has admitted to the United States that the afore-said paragraph 6 is applicable to the special progressive tax on property. It is not denied, and in any event it appears from the receipts included in the records of the case, that Mr. and Mrs. Levi have paid to the Italian Government the sum of 192,680 lire for the purposes of the special progressive tax on property; this amount must be reimbursed to them (Article 78, paragraph 6, *in fine* of the Treaty) and no further sums can be claimed from them under this heading (see note of June 13, 1950 of the Ministry of Foreign Affairs of the Italian Republic to the Embassy of the United States of America in Rome).

With regard to the war damages (Article 78, paragraph 4 of the Treaty of Peace) and to the reasonable expenses sustained during the proceedings (Article 78, paragraph 5 of the Treaty of Peace) it would be proper to accord a short time-limit to the Agent of the Italian Government in order that he may express an opinion on the amount claimed.

**DECIDES:**

1. The Petition is accepted in the sense that:

(a) Mr. and Mrs. Levi are lawfully entitled to avail themselves of the status of "United Nations nationals" within the meaning of Article 78, second paragraph of paragraph 9 (a) of the Treaty of Peace;

(b) the Italian Government shall reimburse to Mr. and Mrs. Levi the sum of 192,630 lire paid by them for the purposes of the special progressive tax on property; said reimbursement shall be effected within sixty (60) days beginning from the date on which this Decision is notified to the Agents of the two Governments;

(c) Mr. and Mrs. Levi are exempted from the payment of any further sums under the heading of special progressive tax on property;

(d) a time-limit of two months, beginning from the date on which this Decision is notified, is accorded to the Agent of the Italian Government in order that he may express an opinion on the amount claimed by Mr. and Mrs. Levi as compensation for war damages and reimbursement of expenses sustained during the legal proceedings.

2. This Decision is final and binding.

3. This Decision shall be notified to the Agents of the two Governments concerned.

Rome, September 24, 1956.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Third Member*

Plinio BOLLA

DISSENTING OPINION OF THE REPRESENTATIVE OF THE ITALIAN REPUBLIC  
IN THE VITTORIO AND AMALIA LEVI CASE

I do not feel I can agree with the Decision of the majority Commission for the reasons I have fully set out in my dissenting opinion in the Treves Case.

Rome, October 11, 1956.

*The Representative of  
the Italian Republic*

Antonio SORRENTINO

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WOLLEMBORG CASE—DECISION No. 146 OF  
24 SEPTEMBER 1956<sup>1</sup>

Claim under Article 78 of the Treaty of Peace—Exemption from special progressive tax on property—Active right to claim—Article 5 of Lombardo Agreement amending first part of paragraph 9 (a) of Article 78 of Peace Treaty—Interpretation of treaties—Treatment as enemy—Supremacy of Treaty over domestic law.

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Réclamation au titre de l'article 78 du Traité de Paix — Exemption d'un impôt extraordinaire sur le patrimoine — Droit d'action — Article 5 de l'Accord de Lombardo modifiant la première partie du paragraphe 9(a) du Traité de Paix — Interprétation des traités — Traitement comme ennemi — Primaute du Traité sur le droit interne.

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

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<sup>1</sup> *Collection of decisions*, vol. IV, case No. 109.

## CONSIDERATIONS OF FACT:

A. Leo J. Wollemborg (hereinafter the claimant), an Italian national of the Jewish race was born in Rome on August 30, 1912. In 1939 he took refuge in the United States to escape racial persecution in Italy. From May 20, 1943 to May 23, 1946 the claimant served in the United States Army and became an American national by naturalization on December 2, 1943.

B. Leo J. Wollemborg was and is the owner of land covering a surface of 4789,25 hectares and of three rural buildings in the municipality of Loreggia, Italy. As a consequence of the measures taken against the Jews and in compliance with a telegram of the Head of the Province dated December 13, 1943, this property was taken over by the Podestà of Loreggia on December 16, and was taken care of by the Jewish Property Commissioner at Padua from the end of December 1943 through May 10, 1945 on which date it was returned to its legitimate owner. The statement of account drawn up by Commissioner Ugo Vittadello showed a balance of 25,884.05 to the claimant's debit who paid said sum to the afore-mentioned Commissioner's office on April 5, 1946.

C. On September 11, 1945 and on December 11, 1946, Leo J. Wollemborg deposited with the Intendenza di Finanza at Padua two claims directed at obtaining compensation covering two-thirds (Article 78, paragraph 4 (a) of the Treaty of Peace) of the war damage which his real and personal property at Loreggia had suffered during the months of January and February 1945. The claimant, with regard to his active right to claim, invoked Article 5 of the Italian-U.S. Agreement of August 14, 1947, known as the Lombardo Agreement, under which

for the purposes of this Memorandum of Understanding, the term "nationals" means individuals who are nationals of the United States of America, or of Italy, or corporations or associations organized under the laws of the United States of America or Italy, at the time of the coming into force of this *Memorandum of Understanding*, provided, that under Article 3 above, nationals of the United States of America shall, for purposes of receiving compensation, also have held this status either at the time at which their property was damaged or on September 3, 1943, the date of the Armistice with Italy.

The claimant was naturalized on December 2, 1943, and therefore after September 3, 1943, but before the property was damaged as a result of the war.

D. On September 19, 1947 Mrs. Alda Menichini, claimant's attorney, filed with the District Office of Direct Taxation of Camposampiero a statement concerning the special progressive tax on property, established by Law Decree No. 828 of the Italian Republic on September 1, 1947. Said statement covered all the personal and real property owned in Italy by the claimant. On September 3, 1951, Mrs. Menichini, still acting as the claimant's attorney, accepted a compromise settlement (*concordato*) with the Tax Collector of Camposampiero, on the basis of which the taxable property for the purposes of the special progressive tax on property was fixed at 118,000,000 lire and the amount of the tax at 22,195,800 lire, plus an additional 2% beginning January 1, 1947 and the collection premiums.

E. On December 30, 1952 the Embassy of the United States of America submitted a claim to the Government of the Italian Republic, on behalf of Leo J. Wollemborg, directed at obtaining exemption from the payment of this special progressive tax on property, and this in application of Article 78, paragraph 6 of the Treaty of Peace.

At the time the claim was filed Mr. Leo J. Wollemborg had already paid

part of the sum agreed to under the compromise settlement for said tax. Subsequently, the claimant was requested to pay, and did in fact pay, further instalments of that sum. The balance was held in abeyance pending this decision.

The Government of the United States took the position that the request for the payment of further instalments which was made after the claim was filed on December 30, 1952, was to be interpreted as a rejection of said claim and, on December 28, 1954, placed the dispute before the Italian-United States Conciliation Commission.

F. Prior to the opening of these proceedings, the Embassy of the United States of America in Rome had written to the Ministry of the Treasury in Rome requesting that the two claims submitted on September 11, 1945 and December 11, 1946 be considered as war damage claims filed under Article 78 of the Treaty of Peace and the Agreements interpretative thereof and supplemental thereto. This communication is still unanswered to date.

G. The Petition filed on December 28, 1954 by the Agent of the United States of America concludes by requesting that the Commission:

- (a) Decide that the claimant is to be considered a United Nations national within the meaning of paragraph 9 (a) of Article 78 of the Treaty of Peace;
- (b) Decide that the claimant is entitled to exemption from the Extraordinary Progressive Patrimonial Tax imposed on his property by the Italian Government;
- (c) Order that any sums paid by the claimant to the Italian Government under the tax assessment dated September 3, 1951 be refunded to the claimant and that the claimant be granted interest thereon at the rate of 5%;
- (d) Order that the costs of and incidental to this claim including the necessary expenses of the prosecution of this claim before this Commission be borne by the Italian Republic.

According to the Agent of the United States Government, the claimant is a United Nations national, not only within the meaning of the first paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace, as amended by Article 5 of the Lombardo Agreement, but also within the meaning of the second paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace; in fact, because he was a Jew, the claimant was treated as enemy under the laws in force in Italy during the war; this conclusion is reached by the fact that his property at Loreggia was placed under sequestration in December 1943 and was restored to him only on May 10, 1945.

H. In his Answer of February 3, 1955, the Agent of the Italian Government concludes by requesting that the Conciliation Commission

declare the Petition submitted by the Hon. Agent of the Government of the United States of America on behalf of Mr. Wollemborg to be inadmissible for lack of right to claim or at least to reject it completely.

The Agent of the Italian Government takes the position that it is impossible to find treatment as enemy under the laws in force in Italy during the war in acts connected with the so-called laws of the Republic of Salò which—because it was itself outside the law—had neither right nor title to issue “laws”. The Agent of the Italian Government espouses the dissent of the Italian Representative, set forth at the end of the Decision rendered in December 1954 by the Italian-United States Conciliation Commission (Swedish Judge Emil Sandström acting as Third Member) in the Jack Feldman Case.<sup>1</sup>

<sup>1</sup> *Supra*, p. 212.

The Agent of the Italian Government considers that also the merits of the case are groundless; he states that we are faced with a tax settlement freely entered into by the lawful representative of the present claimant with the Italian Finance Offices at a time subsequent not only to the coming into force of the Treaty of Peace but also to the well known decision rendered by the Franco-Italian Conciliation Commission on August 29, 1949, concerning the patrimonial tax.<sup>1</sup> The Conciliation Commission, in the exercise of its powers, even though very broad, cannot proceed to an examination (not subordinate but a major issue) of that settlement which belongs wholly and entirely within the sphere of Italian domestic law.

I. The Agent of the United States Government filed a Reply on August 8, 1955 while the Agent of the Italian Government filed a Counter Reply on October 12, 1955.

The Reply and Counter Reply deal mainly with the exception raised by the Italian Government with respect to the tax settlement of September 3, 1951.

The Agent of the United States refers to the decision issued by the Supreme Court of Cassation and by the Central Commission of Direct Taxation in Italy, according to which the tax settlement (*concordato fiscale*) is not a compromise settlement entered into by the fiscal authorities and the tax-payer, and binding for the parties, but an administrative act of the Government which is agreed to by the tax-payer and therefore represents the combination of a public act (the assessment of the tax on the part of the authorities) with a private act (the agreement of the tax-payer to consider said assessment as final); the settlement does not prejudice the question of law which may again be raised within the prescribed time-limit before the competent agencies, in view of the fact that the settlement hinges and can only hinge on the amount of the tax to be levied, on the extent of the taxable property. In the instant case the settlement referred only to the amount of the tax payable by the claimant.

In his Counter Reply the Agent of the Italian Government has admitted that the settlement (*concordato*) does not constitute a compromise agreement in the private law sense of the term; according to the Italian legal system in matters of taxation, there is no possibility of a compromise agreement; on the other hand, the signing of the fiscal agreement at the time and under the conditions in which it was signed by Wollemborg's attorney, represents an act of acquiescence in the tax claim of the Italian Government; that this act of acquiescence which occurred in terms of domestic law, cannot be attacked on the international level; that by such act the legal relationship of taxation became extinct through the extinction of the fiscal obligation; and international jurisdiction is completely incompetent for the purpose of reviving this relationship.

J. By *Procès-verbal* of Non-Agreement dated October 24, 1955, the Representative of Italy and the Representative of the United States of America on the Italian-United States Conciliation Commission agreed to resort to a Third Member "in order to resolve the disputed questions raised by this claim".

L. The Conciliation Commission, completed and presided over by the Third Member, Dr. Plinio Bolla, former President of the Swiss Federal Court at Morcote (Switzerland) heard the Agents of the two Governments during the discussions held at Rome on March 12, 1956.

The Agents confirmed their contentions, arguments and conclusions.

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<sup>1</sup> Volume XIII of these *Reports*, Decision No. 32.

## CONSIDERATIONS OF LAW:

1. This decision does not deal with the claims submitted by Leo J. Wollemborg on September 11, 1945 and December 11, 1946 directed at obtaining compensation for the war damages suffered by his property in Italy. The Italian Government has not yet taken a position on these claims so that they have not, so far, become the subject of a dispute within the meaning of Article 83 of the Treaty of Peace.

In the absence of a dispute, the Commission cannot even render an opinion on the preliminary question of Mr. Leo J. Wollemborg's active right to file a claim for war damages. The request contained in paragraph No. 1 of the conclusions of the Petition of December 28, 1954 can only concern the claim relating to the special progressive tax on property.

The claimant should however be advised that, during the discussion of the case before the Commission, the Agent of the Italian Government admitted that Leo J. Wollemborg should be considered as a United Nations national within the meaning of Article 5 of the Lombardo Agreement for the purpose of obtaining compensation for the war damages suffered by his property in Italy, under Article 78, paragraph 4 (a) of the Treaty of Peace, on the condition that it is proved that these damages occurred after the claimant became an American national by naturalization.

2. The active right of the claimant to avail himself of paragraph 6 of Article 78 of the Treaty of Peace is disputed; on the other hand it is not disputed by the two Governments that the special progressive tax on property falls under the provisions of the afore-mentioned paragraph 6.

The claimant derives his right in the first place from Article 5 of the Lombardo Agreement, which amended the first paragraph of paragraph 9 (a) of the Treaty of Peace, extending the benefit of certain provisions of Article 78 from individuals who were United Nations nationals on September 3, 1943 to individuals who became United Nations nationals at a later date but prior to the date when their property was damaged. Nevertheless, Article 5 of the Lombardo Agreement only considers cases in which the property, or the interests of United Nations nationals in property in Italy were damaged and hence have a right to receive compensation. This appears unquestionably either by the reference made in Article 5 of the Lombardo Agreement to Article 3 thereof, which deals exclusively with sub-paragaphs (a) and (d) of paragraph 4 of Article 78, or by the two expressions contained in the aforementioned Article 5: "for the purposes of receiving compensation" and "at the time at which the property was damaged".

The Agent of the Government of the United States finds that there is contradiction in the fact that a national of the United States of America, who is entitled to receive partial compensation for the war damages suffered by his property in Italy, should be forced to pay to the Italian State the special progressive tax on property which was established to meet the expenses arising out of the payment of war damage compensation also. This contradiction, if there is a contradiction, would lie solely in the contentions of one of the contracting parties and in any case would not be so broad as to allow the interpreter to wander from the clear text of Article 5 of the Lombardo Agreement; there are no grounds whatever for doubting that the expressions used in this article have faithfully interpreted the intentions of the contracting parties, nor are there any positive elements to assume a different intention to that expressed in the words used (cf. Balladore Pallieri, *Diritto internazionale pubblico*, p. 236). In Article 5 of the Lombardo Agreement the Italian Government made a concession to the United States Government by accepting, in certain specific

cases and for specific purposes, a date subsequent to that established by the first paragraph of paragraph 9 (a) of the Treaty of Peace concerning the possession of *statua*; the effects of this concession cannot be extended by the interpreter beyond the clear limits of the Agreement for the sole reason that the Government of the United States might have had resonable grounds for requesting such an extention from Italy during the negotiations.

3. In the second place the claimant derives his active right to claim from the second paragraph of paragraph 9 (a) of Article 78, namely, because he was considered ("*traitée*", "treated") as enemy "under the legislation in force during the war".

On the interpretation to be given to this provision the Commission has rendered an opinion in the two Decisions issued this date in the cases of Vittorio Leone and Amalia Levi Sacerdote,<sup>1</sup> and Peter G. and Gino Robert Treves.<sup>2</sup> Specific reference is made here to these Decisions.

In view of the arguments set forth in the afore-mentioned Decisions, the Commission is of the opinion that the provision to be interpreted intended to subordinate the similarity required by it to a condition of fact, namely that the effective treatment as enemy should be linked with legislative provisions in force in Italy during the war, hence also subsequent to the Armistice (September 3, 1943), little mattering whether enacted by the national Government or by the Government of the Italian Social Republic, the legitimacy of the legislative enactments of the latter being unprejudiced. The Commission also believes, still for the reasons set forth in the decisions referred to above, that the application of the second paragraph of paragraph 9 (a) of the Treaty of Peace does not require that the legislation in question have in the abstract and specifically declared certain Italian nationals as enemies, and, as such, subjected them to the War Law; it is sufficient that it required the application against them of measures which, in substance, permitted a treatment as enemy.

The only peculiarity in the instant case is that the measures directed against the claimant's property (inventory and beginning of the administration by the Jewish Property Commissioner at Padua) were taken before the coming into force (January 10, 1944) of the Legislative Decree of the Duce, No. 2, of January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944. By this Decree, containing new provisions concerning property owned by citizens of the Jewish race, confiscation and sale of the property owned by said Jews was ordered. The State was the beneficiary of the proceeds of said sale "as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damages to persons rendered homeless by enemy air attacks" (Article 15). By this Decree, a treatment which was even more severe than that provided for enemy owned property was made lawful with respect to property owned by Italian Jewish nationals.

The question as to whether or not the programme approved in November 1943 by the First Assembly of Republican Fascism may be considered as "legislation" can remain unsolved. Point 7, included in this programme reads as follows:

Individuals of the Jewish race are aliens. During the war they belong to enemy nationality.

It is a fact that, in pursuance of this policy, certain property owned by Italian nationals of the Jewish race was placed under sequestration in December 1943 (see, in the records, the Decree of December 28, 1943 of the Head of

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<sup>1</sup> *Supra*, p. 272.

<sup>2</sup> *Supra*, p. 262.

the Province of Brescia concerning Vittorio Coen di Edmondo, which refers to the "instructions issued by the Ministry of the Interior on December 1, 1943" and which contains in the "having seen" paragraphs, the sentence: "having seen that Jews are considered as subjects of an enemy State").

The more decisive factor is that said measures were in any event made lawful *a posteriori* by the Decree of the Duce of January 4, 1944. There could be no justification in conferring Italian nationals of the Jewish race a different treatment, when implementing the second paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace, according to whether the measures taken against their property by the agencies of the Italian Social Republic were in actual fact taken before or after January 10, 1944; and that the benefits of the said provision should be denied primarily to those individuals who were the first to be attained and therefore for a longer period.

4. As regards the merits of the case, the Agent of the Italian Government opposes to the Petition the fact that on September 3, 1951 the claimant's attorney signed an agreement with the Italian financial administration concerning the special progressive tax on property and that the sums paid by the claimant were paid in fulfilment of this agreement (*concordato*) and that, also in fulfilment of this agreement, claimant was requested to pay further instalments.

The parties have discussed at length and learnedly the nature and the effects of the tax settlement (*concordato*) under Italian domestic law. The Commission does not believe it should follow them on this ground. The proceedings started by the United States Government are in the sphere of international law, because they are based on paragraph 6 of Article 78 of the Treaty of Peace.

Without it being necessary to embark here on an academic discussion as to whether or not the question of relationship between international and domestic law should be solved according to the teachings of the doctrine of monism or of dualism (cf. Rousseau, *Principes généraux du droit international public* I. p. 54 through 75, above all 74), 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. Judicial decisions of the Permanent Court of International Justice are all identical on this point:

(a) in the consultative advice of February 21, 1935 (matter of exchange of Greek and Turkish peoples), the Court refers to "the self explanatory principle according to which, a State that has validly subscribed to international obligations is bound to provide its legislation with such amendments as are necessary to ensure the fulfilment of these obligations";

(b) in the consultative advice of July 31, 1930 (matter of the Greek-Bulgarian community), the Court expressed the following opinion: "It is a generally recognized principle of human rights that in the relationships between Powers who are contracting parties to a treaty, the provisions of a domestic law shall not prevail over those of the treaty";

(c) this principle is restated in the decision of June 7, 1932 in a dispute between France and Switzerland (matter of the free areas) "France cannot avail itself of its legislation for the purpose of restricting the scope of its international obligations".

In any event, within these limits, the priority of human rights over domestic law in the relationships between treaty and law must be recognized by the international court established under the treaty itself.

Article 78, paragraph 6 of the Treaty of Peace, after having charged the Italian Government with the obligation of exempting United Nations nationals

from certain specific taxes (and it is undisputed between the parties that these taxes include the special progressive tax on property), imposes on the Italian Government the obligation to return all sums which may have been collected for that purpose. Restitution should be made also in the event that the Italian fiscal legislation, like that of certain other States, should rule out in a general and absolute manner any restitution by the fiscal authorities of sums unduly collected.

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, op. cit. 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. The claimant's attorney, according to the sworn statement contained in the records, was unaware, at the time of the signing of the settlement (*concordato*) of the provisions of the Treaty of Peace concerning the exemption of United Nations nationals from certain taxes; the attorney, as a good administratrix, could not take any heed of the consequences of the notification of September 19, 1947 and, in settling by compromise the amount of the taxable property, certainly did not intend to relinquish any possible rights which may have been due to the claimant, of which she was unaware, and wished to oppose every imposition of this kind. As to the claimant, he was absent from Italy; even though the French-Italian Conciliation Commission had admitted on August 29, 1949 the applicability of Article 78, paragraph 6 of the Treaty of Peace to the special progressive tax on property,<sup>1</sup> it does not appear that he became aware of this until September 3, 1951. Neither did he learn before this date of the Exchange of Notes of June 13, 1950, by which Italy acknowledged the applicability of said exemption to the United States of America also; until then no action whatever had been taken on his claims filed on September 11, 1945 and December 11, 1946 for war damage compensation and the Italian Government denied, and still denies, that Italian nationals of Jewish origin, racial persecutees under the Italian Social Republic, have a right to be considered as "United Nations nationals" within the meaning of the second paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace. It was excluded therefore that the exceptions raised by the claimant could be made the subject of a trial, and in no event of a favourable trial on the part of the Italian fiscal authorities; it was only possible to have recourse to an international court (Article 83 of the Treaty of Peace) and it was not necessary to make any specific reservation in this connexion.

5. It follows that the claimant is entitled to be exempted from the payment of the special progressive tax on property established by the Italian Republic by Law Decree No. 828 of September 1, 1947, and that the sums already paid by the claimant for this purpose are to be reimbursed to him by the Italian Government.

Paragraph 6 of Article 78 of the Treaty of Peace makes no reference to interest on delayed payments and there is therefore no legal basis thereto.

6. The claimant requests that the expenses for the legal proceedings, including those incurred in the proceedings before this Commission, be charged to the Italian Government.

Article 83, paragraph 4 of the Treaty of Peace provides that each Government shall pay the fees of its Member on the Conciliation Commission and the

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<sup>1</sup> Volume XIII of these *Reports*, Decision No. 32.

fees of its Agent. The fees of the Third Member and the joint expenses of the Commission shall be borne by the two Governments on a fifty-fifty basis.

The claimant can avail himself only of Article 78, paragraph 5 of the Treaty of Peace under the terms of which "all reasonable expenses incurred in Italy in establishing claims, including the assessment of loss or damage, shall be borne by the Italian Government". This provision is brought to the knowledge of the claimant, who has so far mentioned no figures in this connexion; wherefore the Commission finds it impossible to fix a specific amount (Article 13 of the Rules of Procedure dated June 29, 1950).

DECIDES:

1. The Petition is admitted in the sense that the claimant, Mr. Leo J. Wollemborg, in application of Article 78, second paragraph of paragraph 9 (a) is acknowledged to be lawfully entitled to be exempted from the payment of the special progressive tax on property established by the Italian Republic by Law Decree No. 828 of September 1, 1947, and to receive reimbursement from the Italian Government of all sums paid under this heading; the reimbursement of these sums paid by the claimant shall be made within sixty (60) days from the date on which this Decision is notified to the Agents of the two Governments.

2. This Decision is final and binding.

Rome, September 24, 1956.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Third Member*

Plinio BOLLA

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DISSENTING OPINION OF THE REPRESENTATIVE OF THE ITALIAN REPUBLIC  
IN THE LEO J. WOLLEMBORG CASE

I do not feel I can agree with the Decision of the majority Commission for the reasons I have fully set out in my dissenting opinion in the Treves Case.

Rome, October 11, 1956.

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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**SPAULDING CASE—DECISION No. 148 OF  
21 DECEMBER 1956<sup>1</sup>**

Claim for compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Criteria laid down by Conciliation Commission in order to establish dominant nationality—Reference to Decision No. 55 rendered in Mergé Case—Claimant considered of dominant Italian nationality—Rejection of claim.

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Demande en indemnisation présentée au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Critères admis par la Commission de Conciliation pour établir la nationalité dominante — Référence à la Décision n° 55 rendue dans l'affaire Mergé — Prévalence de la nationalité italienne — Rejet de la demande.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 20th day of May 1949, to the Ministry of the Treasury by Alice Orpha Spaulding Paolozzi through the Embassy of the United States of America.

The Italian Ministry of the Treasury, by letter dated February 13, 1952, informed the Embassy that the claim had been rejected on the ground that the claimant, an American national by birth, acquired Italian nationality on October 31, 1938, by marriage to an Italian citizen.

On December 28, 1955 the American Embassy requested the Italian Ministry of the Treasury to reconsider the claim in light of the decision of the Italian-United States Conciliation Commission in the Mergé Case (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Case No. 3, Decision No. 55<sup>2</sup>) and further documented the following facts:

On October 30, 1938, the claimant, an American citizen, married Lorenzo Paolozzi, an Italian citizen, in Rome, Italy, and thereby also acquired Italian citizenship. The claimant and her husband lived in Italy until June, 1939, whereupon she returned to the United States to await the birth of her first child. In March, 1940, she returned to Italy where she purchased some property in Lucca and Rome. From that date to May 1943, she lived intermittently

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 255.

<sup>2</sup> *Supra*, p. 236.

between Italy and Switzerland. Mrs. Paolozzi went to Switzerland in July 1941, to await the birth of her second child. Thereafter, she returned to Italy and returned permanently to Switzerland in May 1943. From Switzerland she returned to the United States in July 1945, and made only occasional trips to Italy thereafter. In her travels between Italy and Switzerland, during the period of the war, the claimant apparently used only her Italian passport. It is also apparent the claimant's husband remained in Italy until 1944 when he joined his wife in Switzerland.

The Italian Ministry of Foreign Affairs, by letter dated May 19, 1956, informed the Agent of the United States that the rejection of the claim had been reconfirmed. Thereupon, the Agent of the United States Government filed a Petition stating that the claimant's nationality was predominantly American on the relevant dates of the Treaty of Peace and that the Italian Government in light of the Decision of the Italian-United States Conciliation Commission in the Strunsky Mergé Case, erroneously rejected the claim.

The Agent of the Italian Government, having deposited his Answer admitting that the claimant is in possession of both Italian and United States nationality, argued that since the facts do not come under Section 7 (c) of the Mergé Decision, which states:

With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

the prerequisites of dominant American nationality are lacking, therefore, the claimant is to be considered of dominant Italian nationality.

#### CONSIDERATIONS OF LAW:

It is not denied that under Italian Law the claimant is an Italian national as she acquired same as a result of her marriage to an Italian national; likewise, it is not denied that under the legislation of the United States she has preserved her United States nationality. The case of women married to Italian nationals was given explicit consideration in the above-cited Decision in the Mergé Case and it was set down as one of the guiding principles that in these cases United States nationality shall be deemed as prevalent when the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

In examining the facts of the case at bar, the Commission holds that Mrs. Alice Orpha Spaulding Paolozzi cannot be considered to be dominantly a United Nations national within the meaning of Article 78 of the Treaty of Peace, as interpreted in the Mergé Decision, because the family did not have its habitual residence in the United States and the interests and personal professional life of the head of the family were not established there. In fact, Mrs. Paolozzi was married in Italy in 1938. From that point to May of 1943, when she established her permanent residence in Switzerland prior to her departure for America, she resided in Italy and went to America only long enough to have her child born there. The other times she left Italy, in her trips to Switzerland, she apparently travelled under an Italian passport exclusively. It is obvious that her Italian citizenship was dominant in that she remained in Italy and Switzerland with her husband, the head of her household, practically continuously from the date of her marriage until she returned to the United States in 1945.

Inasmuch as Mrs. Paolozzi, for the foregoing reasons, cannot be considered to be dominantly a United Nations national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America, acting on behalf of Mrs. Paolozzi, is not entitled to present a claim against the Italian Government, and therefore

**DECIDES:**

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.

Rome, December 21, 1956.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

**ZANGRILLI CASE—DECISION No. 149 OF  
21 DECEMBER 1956<sup>1</sup>**

Compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Criteria laid down by Conciliation Commission in order to establish dominant nationality—Reference to Decision No. 55 rendered in Mergé Case—Claimant's United States nationality deemed as prevalent.

Indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Critères admis par la Commission de Conciliation pour établir la nationalité dominante — Référence à la Décision n° 55 rendue dans l'affaire Mergé — Prévalence de la nationalité américaine du réclamant.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under

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<sup>1</sup> *Collection of decisions*, vol. IV, case No. 228.

Article 78 of the Treaty of Peace and the Agreements supplement thereto or interpretative thereof, which was submitted on the 25th day of August, 1952, to the Ministry of the Treasury by Francesco Saverio Zangrilli through the Embassy of the United States of America.

The Italian Ministry of the Treasury, by letter dated June 18, 1955, informed the Embassy that the claim had been rejected on the ground that the claimant, naturalized as an American citizen in 1900, had reacquired his original Italian nationality according to the Law of June 13, 1912, No. 555, following his uninterrupted residence in Italy from 1915 to 1929.

On December 28, 1955, the American Embassy wrote to the Italian Ministry of the Treasury, requesting them to reconsider the claim because of the following additional facts:

The claimant, born on April 9, 1874, and naturalized as an American citizen on October 29, 1900, resided in the United States until 1915; he returned to Italy in 1915 and remained there until 1929; in May of 1929 he returned to the United States and resided there until 1936; he visited Italy between the autumn of 1936 and July 1937 and then went back to the United States and did not return to Italy again until September 1946. He has resided in Italy since September 1946 only because he has been unable to return to the United States for reasons of old age and ill health. He has used only American passports in his travels. He has maintained his American nationality continuously since his naturalization on October 9, 1900, and has otherwise conducted himself solely as American national since then. Throughout the period of the war and at the time the damage occurred he resided in the United States.

The Italian Ministry of Foreign Affairs, by letter dated February 25, 1956, informed the Agent of the United States that the rejection of the claim had been reconfirmed. Thereupon, the Agent of the United States Government filed a Petition stating that the claimant's predominant nationality was American on the relevant dates of the Treaty of Peace and that the Ministry of the Treasury had erroneously rejected his claim in the light of the Decisions of the Italian-United States Conciliation Commission in the Mergé Case (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Case No. 3, Decision No. 55<sup>1</sup>).

The Agent of the Italian Government, having deposited his Answer admitting that the claimant is in possession of both Italian and United States nationality, argued that since the facts in this case do not come under Section 7 (b) of the Mergé Decision, which states:

The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

because the claimant transferred his residence permanently to Italy, the necessary prerequisites of dominant American nationality are lacking and therefore the claimant is to be considered of dominant Italian nationality.

#### CONSIDERATIONS OF LAW:

Having analysed the facts of the case, the Commission considers that the American nationality of Francesco Saverio Zangrilli should be deemed as prevalent.

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<sup>1</sup> *Supra*, p. 236.

Notwithstanding the fact that he resided in Italy from 1915 to 1929, the Commission, on the basis of the elements acquired during the proceedings, considers that this sojourn, although a lengthy one, was not accompanied by the intention to reside permanently in this country. Therefore, there is here involved the hypothesis provided for by point 7 (b) of the above-cited Decision in Case No. 3, namely, an Italian national who reacquired his nationality of origin as a matter of law merely as a result of having sojourned in Italy for more than two years, without the intention of re-transferring his residence permanently to Italy.

The fact that he now resides in Italy is irrelevant for the purposes of the subject case because it involves events which occurred subsequent to those which the Commission is called upon to consider.

The Commission, having examined the appraisals of the damages prepared by the two Governments, acting in the spirit of conciliation,

**DECIDES:**

1. That the claimant, Francesco Saverio Zangrilli, is entitled to receive from the Italian Government under the provisions of Article 78 of the Treaty of Peace, the sum of 900,000 lire plus 100,000 lire for the expenses in establishing this claim, thus making a total of 1,000,000 lire net, without any reduction of one-third which may be applicable under said Article 78 as amended by the Exchange of Notes of February 24, 1949, between the Governments of the United States of America and of the Italian Republic.

2. The amount set forth in the foregoing paragraph shall be paid within sixty (60) days from the date in which a request for payment is presented to the Italian Government by the Government of the United States of America.

This Decision is final and binding and its execution is incumbent upon the Italian Government.

Rome, December 21, 1956.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

SONNINO CASE—DECISION No. 155 OF  
27 NOVEMBER 1956<sup>1</sup>

Claim under Article 78 of the Treaty of Peace—Exemption from special progressive tax on property—Active right to claim—Applicability of second part of paragraph 9 (a) of the aforementioned Article—Interpretation of treaties—Treatment as enemy—Meaning and scope of the expression “laws in force in Italy during the war”—Confiscation of property—Failure to pay indemnity for expropriated property—State responsibility—Acts and omissions of State organs and officials.

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 100.

Réclamation au titre de l'article 78 du Traité de Paix — Exemption d'un impôt extraordinaire sur le patrimoine — Droit d'action — Applicabilité de la seconde partie du paragraphe 9 a) de l'article 78 du Traité — Interprétation des traités — Traitement comme ennemi — Signification et portée de l'expression « législation en vigueur en Italie pendant la guerre » — Confiscation de biens — Défaut de payement d'indemnité pour expropriation — Responsabilité de l'Etat en raison d'une action ou d'une omission qui lui est imputable.

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The Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between Italy and the Allied and Associated Powers, and composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Plinio Bolla, former President of the Swiss Federal Court, Third Member chosen by mutual agreement between the United States and Italian Governments, on the Petition of the Government of the United States, represented by its Agent, Mr. Carlos J. Warner and subsequently represented by its Agent, Mr. Edward A. Mag at Rome, on behalf of Mr. Gabriel Sonnino, residing at 15 West 16th Street, New York, N.Y. *versus* the Government of the Italian Republic, represented by its Agent, State's Attorney, Prof. Dr. Francesco Agrò, at Rome.

#### CONSIDERATIONS OF FACT:

A. Mr. Gabriel Sonnino of the late Mosè Marco (hereinafter: the claimant) at the time an Italian national of the Jewish race, left Rome, where he was domiciled, for the United States in the summer of 1939. He became a naturalized citizen of that country on May 6, 1946.

On May 22, 1954 the District Office of Direct Taxes in Rome served on the claimant a notice of assessment of the special progressive tax on property established under Italian Law No. 828 of September 1, 1947.

The claimant refused to pay this tax contending that he was a United Nations national within the meaning of Article 78, second paragraph of paragraph 9 (a) of the Treaty of Peace; it is agreed between Italy and the United States that United Nations nationals, on the strength of paragraph 6 of Article 78 of the Treaty of Peace, are exempted from the payment of the Italian progressive tax on property.

The Italian Government denied that the claimant could be considered as having had the status of a United States national; according to the Italian Government, Mr. Sonnino was not considered ("*traité*" "treated") as enemy under the legislation in force in Italy during the war.

The United States Government has espoused the theory of the claimant who, in rebutting the Italian Government's argument, claims he was treated as enemy under the laws in force in Italy during the war.

B. By Petition dated November 8, 1954, the dispute was brought before Conciliation Commission, established under Article 83 of the Treaty of Peace; in the Petition the Commission was requested to:

- (a) Decide that the claimant is to be considered a United Nations national within the meaning of paragraph 9 (a) of Article 78 of the Treaty of Peace.

(b) Decide that the claimant is entitled to exemption from the Extraordinary Progressive Patrimonial Tax on his property by the Italian Government.

The Agent of the Italian Government has, in turn, requested that the action taken by the Italian authorities be acknowledged and admitted to be quite legitimate.

C. By *Procès-verbal* of Non-Agreement, dated January 25, 1955, the Representatives of Italy and of the United States of America on the Conciliation Commission decided to resort to a Third Member "in order to resolve the disputed questions raised by this claim".

The Conciliation Commission, completed and presided over by the Third Member, Dr. Plinio Bolla, former President of the Swiss Federal Court at Morcote (Switzerland), heard the Agents of the two Governments during an oral discussion held in Rome on March 12, 1956. The Agents confirmed their contentions, arguments and conclusions. The arguments of the Parties are summed up below in the Considerations of Law of this Decision.

D. As regards the treatment as enemy suffered by the claimant in Italy during the war, the records show the following:

(a) Prior to the outbreak of World War II, the Italian Government, by Royal Law Decree No. 1728, of November 17, 1938, made certain provisions for defending the Italian race. Article 10 of this decree reads as follows:

Italian nationals belonging to the Jewish race cannot:

- ...
- d. be the owners of plots of land the global value of which exceeds 5,000 lire;
  - e. be owners of urban buildings the global taxable value of which exceeds 20,000 lire;

By Royal Decree, at the proposal of the Minister of Finance, in concurrence with the Ministers of the Interior, of Justice, of Corporations and of Exchange & Currencies, new regulations shall be issued for implementing the provisions contained in sub-paragraphs (c), (d) and (e).

These regulations for implementing the provisions contained in Article 10 of Royal Law Decree No. 1728, of November 17, 1938, regarding the limitations on the property owned, and the industrial and commercial activities performed by Italian nationals belonging to the Jewish race, were included in Royal Law Decree No. 126 of February 9, 1939. This law also was enacted prior to the outbreak of World War II. Under this latter decree there was established (Article 11) a corporation known as *Ente di Gestione e Liquidazione Immobiliare* (E.G.E.L.I.) with head office in Rome, for the purpose of taking over, managing and selling "that part of the property exceeding the limits permitted to Italian nationals belonging to the Jewish race" (Article 4). Royal Law Decree of February 9, 1939 provided for a procedure which permitted recourse to a provincial commission (Article 23 through 25) in the determination of the permitted quota, the excess quota and the evaluation of the property. When the determination of the excess quota of the property became final, said quota was transferred to E.G.E.L.I. (Article 26 through 31), which corporation paid the corresponding amount, in application of the principles laid down in the decree itself, in the form of special registered 30-year 4% interest shares. Normally, these shares were transferrable only to persons belonging to the Jewish race (Article 33); and their substitution with Public Debt Bonds was to be provided for thirty years subsequent to their issue (Article 35). The disposal of the real property transferred to E.G.E.L.I. was to be made in accordance with a progressive plan of sale; the proceeds collected as a result of the sale were to be paid into the Treasury of the State (Article 40).

(b) These regulations were applied to the claimant in the following manner:

By Decree dated November 10, 1942, that is to say, after Italy and the United States had entered World War II, the *Intendenza di Finanza* of the province of Rome transferred to E.G.E.L.I., at the latter's request, title to the following property owned by "Sonnino Gabriele of the late Mosè Marco, an Italian national of the Jewish race":

- (a) a house with stores at via del Vantaggio and via di Ripetta;
- (b) grotto and small vat at via Galvani;
- (c) house and court-yard at via del Boschetto;
- (d) house with store at via San Teodoro;
- (e) house with stores at via San Teodoro;
- (f) house with store at via Sforza ai Monti and via Giovanni Lanza;
- (g) part of a small villa with garden at via Po; the remaining part was left to the claimant as permitted quota.

About three months later, in implementing the same regulations of Royal Law Decree of February 8, 1939, the *Intendenza di Finanza* of the province of Frosinone, by Decree dated January 19, 1943, transferred to E.G.E.L.I. other property owned by Gabriel Sonnino of the late Mosè Marco, to be more specific, plots of land and rural buildings located in the territory of the municipality of Paliano (province of Frosinone).

On January 3, 1943, E.G.E.L.I. took possession of that part of the villa with garden at via Po, which had been considered to be the excess quota; the value of this quota, and therefore the price thereof, had been fixed at 402,580, equal to 20 times its taxable value, according to the principles laid down in Royal Law Decree of February 1, 1939 (Article 20). E.G.E.L.I. took possession of the other real property located in the province of Rome, which also came under the excess quota, by *procès-verbal* of January 8, 18, 21 and 25 and February 5 and 10, 1943. E.G.E.L.I. also took possession of the plots of land and rural buildings owned by the claimant in the municipality of Paliano (province of Frosinone).

When the war came to an end, the retransfer of all the buildings, formerly owned by him and transferred to E.G.E.L.I., was made under Article 3 of Royal Law Decree No. 6 of January 20, 1944, published by virtue of Legislative Decree of the Lieutenant of the Realm No. 252 of October 5, 1944.

Said retransfer was verified, excepting the portion of the villa at via Po and the plots of land and rural buildings at Paliano (province of Frosinone) by an amicable *procès-verbal* dated December 13, 1944, which was subsequently confirmed and extended, by notarial deed of October 24, 1946, to the buildings located in the municipality of Paliano. The premises in the deed of October 1946 show that, as regards the real property retransferred, E.G.E.L.I. had "delayed the payment of the amount due under Royal Law Decree No. 126 of February 9, 1939 because a state of emergency had arisen"; the "failure to deliver the shares representing the amount of the transfer" had already been pointed out by Mr. Piperno, claimant's attorney, in the amicable *procès-verbal* of December 13, 1944, and E.G.E.L.I. had raised no exception in that respect.

As regards the quota of the villa at via Po, which had been transferred to E.G.E.L.I., this corporation had sold that quota in the meanwhile to Mr. and Mrs. Filippo Pennavaria and Jolanda Medici in Pennavaria, by notarial deed of April 23, 1943, for 2,250,000 lire; it was retransferred by the purchaser to the claimant by notarial deed of February 20, 1945; E.G.E.L.I. intervened in this act and reimbursed Mr. and Mrs. Pennavaria the price it had collected

from them; also for this property the claimant was not handed the shares due to him in payment thereof.

(c) The claimant was also co-owner of a farm at Monte Porzio Catone. This farm does not appear to have been subjected to measures based on racial laws. It appears, however, from the sworn statements contained in the records, that the Sonnino farm at Monte Porzio Catone was occupied by German troops from October 1943 through June 1944, that these troops persecuted the land agents in order to discover the whereabouts of the claimant, that the occupying troops laid mines and set fire to the buildings of the farm when they withdrew prior to the arrival of the American troops. From another sworn statement contained in the records it appears that, after the outbreak of war, Italian police searched for the claimant, presumably to arrest him, and that on October 16, 1943, German S.S. accompanied by Italian policemen, called at Via Po No. 28, claimant's former residence, to arrest and deport him and his family.

#### CONSIDERATIONS OF LAW:

(1) The issue involved is whether or not the claimant was considered as enemy "under the laws in force in Italy during the war".

The Italian Government admits that, by decrees of November 19, 1942 of the Intendenza di Finanza of the Province of Rome, and of January 19, 1943 of the Intendenza di Finanza of the Province of Frosinone, all the buildings owned in Rome and Paliano by the claimant were confiscated and turned over to E.G.E.L.I., in application of Article 26 of Royal Law Decree No. 126 of February 9, 1939, because he belonged to the Jewish race.

The Agent of the Italian Government acknowledges that the Law Decree under which the transfer to E.G.E.L.I. occurred was in force in Italy during the war and does not deny that said Law Decree, enacted prior to the time when Italy was cut in two, comes within the notion of legislation as intended by the second paragraph 9 (a) of Article 78 of the Treaty of Peace.

But, the Agent of the Italian Government adds, the Law Decree of February 9, 1939 was enacted not only prior to the Armistice but prior to the outbreak of war as well. It cannot, therefore, have considered as enemies Italian nationals belonging to the Jewish race because on February 9, 1939 Italy was at war with no one. Law Decree of February 9, 1939, which authorized racial discriminatory measures, should be considered—still in the words of the Agent of the Italian Government—as a mere and simple peacetime police act; these measures which are distinct and separate from the contingencies of war, appear to be, in the technical sense, different to those which were applicable to nationals of enemy Powers.

(2) The argument of the Agent of the Italian Government, even if it were to be accepted in principle, does not take into any account whatever the fact that the claimant never received from E.G.E.L.I. the shares representing the amount due on the transfer to that corporation of his property in Rome and Paliano (province of Frosinone), in accordance with Royal Law Decree of February 9, 1939. The treatment to which the claimant was subjected by the Italian authorities during the war cannot therefore be referred to the mere and simple implementation against him, and his property located in Rome and Paliano, of Royal Law Decree of February 9, 1939 which provided for (Article 36) the payment of compensation "within ninety days of the date of publication in the Official Gazette of the Kingdom, of the decree concerning transfer of property to E.G.E.L.I." (the decree of November 19, 1942 concerning the claimant, was published in the Official Gazette of November 25, 1942).

Nor can the failure to deliver the shares to the claimant be attributed to any negligence on his part or to the arbitrary action of a State or State controlled agency, which had been careless and had not fully implemented Royal Law Decree of February 9, 1939. From the premises appearing in the notarial deed of October 24, 1946, which were accepted by E.G.E.L.I.'s attorney, it seems that failure to make delivery of the shares was due to the "existence of a state of emergency". In fact, Royal Law Decree of February 9, 1939 was not immediately implemented against the claimant, as it should have been, in accordance with the spirit and the letter thereof (cf. Article 13) but after a lapse of three to four years, and was implemented against him when Italy had changed from a state of peace to a state of war. It is a well-known fact that Italy's entry into World War II, and to even a greater extent the United States' entry into the war, caused a stiffening on the part of the Italian Government against Italian nationals belonging to the Jewish race, and especially against those who had left the country, most of them to take refuge in an enemy country such as (from December 1941) the United States. Whatever the arguments in this respect, after the Armistice was published on September 8, 1943, Rome, its province and the province of Frosinone formed part, until this area was occupied by the Allied forces, of the territory subjected *de facto* to the power of the Italian Social Republic. Said Republic had proclaimed the principle that, during the war, all individuals belonging to the Jewish race were enemy nationals. In implementing this principle, the Duce of the Italian Social Republic, Head of the Government, enacted Legislative Decree No. 2, of January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944, under which Italian nationals belonging to the Jewish race were deprived, in the territory of the State, of the possibility of being owners of plots of land, buildings or of stocks, valuables, credits and movable property, whatever the nature thereof (Article 1); this decree confiscated said property in favour of the State and turned it over to E.G.E.L.I. for management in order that it be disposed of and the proceeds of the sale paid into the State "in partial recovery of the expenses sustained for assisting, paying subsidies and compensation for war damages to individuals rendered homeless by enemy air attacks". The reference to the "state of emergency" contained in the deed of October 24, 1946 cannot be interpreted other than as a specific reference to this *de facto* and *de jure* change of condition, and in any event to the issuance of the decrees of November 10, 1942 of the Intendenza di Finanza of Rome and of January 19, 1943, of the Intendenza di Finanza of Frosinone.

(3) Even supposing that the claimant, notwithstanding the radically changed situation of fact, had still been entitled to obtain certain shares in payment of the excess quota of his property transferred to E.G.E.L.I., this right was in any event wiped out in favour of the Italian State through the enactment of the Legislative Decree of January 4, 1944, which deprived claimant also of title to the quota permitted (part of the small villa at via Po in Rome) and of his joint interest in the Sonnino Farm at Monte Porzio Catone.

Certainly, Decree Law of January 4, 1944 required a decree of confiscation issued by the Head of the Province. But even supposing that, with regard to the quota of the small villa at via Po and the joint ownership of Monte Porzio Catone, treatment as enemy within the meaning of paragraph 9 (a) of Article 78 of the Treaty of Peace could have occurred only by the issuance of the executive decree of confiscation, no decree was required to free E.G.E.L.I., in actual fact the Italian State, from the obligation to deliver the shares representing compensation for the excess quota. It was in fact not a question of property, whether movable or immovable, in the hands of the claimant or of

third parties, and of taking this property away from its holder; there were here involved shares, which were to be issued by the State controlled agency in question (Article 32 of Royal Law Decree of February 9, 1939) and it is obvious that this was an obligation to issue shares in favour of an individual who, under the intervening Law Decree of January 4, 1944, had been deprived of the possibility of owning "shares, valuables, credits and real property, whatever the nature thereof". A decree of confiscation by the Head of the Province would have been utterly redundant; in this case implementation had already resulted from the confiscation required by law; and this was exactly E.G.E.L.I.'s thinking in that it never issued the shares and even less attempted to deliver them to the claimant. The latter was therefore completely dispossessed of his property located at Rome and at Paliano, *ope legis*, without receiving the slightest compensation.

(4) Coming to the question as to whether or not the legislation of the Italian Social Republic can be considered as legislation in force in Italy during the war within the meaning of the second paragraph 9 (a) of Article 78 of the Treaty of Peace, this Commission has given an affirmative opinion in its decisions rendered on September 24, 1956 in the Vittorio Leone and Amalia Sacerdote Levi,<sup>1</sup> Peter G. and Gino Robert Treves<sup>2</sup> and Leo J. Wollemborg<sup>3</sup> cases, which are incorporated herein.

This decision in no way conflicts with the two-Member decision of this Commission, rendered on February 19, 1954, in the Hilde Gutman Bacharach Case.<sup>4</sup> In that decision the Commission judged that "to be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals". Actual comportment may result also from an omission and in the instant case it flows from the failure to deliver the shares representing compensation of the property transferred; this failure to deliver, which was due to intervening regulations, has changed a partly compensated expropriation (the portion of the villa at via Po transferred to E.G.E.L.I. on January 3, 1943 for 402,580 lire, had been re-sold by E.G.E.L.I., on April 24, 1943, for 2,250,000 lire) into a total dispossession, which is fully equal to treatment as enemy within the meaning of the second paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace; in this latter connexion, reference is made to the afore-mentioned decisions rendered on September 24, 1956 by this Commission in the Vittorio Leone and Amalia Levi Sacerdote, Peter G. and Gino Robert Treves and Leo J. Wollemborg Cases. In addition to the arguments contained therein, it should be stated that the premises of the Treaty of Peace make specific reference to the Armistice clauses signed by Italy on September 3 and 29, 1943, and to the fact that the Armistice clauses of September 29, 1943 contain an Article 31, which reads as follows:

All Italian laws involving discrimination on grounds of race, colour, creed or political opinions insofar as this is not already accomplished be rescinded, and persons detained on such grounds will, as directed by the United Nations, be released and relieved from all legal disabilities to which they have been subjected. The Italian Government will comply with all such further directions as

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<sup>1</sup> *Supra*, p. 276.

<sup>2</sup> *Supra*, p. 262.

<sup>3</sup> *Supra*, p. 283.

<sup>4</sup> *Supra*, p. 187.

the Allied Commander-in-Chief may give for repeal of Fascist legislation and removal of any disabilities or prohibitions resulting therefrom.

An interpretation of Article 78, second paragraph of paragraph 9 (a) of the Treaty of Peace, such as that proposed by the Italian Government, would mean an utter disregard of the letter of said provision and of the reasons for which the Allied and Associated Powers had insisted on its inclusion, reasons which had been clearly explained in the Armistice of September 29, 1943. Wherefore, the afore-mentioned provision of the Treaty of Peace appears to be a logical confirmation and completion of said Article 31.

(5) One can therefore leave unresolved the question as to whether or not the treatment required by the second paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace against the claimant can be found in the conduct of the detachment of German troops in the Sonnino Farm at Monte Porzio Catone during the period December 1943 through the first days of June 1944, and the search for the claimant made in Lazio by the Italian police, subsequent to the outbreak of war; and by German security men accompanied by Italian policemen, subsequent to the Armistice.

DECIDES:

1. The Petition is admitted.
2. This Decision is final and binding.

Rome, November 27, 1956.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Third Member*

Plinio BOLLA

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DISSENTING OPINION OF THE REPRESENTATIVE OF THE ITALIAN REPUBLIC  
IN THE GABRIEL SONNINO CASE

The majority Decision asserts that treatment as enemy originates from the failure to pay the indemnity for the expropriated property and, to that end, bases its assertion on a sentence appearing in a report drawn up *ex post*, wherein it is stated that E.G.E.L.I. had "*deferred* payment of the amount due under R.D.L. of February 9, 1939, because a state of emergency had arisen". Wherefrom it is assumed that failure to make such payment is due to the confiscation provided for by the law of January 1944 enacted by the Salò Government.

It seems to me that this opinion is not justified; and that the indemnity was, in this case, confiscated, is denied:

(a) By the tenor of the wording used. One does not *defer*—that is, one *withholds*—payment of a confiscated indemnity; one does not refer to *the arising of a state of emergency* to indicate the phenomenon of the implementation of a provision of law;

(b) By the fact that failure to make payment occurred quite some time before the Salò Republic came into being; the observation that payment should have been made as soon as the ninety days had elapsed, hardly seems,

to me, to be reconcilable with the statement that failure to make such payment was due to a law which was enacted one year later;

(c) By the circumstance that the implementation of the laws of Salò requires a decree of confiscation which, doubtless, was never issued in the instant case; nor, in my opinion, is the objection valid that in this case the decree was not required in view of the fact that E.G.E.L.I. was the debtor, that is, the State itself; the objection does not take into account either the fact that E.G.E.L.I. was not the State, but an autonomous corporation, with a separate budget and property assets, or that, also vis-à-vis the State a formal decree was required were it not but for the purpose of legitimizing the essential formality of cancelling a debt entered in the budget and losing the corresponding revenue.

In view of this essentially different evaluation of the facts, I do not feel I can sign the Commission's majority Decision. I also disagree with the interpretation given of the efficacy and value of the legislation of the so-called Italian Social Republic, on which point I expressed my dissent at the time, September 24, 1956, the Decision in the Treves Case was rendered.

Rome,

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

GATTONE CASE—DECISION No. 156 OF  
22 JANUARY 1957<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Nationality of claimant—Defence of dual nationality—Expatriation—Renunciation of nationality—Effect of oath of allegiance—Measure of damages.

Indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Invocation de la double nationalité — Expatriation — Renonciation à la nationalité — Effet d'un serment d'allégeance — Détermination du montant de l'indemnité.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 258.

of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 19th day of January, 1953, to the Ministry of the Treasury by Michele Gattone, through the Embassy of the United States of America at Rome.

The Italian Ministry of the Treasury, by letter dated April 23, 1956, informed the Embassy that the claim had been rejected on the grounds that the claimant, who was born in Italy of a naturalized American father, formerly an Italian national, resided in Italy until 1937, served in the Italian Armed Forces and exercised political rights in Italy; that he possesses, therefore, also Italian nationality and that, for purposes of the application of Article 78 of the Treaty of Peace, the claimant's Italian nationality must be considered dominant over his United States nationality.

Thereupon, the Agent of the United States of America filed a petition stating that the claimant's predominant nationality was American since he had maintained his residence in the United States since 1935 and that his economic social political civic and family life evidenced a closer and more effective bond with the United States than with Italy.

The Agent of the Italian Government, having deposited his Answer admitting that the claimant is in possession of both Italian and United States nationality, argued that since the facts of this case do not come under any of the exceptions as stated in the Mergé Decision (*The United States of America, ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Decision No. 55, Case No. 3<sup>1</sup>), paragraph 9 of the Decision would apply, i.e.:

(9) In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1930) with international custom and generally recognized principles of law in the matter of nationality, will reacquire its force.

In addition, the Agent of the Italian Government argues that "an individual who has lived in Italy uninterruptedly for 37 years since birth; who served in the Italian Army; who exercised political rights; who when departing for America in 1937, left his family, home and furniture in Italy; who also left in Italy cattle and tools—carpenter's bench, etc.—kitchen and table utensils including a large tomato squasher, has not shown any intention of transferring to the Starred Republic that closer and more effectual bond which until then had unquestionably tied him to Italy".

The Commission ordered that the Agent of the United States of America deposit evidence proving on what elements the claimant was considered to be an American national subsequent to his return to the United States.

The Agent of the United States of America filed with the Commission evidence of the claimant's American nationality. He filed a copy of a letter dated April 30, 1952 addressed to the Secretary of State by the Commissioner of the United States Immigration and Naturalization Service, from which it

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<sup>1</sup> *Supra*, p. 236.

appears that the Service issued a Certificate of derivative citizenship to Michele Gattone, upon his application, pursuant to Section 339 of the Nationality Act of 1940, in that he was born abroad on July 17, 1900 subsequent to the naturalization of his father and while his father was still a citizen of the United States; a copy of Section 339 of the Nationality Act of 1940, which provides that the Commissioner of the United States Immigration and Naturalization Service shall issue a certificate of derivative citizenship when it is proved to his satisfaction that the applicant for such a certificate is a citizen, that he derived his citizenship through the naturalization of his parent, and upon taking and subscribing to the oath of allegiance required of a petitioner for naturalization, but only if the individual is at the time within the United States; and a copy of Section 336 (b) of the Nationality Act of 1940 which prescribes the form of oath of renunciation and allegiance required to be taken by a petitioner for naturalization.

The oath required under this section is as follows:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion; So help me God. In acknowledgment whereof I have hereunto affixed my signature.

#### CONSIDERATIONS OF LAW:

Having examined the facts of the case, the Commission finds that the question of dual nationality does not arise here.

From the evidence contained in the record it appears that the claimant, who acquired American nationality at birth and therefore not of his own volition, went to America (it is disputed whether in 1935 or in 1937, but the exact date is immaterial) where he established his residence; it also appears that, prior to securing a certificate of derivative citizenship, the claimant was requested to take an oath of allegiance which includes, as can be seen from the wording cited above, a formal renunciation of every other citizenship.

The instant case, therefore, comes under paragraph 2 of Article 8 of Italian Law No. 555 of June 13, 1912, which provides that nationality is lost by any individual who subsequent to acquiring, not of his own volition, a foreign nationality, declares that he renounces Italian citizenship, and establishes or has established his residence abroad.

As regards the amount of the damage, the Commission holds that the evaluation made by the Italian Government is adequate. Therefore, with due regard to the Agreements supplemental to and interpretative of Article 78 of the Treaty of Peace, grants an award of 1,500,000 lire inclusive of expenses incurred in establishing the claim.

#### DECIDES:

1. That the claimant, Michele Gattone, is entitled to receive from the Italian Government under the provisions of Article 78 of the Treaty of Peace, the sum of one million, five hundred thousand (1,500,000) lire, without any reduction of one-third which may be applicable under said Article 78 as amended by the Exchange of Notes of February 24, 1949, between the Governments of the United States of America and of the Italian Republic.

2. The amount set forth in the foregoing paragraph shall be paid within sixty (60) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.

This Decision is definite and binding and its execution is incumbent upon the Italian Government.

Rome, January 22, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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CESTRA CASE—DECISION No. 165 OF  
28 FEBRUARY 1957<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Criteria laid down by the Conciliation Commission in order to establish prevalent nationality—Reference to Decision No. 55 handed down in Mergé case—Applicability of principles established in said Decision—Measure of damages.

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Indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Critères admis par la Commission pour établir la nationalité dominante — Référence à la Décision n° 55 rendue dans l'affaire Mergé — Applicabilité des principes établis par cette décision — Détermination du montant de l'indemnité.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 3rd day of October 1951 to the Ministry of the Treasury by Natale Cestra through the Embassy of the United States of America.

The Italian Ministry of the Treasury, by letter dated March 15, 1956

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<sup>1</sup> *Collections of decisions*, vol. IV, case No. 192.

informed the Embassy that the claim had been rejected on the ground that the claimant, an American national by naturalization, had reacquired his original Italian nationality, following his return on several occasions to Italy and his sojourn here from November 6, 1934 to May 17, 1938; from October 29, 1938 to March 28, 1939, and from November 19, 1954 to date.

Thereupon, the Agent of the United States of America filed a Petition stating that the claimant was only an American national during the pertinent dates of the Treaty and that he did not reside in Italy from 1934 to 1938, as alleged by the Ministry, and did not reacquire his Italian nationality by virtue of residing in Italy for a period in excess of 2 years, as provided under the Italian law.

The Agent of the Italian Government, having deposited the Answer, stating that the claimant is in possession of both Italian and United States nationality, alleged that the facts of this case do not come under Section 7 (b) of the Mergé Decision (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Decision No. 55<sup>1</sup>) which states:

The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

It is further alleged that since the claimant resided in Italy from 1934 to 1938 he had reacquired his Italian nationality and as such did not comply with the necessary prerequisites of this Decision.

#### CONSIDERATIONS OF LAW:

The Agent of the United States denies that the claimant resided continuously in Italy from November 6, 1934 to May 17, 1938; this sojourn is said to have begun on November 6, 1937 and is alleged to have lasted, therefore, little more than six months. If the allegation of the Agent of the United States were proved, there would not arise in this case a question of dual nationality, in that, at no time prior to the Treaty of Peace would Cestra have reacquired Italian nationality, in view of the fact that his two sojourns in Italy subsequent to his acquisition of American citizenship and prior to September 15, 1947 would both have lasted less than two years.

There is, however, in the record—submitted by the Italian Agent—a statement by the Frosinone Chief of Police, according to which Cestra resided in Italy from November 6, 1934 to May 17, 1938 and then from October 29, 1938 to March 28, 1939, on which date he left for America and returned to Italy only as late as January 19, 1954 (whereas the United States Agent admits that Cestra came to Italy on December 3, 1947 and that he resided in this country until April 15, 1950).

Prescinding from investigating into this latter difference, which seems to be irrelevant, the Commission is of the opinion that the sojourn of 1934, in exceeding two years, raises the question of Cestra's dual nationality and therefore the applicability to this case of the principles established in the afore-mentioned Mergé Decision.

The Commission is also of the opinion that the instant case does not involve a sojourn coupled with the intention of retransferring residence to Italy; in actual fact Cestra came to Italy periodically, where he had a family and

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<sup>1</sup> *Supra*, p. 236.

interests, but always for limited periods of time, and if the duration of one of these periods exceeded two years it cannot be assumed without a doubt that claimant intended to resettle definitively in Italy.

The Commission therefore, considers that the claimant is entitled to receive compensation for damages as provided for by Article 78 of the Treaty of Peace. As regards the amount thereof, the Commission observes that it is not denied that the house owned by the claimant suffered war damages which U.T.E., in its report, appraises at 204,500 lire. As regards the linen and furniture the damages are likewise not denied and are valued by the Italian technical agencies at 140,000 lire globally.

The Italian Government is of the opinion, however, that these latter damages should not be compensated in view of the fact that the linen and furniture were the property of Cestra's wife.

However, whereas U.T.E. refers to a second report of the Guardia di Finanza which, in contrast with the former, acknowledges claimant's title to the property; whereas this assumption arises from the fact that the furniture was located in the house owned by Cestra himself; and finally considering the time at which the evaluation was made and the subsequent increases in the cost of living, the Commission, acting in the spirit of conciliation, holds that global award of 300,000 lire can be made for the real property, the furniture and the linen, including expenses for preparing claim.

DECIDES:

1. That the claimant, Natale Cestra, is entitled to receive from the Italian Government, under the provisions of Article 78 of the Treaty of Peace, the sum of three hundred thousand (300,000) lire, including expenses in establishing his claim, without any reduction of one-third which may be applicable under said Article 78 as amended by the Exchange of Notes of February 24, 1949, between the Governments of the United States of America and of the Italian Republic.

2. The amount set forth in the foregoing paragraph shall be paid within sixty (60) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.

This Decision is definitive and binding and its execution is incumbent upon the Italian Government.

Rome, February, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

MANNELLA CASE—DECISION No. 168 OF  
5 APRIL 1957<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Measure of damages—Expert evidence—View by Conciliation Commission of damaged property.

Indemnisation au titre de l'article 78 du Traité de Paix — Evaluation des dommages — Expertise — Descente sur les lieux.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 11th day of August 1948, to the Ministry of the Treasury by Domenica Mannella through the Embassy of the United States of America. The claim requested compensation for damages caused by the war to the real and personal property belonging to the claimant, a national of the United States of America, and located at Ateleta, Province of l'Aquila.

The Italian Ministry of the Treasury, by letter dated December 28, 1950, submitted an offer in settlement of the claim which the claimant refused to accept because it was insufficient compensation for her loss.

On December 21, 1954 the claimant and the Embassy requested the Italian Ministry of the Treasury to re-examine its offer of settlement and, in support thereof, submitted additional evidence. On March 16, 1955 the Embassy was unofficially informed by the Italian authorities that, following reconsideration of the case, the initial offer was confirmed.

Thereafter, on May 23, 1955, the Agent of the United States Government filed a Petition in which he stated that a dispute existed between the two Governments because the Italian Government had failed to offer the claimant an amount sufficient to compensate her for her losses, as provided in Article 78 of the Treaty of Peace and the Agreements supplemental thereto. The Answer of the Italian Agent, dated July 5, 1955, again confirmed the offer made by the Italian Ministry of the Treasury.

By order dated September 28, 1955 the Commission fixed a hearing in which the testimony of both partial experts was to be heard. After said hearing the Commission, by Order dated March 6, 1956, ordered both partial experts

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 167.

to meet and submit further findings on the question of damages. On April 6, 1956 both experts submitted reports of their findings.

Subsequently, the Representatives of both Governments each appointed an impartial expert to accompany them and the other interested members of the Commission to personally inspect the property. The Commission met at Roccaraso on July 19, 1956 and on the Mannella property on July 20, 1956, held hearings and made a personal inspection of the real property. Thereafter, both impartial experts submitted their reports to the Representatives.

CONSIDERATIONS OF LAW:

The only questions to be decided, by the Commission are those involving the evaluation of the various damages. The Commission, having heard the partial and impartial experts; having studied the appraisals submitted by both parties to this controversy; and acting in the spirit of conciliation finds that the damages suffered as a result of the war by the claimant's property can be equitably valued at 17,000,000 lire. Therefore,

DECIDES:

1. The claimant, Domenica Mannella, is entitled to receive from the Government of the Italian Republic, under the provisions of Article 78 of the Treaty of Peace, the sum of 11,666,000 (eleven million six hundred and sixty six thousand) lire, representing two-thirds of the amount of 17,000,000 (seventeen million) lire, as compensation for the damages suffered, as a result of the war, by her property in Italy.
2. The claimant is also entitled to receive the sum of 1,000,000 (one million) lire as reimbursement of expenses sustained in the preparation of her claim.
3. The total of the sums specified in paragraphs 1 and 2 above shall be paid within sixty (60) days of the date on which the United States Government has presented a request for payment to the Italian Government.

This Decision is final and binding, and its execution is incumbent on the Italian Government.

Rome, April 5, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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SALVONI CASE--DECISION No. 169 OF  
9 MAY 1957<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—Nationality of claim—Dual nationality—Criteria laid down by Conciliation Commission in order to establish dominant nationality—Reference to Decision No. 55 rendered in Mergé Case—Italian nationality regarded as prevalent—Rejection of claim.

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<sup>1</sup> *Collection of decisions*, vol. IV, case No. 250.

Demande en indemnisation au titre de l'article 78 du Traité de Paix — Nationalité de la réclamation — Double nationalité — Critères admis par la Commission pour établir la nationalité dominante — Référence à la décision n° 55 rendue dans l'affaire Mergé — Prévalence de la nationalité italienne — Rejet de la demande.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 3rd of October 1951 to the Ministry of the Treasury through the Embassy of the United States of America.

The Italian Ministry of the Treasury, by letter dated April 9, 1953 informed the Embassy that the claim had been rejected on the ground that the claimants' predecessor, an American national by birth, acquired Italian nationality on June 21, 1927 by marriage to an Italian citizen and, secondly, that the ownership of the property does not appear to have been proved.

On February 9, 1955, the American Embassy requested the Italian Ministry of the Treasury to reconsider the claim in light of the Decision of the Italian-United States Conciliation Commission in the Mergé Case (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Case No. 3, Decision No. 55<sup>1</sup>) and further documented the following facts:

On June 21, 1927, Mrs. Salvoni, an American by birth, married Ippolito Salvoni, an Italian national, and thereby also acquired Italian citizenship. After her marriage, she and her husband spent many years in the United States during which period her husband became an immigrant to the United States and was engaged in business there. In 1937 the claimant, with her husband, went to Italy to visit relatives. Before leaving the United States her husband had applied for and received a re-entry permit. From 1937 they both resided in Italy up to date of her death in 1951. She also submitted evidence to show that due to an operation that she had for cancer in 1940 she could not return to the United States. Immediately after the war she repeatedly attempted to obtain from the United States Government a permit for her husband to return to the United States but was unsuccessful in so doing. In addition thereto, there were numerous letters showing her attachments to America and her desire to return thereto, as well as affidavits filed with the American Consular offices in Italy. Most of her investments were in America and the only income she received were from trusts established at American banks and administered there.

The Italian Ministry of Foreign Affairs, by letter dated May 28, 1956, informed the Agent of the United States that the rejection of the claim had been reconfirmed. Thereupon, the Agent of the United States Government filed a Petition stating that Mrs. Salvoni's nationality was predominantly

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<sup>1</sup> *Supra*, p. 236.

American on the relevant dates of the Treaty of Peace and that the Italian Government in the light of the decision of the Italian-United States Conciliation Commission in the Mergé Case, had erroneously rejected the claim. The Agent of the Italian Government, having deposited his Answer, merely confirmed the opinion submitted by the Ministry of the Treasury in that the claimant is to be considered of dominant Italian nationality.

#### CONSIDERATIONS OF LAW:

It is not denied that under Italian Law the claimant is an Italian national as she acquired same as a result of her marriage to an Italian national; likewise, it is not denied that under the legislation of the United States she has preserved her United States nationality. The case of American women married to Italian nationals was given explicit consideration in the above-cited Decision in the Mergé Case and it was set down as one of the guiding principles that in these cases United States nationality shall be deemed as prevalent when the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

In examining the facts of the case at bar, the Commission holds that Mrs. Salvoni cannot be considered to have been dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, as interpreted in the Mergé Decision, because the family did not have its habitual residence in the United States and the interests and personal professional life of the head of the family were not established there. In fact, Mrs. Salvoni came to Italy in 1937 and resided there until her death in 1951. During the war her husband was "recalled"—and the Commission must assume from this evidence that he was recalled to the Italian Armed Forces. She further stated as a reason for residing in Italy that she wanted to be near her husband who had his business there and would return to the United States as soon as circumstances would permit. From the facts it would seem that if she wanted to return to the United States before or after the war she would have had ample opportunity to do so. As a matter of fact, in a letter written to the Washington Loan and Trust Company, Washington, D.C., dated September 13, 1940, she apparently foresaw the possibility of war and asked for a year's income in advance. It is obvious that her intention, irrespective of her sentiment, was to be with her husband in Italy during those times. Her intention obviously continued after the war as can be seen from her correspondence and the fact that she did not return to America.

Inasmuch as Mrs. Salvoni, for the foregoing reasons, cannot be considered to be dominantly a United Nations national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America, acting on behalf of Mrs. Salvoni's successors in interest, is not entitled to present a claim against the Italian Government, and therefore

#### DECIDES:

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.

Rome, May 9, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

**RUSPOLI-DROUTZKOY CASE—DECISION No. 170 OF  
15 MAY 1957<sup>1</sup>**

Claim for compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality involving American women married to Italian national—Dissolution of marriage—Loss and re-acquisition of nationality of origin—Test of dominant nationality.

Demande en indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Acquisition d'une autre nationalité par mariage — Dissolution du mariage — Perte et rétablissement de la nationalité d'origine — Critères admis par la Commission pour établir la nationalité dominante.

The Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member chosen by mutual agreement between the United States and Italian Governments,

On the Petition filed by the Agent of the Government of the United States of America on February 6, 1952 *versus* the Government of the Italian Republic in behalf of Mrs. Maria Theresa Droutzkoy.

**I. THE FACTS**

On November 10, 1948 the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic, in behalf of Mrs. Eugenia Berry Ruspoli, a national of the United States of America, a claim based on Article 78 of the Treaty of Peace with Italy for compensation for the damage, destruction and loss of real and personal property located at Nemi, Italy and owned by Mrs. Ruspoli.

By letter dated November 10, 1949 the Italian Ministry of the Treasury rejected the claim on the grounds that Mrs. Ruspoli, under Italian law, was deemed to be an Italian national by virtue of her marriage to Prince Ruspoli, an Italian citizen. Because a dispute existed between the two Governments the American Agent, on February 6, 1952, submitted this case to the Commission on behalf of Maria Theresa Droutzkoy, also a United Nations national and successor to the late Eugenia Berry Ruspoli. Subsequently other pleadings were filed relating to the question of Mrs. Ruspoli's nationality.

As is revealed by the record, the decedent was born in the United States of America, at Oak Hill, Georgia, on October 19, 1869, thereby acquiring United States nationality. On May 7, 1889 she married Henry Burton, also

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 26.

a United States national. Three years later Mr. Burton died and in his will he named his wife as his heir, leaving her a considerable fortune.

In March 1901 she married Enrico Ruspoli, an Italian national, at Washington, D.C. before the Nuncio of the Holy See. As a result of said marriage Eugenia Ruspoli became an Italian citizen and lost her American citizenship. The couple went to Italy and rented an apartment in Rome. They travelled a great deal throughout Europe and probably America. It is established that Mrs. Ruspoli was in America at the time of purchase of the Castle at Nemi, in 1902. The castle was purchased in her husband's name and, it is assumed, with the funds supplied by Mrs. Ruspoli.

Mr. Ruspoli passed away on December 4, 1909 and in his will he left most of his property, including the castle at Nemi, to his family. Much litigation was had concerning the title to the castle. The matter was finally settled by agreement in 1916 and Mrs. Ruspoli obtained title thereto together with all the personal property therein.

Mrs. Ruspoli arrived in America, for the first time since her husband's death, on March 26, 1910. She remained there for ten months and then returned to Italy. Thereafter she made many trips between America and Italy. The first American passport issued to her was dated September 21, 1915 and in the application for same filed with the American Embassy, Rome, she stated she was temporarily sojourning in Rome and that her permanent residence was at Oak Hill, in the State of Georgia. She also stated that she was applying for the passport for the purpose of returning to Georgia. She applied for and received many other American passports thereafter, the last of which was issued on April 26, 1950.

It is evident that Mrs. Ruspoli did a great deal of travelling in her lifetime and that a considerable portion of her travels, after her marriage to Mr. Ruspoli, was made between Italy and the United States. During the period of both World Wars she lived in America and returned to Italy only after the cessation of hostilities.

In 1929 she legally adopted her niece, the claimant herein, in the Surrogate's Court of the City of New York. In the legal proceeding she listed her residence as New York City. Residence in New York was a necessary prerequisite to give the Court jurisdiction.

On April 29, 1938 Mrs. Ruspoli re-registered in the Register of Inhabitants of Rome as coming from Oak Hill. She paid the fee charged to aliens transferring their residence to Rome and exhibited her American passport, the number of which was duly noted.

At the advent of World War II Mrs. Ruspoli returned to America and had money sent to her at the American Express Co. in Rome to pay for her voyage. But the money was blocked as soon as it reached Rome because it belonged to an American citizen. When she finally did leave Italy on September 4, 1941 her Italian money was seized at the border in accordance with Italian law because she was an alien.

The Italian Ministry of the Interior, on September 30, 1930, declared that Mrs. Ruspoli was an Italian citizen and that a certificate could be issued accordingly.

In 1941 Mrs. Ruspoli returned to the United States and remained there until 1946. She subsequently returned to Italy several times until her death in 1951 in New York.

## II. THE ISSUE

It is not disputed between the parties that the claimant was born an American citizen and that upon her marriage to Prince Ruspoli she lost that citizenship

and became solely an Italian citizen. Thereafter, Mrs. Ruspoli remained solely an Italian national until the death of her husband in 1909. The dispute between the two Governments arises from the interpretation of the facts thereafter.

1. Position of the Government of the United States of America:

Mrs. Ruspoli regained her American citizenship pursuant to the provisions of Section 3 of the Act of March 2, 1907 which reads as follows:

That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

The United States Government claims that Mrs. Ruspoli regained her citizenship under the provision "... by returning to reside in the United States ..." and offers several alternative dates on which she had met the condition. In any event, when she applied for a passport in 1915 she specifically stated that she wanted it "for the purpose of returning home at Oak Hill, Georgia" and for the purpose of residing there and fulfilling her duties of citizenship". The year 1915 was the first time that American passports were required and the first time Mrs. Ruspoli applied for one. The American Agent argues that 1915 was the latest date on which Mrs. Ruspoli could have re-acquired her American citizenship but it is probable that she re-acquired it sooner.

In the Brief of the claimant's American counsel there is also developed the argument that Mrs. Ruspoli never lost her American citizenship by virtue of her marriage to an Italian national in 1901. Said argument is based on the common law interpretation of American law prior to the enactment of the Act of March 2, 1907.

The American Government also argues that Mrs. Ruspoli lost her Italian citizenship at least in 1915, when her transfer of residence to the United States is unquestionable, under the provisions of Article 10 of the Italian Law of June 13, 1912 which provides as follows:

An alien who marries an Italian national acquires Italian nationality. She preserves it also in widowhood unless, by maintaining or transferring her residence abroad, she re-acquires her nationality of origin.

In any event, the American Agent points out, if the Commission should find that Mrs. Ruspoli was in possession of both American and Italian nationality the facts indicate that her dominant nationality was American. To this end, he points out the many ties she had with America; her preference of America during both World Wars; the fact that she travelled with an American passport continuously since 1915; that she always was considered an American by the American authorities; that on many occasions the Italian authorities also considered and treated her as an American national.

2. Position of the Italian Government:

Mrs. Ruspoli never lost the Italian citizenship she acquired when she married her Italian husband. Article 10 of the Italian Law of 1912 imposes two conditions for loss of Italian citizenship, to wit: transfer or residence abroad and re-acquisition of citizenship of origin. While the latter may be questionable, there is no doubt that under Italian law Mrs. Ruspoli did not transfer her

residence abroad, and thus did not lose her Italian citizenship. At the very least she is to be considered as a dual national.

However, the Italian Government also contends that under American law Mrs. Ruspoli did not re-acquire her American nationality of origin. In support of this they submit a Brief of their American Counsel on the interpretation of American law.

The Italian Government also argues that, in the alternative, Mrs. Ruspoli was dominantly an Italian national under the interpretation rendered in the decision of the Mergé case. This they say is substantiated by the facts which show Mrs. Ruspoli's almost continuous residence in Italy (in Rome or in the castle at Nemi), her re-registration as a resident of Rome in 1938 and the application for the Italian citizenship which was subsequently granted.

In either alternative, sole Italian nationality or dominant Italian nationality, the Petition should be rejected.

### III. CONSIDERATIONS OF LAW:

1. Although, from a chronological standpoint, the legal exhibits submitted in compliance with the Order of July 6, 1955, represent thus far the ultimate stage of the procedure followed by the Commission, it is nevertheless necessary to consider them first because they are the basis of a previous question, namely, the determination of the point at issue.

Until the American attorney of Mrs. Droutzkoy submitted his Exhibit, both parties agreed in admitting that Mrs. Ruspoli, an American born national, had lost her American nationality when she acquired Italian nationality as a result of her marriage to Prince Ruspoli. The Brief of this attorney contends that the decedent, Mrs. Ruspoli, never lost her American nationality even though she married an Italian subject.

He bases this assertion on the fact that, under the American "common law", which was in force prior to the Act of March 2, 1907, American women who married aliens did not lose their nationality of origin. To prove his allegations he cites the *Shanks v. Dupont* Case, concerning the marriage of a woman born in North Carolina, to a British officer.

It is not sufficiently proved that the decision in this case is binding and constitutes case-law. Even less, when said case-law should have a derogatory effect on a rule generally accepted in the United States and confirmed by the law of 1907, according to which, prior to the enactment of the law of September 22, 1922, an American woman who married an alien lost her American nationality.

Even supposing that the allegation of the claimant's attorney had a substantive basis, its admission in the proceedings would still be opposed by the limits set to the disputed issue by the Agents of the two Governments and by the Commission itself in its Order of July 6, 1955, whereby both Agents were directed to "submit citations of American judicial decisions and of qualified legal writings with reference to the interpretation of that part of the United States citizenship law of March 2, 1907, which refers to the re-acquisition of the nationality of origin by the American woman who 'returns to reside' in the United States after the dissolution of her marriage to an alien, and with reference to the provisions of subsequent laws which specifically refer to the instant case".

The theory developed by claimant's attorney is in clear contrast with this Order, in compliance with which it was submitted and cannot, therefore, be accepted.

2. Neither can one admit the American Agent's alternative allegation, that is, that Mrs. Ruspoli was treated as enemy under the last sub-paragraph of paragraph 9 (a) of Article 78 of the Treaty of Peace.

No convincing proof has been submitted to the Commission in this connexion.

3. As it is established that Mrs. Eugenia Berry lost her American nationality when she married Prince Ruspoli, the matter should not be investigated as to whether or not she recovered her nationality of origin when she became a widow.

The American applicable text is Section 3 of the law of March 2, 1907 under which a woman who marries an alien can, upon the dissolution of her marriage, re-acquire her American nationality by either one of the following three procedures: (1) registering, if abroad, as an American national, with a United States Consular Office within one year; (2) returning to reside in the United States; (3) if residing in the United States at the time of the dissolution of her marriage by continuing to reside there.

The application of the first of these three procedures should be excluded because, although Mrs. Ruspoli registered with the United States Consular Office in Rome, she did so on August 10, 1915, that is six years after the death of her husband, which occurred on December 4, 1909, whereas the first of the procedures provided for by the law requires that the entry in the Consular Register be made within one year of the dissolution of the marriage.

Neither is the third procedure for re-acquiring nationality applicable in that Mrs. Ruspoli, upon the dissolution of her marriage, resided in Italy and not in the United States.

There remains to be determined as to whether or not Mrs. Ruspoli recovered her American nationality under the second procedure provided for by the law of 1907, that is "by returning to reside in the United States".

Under this rule two elements must of necessity be present in order that Mrs. Ruspoli could be entitled to re-acquire her American nationality: The *animus* and the *facto*. The first is an act of intent; while the latter is a physical fact.

The key to the interpretation lies in the meaning of the phrase "returning to reside". Does it require a sojourn of a certain length of time or just the mere fact of going to the United States with the intent of establishing residence there?

The citations submitted to this Commission do not reveal either the requirement of a certain length of time, or any concrete and specific determination as to its duration, had it been required. As a result, whatever time-limit were to be adopted, would be arbitrary. The only matter which, from a physical and material standpoint appears to be an indispensable and necessary requisite, is the transfer to the United States, even if conditioned upon the element of intent, which must be made evident by sufficiently clear outward signs.

In concurrence with this criterion it cannot be admitted that Mrs. Ruspoli re-acquired her American nationality following her first trip, in 1910, to the United States after she became a widow, because no express statement was submitted by her to assert that this trip was made for the purpose of re-acquiring her American nationality.

The trip made by the decedent in 1915 is different because that voyage was preceded by her formal statement made at the American Consulate in Rome that she intended to re-acquire her American nationality.

In this statement Mrs. Ruspoli asserted, under oath, that she intended to return to the United States "within two months, for the purpose of residing there and fulfilling her duties of citizenship", and that she wished to have a

passport (which was issued to her) for the purpose of returning home at Oak Hill, Georgia.

This statement, together with her transfer to America, to her home in Georgia in 1915, represents the *animus* and the *facto* required by the second of the procedures provided for by the law of 1907 for the re-acquisition by Mrs. Ruspoli of her American nationality.

4. It should now be established whether or not Mrs. Ruspoli lost her Italian nationality as a result of having re-acquired her American nationality.

As American law is applicable in connexion with the re-acquisition of her nationality of origin, Italian law must be referred to in connexion with the loss of her Italian nationality.

The pertinent rule here is that contained in Article 10 of the Law No. 555 of June 13, 1912, under which "an alien woman who marries an Italian national acquires Italian nationality. She preserves it also in widowhood unless, by maintaining or transferring her residence abroad, she re-acquires her nationality of origin".

The Third Member accepts the arguments propounded by the Hon. Italian Member on this Commission during the hearing held at Madrid in February 1957 (the third, devoted to this case), namely, that the expression of residence specified in Article 10 must be interpreted in accordance with Italian legislation.

It can therefore be stated that Mrs. Ruspoli did not fulfil all the necessary conditions required for losing Italian nationality, under Italian legislation.

The instant case involves, therefore, a case of dual nationality which comes under the principles established in the Strunsky Mergé Decision.<sup>1</sup>

5. Hereunder are the facts which have been alleged and have not been denied, as far as their correctness is concerned; although they are differently valued by both parties to this dispute in connexion with the effects thereof on the re-acquisition of nationality:

(a) The existence of *jus soli* and *jus sanguinis* in the original American nationality of Mrs. Eugenia Berry, born in 1869 in American territory and coming from a typically American family, the family of Captain Thomas, her father, whose closest relatives preserve their American nationality and continue to reside in the territory of the United States.

(b) Her education and her stay in the United States during the first thirty years of her life.

(c) Her marriage, in 1889, performed in the Catholic ritual, to Mr. Henry Burton, a North American citizen, who died in 1892 and who had named his wife as the sole heir to his large fortune. This fortune was increased one year later by the fortune left to her by her father which included property, and business established in America.

(d) Her second marriage to Mr. Enrico Ruspoli on March 2, 1901, in Washington, before the Papal Nuncio.

(e) The transfer to Italy of Mr. and Mrs. Ruspoli. They rented an apartment in the Palazzo Colonna at Rome, where they established their residence, although they travelled frequently abroad.

(f) The marriage lasted only eight years and no children were born.

(g) Her conduct following the dissolution of her marriage, and especially:

(i) Mrs. Ruspoli's two prolonged stays in America which coincided with World War I and World War II, critical circumstances in which a

<sup>1</sup> *Supra*, Decision No. 55, p. 236.

preference clearly stands out, in view of the fact that fear of danger is not a valid reason, because an ocean trip was far from being devoid of danger with the threat of submarines.

- (ii) The continued use of American passports, which were issued to her in the years 1915, 1916, 1918, 1921, 1923, 1925, 1927, 1932, 1938, 1941, 1946.
- (iii) The fact that in 1929 she performed in New York, and under American law, such an intimate family act as that of adopting her niece, Maria Theresa Droutzkoy Ruspoli.

All the foregoing points are not lessened in value by the fact that in June 1941 a friend of Mrs. Ruspoli, Baroness Rossi Rugi, requested a certificate of Italian nationality for Mrs. Ruspoli because it is not proved that Baroness Rossi Rugi acted as attorney for Mrs. Ruspoli.

The repeated signs of preference for the bond with the country of origin, first and after the interlude of her second marriage which lasted eight years, when examined in the light of the "Considerations of Law" of the Decision rendered in the Mergé Case (No. 7, letter *d*), lead the majority of the Commission to conclude that Mrs. Ruspoli's dominant nationality was American.

The preliminary question should therefore be settled in the sense that the Petition submitted by the Government of the United States of America in behalf of Mrs. Maria Theresa Droutzkoy, Mrs. Ruspoli's successor in interest, is to be declared to be admissible, without prejudice to the further investigation to be made on the existence and extent of the damages claimed.

Whereas the Italian Member disagrees with some of the statements made in this Decision, the majority Commission

**DECIDES:**

1. The Petition submitted by the Agent of the Government of the United States of America in behalf of Mrs. Maria Theresa Droutzkoy is admissible.
2. A time-limit of six months, beginning from the date on which this Decision is notified, is accorded to the Agent of the Government of the Italian Republic within which to submit an Answer on the question of the amount of compensation for damages claimed in behalf of Mrs. Maria Theresa Droutzkoy.
3. The Agent of the Government of the Italian Republic shall deposit, together with the Answer specified in paragraph 2 above, the evidence on which said Answer is based.

Rome, May 15, 1957.

*The Third Member*

JOSÉ DE YANGUAS MESSIA

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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VEREANO CASE—DECISION No. 172 OF  
17 MAY 1957<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Right of a United Nations national possessing also the nationality of a third State to claim under said Treaty—Reference to decision No. 55 rendered in Mergé Case—Failure of claimant to prove damages—Rejection of claim.

Demande en indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Droit d'un ressortissant d'une Nation Unie, possédant également la nationalité d'un Etat tiers, de se prévaloir des dispositions du Traité de Paix — Référence à la Décision n° 55 rendue dans l'affaire Mergé — Défaut de preuve quant aux dommages subis — Rejet de la demande.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 18th day of December, 1951, to the Italian Ministry of the Treasury by Mrs. Vereano, through the Embassy of the United States of America at Rome.

The Italian Ministry of the Treasury, by letter dated February 21, 1955, informed the Embassy that the claim had been rejected on the grounds that the claimant had acquired Turkish nationality by virtue of her marriage to a Turkish citizen.

On March 15, 1956 the American Embassy requested the Italian Ministry of the Treasury to reconsider the claim in the light of the decision of this Commission in the Strunsky Mergé Case (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Case No. 3, Decision No. 55<sup>1</sup>).

The Italian Ministry of the Treasury again rejected the claim whereupon the Agent of the United States Government filed a Petition with this Commission in which he stated that the claimant was an American by birth and reacquired her American citizenship by naturalization on January 10, 1939, after she married a Turkish citizen through whom the Italian Ministry of the Treasury claims she acquired Turkish nationality. The United States Agent argued that even if the claimant had possessed Turkish nationality as well

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 257.

<sup>2</sup> *Supra*, p. 236.

as American nationality on the relevant dates of the Treaty of Peace, she is eligible to assert a claim under Article 78 of the Treaty and is entitled to the protection of the United States of America before the Commission in connexion therewith; and the claimant's simultaneous possession of the nationality of a third State would not exclude her from the benefits afforded a United Nations national by the provisions of Article 78, as was established by this Commission in the Strunsky Mergé Case.

The Agent of the Italian Government, in his Answer, limits himself to comments on the amount of damage and the proofs offered by the claimant. The Answer brings to the attention of the Commission the fact that the whole of the contents of the apartment had been withdrawn by the Credito Fondiario della Cassa di Risparmio della PP. LL., a corporation acting as Mrs. Vereano's administrator, and that they were given instructions for the transfer of her chattels to America.

#### CONSIDERATIONS OF LAW:

The Commission finds that the claimant has a right to file a claim with this Commission, notwithstanding the fact that she may have been in possession of Turkish nationality. This question was already settled in the Mergé Decision and it was set down as one of the guides in Section 8 therein that

United Nations nationals who did not possess Italian nationality but the nationality of a third State can be considered "United Nations nationals" under the Treaty, even if their prevalent nationality was the nationality of a third State.

However, the Petition must be rejected on its merits because the claimant has failed to establish that she suffered damage. The only evidence in the file as to the amount of damage is her uncorroborated statement. The claimant annexed to her claim the statements of four persons describing the contents of her apartment. These statements make no mention of any damage to any of the articles nor do they state that the articles were taken or stolen. Furthermore, the watchman of the building and the former secretary of the claimant's husband, deny that they ever had any knowledge of the fact that the occupiers had removed any object from the apartment. The Agent of the Italian Government has established that the contents of the apartment were returned to Mrs. Vereano and she has not come forward with any proof that any of the articles were missing or returned in a damaged state. Therefore, the Commission must reject the Petition for failure of the claimant to prove damage and

#### DECIDES:

1. The Petition filed by the Agent of the United States of America on behalf of Mrs. Emma Vereano née Hoffman is rejected.
2. This Decision is final and binding.

Rome, May 17, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

PUCCINI CASE—DECISION No. 173 OF  
17 MAY 1957<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Criteria laid down by Conciliation Commission in order to establish dominant nationality—Reference to Decision No. 55 rendered in Mergé Case.

Indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Critères admis par la Commission pour établir la nationalité dominante — Référence à la Décision n° 55 rendue dans l'affaire Mergé.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America and Antonio Sorrentino, Representative of the Italian Republic finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 21st day of June, 1949, to the Italian Ministry of the Treasury by Virginia Mattei Puccini, through the Embassy of the United States of America at Rome.

The Italian Ministry of the Treasury, by letter dated March 22, 1951, informed the Embassy that the claim had been rejected on the grounds that the claimant, an American national by marriage, re-acquired her original Italian nationality according to the Italian Law of June 13, 1912, No. 555, following her return to Italy in 1938 and sojourn here until 1946.

Subsequently, on December 28, 1955, the American Embassy requested the Italian Ministry of the Treasury to reconsider the claim and further documented the following facts:

The claimant was born at Arliano, Lucca, on December 15, 1886. In 1914 she went to the United States and on January 6, 1915 married Joseph Mattei, an American born national, thus acquiring her American nationality. After her husband's death on July 18, 1937, Mrs. Mattei returned to Italy to visit her sister and old mother, travelling on an American passport which was later confiscated by the Italian police. Since 1938 she had been registered as an American at the Police Headquarters of Lucca. During the war she hid in the country to avoid arrest and internment in a concentration camp. In 1946 she sold her property in Italy and returned to the United States. Since the death of her husband Mrs. Mattei has been supported and maintained by

<sup>1</sup> *Collection of decisions*, vol. IV, case No. 267.

the income and assets of her deceased husband which have been and still are invested in the United States.

The Italian Ministry of the Treasury by letter dated July 11, 1956 informed the Embassy that the rejection of the claim had been confirmed on the grounds that all the evidence in the file, relative to Mrs. Mattei's return to Italy in 1938, makes one believe that she intended to stay permanently in Italy. Thereupon, the Agent of the United States Government filed a Petition stating that the claimant's nationality was predominantly American on the relevant dates of the Treaty of Peace and that the Italian Government, in the light of the Decision of the Italian-United States Conciliation Commission in the Mergé Case (Decision No. 55<sup>1</sup>) had erroneously rejected the claim.

The Agent of the Italian Government argues, in his Answer, that the claimant permanently retransferred her residence to Italy. Therefore, she does not come under the rule set down in Section 7 (b) of the Mergé Decision, which states:

The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have re-acquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

she must be considered to be dominantly an Italian national.

#### CONSIDERATIONS OF LAW:

The Commission finds, in the first place, that the claimant is in possession of both, American and Italian nationality. Therefore, this case must be considered in the light of the Mergé Case which has already been decided by this Commission and it was set down as one of the guiding principles that United States nationality shall prevail in cases involving Italians who, after having acquired United States nationality by naturalization, and having thus lost Italian nationality, have re-acquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years without the intention of retransferring their residence permanently to Italy.

In examining the facts of the case at bar which disclose that the claimant travelled on an American passport, that she was registered as an American with the Italian police, and that all her income and assets were always in the United States, the Commission must conclude that the claimant's sojourn of more than two years in Italy was not coupled with the intention of permanently retransferring her residence to Italy. As a matter of fact, when war broke out at the completion of the two-year period, Mrs. Mattei although she had an American passport, was confronted with difficulties in returning to the United States. At the cessation of hostilities she immediately returned to the United States (in 1946) where she presently resides. Therefore, the Commission considers that she is dominantly a United States national and as such is entitled to receive compensation for damages as provided by Article 78 of the Treaty of Peace. As regards the amount thereof, the Commission, having examined the appraisals as prepared by the Agents of the two Governments, acting in the spirit of conciliation,

#### DECIDES:

1. The claimant, Mrs. Virginia Mattei Puccini, is entitled to receive from the Government of the Italian Republic under the provisions of Article 78,

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<sup>1</sup> *Supra*, p. 236.

the sum of one million and five hundred thousand (1,500,000) lire, in full settlement of her claim, without any reduction of one-third as may be applicable under said Article 78 as amended by the Exchange of Notes of February 24, 1949 between the Government of the United States of America and the Italian Government.

2. The amount stated in the foregoing paragraph shall be paid within sixty (60) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.

This Decision is final and binding and its execution is incumbent on the Government of the Italian Republic.

Rome, May 17, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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D'ANNOLFO CASE—DECISION No. 174 OF  
25 JUNE 1957<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—Evidence—Proof of ownership—Burden of—Value of affidavits by claimants as to ownership—Reference to Decision No. 11 rendered in Amabile Case.

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Demande en indemnisation au titre de l'article 78 du Traité de Paix — Preuve — Fardeau de la preuve quant à la propriété du bien — Affidavits — Admissibilité en preuve — Référence à la décision n° 11 rendue dans l'affaire Amabile.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 183 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America, and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted on the 18th day of December

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<sup>1</sup> *Collection of decisions*, vol. IV, case No. 185.

1951 to the Ministry of the Treasury by Federico and Beniamino d'Annolfo, through the Embassy of the United States of America at Rome.

The Agent of the United States filed a Petition on May 25, 1955 which was subsequently withdrawn. On April 19, 1956, the Agent of the United States filed a Second Petition which contained substantially the same allegations as in the original claim. The Italian Ministry of the Treasury, by letter dated July 20, 1956, informed the Embassy that the claim had been rejected on the grounds that the property in question according to the official records, belongs to persons other than the claimants and there is no documentation of the passage of the property to the claimants. The Agent of the United States then requested the Commission's permission to file additional evidence to establish the claimant's title to the property. By Order dated November 16, 1956, the Commission granted the Agent of the United States 90 days within to which to file the said evidence. After the expiration of that period no additional evidence was filed.

#### CONSIDERATIONS OF LAW:

It is well established that a person who makes a claim of property has the burden of establishing ownership thereof. The Petition states that the claimants were each half owners of a building and two parcels of land. Annex 1 of the original Petition is a copy of the statement of claim filed with the Italian Ministry of the Treasury. It is the only evidence filed in support of the claim.

There are two affidavits, one by each of the claimants, which are a part of Annex 1 and which contain, in substance, identical statements. The only portion thereof which has any reference to ownership is contained in paragraph 2 which states: "In support of such claim and *as proof of ownership* and the extent and nature of the damage suffered, I submit Exhibit 'A'—a detailed description of the property, before and after the war, and appraisal of the damage drawn up by a duly recognized surveyor together with his sworn statement . . ." (emphasis supplied). The Exhibit "A" referred to contains only the following pertinent statement in the opening paragraph (in translation): "It is presumed that the above-named person is the rightful owner of etc." The petitioners' case is based on this evidence alone.

In the first place, the question of probative value of an affidavit was given due consideration by this Commission in its Decision Number 11 (*The United States of America ex rel. Norma Sullo Amabile vs. The Italian Republic*, Case No. 5)<sup>1</sup> and it is not necessary to set forth the entire reasoning of that decision here. Suffice it to say that the said decision accepts as proof the introduction of affidavits into evidence but leaves to the individual case the weight to be given said affidavits, especially in the light of their contents and the availability of other or better evidence. In the instant case it can be said that the affidavits presented are of no value on the question of ownership. Federico and Beniamino d'Annolfo claim to be the owners of the damaged parcels, but, at best, they have made only self serving declarations to establish that fact. They rely on the sworn statement of the surveyor "*as proof of ownership*" yet that statement contains no more than a presumption that the claimants are the owners of the property.

Furthermore, the best evidence of ownership is an extract of the official real property records of the municipality where the property is located. It is true that said records may have been destroyed, although no such evidence appears in this case, but in that event it would have been incumbent on the

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<sup>1</sup> *Supra*, p. 115.

claimants to establish that fact and then come forth with the best evidence in lieu thereof. The claimants have not produced any official real property records nor have they given any explanation for their absence.

The Italian Ministry of the Treasury rejected the claim because the official records show that the property belonged to persons other than the claimants. Thereafter the claimants were given 90 days within which to submit additional evidence of title but after the expiration of that time they did not come forth with any new evidence nor did they make any statement to refute the findings of the Italian Ministry of the Treasury. Their inaction, when combined with the complete inadequacy of the evidence already submitted, leaves the Commission no alternative but to reject their claim for failure of proof. Therefore, the Commission

**DECIDES:**

1. The Petition submitted by the Agent of the United States of America in behalf of Federico and Beniamino d'Annolfo is rejected.
2. This Decision is final and binding.

Rome, June 25, 1957.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

FLEGENHEIMER CASE—DECISION No. 182 OF  
20 SEPTEMBER 1958<sup>1</sup>

Claim under Article 78 of Peace Treaty—Exception of inadmissibility—Nationality of claimant—Status of a “United Nations national”—Applicability of first part of paragraph 9 (a) of Article 78—Exclusive competence of the State in matters of nationality—Power of investigation of international tribunals—Principle of equality of the States parties—Principle of effectivity—Evidence of nationality—Law to be applied—Theory of effective nationality—Theory of apparent nationality—Acquisition and loss of United States nationality—Bancroft treaties—Treaties concluded by a State member of federated States—Effects of war on treaties—Treaties

<sup>1</sup> *Collection of decisions*, vol. V, Case No. 20.

The following abbreviations have been used in this Decision:  
*Am. J. Int.* (*American Journal of International Law*).  
*Annual Digest* (*Annual Digest and Reports of Public International Law Cases*).  
*Ann. Inst.* (*Annuaire de l'Institut de Droit International*).  
*Moore Arb.* (*Moore, International Arbitrations* (1898)).  
*Rec. Ac.* (*Recueil des Cours de l'Académie de Droit International de la Haye*).  
*Rec. Arb.* (A. de la Pradelle et N. Politiis, *Recueil des Arbitrages Internationaux*).  
*Recueil C.P.I.J.* (*Recueil des Arrêts de la Cour Permanente de Justice Internationale*).  
*Rec. C.I.J.* (*Recueil des Arrêts de la Cour Internationale de Justice*).  
*T.A.M.* (*Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les Traité de Paix*).  
*U.N.R.A.* (*Reports of International Arbitral Awards*, United Nations).

invoked by a State not party thereto—Supremacy of treaty provisions over municipal law—Principle of estoppel—Applicability of second part of paragraph 9 (a) of Article 78 of Peace Treaty—Meaning of expression “treated as enemy”—Interpretation of treaties—Principles of—Interpretation of treaty drafted in various languages not reconciled with one another.

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Réclamation présentée au titre de l'article 78 du Traité de Paix — Exception d'irrecevabilité — Nationalité du réclamant — Qualité de « ressortissant des Nations Unies » — Applicabilité de la première partie du paragraphe 9(a) de l'article 78 — Compétence exclusive de l'Etat en matière de nationalité — Droit de contrôle du juge international — Principe de l'égalité des Parties — Principe d'effectivité — Preuve de la nationalité — Droit applicable — Théories de la nationalité effective et de la nationalité apparente — Acquisition et perte de la nationalité des Etats-Unis — Traités Bancroft — Traités passés par un Etat membre d'un Etat fédéral — Effets de la guerre sur les traités — Traités invoqués par un Etat tiers — Primauté des traités sur le droit interne — Principe de l'estoppel — Applicabilité de la seconde partie du paragraphe 9(a) du Traité de Paix — Signification de l'expression « traitées comme ennemis » — Interprétation des Traité — Principes d'interprétation — Interprétation d'un traité en cas de contradiction entre les versions faisant foi.

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The Italian-United States Conciliation Commission established by the Italian Government and by the Government of the United States of America pursuant to Article 83 of the Treaty of Peace with Italy, of February 10, 1947, composed of Messrs. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, Alexander J. Matturri, Representative of the Government of the United States of America, Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member chosen by mutual agreement between the Italian and United States Governments.

On the Petition dated June 25, 1951 submitted by the Agent of the Government of the United States of America, and filed on the following day with the Secretariat of the Commission *versus* the Italian Government in behalf of Mr. Albert Flegenheimer,

Having seen the *Procès-verbal* of Non-agreement dated August 6, 1954, signed by the Representatives of the High Parties to this dispute, whereby it was decided to resort to a Third Member as provided for by Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, in order that the controverted issues of this case be resolved:

Having noted that these controverted issues arise out of the preliminary objection of inadmissibility of the Petition raised by the Agent of the Italian Government in his Answer of October 15, 1951;

Having examined the written Pleadings and Defences exchanged by the Agents of the two Governments, as well as the abundant documents submitted by both parties;

Having heard the Agents of the two Parties, assisted by their Counsel, in the oral discussions held at Rome in one of the Court Rooms of the Italian Council of State, from October 3, through October 17, 1957;

Having seen the final Reply and Counter-Reply filed on October 28 and on November 9, 1957 by the Agents of the two Governments, in substitution for the oral Reply and Counter-Reply which, considering the length of the oral discussion, were waived by mutual agreement, with the approval of the Commission;

Having considered that the case is now ready for decision insofar as the preliminary objection of inadmissibility raised by the Agent of the Italian Government is concerned;

## I

The Parties reached the following conclusions, in their final Observations filed with the Conciliation Commission, in the Rebuttal of the Agent of the Government of the United States of October 28, 1957, and in the final Counter-Reply of the Agent of the Government of the Italian Republic, of November 9, 1957;

### A. American conclusions:

May it please this Honorable Commission:

I. To decide that Albert Flegenheimer has the status of a national of the United States of America and is therefore a United Nations national within the meaning of Article 78, 9 (a), first sentence of the Peace Treaty with Italy.

II. To proceed with the examination of the merits of the case, and preliminarily, of the request for evidence filed by the Agent of the United States of America on October 30, 1954;

Alternatively;

III. To decide that Albert Flegenheimer is a United Nations national within the meaning of Article 78, 9 (a), second sentence of the Treaty of Peace with Italy;

IV. To proceed as stated under point II above.

V. In case this Honorable Commission does not think that sufficient evidence exists in the records to warrant the granting of our alternative conclusions stated above in point III, to direct the Italian Government to submit or to make available within a period of sixty days, the original or a certified true copy of correspondence, acts and documents at the disposal of the Italian authorities for the years 1940 and 1941 regarding foreign exchange operations of the Società Finanziaria Industriale Veneta, the corporations controlled by that company and of Ilario Montesi, individually, in particular as regards the purchase of Albert Flegenheimer's Finanziaria participation.

### B. Italian conclusions:

In conclusion

it is requested that the Hon. Italian-United States Conciliation Commission declare that Mr. Albert Flegenheimer cannot be considered as a "United Nations national" for purposes of Article 78 of the Italian Peace Treaty and therefore declare all the claims made by the United States of America against the Italian Republic in the instant case to be inadmissible, and at the same time make all the necessary provisions thereby involved.

## II

**THE FACTS:**

Having considered the following facts:

1. In its Petition of June 25-26, 1951, the Government of the United States requests cancellation of the sale effected by Albert Flegenheimer on March 18, 1941 of 47,907 shares of the Società Finanziaria Industriale Veneta, of Padua, to the Società Distilleria Cavarzere, controlled by the former Company, whose major portion of capital-stock belongs to Mr. Ilario Montesi, for the sum of \$277,860.60, because the actual value of these shares is said to be from four to five million dollars.

The Petition is based on the fact that Albert Flegenheimer, of the Jewish creed, fearing that the anti-semitic legislation enacted in Italy in the month of September 1938 might be applied to him, stipulated an unsavourable contract under conditions of force or duress, so that this contract was void *ab initio*; the allegedly injured individual affirms that he should be restored to his rights on the basis of a settlement of account with Mr. Montesi, by the application of Article 78, paragraph 3 of the Treaty of Peace with Italy of February 10, 1947 and of Article III, section 16 (b) of the Lombardo-Lovett Agreement, which came into force on August 14, 1947.

This sale occurred before the United States entered the war, December 8, 1941, but after Italy had entered the war, June 10, 1940.

2. In its Answer of October 15, 1951, the Italian Government raised a preliminary objection based on the fact that Albert Flegenheimer is not a United States national within the meaning of Article 78 of the Treaty of Peace and that the legal action undertaken on his behalf before the Commission was inadmissible.

3. The Agent of the Government of the United States, in his Reply of November 17, 1952, denied that there were grounds for this exception of inadmissibility and, in order to prove Albert Flegenheimer's American nationality, filed a certificate of nationality dated July 10, 1952, as well as the Order of the Acting Assistant Commissioner reproducing *in extenso* the results of the inquests made by the Inspection and Examinations Division (of Immigration and Naturalization Service), of the United States and stating the reasons that led to the issuance of the subject certificate of citizenship.

4. Following several procedural incidents (pleadings), the Italian Surrejoinder, filed on July 30, 1954, supported by numerous opinions of American and neutral jurists, again concludes for the inadmissibility of the Petition on several grounds, *inter alia*, the absence of Albert Flegenheimer's American nationality within the meaning of Article 78 of the Treaty of Peace.

5. On February 18, 1956, the Commission, completed by a Third Member, issued an Order directing that the exception based on Albert Flegenheimer's nationality, be dealt with before any other question involved in the case was to be examined.

6. Insofar as Albert Flegenheimer's nationality is concerned, the facts give rise to certain disputes between the High Parties; and the main issue will be settled in this part of the Commission's Decision, while others shall be dealt with only insofar as they are connected with the legal examination of the subject case.

7. It has been established by the documents introduced in the record that Samuel Flegenheimer, the father of the allegedly injured individual, was born

on August 21, 1848 at Thaierenbach in the Grand Duchy of Baden, from where he emigrated to the United States, at the age of 16 in 1864 according to the Plaintiff Party, and at the age of 18 in 1866 according to the Respondent Party; he was naturalized in the State of Pennsylvania (U.S.A.) on November 7, 1873, upon attaining majority, and after having fulfilled the condition of five-year residence required by the United States law of candidates for naturalization.

He left his new home-country as early as 1874, a fact which is established by the publication of his marriage banns in Germany on January 22, 1876, wherein it is indicated that he already has resided in that country, on that date, for eighteen uninterrupted months.

Samuel Flegenheimer did not return to the Grand Duchy of Baden. He settled in Wurttemberg, where he was naturalized on August 23, 1894 and where he lived until the time of his death which occurred on May 14, 1929.

He therefore resided eight, at the most ten, years in the United States, according to whether one fixes the date of his emigration in 1866 or in 1864; and he spent the whole of the rest of his life, that is 55 years, in Wurttemberg. He married there three times and a number of children were born of these wedlocks, amongst them three sons were born at Hall (Wurttemberg), Joseph, in 1876, Eugene, in 1888 and Albert in 1890.

8. Albert Flegenheimer and his brothers were included in their father's naturalization in Wurttemberg in 1894; the eldest was then 18 years old, the middle one was 6 and the youngest, Albert, was 4. The latter lived in Germany from the time of his birth until 1937, that is 47 consecutive years, and in all probability he would have continued to reside there had it not been for the political events which forced him to leave that country.

9. Beginning from the time when the socialist régime seized power in Germany on January 30, 1933, Albert Flegenheimer, like other Germans of the Jewish faith, felt himself, his family and his property threatened in an ever increasing measure by the racial persecutions which began to rage; being apprehensive, he became fearful and acquired the psychology of the hunted man, the concentration camp constantly looming on the horizon of his future. This circumstance explains some of the conflicting statements made by him during the inquests to which he was subjected by the American authorities, as well as certain improvident steps taken by him, and one cannot reproach him nor say that he acted in bad faith.

10. At that time, Albert Flegenheimer and his brother Eugene, when examining the papers of their father who had died four years earlier, discovered that their father had been naturalized in the United States and that it was not impossible that they too had acquired American nationality *jure sanguinis*. They assert that they reproached their mother for having concealed this circumstance which, in their view, took on a very considerable importance in the situation which was developing in Germany, because it constituted for them a sheet-anchor in that it could protect them, as United States nationals, from the very serious threat of persecution which they felt was heavily weighing on their destinies. The probative value of this statement shall be examined under the considerations of law of this Decision.

11. The two brothers, one of whom, Eugene Flegenheimer, had studied law, began to make certain researches in order to find out whether they themselves had preserved their father's American nationality or whether they could eventually recover it. Between 1933 and 1939 they contacted several American Consulates in Europe and even the Embassy of the United States in Paris, but only obtained negative or ambiguous information. Albert Flegenheimer

never submitted a formal claim for recognition of his American nationality to any United States authority, before proceeding with his efforts in the United States itself, as will be set out hereinafter. His brother, Eugene Flegenheimer, abandoned these attempts at the administrative level and applied for naturalization in the United States, where he was in fact naturalized by decree of the (United States) District Court of Seattle (Washington), on January 24, 1944; also Joseph, the eldest of the Flegenheimer sons, was naturalized by decree of that same Court on May 5, 1947.

12. During the month of November 1937, Albert Flegenheimer was peremptorily notified by the Deutsche Bank in Berlin that he was to dispose of all his property in Germany under penalty of total confiscation. He was therefore compelled to sell his property for a nominal price. Later he was told he was to leave Germany definitively and, travelling on a German passport, he went to Italy where he still owned other assets which he hoped he could dispose of. But, during the summer of 1938, the Italian Government enacted anti-semitic laws and Albert Flegenheimer considered that the safeguarding of his personal security required that he leave Italy immediately.

He first went to Switzerland where, according to incorrect information given him, he thought he could easily obtain naturalization; in actual fact Swiss law at that time required an actual residence of six years on the basis of a regular permit of domicile. The hope of being able to go to America on a passport other than German, led him to commit the blunder of contacting unscrupulous people who made him part with some of his money in exchange for illusory services and the whole matter ended with the arrest of one of these individuals. On January 10 and May 9, 1939 he was questioned by the Swiss authorities, as a witness and as an injured party, and not as a defendant, so that the Swiss episode can throw no moral discredit on him.

13. Holding on to his German passport because he could obtain no other at that time, Albert Flegenheimer went to Canada; he arrived there on February 10, 1939 and on the 13th of that month he obtained, for the first time, the renewal of his passport No. 44/1939 by the German Consulate at Winnipeg, and, later, on June 10, 1941, by the Swiss Consulate in that city which had taken over the protection of German interests in Canada.

He went back to Switzerland the same year, and later he was in Winnipeg where, on November 3, 1939, he submitted to the Consulate of the United States his first formal claim to be recognized as a national of the United States, on the grounds that he had learned that he had not lost his U.S. nationality under American law.

The Board of Special Inquiry of the Immigration and Naturalization Service of the United States heard him, under oath, on November 22, 1939. During that hearing he confirmed that he only acquired knowledge of his father's, Samuel Flegenheimer's, naturalization in 1933 and stated he had never claimed his right to American nationality, whereas during these proceedings he has contended he took many steps in that direction between 1933 and 1939. These conflicting statements are not inexplicable, however, if one considers that it is proved that he never submitted, before 1939, a formal claim for recognition of his status as an American national, but that he confined himself to making inquiries at American diplomatic and consular agents in Europe in order to learn whether or not he was vested with this nationality, steps which, as has already been pointed out, did not result in the submission of a claim in the technical sense of the word.

14. On November 22, 1939, the aforesaid Board of Special Inquiry, unanimously decided that Albert Flegenheimer was not a United States national

and that he could be admitted in that country only as a German national and for a limited period of six days, as the examination of the question of his nationality was still pending.

On December 14, 1939 the Department of State of the United States informed him that he could not be registered as a United States national because he did not have this quality and that, over a period of many years, he had "manifested an adherence to German nationality". It should be pointed out that he was notified of this decision subsequent to the judgement of the Supreme Court in the *Perkins v. Elg* Case of 1939, to which the State Department expressly refers and which shall be analysed in the considerations of law of this Decision, in view of the fact that the Plaintiff Party has attached decisive importance to it.

15. While in America, Albert Flegenheimer was, without his knowledge, divested of his German nationality in application of the national socialist law of July 14, 1933 concerning the withdrawal of naturalizations and the forfeiture of German nationality; the decree of April 29, 1940 affirming this forfeiture was published in the *Reichsanzeiger* of May 4, 1940.

Neither Party to this dispute denies that Albert Flegenheimer lost, under this law, the German nationality he had acquired by naturalization together with his father in Württemberg in 1894.

Albert Flegenheimer was informed of this forfeiture only later by his Counsel in Italy who carried out negotiations for the sale of his 47,907 shares of the Società Finanziaria Industriale Veneta, subject of the dispute between the two Governments. The price of this sale was fixed at 277,860.60 U.S. dollars. Because Canada, where Albert Flegenheimer then visited, had entered the war against Italy on June 10, 1940, this sum was sent to him in New York on June 6, 1941, in accordance with his instructions.

In connexion with this payment, the Italian Government reproaches Albert Flegenheimer for having then availed himself of his German nationality in order to obtain authorization for said payment by a State which was allied to Germany in a State which was still neutral, as the United States of America declared war on Japan, Germany and Italy only on December 8, 1941; it opposes this attitude to that adopted by Albert Flegenheimer in this dispute where he never ceased to contend that he has always been a United States national uninterrupted since birth. The Commission, nevertheless, can give no consideration to this criticism, because at that time Albert Flegenheimer was unaware of his forfeiture of German nationality decreed against him and he could justifiably claim no other citizenship than that which appeared from his identity papers. The Italian Ministry of Foreign Exchange was in any event aware of Albert Flegenheimer's legal position, and proof of this is the letter which has been introduced in the record, written on March 11, 1941 to the Società Finanziaria Industriale Veneta, authorizing the transfer of dollars to the United States, and qualifying *expressis verbis* the Flegenheimer brothers as "ex-German Jews". The German nationality of the individual concerned therefore was not a determinant factor in the conclusion of this financial operation.

16. On June 10, 1941, after having travelled about, Albert Flegenheimer was authorized to enter the United States for a temporary sojourn. At that time he had possession of large sums in dollars and it was his intention to do everything in his power to remain in that country until peace had been re-established.

But, following the attack on Pearl Harbor, the United States entered the war on December 8, 1941. Albert Flegenheimer's position became critical because he had entered the United States on a German passport.

On December 13 and 19, 1941 he began by requesting an extension of his sojourn permit and was again submitted to a lengthy questioning on January 31, 1942 at Ellis Island (New York). He testified under oath he had lost his German nationality since May 8, 1940, by legal decree of forfeiture. This is a correct statement which cannot be contradicted by his former statements in view of the fact that at the time he made these statements, he had no knowledge of the German decree in question. But, in view of the fact that he did not yet have sufficient mastery of the English language at the time of the second inquest, his statements appeared to be somewhat conflicting with the results of the inquests made by the Board of Special Inquiry on November 22, 1939. A supplementary questioning occurred in Washington, on February 12, 1942; it resulted in the correction of certain statements made by Albert Flegenheimer during the inquests held prior to January 31, 1942. This supplementary procedure of inquiry is described as irregular by the American attorneys of the Italian Government in the proceedings before this Commission; but it cannot be dismissed in view of the fact that said procedure was never challenged or annulled in the United States.

17. On the basis of this supplementary inquest, the Immigration and Naturalization Service of the Department of Justice of the United States, according to the communication sent to Albert Flegenheimer on February 24, 1942, ordered that the latter be given the status of American national and that the record of his entry into the United States at Rouses Point, New York, be amended so as to indicate that he was admitted into the country as an American national, and not as a German national.

18. The State Department did not concur, without reservations, in the decision of the Immigration and Naturalization Service. When Albert Flegenheimer requested that he be given a passport, the issue thereof was refused him by letter dated May 14, 1946, on the grounds that it was necessary to await the return of more normal conditions in Europe before journeying thereto. The Department, finally issued a passport to him on October 24, 1946 and accorded him the necessary renewals.

19. On May 8, 1952, Albert Flegenheimer requested the issue of a certificate of United States nationality, which is attached to the record of these proceedings, and which was given to him on July 10, 1952, more than one year after legal action before this Commission was instituted.

The issuance of this document was, however, preceded by a request for information addressed by the Immigration and Naturalization Service to the State Department concerning the inquiries which Albert Flegenheimer claimed to have made at several consulates and at one Embassy of the United States in Europe, between 1933 and 1939, for the purpose of obtaining recognition of his American nationality.

The State Department answered that prior to Albert Flegenheimer's application made at Winnipeg in 1939, there existed no document in its files establishing that steps in that direction were taken by the claimant. The State Department added that even if Albert Flegenheimer had had an occasional conversation with any one of the consular or diplomatic agents of the United States, this would have been the subject of a report which would have been sent to it (the State Department), because "it was well known to citizenship officers in Europe that a person who came in to discuss his status but who declined to execute a formal application when invited to do so, would be likely to apply at some other office and attempt to conceal information which he learned would be damaging to his case".

20. On May 8, 1952, Albert Flegenheimer was again questioned in New York,

under the direction of Eugene C. Cassidy (Examining Officer), at the close of which questioning this official drew up a lengthy report, and the following excerpts thereof deserve special attention:

It appears highly improbable that the three foreign service officials to whom he says he spoke in three different cities and in different years all neglected to follow the established procedures and customs of the Department of State. This factor plus the subject's own evidence containing correspondence giving the reason why he made no claim to citizenship during this period, leads to the conclusion that he did not, between 1933 and 1939, assert any claim of United States citizenship but on the contrary continued by his actions to show an election of the German nationality which had been conferred upon him by naturalization of his father in 1894 when he was a minor and included in his father's naturalization.

The Examining Officer concluded by making the following recommendation:

It is therefore recommended that the application of Albert Flegenheimer for a certificate of citizenship be denied.

Nevertheless, on July 10, 1952, the American authorities ordered that a certificate of nationality be issued to Albert Flegenheimer.

21. For purposes of clarity of the case, the Commission considers it necessary to transcribe below the principal excerpts from the conclusions reached in connexion with Albert Flegenheimer's application, by the Acting Assistant Commissioner, Inspection and Examinations Division of the Department of Justice of the United States, James E. Riley, which led to the issuance of the certificate of citizenship dated July 10, 1952; they are as follows:

The subject's case has twice been decided on the question of election. In 1939 the State Department stated he had elected German nationality, and in 1942 the Service stated there was no evidence to show he had elected German nationality and, therefore, he should be considered a United States citizen. While much of the new evidence that has been added to the case is conflicting . . . there is much to support his allegation that he did attempt to claim United States citizenship many times between 1933 and 1939. It is true his story is in conflict with the known practice of the Department of State in connexion with such matters, but it is difficult to believe one could fabricate a story specifically naming so many people and then have many of those people prepare affidavits corroborating him . . . Accordingly, while no formal application for a United States passport or of registration as a United States citizen was made, the subject did what he thought was appropriate to claim United States citizenship . . . It must also be borne in mind that during all the crucial period between 1933 and 1939 Nazism had risen to great power in Germany and, being Jewish, many of the subject's activities were influenced by a fear of the concentration camp . . . It is a matter of placing credences in the subject's explanations. If he had to be believed only as to certain items, which are they? Only those supported by affidavits of others? It appears there is no choice but to believe all his statements or none.

In the foregoing it is conceded for the moment that the subject was unaware until 1933 that he had a claim to United States citizenship. Evidence has now been introduced establishing that when the subject was married in Stuttgart in 1920 he had to furnish evidence of his German nationality. To accomplish this a copy of the German naturalization certificate relating to his father's naturalization was furnished. He disclaimed any knowledge of such a certificate. The registrar at Stuttgart has stated such documents were requested when one's

citizenship status was in doubt . . . From all this it appears that in 1920 the subject could have become aware of his father's former United States citizenship if he had read the German naturalization certificate he allegedly submitted. He swears he never saw that certificate or any other German certificate of citizenship. Since . . . he denies knowledge of such certificate, it is not possible to establish that he did have such knowledge.

The allegation that the father, Samuel Flegenheimer, had never mentioned during his entire lifetime to his sons the fact of his former American citizenship would appear to be plausible in the light of a general attitude prevailing in Germany . . . displaying it to be a lack of patriotism . . . Again it is a matter of credence . . . Accepting that, there is no alternative to accepting all of the subject's statements . . .

Inasmuch as there is no evidence of any voluntary acts of the subject which may have expatriated him, it is further concluded the subject is a citizen of the United States.

The question of Albert Flegenheimer's American nationality was thus settled by an administrative authority; it was never made the subject of a judicial decision of the United States.

22. In order to be able to benefit by Article 78 of the Treaty of Peace, paragraph 9 thereof provides that the injured party must have been a United Nations national on certain given dates, to wit, September 3, 1943, the date of the Armistice and September 15, 1947, the date of the coming into force of the Treaty.

The Italian Government contends that this condition is not fulfilled and that it cannot, for purposes of application of the Treaty of Peace, recognize Albert Flegenheimer's American nationality on the basis of the documentation submitted during the proceedings before this Commission, because, in order to be in a position to be permitted to exact from Italy the heavy obligations imposed on her by the Treaty of Peace in favour of certain given United Nations nationals, it is necessary that the bond of nationality with one of the United Nations be positive and not subject to denial or criticism.

The Government of the United States contends that it has submitted proof of the existence, which fully satisfied the law, of the United States nationality with which Albert Flegenheimer has been vested, by the certificate of citizenship dated July 10, 1952, introduced in the record, and that the claimant therefore fulfils the conditions required by the Law of Nations in order to be able to benefit by the diplomatic protection of the United States.

### III

#### CONSIDERATIONS OF LAW:

23. A. *Power of the Conciliation Commission established, pursuant to the Treaty of Peace with Italy, of February 10, 1947, of examining the probative value of certificates of nationality submitted by the parties to a dispute.*

As the signatory States of the Treaty of Peace have entrusted the Commission with the task of settling, under the terms of Article 83 of the aforesaid Treaty, all disputes giving rise to the application of Articles 75 and 78, as well as Annexes XIV, XV, XVI and XVII, part B, the Commission has no other powers than those resulting from said Treaty; and the Treaty is its Charter.

In the exercise of its powers, it has the right to examine all questions concerning its jurisdiction, and amongst these questions, one should make a distinction between those which concern its competence and those which concern the admissibility of the Petition.

The competence of the Commission in the instant case is not in doubt. It is based on Article 78, paragraph 3 of the Treaty of Peace which reads as follows:

The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

It is not disputed between the Parties that the Petition of the U.S. Government is based on this provision: the merits of the case are based on the legal justification of the claim involved.

On the other hand, the admissibility of the Petition of the Government of the United States is uncertain, because there exists a dispute between the High Parties on an element of fact required by Article 78, paragraph 9, letter (a) of the Treaty of Peace with Italy which provides:

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

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

The Italian Government denies that Albert Flegenheimer was a United Nations national on the relevant dates in accordance with the foregoing provision, namely, September 3, 1943 and September 15, 1947, and it is necessary that the Commission settle this issue in order to determine whether the Petition submitted by the Government of the United States is admissible or inadmissible.

24. It is clear that the afore-mentioned provision of the Treaty of Peace, in explaining the meaning of "United Nations nationals" refers to an unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality.

The lengthy arguments developed both in the written proceedings and in the oral hearings by the Agents, and Counsel, for both Parties on the title to nationality of the United States, suffice to establish that they (the Parties) consider this right to be determinant in deciding Albert Flegenheimer's nationality and that the Commission will have to submit to the jurisprudential or conventional legal content thereof when it has established the rules that must be applied; in other words, the Commission will have to admit or reject, at the international level, a nationality, the existence or inexistence of which shall be established, in its opinion in full compliance with the law, at the national level.

25. Nevertheless, the Commission recalls that, according to a well established international jurisprudence, where international law and the international bodies who must apply that law are concerned "national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures" (*C.P.I.J.*, Decision of May 25, 1926, case relating to certain German interests in Upper Silesia, series A, No. 7, p. 19).

The result is that, in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They

are statements made by one of the Parties to the dispute which, when denied, must be proved like every other allegation. It is the duty of this Commission to establish Albert Flegenheimer's true nationality at the relevant dates specified in Article 78, paragraph 9 of the Treaty of Peace, and it has a right to go into all the elements of fact or of law which would establish whether the claimant actually was, on the aforementioned dates, vested with the nationality of the United States; these investigations are necessary in order to decide whether the international action instituted in his behalf, fulfils the conditions required by the Treaty of Peace from which the Commission cannot deviate. It must therefore freely examine whether an administrative decision such as that taken in favour of Albert Flegenheimer in the United States, was of such a nature as to be convincing.

The profound reason for these broad powers of appreciation which are guaranteed to an international court for resolving questions of nationality, even though coming within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that complete equality must be enjoyed by both Parties to an international dispute. If it were to be ignored, one of the Parties would be placed in a state of inferiority *vis-à-vis* the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless to prevent an abusive practice of diplomatic protection by its Opponent.

The right of challenge of the international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations entirely and allows the court to fulfil its legal function and remove the inconveniences specified.

26. During these proceedings, the Agent of the United States and his Counsel have nevertheless persistently contended that the certificate of nationality issued to Albert Flegenheimer on July 10, 1952, under American law, constitutes legally valid proof of his nationality, and that the nature of this proof is such as to be binding on this Commission, unless it were proved that the aforesaid certificate was obtained by fraud or favouritism such as to allow the claimant to avail himself of the diplomatic protection of the United States and, as a consequence, benefit by the reparation provisions of the Treaty of Peace with Italy, and of the Commission's jurisdiction. In the latter part of their allegations, they contended that it would be sufficient for Albert Flegenheimer's American nationality to be plausibly established in order to avoid any challenge and investigation by the Commission.

They invoke several precedents, principally the Rau, Meyer Wildermann and Pablo Najero cases.

The Rau Case was brought before the German-Mexican Claims Commission and decided by that Commission on January 14, 1930; the allegations of the Agent of the Mexican Government were based on the unconstitutionality of a Mexican law concerning nationality; these allegations were rejected because the Commission held it had "no power to pass on the constitutionality of Mexican laws" (*Annual Digest*, 1931-1932, No. 124, p. 251). This precedent is not pertinent with regard to the situation which this Commission is called upon to examine, because in Albert Flegenheimer's case there is no question of constitutionality of the law that is to be applied; the Commission must only investigate whether, in actual fact, the nationality invoked is that resulting from the law applicable to this case in the United States.

The Pablo Najero case, decided on October 19, 1928, by the Franco-

American Claims Commission, gave rise to the following statement by the Commissioners:

A legal presumption militates in favour of the regularity of all official acts of public officers. An international Tribunal in face of declarations of option accepted by the Government concerned is fully justified in considering these declarations as regular options, and in refraining from entering into an independent examination of the conditions on which their validity depend. (*Annual Digest*, 1927-1928, p. 303).

In support of its theory denying the international court the right of interpretation in matters of nationality when this fact is plausibly established, the Plaintiff Party also lays stress on the *Meyer Wildermann vs. Héritiers Stinnes et consorts* Decision, rendered by the German-Rumanian Mixed Arbitral Tribunal on June 8, 1926 wherein, in connexion with the verification of a certificate of nationality, it is stated:

It is hence the duty of the Tribunal to verify whether the Rumanian Minister of the Interior has performed an act of favour or of justice . . . The Arbitral Tribunal cannot impose an interpretation of municipal law. It must be acknowledged that the Rumanian authorities, when applying their own law and investigating the circumstances of the instant case, has the same latitude enjoyed by tribunals and, above all, administrative courts everywhere. The hypothesis of an act of favour shall be discarded if the challenged decision is reconcilable with a *plausible* interpretation of Rumanian Law and of the circumstances of fact. (*T.A.M.*, vol. VI, p. 493.)

The Agent of the Government of the United States and his Counsel also attach great importance to the Instructions given on November 30, 1881 by Secretary of State Blaine to the United States Commissioner on the Spanish-American Reparations Commission, established under the Treaty of February 11/12, 1871, in connexion with a decision rendered in the Buzzi Case on April 18, 1881; Secretary of State Blaine said:

. . . I refuse to recognize the power of the Commission to denationalize an American citizen. When a court of competent jurisdiction, administering the law of the land, issued its regular certificate of naturalization to Pedro Buzzi, he was made a citizen of the United States, and no power reside in the Executive Department of this Government to reverse or review that judgment. And what the power of the Executive can not do in itself it cannot delegate to a commission which is the mere creation of an executive agreement. (*Moore Arb.*, vol. III, p. 2592 to 2642, particularly pp. 2618-2619.)

27. In sharp contrast with this point of view, the Agent and Counsel of the Italian Government before this Commission, deny the correctness, as regards the merits, of Secretary of State Blaine's Instruction of 1881 to the United States Commissioner on the Spanish-American Commission. They refer to other instructions given by other American Secretaries of State, on the basis of that same 1871 Treaty, and concerning the same Commission, some of which are prior to while others are subsequent to Secretary of State Blaine's Instruction, so that the latter appears as isolated in American practice and in conflict with the opinions of his predecessors and successors.

In his Instruction of November 18, 1870, prior to the operation of the Spanish-American Commission, Secretary of State Fish expressed himself regarding the manner in which the said Commission was to exercise its powers, as follows:

Naturalized citizens of the United States will, if insisted by Spain, be required to show when and where they were naturalized, and it will be open to Spain to traverse this fact, or to show that from any of the causes named in my circular of October 14, 1869, the applicant has forfeited his acquired rights; and it will be for the Commission to decide whether each applicant has established his claim. (*Moore Arb.*, vol. III, p. 2563.)

Blaine's immediate predecessor, Secretary of State Evarts, developed this point of view in his letter to the Spanish Minister in Washington, dated March 4, 1880:

The Government of the United States from the first considered, as it still maintained, that the Commission established under the Convention of 1871 was an independent judicial tribunal, possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent in the jurisdiction conferred upon it to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either Governments to interfere with, direct or obstruct its deliberations. (*Moore Arb.*, vol. III, p. 2599.)

Secretary of State Evarts then pointed out that certificates of American nationality of claimants could always be impeached by Spain when it was established that the proofs submitted were inadmissible in form, or that they were the result of fraud or that, taken together, such proofs were insufficient to establish the demand of American citizenship.

Secretary of State Frelinghuysen who succeeded Blaine made an attempt at clarifying what he defined as the "true rule" in a letter written by him on September 25, 1882 to the United States Counsel before said Commission, wherein he stated:

The true rule to govern this Commission is, that when an allegation of naturalization is traversed, and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other and sufficient proof, it can only be impeached by showing that the court which granted it, was without jurisdiction or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practised upon it, or that the naturalization was granted in violation of a treaty stipulation or a rule of international law. (*Moore Arb.*, vol. III, p. 2620.)

The American and Spanish Commissioners accepted this Instruction of Secretary of State Frelinghuysen for themselves on December 14, 1882 and transmitted it to the Umpire as a matter of policy.

Therefore, Blaine's Instruction only played an incidental role in the jurisprudence of international commissions when they are called upon to deal with matters of nationality: it was promptly disavowed and abandoned, to the point where all cases giving rise to this question and brought before the Spanish-American Commission, either before or after Blaine's statement, have resulted in decisions refusing to recognize foreign judgments on this subject (Van Dyne, *Treatise on the Law of Naturalization of the United States* (1907), p. 172-173, 177).

28. The Agent of and Counsel for the Italian Government before this Commission were not satisfied with this refutation and contended that every international jurisdiction is fully at liberty to investigate the existence or inexistence of a nationality invoked before it.

They affirm that the principles invoked by the Government of the United

States in these proceedings do not correspond to positive law and that, in particular, when a certain given nationality is the very condition for the existence of an obligation sanctioned by an international treaty, the international body who must interpret and apply said treaty, is entitled and has the duty to examine, in the utmost freedom, whether such a condition exists in accordance with the Treaty, in order that it may not impose charges on the debtor State, and that it may not confer to the creditor State rights which do not come under the intentions of the High Contracting Parties.

They stress that the Law of Nations itself does not contain any rule by which the acquisition and loss of nationality is established, and on this point reference is made by them to the municipal law of the various States; but this reference is not absolute; it is limited by the powers vested in a body, whose duty it is to give judgment between the Parties, to investigate, by verification and appraisal of the facts, whether nationality was actually acquired or lost, to exclude fraud, favouritism, error and inconsistencies with treaties and general principles of law, even if the rules of municipal law, which may not contain a strict system of regulating the manner of disputing the acquisition or the loss of nationality, or which may be organized in a special manner, would result in recognition in a given person or the quality of a national of a given State. In other words, the International court, even though having the power of applying rules of municipal law in order to establish the nationality of an individual has, in addition, the power to dismiss these rules and to reach, for instance on the basis of a conception of fraud directly inspired by the Law of Nations and which might differ from the notion which it would have in municipal law, the conclusion that the quality if national of a given State should be denied a given individual. The result is that nationality could exist with regard to municipal law, although inoperative in international proceedings, without requiring that the international body express an opinion on this nationality under municipal law, or annul it.

They draw the conclusion from the foregoing allegations that this Commission has the power to examine, within the framework of international law and particularly of Article 78, paragraph 9 of the Treaty of Peace with Italy, the correctness of the administrative document of the United States dated July 10, 1952 which recognizes in Albert Flegenheimer the quality of United States national; if in its appraisal it reaches a conclusion that differs from that of the competent administrative bodies of the United States, the interested person would still remain an American national for the authorities of the United States, but this quality would not be recognized in him by this Commission on the basis of the documents introduced in the record and by the arguments developed during the proceedings.

29. In fulfilling its duties, the Commission can draw its authority from a long series of arbitral precedents, as well as from important qualified legal writings distinctly affirming the power of investigation by the international court in matters of nationality.

The first case in which the question was dealt with is the Medina Case, decided by the United States-Costa Rican Claims Commission on December 31, 1862. This case has a certain analogy with the instant case, in that the Government of Costa Rica contended that Medina's naturalization was not valid because it was not in conformity with United States law; the American Commissioner answered that the Commission must respect a decision which, rendered by an American judge, had the authority of a *res judicata* and, as such, is not contestable in any other jurisdiction, even an international jurisdiction, at least until it was annulled by the judge that had rendered it; it was a

judicial and not a merely administrative act, entailing an interpretation of United States laws and had to be recognized in Costa Rica. But Umpire Bertinatti rejected this argument and stated:

An act of naturalization, be it made by a judge ex parte in the exercise of his *voluntaria jurisdicção*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle *locus regit actu*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such matter. (*Moore Arb.*, vol. III, p. 2587.)

In the Salem Case between the United States and Egypt, which gave rise to an arbitral decision on June 8, 1932 in connexion with the nationality of the interested party, the majority of the Commission affirmed:

The Arbitral Tribunal is therefore entitled to examine whether the American citizenship of Salem really exists. Such examination is not impeded by the principle of international law that every foreign State is, generally speaking, sovereign in deciding the question as to which persons he will regard as his subjects, because the bestowal of citizenship is a manifestation of his international independence. In fact, as soon as the question of nationality is in dispute between two sovereign powers, it cannot be exclusively decided in accordance with the national law of one of these powers. In the present case it should be ascertained whether one of the powers, by bestowing the citizenship against general principles of international law, has interfered with the rights of the other power, or if the bestowal of the citizenship is vitiated because it has been obtained by fraud. (*U.N.R.A.*, vol. II, p. 1184.)

In the Hatton Case, decided on September 26, 1928 by the United Mexican States-United States of America General Claims Commission, United States Commissioner Nielsen, who had rendered a dissenting opinion in the Salem Case, affirmed that:

However, it is proper to observe with reference to this point that, as has already been pointed out, convincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement. (*U.N.R.A.*, vol. IV, p. 331.)

In the Russel Case, which was brought before this same Commission, United States Commissioner Nielsen expressed the opinion that nationality, in international law, is justification for the intervention of Government in the protection of persons or property in another country; that the jurisdictional articles of the Convention of September 8, 1923 between Mexico and the United States of America for the settlement of claims, were established within the framework of this principle, and added:

. . . The Commission, created by that Convention has the power to deal with the merits of claims only in cases where the claimants possess American nationality. It must of course dispose of the preliminary jurisdictional question of nationality before deciding a case on the merits. (Nielsen, *International Law Applied to Reclamations* (1933) p. 596-597.)

In the Flutie Case, decided in 1903 by the American-Venezuelan Commission, the following opinion was rendered:

The American citizenship of a claimant must be satisfactorily established as a primary requisite to the examination and decision of his claim. Hence the Com-

mission, as the sole judge of its jurisdiction, must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf . . . And the fact of such citizenship, like any other fact, must be proved to the satisfaction of the Commission or jurisdiction must be held wanting. (Ralston and Doyle, *Venezuelan Arbitration of 1903*).<sup>1</sup>

A similar point of view is to be found in the decision of June 8, 1926 rendered by the Rumanian-German Mixed Arbitral Tribunal in the *Meyer Wildermann vs. Héritiers Stinnes et consorts Case* (*T.A.M.*, vol. IV, p. 848); in the Case of Religious Property between France, the United Kingdom and Spain on the one hand, and Portugal on the other, brought before the Permanent Court of Arbitration and decided on September 4, 1920 (*U.N.R.A.*, vol. I, p. 27); in the Carlos Klemp Case, decided in 1925, by the German-Mexican Mixed Claims Commission (*Am. J. Int.* 24, 1930, p. 622); in the Lynch Case, decided on November 8, 1929, by the Mexican-British Claims Commission (*U.N.R.A.*, vol. V, p. 227); in the Durcatte Case, decided by the Franco-Mexican Mixed Commission, wherein, against the opinion of the French Commissioner, it was admitted that claimant did not possess French nationality inasmuch as he had lost it by virtue of the provisions of the French Civil Code (Ralston, *The Law and Procedure of International Tribunals*, 1926).

The majority of international tribunals has thus accepted this concept. It would be purposeful to mention, further, from a series of precedents which could still be lengthened, the following excerpt appearing in the decision rendered by the Franco-Mexican Reparations Commission, Prof. Verzijl acting as Umpire, on April 6, 1928, in the Georges Pinson Case:

. . . It is the duty of an international tribunal to determine the nationality of claimants in such a manner that, insofar as the tribunal is concerned, this nationality is positive, irrespective, in principle, of the requirements of the national laws of each claimant individually. The national provisions are not devoid of value in his respect, but it is not bound by them. (*U.N.R.A.*, vol. V, p. 371.)

30. the foregoing point of view is, in any event, that which has been upheld on many occasions by the Agents of the Government of the United States during international proceedings.

Hence, in his Answer concerning the Castaneda and de Leon Case, which was pending before the American and Panamanian General Claims Commission in 1926, the Agent of the Government of the United States said:

It is admitted by the Government of the United States that proof of the nationality of claimants is of fundamental importance, since the jurisdiction of the Commission depends upon the proof thereof, and the facts regarding citizenship must be established in the record before the Commission, to bring the claim within the jurisdiction of the Commission under Article 1 of the Convention. (*Hunt's Report*, State Department Publication No. 593 (1934), p. 663.)

The same point of view was further expressed in the Yanquez Case which was pending before the same Commission in 1926; the Government of the United States then contended that:

Numerous claims have been dismissed by Claims Commissions, not only for the lack of evidence regarding the citizenship of the claimant, but also because of the inadequacy of such evidence. (*Ibid.*, p. 723.)

Lastly, it is purposeful to quote, in part, the answer given by United States Secretary of State Evarts on February 9, 1880, to a protest of the Minister of

<sup>1</sup> *U.N.R.A.*, vol. IX, p. 151.

Spain who expressed dissatisfaction with a decision of the United States-Spanish Claims Commission, concerning American nationality:

"I sincerely hope that the views I have had the honour to submit to you may satisfy you that the contention on the citizenship of the claimants, dependent upon naturalization, is as fully a question of judicial determination for the tribunal in respect to the admissibility of evidence, its relevancy and its weight, and in respect to the rules of jurisprudence by which it is to be determined, as any other question in controversy in the case." (*Moore Arb.* (1898), vol. III, p. 2600.)

31. Abundant doctrine in international law confirms the power of an international court to investigate the existence of the nationality of the claimant, even when this is established *prima facie* by the documents issued by the State to which he owes allegiance and in conformity with the legislation of said State. This opinion is supported, in particular, by distinguished American authors of international law, such as the late professors Borchard and Hyde. The former expresses himself as follows in his report to the Institute of International Law on the diplomatic protection of citizens abroad:

. . . It is the duty of the defendant State to look into the question as to whether the individual, in whose behalf the Petition is submitted, actually is a national of the plaintiff State . . . Therefore, a mere statement by the claimant State concerning the fact that claimant is its national should not be sufficient. (*Ann. Inst.* 1931, vol. I, p. 277-278.)

The latter author makes a more specific reference to the practice followed by the United States and sums it up as follows:

If the validity of the naturalization of an individual claimant (or of one through whom a claim is derived) is challenged in a case before an international tribunal, the Department of State appears to recognize the reasonableness both of the right of contest and of the decision of the question by the arbitral court. The consent to its jurisdiction is believed to be implied from the agreement for the submission of claims. Such tribunals have not hesitated to impeach certificates of naturalization when the evidence warranted such action. (*Hyde International Law, Chiefly as Interpreted and Applied by the United States* (2nd revised Edition, 1945), vol. 2, p. 1130-1131.)

(See also Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (1947) p. 329, who wrote that international jurisdictions were not satisfied, in many cases, with the submission of an act of naturalization and proceeded themselves with an investigation of its legal validity, by looking into whether the conditions of naturalization had been fulfilled; he notes that qualified legal writings were able to draw from these precedents the conclusion that the possibility of subjecting to a new investigation the validity of naturalization acts was "well established" by international tribunals. The same opinion is voiced by Sandifer, *Evidence before International Tribunals* (1939), p. 149.)

32. This Commission does not intend to espouse an argument which would lead to extremes the logical consequences of the freedom of international jurisdictions when examining questions of nationality.

It could not disregard the scope of the presumption of truth *omnia rite acta praesumantur* of the decisions rendered by the official authorities of a State acting in the sphere of their duties and in matters over which they have internal jurisdictional power. But there is here involved only a *juris tantum* presumption which could be reversed by contrary evidence.

33. The Commission is thus faced with the question of the law that is applicable to the evidence of disputed nationality. In the jurisprudence of the

various States, this law is either the *lex fori* or the *lex causae*, namely, the law of the State with which, it is contended, the individual has a bond of citizenship.

Now, the Commission has no other *lex fori* than the provisions of the Treaty of Peace which it must apply and the general rules of the Law of Nations; and neither the former nor the latter contain any requirements as regards evidence of a disputed nationality. It must further notice that the application of the *lex causae* could constitute an obstacle to the jurisdictional mission entrusted to it by the signatory States of the Treaty of Peace, because this law could, by the operation of formal evidence, force it to recognize a nationality the actual existence of which it has the right and the duty to investigate.

Umpire Bertinatti affirmed the foregoing in his decision rendered on December 31, 1862, by the Commission for Claims against the United States and Costa Rica, in the Medina Case, the most important excerpt thereof being the following:

The certificates exhibited by them being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to the truth itself.

It has been alleged in behalf of the claimants that even admitting that their acts of naturalization are intrinsically void, it is not in the power of the Commission to reject them as proof, if they are not first set aside as fraudulent by the same tribunal from which they were obtained.

To admit this would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this Commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States.

. . . Consequently this Commission judges according to truth and justice, and cannot be prevented from examining the intrinsic value of an act exhibited as evidence by any limitation or extrinsic objection arising from a matter of form established by the municipal law of the United States. The claimants having chosen to place themselves under the jurisdiction of this Commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States. (*Moore Arb.* (1898), vol. III, p. 2587-2588.)

This Commission cannot neglect remarking that this decision by Umpire Bertinatti, the first which has affirmed the powers of investigation of the international court in matters of nationality, was the subject of severe criticism on the part of two distinguished French jurists, the late Professors de la Pradelle and Politis who do not accept that the international court may, when an act of naturalization is valid in form, "investigate whether the authority that issued such certificate did or did not do so in conformity with the laws"; it can only require that the act be in conformity with international law and issued without "fraud" (*Recueil Arb.* (1923) vol. II, p. 176). But this restrictive interpretation of the powers of the international court is not predominant in international jurisprudence. If it is correct that a body established by States cannot freely interpret municipal law, this Commission intends to follow the jurisprudence of the International Court of Justice which permits it to "verify, by its own knowledge, the application of municipal law in connexion with the facts alleged or denied by the parties in order to determine whether these are correct or incorrect". Decision of April 6, 1955, Nottebohm Case (2nd phase) *C.I.J.* 1955, p. 52, *Liechtenstein vs. Guatemala*.

A similar viewpoint has already been adopted by the Permanent Court of International Justice (Decision of March 26, 1925, Case of the *Mavrommatis Concessions in Jerusalem, Greece vs. Great Britain*, C.P.J.I., series A, No. 5, p. 30).

It has been further alleged by one of the jurists of the Plaintiff that, in order to successfully deny a nationality, proof of which consists in an official statement of the national State, the other Party must establish the existence of so serious a cause as to affect the validity of the acquisition of nationality within said national State; if the irregularity alleged is not liable to entail cancellation under the municipal law of that State, this irregularity cannot be brought up before an international court.

But this restriction, in its absolute form, does not appear to find support in international jurisprudence; in the Salem Case, the Arbitral tribunal certainly held that the international court must examine municipal law of the State which contends that a person is its national, but the opinion has not been expressed that the nullity in municipal law must be presupposed so that the other State may contest the nationality. It is the opposite idea that emerges from the following excerpt of that decision:

In order to decide the question of fraud it will be necessary to examine if the false representation with which the nationality of a certain power has been acquired refer to those points on which, according to the law of this power, the acquisition of nationality is essentially dependent. So far the notion of fraud cannot be construed without taking into consideration the national law of the power which bestowed the citizenship, . . . The objection of the American Government that such proof can only be furnished to the American courts who, under the law of June 29, 1906, section 23, are competent to deprive any naturalized person of citizenship, if fraud is proved, is not admissible before an international arbitral tribunal. The judgment of a national court may be indispensable to engender the legal effects of such a fraud under national law, but nevertheless in a litigation between States regarding the nationality of a person the right of one State to contest, as acquired by fraud, the nationality claimed by the other State cannot depend on the decision of the national courts of this State. (*U.N.R.A.*, (1949), vol. II, p. 1185.)

One could also add that from the standpoint of practice it may frequently be impossible for the international court to have knowledge of the grounds for nullity, under municipal law, in matters of nationality, as the laws are often silent in this respect and jurisprudence does not cover all the eventualities that might occur, and this is exactly so in the Flegenheimer Case, i.e., a case of "first impression" submitted to the court for the first time.

34. The Commission, in conformity with the case law of international tribunals, holds that it is not bound by the provisions of the national law in question, either as regards the manner or as regards the form in which proof of nationality must be submitted. And this is in harmony with the opinion expressed by the Franco-Mexican Reparations Commission in the George Pinson Case:

An international tribunal . . . may lay down stricter requirements than those contemplated under national legislation, for instance for the purpose of unmasking naturalizations obtained in *fraudem legis* but it may also be satisfied with less strict requirements in cases where it does not appear to it to be reasonably necessary to set in motion the entire apparatus of formal proofs . . . it is much more logical not to bind the tribunal to any national system of proof, but to give it complete freedom of investigation of the evidence submitted, as the case may warrant. (*U.N.R.A.*, vol. V, p. 371.)

35. The Commission, on the basis of the research made in jurisprudence and authoritative doctrine, holds that its powers of investigation as to whether Albert Flegenheimer validly acquired United States nationality is all the less disputable in that no American judgment of naturalization has been introduced during these proceedings but a mere administrative statement which, according to the international practice commonly followed, is subjected to the valuation of every court, whether national or international, to which the question of the validity of a nationality is submitted.

The Commission nevertheless considers that the observations made by the commentators of the Medina Case cannot be ignored, and that international jurisdictions must act with the greatest caution and exercise their powers of investigation only if the criticism directed by one Party against the allegations of the other, not only are not manifestly groundless, but are of such gravity as to cause serious doubts in the minds of their Members with regard to the reality and truth of the nationality invoked.

36. In the instant case, the grounds for doubt in connexion with Albert Flegenheimer's nationality are so numerous and so patent, that the Commission could allow him to benefit by Article 78 of the Treaty of Peace with Italy only if all the doubts, raised in its mind over the facts on the basis of which the certificate of United States nationality was issued, were dispelled.

These facts are first of all connected with the validity of Samuel Flegenheimer's naturalization in the United States from which flows the acquisition *jure sanguinis*, of his son Albert's American nationality; subsequently with the loss by the latter of his American nationality as a result of his naturalization together with his father in Württemberg in 1894, when he was still a minor; with the long sojourn of the interested party, as a German national, in Germany from 1904 to 1937, with his entry into Canada on February 10, 1939 before the outbreak of World War II, on a German passport which was renewed to him a few days later by the German Consulate at Winnipeg, and then in 1941 by the Swiss Consul in that city, who had taken over the protection of German interests.

The Commission's grounds for doubt are further increased when acquiring knowledge, from the documents in the record, of the fact that all inquiries for information made by Albert Flegenheimer at consular offices and even at an Embassy of the United States in Europe in connexion with his American nationality only resulted in negative or dubious answers; that, if he succeeded in obtaining an authorization of making, at the outset, only temporary sojourns in the United States, his case gave rise to conflicting decisions by the State Department and by the Immigration Service of the Department of Justice of the United States; that at the time of the inquests to which he was subjected by American officials, he made statements which are not entirely consistent; that the authorization which was accorded to him to enter the United States as a German national was only modified by a decision of the Immigration and Naturalization Service of February 24, 1942, in the sense that he was thereafter qualified as a citizen of the United States, but that the subsequent inquests which resulted in this amendment of the record of his entry, are defined as irregular by the American Counsel for the Italian Government in these proceedings.

This Commission cannot fail to take notice of the fact that the State Department on May 14, 1946 refused at first to issue an American passport to Albert Flegenheimer, and that if later, on October 24, 1946, it did decide to issue a passport, it specified that this document would not be renewed; that even after the institution of legal action before this Commission on behalf of Albert

Flegenheimer on June 26, 1951, the application for a certificate of citizenship made by him gave rise to a dispute between the State Department and the Department of Justice of the United States; that on May 8, 1952 Albert Flegenheimer then swore to an *ex parte* affidavit in which he explained his case; that the Examining Officer nevertheless concluded that his application should be refused, but the Acting Assistant Commissioner held that the petitioner was to be considered as a United States citizen on the basis of his own statements, on the scarcely convincing grounds that there could be no other alternative than that of considering them as completely incorrect or entirely correct; that he concluded by following this latter course which resulted in the issuance of the certificate of nationality of July 10, 1952, more than one year after the Petition was submitted to this Commission. Lastly, this Commission cannot but be impressed by the fact that the precedent of the Supreme Court of the United States in the *Perkins vs. Elg* Case (1939), which instigated the decision of the American administrative authorities in Albert Flegenheimer's favour, was already known at the time the preceding negative decisions were rendered, and that the effects which the Bancroft Treaties might have had on the nationality of Albert Flegenheimer were not examined by the American authorities. Hence, Albert Flegenheimer's nationality is far from presenting such a character of certitude and of clarity as to entail conviction.

37. This Commission owes it to itself, as it owes it to the two States who have placed their confidence in it so as to assure a correct application of Article 78 of the Treaty of Peace with Italy, to make an objective search for the truth and to clarify the legal position which, as far as the Commission, in its capacity as an international organ, is concerned is Albert Flegenheimer's factual position.

In the fulfilment of this duty, the Commission feels it is not bound by the unilateral statements of either of the two States. It cannot directly consider, without a thorough investigation, an assertion of faith made by an official of the United States in connexion with the statements of the interested person to the point of giving rise to certain international obligations to be borne by the Italian Republic; but it cannot lightly reject a nationality which is recognized by the Plaintiff State, because its powers of investigation are not so extensive as the Agent of and Counsel for the Italian Government would have it believed.

38. It is therefore important to establish in as precise a manner as possible the limits within which an international jurisdiction is entitled to investigate the acquisition or the loss of nationality by a person whose nationality is established *prima facie*. These limits may concern the form in which a certificate of citizenship is issued; they may also concern the merits when an official certificate, regular as to form, is inconsistent with the conditions of merit required by law, by the case law of the State whose nationality is claimed or by the international treaties to which said State is a party.

From the standpoint of form, international jurisprudence has admitted, without any divergence of views, that consular certificates as well as certificates issued by administrative bodies which, according to the national legislation of the subject State do not have absolute probative value, are not sufficient to establish nationality before international bodies, but that the latter are nevertheless entitled to take them into consideration if they have no special reasons for denying their correctness.

From the standpoint of merit, even certificates of nationality the content of which is proof under the municipal law of the issuing State, can be examined and, if the case warrants, rejected by international bodies rendering judgement

under the Law of Nations, 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. It is thus not sufficient that a certificate of nationality be plausible for it to be recognized by international jurisdictions; the latter have the power of investigating the probative value thereof, even if its *prima facie* content does not appear to be incorrect. This is particularly true before international arbitral or conciliation commissions who are called upon to adjudicate numerous disputes following troubled international situations that are the outcome of war, internal strife or revolutions.

39. B. *On Albert Flegenheimer's jure sanguinis, acquisition of United States nationality.*

The Government of the United States contends that Albert Flegenheimer acquired United States nationality through filiation, *jure sanguinis*, at birth, on July 4, 1890, in German territory, because he was born of a father who at that date was vested with United States nationality and had not yet been naturalized in Württemberg.

The Italian Government denies this and claims that Samuel Flegenheimer secured his naturalization in the United States in 1873 in a fraudulent manner, and that, consequently, it was null and devoid of effects; furthermore, even supposing, by way of hypothesis, that he had validly secured the said naturalization, he would have lost his American nationality because of the lack of *animus revertendi* to the United States and as a result of his having taken up permanent residence in Germany since 1874, so that, on the date of the birth of his son Albert, in 1890, he could not have transmitted to him *jure sanguinis* a nationality which he had never acquired or which he has previously lost.

This Commission is hence called upon to pass on the validity and the actual existence of the American nationality of an individual who, in any event, had possession thereof from 1873 through 1894, the year in which he was naturalized in Württemberg, without it ever being contested, and to decide whether the nullity of the citizenship of an individual who died in 1929 can still be raised before it (the Commission).

Although, at first sight, the opening of an inquiry regarding a person now many years deceased would appear to be somewhat unusual, the Commission does not intend to shun the issue, because the very nature of acquisition of nationality by filiation entails a probatory examination which necessarily extends to the citizenship of the claimant's ascendants; it can hence embrace many generations if the law which is recognized as applicable by the Commission does not exclude proof *ad infinitum* by laying down certain presumptions like that, for instance, of the French nationality Code (Article 143).

In order to evaluate Samuel Flegenheimer's naturalization in the United States in 1873—likewise in order to decide whether it must admit or deny the effects of the American nationality of his son Albert—the Commission must naturally make an analysis of United States law such as it existed at the time when the facts entailing the acquisition or the loss of American nationality of these persons occurred, exclusive of all developments, amendments or restrictions this law may have been subjected to subsequently, either by the enactment of laws, by international treaties or by jurisprudence.

40. The XIVth Amendment of the United States Constitution provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

In the instant case, the regularity of Samuel Flegenheimer's naturalization, as to form, is not questioned; likewise, the fact that he complied with the five-year residence condition in the United States before naturalization, in conformity with the Act of February 10, 1855, chapter 71, section I (10 Stat. 604/1855) is not denied by the High Parties. The criticism raised by the Italian Agent and his Counsel is directed at the following points:

41. (a) Samuel Flegenheimer, it is objected, at the time of his naturalization, had no intention of residing permanently in the United States.

Even though this condition was required by a United States statute only in the law of June 29, 1906 [34 Stat. 596 (1906)], the Supreme Court expressed the opinion that this condition was implicitly contained in previous laws; in fact, in 1913, it ruled that:

... by necessary implication the prior laws conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States. ... By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant ... True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. [*Luria vs. United States*, 231 U.S. 9 (1913).]

In its decision the Supreme Court ordered that the certificate of nationality issued to Luria be cancelled, on the grounds "that the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purposes with which the latter was sought and affords some reason for presuming that there was an absence of intention at that time to reside permanently in the United States is not debatable".

In the case *United States vs. Ellis*, 185 fed. 546 (Circuit Court, Eastern District of Louisiana, 1911) a similar judgment was rendered.

(b) Samuel Flegenheimer, it is also objected, acted in bad faith when he submitted his application for naturalization because he had no intention to reside permanently in the United States; and the Supreme Court, in the case cited above, admitted that this intention was an element of good faith required of candidates to naturalization.

(c) Samuel Flegenheimer, it is further objected, went to the United States at the age of sixteen (or eighteen), in 1864 (or in 1866), just prior to being called up for military service in his country of origin, the Grand Duchy of Baden, at a time when Germany was living through a troubled period known as the Bismarck era, and to have abandoned his new home country less than one year after securing naturalization, not for the Grand Duchy of Baden, where he was liable to indictment for violation of his military duties, but for Württemberg, of which country he was not a citizen prior to his emigration to America, and where he secured naturalization as soon as he reached an age to be dispensed with every obligation of serving in the German armies; he lived there uninter-

ruptedly until he was eighty-one. This conduct was considered as a fraudulent naturalization by the Supreme Court of the United States in the Knauer Case, concerning an individual who was naturalized in 1937 and who, after having taken an oath of allegiance to the United States, swore loyalty to Hitler. The Court said:

Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court. (*Knauer vs. United States*, 328 U.S., 654 (1945).)

In order to establish that this conception was that expressed by American statesmen at the time when Samuel Flegenheimer secured naturalization, the Italian Government invokes a communication written by Secretary of State of the United States, Fish to Bancroft, then Minister to Berlin, in which he indicates the reasons justifying a revision of the nationality treaties between the United States and several specific States of the German Empire:

A German can now come to America, obtain his naturalization papers through the operation of our laws, return to Germany and reside there indefinitely as an American citizen, provided he does not reside the requisite time for renunciation in the territories under the jurisdiction of the particular power of whom he was formerly a subject. It is true that such a course would be a fraud upon the United States and a fraud upon the German Empire. . . . It is for the interest of neither to perpetuate this. (Letter, June 4, 1873; *vide Wharton, International Law Digest*, p. 377-378.)

(d) Lastly, the Respondent Party finds support in the fact that as Samuel Flegenheimer left the United States a few months after acquiring naturalization without *animus revertendi*, he must be deemed to have had the intention of expatriating himself and to have lost, on these grounds, his American nationality, even if it were to be assumed that he had acquired it in good faith and without fraud.

In this connexion the Respondent Party refers to the Act of March 2, 1907 (Ch. 2534), section 2, paragraph 2, which established a presumption of expatriation against all aliens who leave the United States after securing naturalization and who reside at least two years in their country of origin or five years in another State. The Respondent Party can, however, cite only one judicial decision in support of its theory, a decision which is prior to the enactment of the aforesaid law; it was rendered by the Court of Appeals of Kentucky, in connexion with Mr. and Mrs. Alsberry, United States nationals who established their residence in Texas in 1824, at a time when this State was not yet a part of the United States. The Court said:

. . . As Thomas Alsberry and his wife settled themselves in Texas, in 1824, with the ostensible purpose of making it their permanent home, and especially as she remained there, with the same apparent intention, for years after his death, and even until after revolutions had been effected in the political relations of that country, its independence had been declared, and a new constitution, to which she should be presumed to have been a party, had been adopted, we are of the opinion that she as well as he, should be deemed to have ceased—so far as by her own act she could cease—to be a citizen of the United States . . . (*Alsberry vs. Hawkins*, 39 Ky. (9 Dana) 177 to 180 (1839).)

The Respondent Party contends that, although prior to the law of 1907, statutes did not contain an accurate description of the acts which could entail

the loss of United States nationality, it was nevertheless clearly admitted that departure of a naturalized national from the United States without *animus revertendi* automatically entailed the loss of American nationality; the Respondent Party cites, in this connexion, numerous assertions made by Statesmen, including many Secretaries of State of the United States, and of American jurists. The Respondent Party also refers to the decision rendered in 1925 by the Supreme Court in the *Mandoli vs. Acheson* case (344, U.S. 133, 136-137).

42. In examining these various arguments, this Commission must note that they are not of such a nature as to give it certainty that, during the period under consideration, and under the laws then in force in the United States, Samuel Flegenheimer did not regularly acquire the nationality of that Power by naturalization or that he had lost the benefits thereof.

It is admitted by the American authors themselves that nationality laws, especially during the period of time that must be taken into consideration, namely from 1873 through 1890, did not have the same technical accuracy which they acquired after the beginning of the twentieth century, especially the laws of June 29, 1906 and March 2, 1907 the provisions of which were used and developed by more recent laws, the Nationality Act of October 14, 1940 and the Immigration and Nationality Act of 1952 as well as the copious jurisprudence which ensued therefrom.

In the Commission's opinion, neither these legislative texts, nor the principles of jurisprudence set forth by the United States' courts following the beginning of the twentieth century, can be retroactively applied, unless an exception is expressly provided by positive law, in order to deny the American nationality of an individual who was vested in it for decades, without his status, as an American citizen, having ever given rise to a dispute while he was living, so that it represented a veritable possession of a status; this could only be contested on the basis of formal texts or a judicial decision concerning the interested person directly, subsequent to an analysis of his particular condition. If the Commission were to follow a different path, it would be led, by an abstract reasoning, to conclusions which would conflict with the content of the records introduced in the case, and thus with reality; it would be faced with the impossibility of establishing the exact date on which Samuel Flegenheimer ceased to be an American national, and consequently of determining whether he transmitted *jure sanguinis* some kind of nationality to his son Albert, or whether the latter should be considered as stateless since birth.

The Commission is strengthened in its conviction that its manner of envisaging the situation, in holding that criticism which is directed against the validity of Samuel Flegenheimer's naturalization, leads to subjective provisions of a psychological nature which escape a definite judicial appraisal in the absence of the party concerned.

Although the whole of Samuel Flegenheimer's conduct raises serious suspicions, they only concern the motives underlying the various changes of nationality which he underwent at a time when those motives were not contemplated by the positive laws of the United States.

As Samuel Flegenheimer had already lost his American nationality following his naturalization in Württemberg in 1894, more than ten years before the enactment of the law of June 29, 1906, the Commission entertains serious doubts as to whether the absence of the intention to permanently reside in the United States could, under the circumstances, entail the invalidity of his naturalization in that State. The American judicial decisions ruling on the nullity of American nationality on these grounds, which have been cited during these proceedings, concern cases which were decided after the enactment of the

law of June 29, 1906. Unlike what is provided in this latter law, former legislation did not require from a candidate to naturalization any statement under oath regarding his intention to permanently reside in the United States, whereas he did have to take such an oath under the 1906 Act.

Nevertheless, in the Luria Case, which raised the question of the validity of a naturalization secured as early as 1894, the naturalization was cancelled by the Supreme Court on October 20, 1913 because the interested party had left the United States only a few months after being naturalized, to take up residence in South Africa. The Supreme Court rendered its decision on the basis of the law of June 29, 1906, by admitting a presumption of revocation of a naturalization, extended by the last paragraph of section 15 of this law, to naturalizations accorded under the authority of former laws, because this presumption was implicitly included in the latter. It should be pointed out, however, that proceedings could not be instituted in an American court after 1894 because Samuel Flegenheimer had already lost his American nationality at that time, as the result of his naturalization in Germany. On these first grounds the Commission holds it cannot take into consideration, without reservations, the Luria case precedent in order to declare that Samuel Flegenheimer's naturalization in the United States was null and void because of lack of *animus manendi*.

It must furthermore take note of the fact that no judicial action for nullity was instituted against the interested party by the American authorities, as was the case in the Luria proceedings. In fact, it appears from the text of the law of June 29, 1906 that cancellation of a naturalization, because of the lack of *animus manendi*, is not incurred under the law; this only creates a presumption of fraud which the person concerned can rebut by countervailing evidence; the law expressly provides for this in section 15 which reads as follows:

That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing of the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State, or the place where such suit is brought. If an alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent . . .

It is not denied by the High Parties to this dispute that a suit for cancellation of Samuel Flegenheimer's naturalization could not be instituted at this time because the law requires that he be notified of the petition and that it be followed by a hearing of the individual concerned and by the submission of

defenses and procedural acts which can no longer be accomplished by reason of his demise.

Therefore, the first argument raised by the Italian Government against the validity of Samuel Flegenheimer's naturalization cannot be accepted.

The same thing can be said, and for the same reasons, of the second argument of the Italian Government which consists in denying that Samuel Flegenheimer acted in good faith. It is true that there has been introduced in the record of the case an excerpt of the application, submitted under oath, by Samuel Flegenheimer on November 7, 1873, to the Court of Pittsburgh (Pennsylvania, U.S.); he swore that the facts set out in his application were true and that for the past three years he had had the bona fide intention of becoming a United States national. But, evidently, this statement can only be referred to the naturalization conditions, such as they existed, at that time, required of and known by the candidates. In the Luria Case, the Supreme Court did not exclude *a priori*, a change in the candidate's intention which would not exclude good faith; it affirmed that, if, in actual fact, the candidate, at the time he submitted his application, intended to reside permanently in the United States, and that if his subsequent residence abroad was established on grounds which were reconcilable with that intention, he was completely at liberty to prove it, because there were involved elements of a decision on which he alone was in a position to supply the necessary information. Now, at this time, no useful inquiry could be carried out to that effect by this Commission.

The whole of the Italian Government's allegations concerning the interested nature of the motives underlying Samuel Flegenheimer's naturalization, who is said to have obeyed, above all, the urge of evading military service in Germany, is plausible, even though it is not proved by the documents of these proceedings that he was compelled to do active service in the army of his country of origin, when it was proven his son Albert was exempted. It is nevertheless not decisive because, at the time he secured naturalization, the United States was not concerned with the motives which induced a candidate to apply for naturalization. This was noted by American Secretary of State Frelinghuysen, in his Instruction of September 25, 1882:

The only question in each case, is whether the person claiming to be naturalized citizen has been naturalized. There is no law of the United States requiring the applicant to disclose the motive which induces him to change his nationality. (*Moore Arb.* (1898), p. 2620.)

If, at that time, naturalization secured by candidates for the only purpose of evading their military duties in their respective countries grew to such an extent as to constitute a genuine evil custom against which the American authorities have vigorously reacted as a consequence, it is no less certain that on the date of Samuel Flegenheimer's naturalization in the United States, these practices were not forbidden by positive law and did not constitute a violation of the naturalization laws. The citations of declarations and opinions of American Statesmen and learned jurists who condemned them and which are abundantly reproduced in the written defences and supporting opinions submitted by the Italian Government, were directed at obtaining an amendment of the laws or of the international treaties then in force; manifestly, they concerned the *lex ferenda* and not the *lex lata*. The Commission thus holds that it cannot consider them for the purpose of evaluating Samuel Flegenheimer's naturalization.

Lastly, the final argument of the Italian Government does not seem to be better founded, namely, that even if Samuel Flegenheimer's naturalization

could not be considered as null and devoid of effects by the Commission on the grounds of fraud against the American law, he lost the benefits of said nationality by his expatriation resulting from his return to Germany, because the term expatriation does not have the mere material meaning of abandonment of residence in the United States, but the legal meaning of the loss of American nationality.

In this connexion the Commission is again led to conclude that the Act of March 2, 1907, entitled "an Act in reference to the expatriation of citizens and their protection abroad" does not appear to be applicable in order to decide whether, in 1890, Samuel Flegenheimer was still a national of the United States. Likewise, the decision of the Supreme Court in the *Mandoli vs. Acheson* Case, referred to by the Italian Government, because it was rendered in 1952, that is, many decades after the enactment of the Act of 1907, is not of such a nature as to clarify Samuel Flegenheimer's legal position, as it existed in 1874, the year of his return to Germany, and in 1890, the year in which his son Albert was born. It should in fact be noted that, in the aforesaid decision, the Supreme Court made an analysis of the origins of said Act of 1907 and came to the conclusion that the Congress of the United States did not accept the proposal of sanctioning an extensive doctrine on expatriation by emigration, but confined itself to introducing in the new law a mere presumption of loss of American nationality limited to naturalized persons, "native born" citizens being excluded. This restriction refutes all arguments tending to describe the Act of 1907 as a synthesis of the principles indisputably recognized and previously followed by unwritten law. The situation is similar to that which existed prior to the Act of 1907 with regard to the effects of a naturalization obtained without a sincere desire to permanently reside in the United States. At that time, American law on expatriation was not very clear and gave rise to uncertain interpretations, wherefore it was impossible to establish whether the departure of a naturalized citizen without *animus revertendi* entailed, as a consequence, the loss of American nationality, or merely an interruption thereof which involved a refusal by the Administration to extend diplomatic protection. It was only under the "Nationality Act" of 1940 that expatriation, that is the complete loss of American nationality, was automatically connected with the materialization of certain objective conditions, laid down by law, without any consideration of the intention of the individual concerned.

The Act of March 2, 1907, Section 2, on the contrary, provided that:

When any naturalized citizen shall have resided for two years in the foreign State from which he came, or five years in any other foreign State, it shall be presumed that he has ceased to be an American.

Also, according to this provision, it is a question of a *juris tantum* presumption which can be reversed by countervailing evidence during the course of judicial proceedings, which were never instituted against Samuel Flegenheimer; the requirement of a special action for cancellation in order that the nullity of a naturalization may be decided, has been admitted in a recent case, the *Laranjo vs. Brownell* suit, adjudicated in 1954 by the U.S. District Court of California.

But as regards the period prior to 1907, and especially that between 1874 and 1890, United States law did not provide for such presumption of loss of citizenship by expatriation, and, unlike section 5 of the Act of June 29, 1906, no retroactivity was assigned by the legislator to Section 2 of the Act of March 2, 1907 (Hackworth, *Digest of International Law*, vol. III (1942), p. 300). Borchard comments on the Act of 1907, which appears to admit only a loss of diplomatic protection, as follows:

By paragraph 2 of the Act of 1907, two years' residence of the naturalized citizen in the country of origin or five years' residence in any other country create a presumption that he has ceased to be an American citizen, and unless that presumption is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended. (*Diplomatic Protection of Citizens Abroad* (1915), p. 531.)

Even though preserving its freedom in evaluating the facts which, as far as the Commission is concerned, are the laws, administrative practice and the jurisprudence of States, the Commission cannot adopt results which would be inconsistent with such positive rules of international law like those linking nationality with diplomatic protection. If these two institutions appear to be separate in the law of the United States, prior to 1907, this is only a consequence of the discretionary power recognized to all States in the field of diplomatic protection because these do not give rise to a subjective right to the benefit of the individual but are dominated by reasons of expediency which the State freely evaluates. But the Court cannot draw therefrom any conclusion with regard to the legal nationality of persons who have been refused diplomatic protection. It is hence clear that the Commission cannot insert in American positive law, preceding the Act of 1907, a cause for the loss of nationality by emigration without *animus revertendi* which is not provided for therein, and which, even under the authority of the law which subsequently sanctioned it, gave rise in the United States to disputes with regard to its scope and veritable meaning.

43. Furthermore, as the Commission does not have jurisdictional powers to decide on the nationality of persons who are not directly connected with the dispute between the High Parties, which it has been called upon to adjudicate, it is of the opinion that, in order to determine Samuel Flegenheimer's nationality, it should abide by the formal evidence submitted to it; it must therefore eliminate from its investigations all questions implying an evaluation of the subjective intentions of a person whose interests are not at stake and who cannot be heard. The Commission can thus only notice that no positive proof of the loss of American nationality, undeniably acquired by naturalization by Samuel Flegenheimer in 1873, has been introduced. The *Alsberry vs. Hawkins* precedent invoked, apart from the fact it is old, does not appear to be determinant by reason of the fact that if the emigration of Mr. and Mrs. Alsberry to Texas goes back to a date that is prior to the incorporation of that State into the American Union, the decision of expatriation of the Federal Court of Kentucky was rendered subsequent to the declaration of independence of Texas, during a time of political transition, whose influence on the decision is difficult to specify; the interested persons lived in Texas and had acquired citizenship by virtue of the Common Law, at a time when rules on nationality had not yet been made uniform in the United States by Federal Law.

The result of the foregoing considerations is that the Commission must take notice of the fact that on the date of Albert Flegenheimer's birth, July 4, 1890, Albert's father, Samuel Flegenheimer, was still vested with the nationality of the United States and that he therefore transmitted to his son, *jure sanguinis*, the quality of a national of the United States, under the Act of February 10, 1855, Revised Statutes, 604, Section 1993 of which reads as follows:

All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their births citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

The conditions of this legal provision are fulfilled, because even though Albert Flegenheimer was born in Germany, it is not denied and it is moreover proved that his father, an American national, had previously resided in the United States. They can thus benefit by the XIVth Amendment to the Constitution of the United States.

44. C. *On the loss, following naturalization in Württemberg, of the United States nationality by Albert Flegenheimer.*

It is henceforth expedient to investigate whether, as a result of his naturalization in the United States in 1873, Samuel Flegenheimer lost his nationality of origin, namely that of the Grand Duchy of Baden and whether later, following his naturalization in the Kingdom of Württemberg in 1894, he lost his title to United States nationality and if, possibly, this latter expatriation was extended to his son Albert who was a minor at the time it occurred.

The two High Parties to this dispute concur in admitting that United States law considers the voluntary naturalization of an American national abroad as cause of loss thereof, under reservation of special clauses introduced in international treaties, because naturalization abroad was considered, subsequent to the nineteenth century, as the most manifest and effective proof of expatriation, although this is not the only manner in which expatriation can occur.

The Act of March 2, 1907 sanctioned this principle in Section 2, which reads as follows:

That any American citizen shall be deemed to have expatriated himself, when he has been naturalized in any foreign State, in conformity with its laws, or when he has taken an oath of allegiance to a foreign State.

The Parties disagree, however, on the question as to whether or not Albert Flegenheimer's position is governed by the Bancroft Treaties stipulated by the United States with the Grand Duchy of Baden on July 19, 1868 and with Württemberg on June 27, 1868. This is affirmed by the Agent of the Italian Government and is categorically denied by the Agent of the Government of the United States. The Parties also disagree on the effects of the father's expatriation on the nationality of his son, then a minor: Italy affirms, while the United States denies, that Albert Flegenheimer lost his American nationality as the result of his naturalization in Württemberg, at a time when he was still a minor.

45. The so-called Bancroft Treaties constitute a pattern of agreements concluded by the United States with a large number of European and American States with a view to settling certain nationality conflicts, and, in fact, to put a stop to the malpractices committed by European emigrants who acquired American nationality for the sole purpose of avoiding their military duties in their respective countries, and later returned thereto when in possession of United States citizenship papers, without any intention of returning to this latter country.

The first of these Treaties was negotiated by George Bancroft, United States Minister in Berlin, with the Northern German Confederation, on February 22, 1868, and it was followed, in that same year, 1868, by four treaties with the Grand Duchy of Baden, with Bavaria, with the Grand Duchy of Hesse and with Württemberg. The United States concluded similar treaties with Austria-Hungary, Belgium, Denmark, Great Britain and Sweden and Norway, between 1868 and 1872. Later, between 1902 and 1928, the United States concluded further treaties of this kind with the States of Central and South America and other European States. All these treaties go under the general name of Bancroft Treaties, even though they were not all negotiated by this diplomat, because

they have certain common features. But they do not contain provisions that are wholly alike; there are two types of Bancroft Treaties and even those concluded with the five afore-mentioned German States do not all belong to the same category. They can therefore be interpreted one for the other only with caution because many of them have certain peculiarities which are not to be found in the treaties concluded with other States. The Agent of the Government of the United States and his Counsel have nevertheless contended that it was necessary to interpret the Treaty with the Confederation of North Germany in order to establish the meaning of the Treaties with the Grand Duchy of Baden and with Württemberg but did not notice that their provisions do not fully agree. They are not, therefore, mutually complementary.

It is also expedient to point out that the five treaties concluded with specific German States are not interchangeable, even if the provisions of some of them are alike. It should not be denied that, in confederation of States and in federated States, the member States of which have maintained a limited international sovereignty permitting them to conclude agreements with foreign States in certain spheres, the treaties binding on a particular State cannot be extended to another member of the Union, even if this latter member were linked with that same foreign State by a Treaty containing similar provisions.

The legal position was not modified by the establishment of the German Empire, on January 18, 1871, because the United States did not conclude similar treaties with all the members of the new federative State, but only with the States of the old Confederation of North Germany and the other four which have been mentioned; it is therefore not possible to admit that the conditions established by one of these treaties, conditions which in any event are not entirely alike, can be applied to all Americans of German origin, whatever the particular State in which they have gone to reside. The question is an important one in the case submitted to this Commission, because if Samuel Flegenheimer applied for naturalization in the United States when he was a citizen of Baden, he did not return to the Grand Duchy of Baden after securing his American naturalization, but to Württemberg, so that the provisions of both treaties should apply to him, one for his connexion with the Grand Duchy of Baden and the other for his connexions with Württemberg. This solution must be unquestionably resorted to, because the American authorities themselves have admitted that each one of the Bancroft Treaties referred to above, concluded with the various German States, had its own territorial sphere of application; this is the reason why, as early as 1873, they proposed to the Government of the Reich in Berlin to extend to the whole of the German Empire, the provisions of the Treaty concluded in 1868 with the Confederation of North Germany; but the German Government did not act on this proposition (Sieber, *Das Staatsbürgerrecht im internationalen Verkehr* (1907), vol. I, p. 520; Hackworth, *Digest of International Law*, vol. III, p. 384; Moore, *Digest of International Law*, vol. III, pp. 364 *et seq.*)

46. The right of the Italian Government to find support in the Bancroft Treaties was denied by the Government of the United States for two reasons: in the first place because the Treaties are no longer in force; and in the second place because as far as Italy is concerned they are a *res inter alios acta* in view of the fact that she was not a party thereto.

Neither of these two objections is founded.

It cannot be denied that the Bancroft Treaties between the United States and the German States expired on April 6, 1917 as the result of the fact that the United States entered World War I, by virtue of the rules of the Law of Nations which provide that treaties between States are cancelled by the out-

break of war between the signatory States, with the exception of treaties concluded in contemplation of war and of collective treaties which are merely interrupted between the belligerent States, but continue to deploy their effects between neutral and belligerent States. They (the Bancroft Treaties) were not subsequently resumed.

The Bancroft Treaties nevertheless fully deployed their effects until April 6, 1917 (Hackworth, *Digest of International Law*, vols. III, p. 334 and V, p. 386), that is, during the whole of the critical period during which Samuel Flegenheimer changed nationality for the first time in the United States, and a second time in Württemberg, hence from 1874 to 1894. Their provisions may have exercised influence, first on the loss of Samuel Flegenheimer's Baden nationality as the result of his naturalization in Pittsburgh, the validity of which is admitted by the Commission, and, subsequently, on his own American nationality and on the American nationality of his son Albert Flegenheimer, whose *jure sanguinis* acquisition of United States nationality is likewise admitted by this Commission. The result is that, in order to examine the political status of these two individuals vis-à-vis Germany, it is indispensable to take into consideration the law that was applicable at the time at which these changes in nationality occurred, that is, in the first place, the Bancroft Treaties in the German-American relationships and, in the second place, in a supplementary and subsidiary manner, if it was established that these treaties had no influence on the nationality of the individuals concerned, the provisions of German municipal law on the loss of nationality, namely the provisions of the German Imperial Law of June 1, 1870 concerning the acquisition and loss of the nationality of the Empire and of the States. The facts which must be legally examined, in fact, occurred under the authority of these conventional and legal provisions.

The objection raised that Italy has no title to invoke the Bancroft Treaties because she was not a party thereto, is also unfounded. It is a foregone conclusion that Italy is obligated to bear the heavy burdens of reparation and restitution which she accepted under the Treaty of Peace of 1947, only if the persons involved are nationals of one of the "United Nations". She has no obligation of this kind, under a reservation which will be examined in letter F of this Decision, towards nationals of other States, especially not towards persons of German nationality. She has a right to require that the "United Nations" nationality be established in each case, and to oppose all rebuttal evidence against the allegations of the opponent Parties. That if this rebuttal evidence flows from conventional provisions concluded with a third State, there is no reason why Italy should not invoke them, preliminarily, insofar as they create objective conditions which can be forced not only upon her but on every other State as well. In other words, the treaty is as legitimate source of nationality vis-à-vis third States as the provision of municipal law of a State which is not a party to an international dispute and which is invoked by one of the States engaged in this controversy. No distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a State or in a treaty concluded by the State with another State. It is the duty of this Commission to clarify, by resorting to these Treaties, Samuel and Albert Flegenheimer's nationality; and their effects on the legal position of these persons have operated long before this dispute between the United States and Italy arose.

47. The Commission further adds to the foregoing considerations that the question of priority of a subsequent law on the rights acquired by an international treaty does not arise for the United States, because the "Nationality Act" of 1940 provides in Section 504:

The repeal herein provided shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

By this express provision the United States legislature intended to preserve the prior status of nationality of a person, whether he or she acquired or lost, by virtue of a treaty concluded with the United States, his or her nationality, thus deviating, in an obligatory manner, from the jurisprudence generally adopted by the American courts, according to which municipal law and international treaty have equal value, so that a legal provision can modify or abrogate a treaty in force prior to its enactment, in the same way as it can be modified or abrogated by a treaty concluded subsequently. This Commission is all the more justified in abiding by Section 504 of the "Nationality Act" of 1940, regarding the consideration of a status established by an international treaty in that this provision is in conformity with the principle of priority of international law which it must follow in that it is an international body and has the duty of observing international law, in conformity with the jurisprudence of the Permanent Court of International Justice which has affirmed:

It is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of a treaty. (*P.C.I.J.*, series B, No. 17, p. 32; in the same sense, series A, No. 24, p. 12; series B, No. 5, p. 26; series A/B, No. 46, p. 167).

48. The Parties to this dispute are in complete disagreement on the meaning of the Bancroft Treaties. The Agent of the United States and his Counsel consider them as agreements whose essential purpose is to eliminate disputes between States in connexion with the diplomatic protection of persons naturalized in a State and returning subsequently to their country of origin, while the Agent of the Italian Republic and his Counsel consider them mainly as conventions governing the nationality of the subjects of one of the contracting States residing in the other, and containing therefore provisions on the acquisition and the loss of title to citizenship of persons whose legal position the signatory States have agreed to settle.

In order to determine their exact scope, it is indispensable to go back to the origin of these Treaties; their conclusion was due to the initiative of the Government of the United States.

As the United States owed its prosperity to a constant flow of European immigrants, beginning with the nineteenth century, it was concerned with attaching legally and in a final manner all this new population to the territory wherein it resided. It forcefully affirmed the right of every individual to change his nationality and to expatriate. In this policy of assimilation of aliens the United States clashed with the law of numerous European States which were desirous of preserving, often for military reasons, their emigrated nationals, either because these States constantly followed the principle of perpetual allegiance, or because they subjected the loss of the nationality of origin to governmental authorization (acts of manumission) which was frequently refused to individuals who were still liable to military service in their home country, or, further, because they did not admit that naturalization abroad entailed, by operation of law, the loss of the nationality of origin of their nationals and required the fulfilment of formalities (application for expatriation, specific renunciation) in order to liberate the naturalized individuals from all ties and bonds with the State of origin.

The United States set out with the idea that the naturalization of all aliens

established in its territory was to entail immediately the loss of their previous nationality; it inversely admitted that naturalization of its nationals abroad directly caused the loss of American nationality. Following a long and concordant practice which goes back to 1793, when American Secretary of State Jefferson affirmed the rights of every American national to divest himself of his nationality, it [the United States] enacted the law of June 27, 1868 which admitted the right of expatriation to be one of the fundamental principles of the Republic (Revised Statutes, tit. XXV, section 1999). Later this law was drawn up in statute form by the Act of March 2, 1907 which provides:

Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its law, or when he has taken an oath of allegiance to any foreign State.

It defended this principle in its international intercourse with regard to both American nationals naturalized abroad and aliens naturalized in America, without however succeeding in having it prevail completely with respect to the latter. Numerous disputes arose, above all, in connexion with immigrants who applied for naturalization for the sole purpose of avoiding their civic and military duties in their country of origin and who returned to that country after having obtained title to American nationality, and requested the diplomatic protection of the United States against their former country, when the latter still intended to consider them as its own nationals and required them to accomplish their military service. These cases cropped up by the thousand beginning from the middle of the nineteenth century.

The conflict between American law on naturalization and the law of numerous foreign States, who thwarted the freedom of expatriation of their nationals, caused a very considerable increase of persons in possession of dual nationality and gave rise to disputes over diplomatic protection. The Bancroft Treaties are, above all, treaties establishing the nationality of persons, and in a manner which is not alike in all of these treaties, as the United States has not always succeeded in obtaining recognition of the principle of the loss, by operation of law, of the nationality of origin as the result of the naturalization of nationals of one of the contracting Parties in the territory of the other. Diplomatic protection was considered only incidentally.

The genesis of the Bancroft Treaties, historically, is to be found in the tendency of the United States to abolish, to the greatest extent possible, the dual nationality resulting from the conflicts of laws between conditions governing naturalization and conditions governing expatriation. When analyzing their provisions this purpose should be borne in mind.

49. All the Bancroft Treaties concluded with the German States reveal one peculiarity in common: they sanction the following principle, the pertinence of which is manifest in the instant case:

The nationals of one of the contracting Powers who have been naturalized in the territory of the other Party and have resided therein uninterruptedly for a period of five years shall be held to be nationals of the naturalizing State by their country of origin and shall be treated as such.

On the other hand the content of all the Bancroft Treaties is not alike in connexion with the legal position of naturalized persons who return to reside in their country of origin. In this respect one is confronted with two diversities in these Treaties:

(a) In some of these treaties these naturalized persons are considered to have renounced their nationality of adoption when they do not intend to return

to the country of their naturalization, as *animus revertendi* was presumed to be lacking after two years' residence in their country of origin (Confederation of Northern Germany, Bavaria, Hesse and Württemberg).

(b) In the treaty with Baden, these naturalized persons cannot be compelled to re-acquire their nationality of origin, but they can renounce their naturalization and be voluntarily reintegrated in their nationality of origin, without the necessity of observing any time limit with regard to residence before obtaining recognition of the nationality of their country of origin.

It is evident that these two types of Bancroft Treaties can have different effects on the nationality of persons falling under their provisions.

Under reservation of particular agreements between the contracting States, such as concordant statements or annexed protocols, it has been contended that in the treaties of the former type, like the one concluded with the Confederation of Northern Germany, the question of dual nationality was not settled and the point as to whether or not, subsequent to naturalization in one of the contracting States, the question of nationality of the immigrant still existed vis-à-vis his State of origin, was not resolved by the Treaty and was left to the municipal legislation of the other Party. The naturalized immigrant was to be treated solely as an alien in his country of origin until it was presumed that he had *animus manendi*. The treaty merely interrupted his citizenship of origin and did not annul it; it did therefore settle only the question of diplomatic protection between the United States and the aforesaid Confederation, and it was for the municipal legislation of the latter to decide whether the nationality of origin of a person naturalized in the United States still existed or had come to an end. This is the viewpoint of the Agent of the United States and his Counsel in the instant case; it is based on the *Bericht der Vereinigten Ausschüsse des Bundesrates für das Landheer und Festungen und Justizwesen* (Dzialosynski, *Die Bancroft Verträge* (1913) p. 45.)

This Commission cannot render an opinion on the foregoing interpretation because the Bancroft Treaty between the United States and the Confederation of Northern Germany is not applicable in the instant case. It will confine itself to point out that this interpretation cannot be extended, by way of analogy, to the provisions of the other Bancroft Treaties concluded with German States, where the question was clearly settled by special protocols; these provide that the naturalized immigrant who returns to reside in his country of origin without the intention of going back to the country of his naturalization, does not recover his nationality of origin by the mere fact of taking up residence therein but can be reintegrated in the nationality of this latter country only by a new naturalization, just like any other alien. This is the solution which is sanctioned in the relationship between the United States and Bavaria, Hessen and Wurttemberg. The result is that these treaties have a direct bearing on nationality, that they do away with dual nationality, as the citizenship of origin is undeniably lost by a naturalization abroad accompanied by a five-year residence, because in case of return to the former country, the person concerned must become naturalized in order to re-acquire it.

In the latter type of Bancroft Treaties, that concluded with the Grand Duchy of Baden, it is undeniable that the contracting States intended to settle directly the question of the nationality of naturalized persons, because it is stated therein, *expressis verbis*, that the nationality of origin can be recovered, in cases where the person concerned returns to reside in his former home-country, only if the latter files an application, in other words, it is lost as the result of naturalization in the other contracting State. The accumulation of nationalities was hence done away with by the treaty itself. This stipulation is also to be found in the Bancroft Treaties with Austria, Belgium, Denmark and Sweden and Norway.

After a careful analysis of these conventional texts, the Commission is convinced that the Bancroft Treaties with the Grand Duchy of Baden and Württemberg, in the relationship with the United States, not only had the purpose of regulating the diplomatic protection of naturalized persons but of determining their nationality as well. There now remains to be examined what bearing these Treaties had on the status of Samuel and Albert Flegenheimer.

50. By his naturalization in the United States in 1873, Samuel Flegenheimer lost his nationality of origin, that of Baden, in application of the "Naturalization Convention" of July 19, 1868 concluded by this State with the Grand Duchy of Baden, Article I of which stipulates:

Citizens of the Grand Duchy of Baden who have resided uninterruptedly within the United States of America five years, and before, during or after that time, have become or shall become naturalized citizens of the United States, shall be held by Baden to be American citizens and shall be treated as such.

The expressions "shall be held" and "shall be treated" do not only refer to the obligation of the Grand Duchy of Baden to consider its nationals who have been naturalized and who have resided for five years in the United States as American nationals and to treat them as such, that is to say not to impose upon them the execution of civic duties nor of interposing in their behalf through diplomatic channels, but imply a loss of the Baden nationality, by virtue of the Treaty of July 19, 1868. This can in no way be doubted because of the existence of Article IV of the aforesaid Treaty which provides:

The emigrant from the one State, who, according to the first article, is to be held as a citizen of the other State, shall not on his return to his original country be constrained to resume his former citizenship; yet if he shall of his own accord re-acquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowed, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country.

It clearly appears from the foregoing text that naturalization in the United States entailed the loss of Samuel Flegenheimer's Baden nationality, because, if he had returned to his former home-country, he could have recovered this nationality only by making an application therefor and renouncing his American nationality. A case of dual nationality never arose in the person of Samuel Flegenheimer, because, at the very time when he acquired American nationality, all the conditions causing the loss of his Baden nationality were fulfilled, namely, his naturalization in the United States and his five-year residence in that country.

51. After being naturalized in the United States, Samuel Flegenheimer returned to Germany, but did not take up residence in his former country of origin, namely, the Grand Duchy of Baden, so that the Bancroft Treaty of July 19, 1868 concluded with that State was not applicable, as regards the consequences of this return, to his nationality. He did not lose his United States nationality under this Treaty, because, on the one hand, he did not fulfil the conditions of Article IV which contemplated a return of the naturalized person to the Grand Duchy of Baden itself, and, on the other hand, even supposing that it was applicable to him, the aforesaid Article IV does not, unlike the provisions made in many other Bancroft Treaties, provide for the automatic loss of the nationality acquired in the United States in cases where the naturalized person returns to reside in his country of origin, without *animus redeundi* to America.

He thus took up permanent residence in Württemberg as an American national, and it is likewise in this quality, and not as a former Baden national, that

he applied for and obtained Württemberg naturalization in 1894, following an uninterrupted residence of twenty years. As the result of this naturalization he directly and finally lost his United States nationality by virtue of Article 1, paragraph 2 of the Bancroft Treaty of July 27, 1868 concluded between the United States and Württemberg, wherein it is provided that:

Reciprocally: citizens of the United States of America who have become or shall become naturalized citizens of Württemberg and shall have resided uninterruptedly five years within Württemberg shall be held by the United States to be citizens of Württemberg and shall be treated as such.

In the foregoing text, like in the corresponding text of the Treaty with the Grand Duchy of Baden of July 19, 1868, the expression "shall be held" and "shall be treated" do not have the meaning of a mere interruption of the American nationality and of the loss of title to the diplomatic protection of the United States, but of a complete annulment of the title to the nationality of that State, by virtue of the Treaty itself. The Commission must reach this conclusion when faced with the Protocol signed at Stuttgart, on the same date as the Treaty, July 27, 1868, which, although making specific reference to Article 4 of the Treaty, explains very clearly that naturalized persons, in application of Article I, lose, as a result of their naturalization, their preceding naturalization; Part III of this Protocol reads as follows:

It is agreed that the fourth article shall not receive the interpretation, that the naturalized citizen of the one State, who returns to the other State, his original country, and there takes up his residence, does by that act alone recover his former citizenship; nor can it be assumed, that the State, to which the emigrant originally belonged, is bound to restore him at once to his original relation. On the contrary it is only intended, to be declared, that the emigrant so returning, is authorized to acquire the citizenship of his former country, *in the same manner as other aliens* in conformity to the laws and regulations which are there established. Yet it is left to his own choice, whether he will adopt that course, or will preserve the citizenship of the country of his adoption. With regard to this choice, after a two years residence in his original country, he is bound, if so requested by the proper authorities, to make a distinct declaration, upon which these authorities can come to a decision as the case may be, with regard to his being received again into citizenship or his further residence, in the manner prescribed by law.

The Commission could interpret this document established by common agreement of the High Contracting Parties, in no other way than as a recognition of the principle constantly defended by the American authorities in their relationship with foreign States, namely that the nationality of origin is lost *ipso jure*, by virtue of the Bancroft Treaty concluded with Württemberg; it draws the conclusion therefrom that even a Württemberg national, if naturalized in the United States, when returning to reside in his country of origin can re-acquire the nationality of this latter country only like any other alien, this means without the slightest doubt that he had lost that nationality as a result of his naturalization in the United States, by virtue of Article I of the aforesaid Treaty, and that, in application of the principle of reciprocity which is at the basis of the Bancroft Treaties, this is all the more so in the case of an American who secures naturalization in Württemberg.

The Commission is of the opinion that Article 4 of the Bancroft Treaty with Württemberg of July 27, 1868 is not applicable to the instant case; it reads as follows:

If a Würtemberger naturalized in America renews his residence in Würtemberg without the intention to return to America he shall be held to have renounced his naturalization in the United States. . . . The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other.

Samuel Flegenheimer never fell under the provisions of this Article, because he was not a Wurttemberg national naturalized in the United States, but an individual of Baden origin. On the other hand, the Bancroft Treaty of July 19, 1868 with the Grand Duchy of Baden (Art. 4) fails to recognize this loss of American naturalization as the result of the return to reside in the country of origin without *animus revertendi* to the United States; it only provides for a new naturalization in the country of origin accompanied by a voluntary renunciation of the naturalization secured in the United States; but this provision also was inapplicable to Samuel Flegenheimer who could not be qualified as a Baden national returning to his country of origin. The two treaties are not complementary and the provisions of one cannot be invoked in order to make good the inapplicability of the provisions of the other. It is therefore by virtue of Article I, paragraph 2 of the Treaty between Würtemberg and the United States that Samuel Flegenheimer and the members of his family, under his control and guardianship as a husband and as a father, lost their American nationality.

52. Samuel Flegenheimer's naturalization in Würtemberg was formally extended, by the very act under which he secured said naturalization, to his wife and to his minor children, namely, Joseph who was then 18 years old, Eugene who was 6 and Albert who was 4. The three of them, through their father, lost under the Bancroft Treaty concluded between the United States and Würtemberg, the American nationality they had acquired *jure sanguinis*. The collective effects of Samuel Flegenheimer's naturalization on the members of his family, under his control and guardianship as a husband and as a father, are explicitly confirmed by the excerpt from the Register of families of the Schwäbisch-Hall district, as well as by a statement, introduced in the record, of the Government of the district of his domicile in Würtemberg (Königliche Kreisregierung) of August 23, 1894. They fulfilled the conditions of domicile required by the Treaty of July 27, 1868; although Albert was only four years old on the date of the naturalization of his father, he too falls under the provisions of this Treaty. The Protocol annexed thereto explicitly provides in Part I (1):

It is of course understood, that not the naturalization alone, but a five years uninterrupted residence is also required, before a person can be regarded as coming within the treaty; but it is by no means requisite, that the five years residence should take place after the naturalization.

It is therefore immaterial whether the five-year uninterrupted residence is placed before or after the grant of naturalization; it is in any event established that Albert Flegenheimer resided uninterruptedly for more than five years in Würtemberg, since birth and immediately after his naturalization. One could admit that he lost title to United States nationality only in 1895, a chronological verification that is devoid of all pertinence for the purpose of settling this dispute.

53. Moreover, the Bancroft Treaty of July 27, 1868, like the others, does not specifically decide the question of the extension, to the minor children of an American national, of the loss of United States nationality by the head of the family who secured naturalization in Würtemberg. As the collective effects assigned to a naturalization under the laws of a State do not have as a necessary corollary an expatriation with collective effects in the State of origin, the law

of which may have adopted, by way of hypothesis, the principle of individual expatriation, the question must be settled by an interpretation of the Treaty that is binding on the two Parties.

A literal interpretation of Article 1, paragraph 2 of the Treaty between Württemberg and the United States of July 27, 1868, leads to the recognition that all of Samuel Flegenheimer's minor children, who were naturalized with him, lost by this fact, like him, their American nationality.

The starting point of the *processus* of all interpretation of an international treaty is the text on which the two Parties have agreed; it is evident that the main point of an international agreement lies in the concordant intent of such Parties and that, without this concordance, there are no rights or obligations which arise therefrom. The written word, Max Huber of the Institute of International Law affirmed, in the art of interpreting texts, has just as important a place as mathematics have in the art of engineering; it aims at precision and this can be obtained only by a choice, after extremely careful thought, of the expressions employed. As Vattel, the Swiss jurist pointed out already in the eighteenth century, "when an act is worded in clear and precise terms, when the meaning is manifest and does not lead to anything that is absurd, there is no reason for refusing this act the meaning that it naturally displays. To search elsewhere for probable inferences so as to restrict or extend it, means an intent to evade it" (*Le droit des gens*, livre II, chap. XVII, paragraph 263).

International jurisprudence has made an extensive application of this rule of interpretation. The Permanent Court of International Justice in fact affirmed:

The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it. (Advisory Opinion of September 15, 1923, Acquisition of Polish Nationality, *P.C.I.J.*, series B, No. 7, p. 20.)

(See also, series B, No. 2, p. 22 and Decision of the Mixed Claims German-American Commission, of November 1, 1923 concerning the interpretation of the Treaty of August 25, 1921 between the United States and Germany (*Lusitania Case*), in Wittenberg, *Decision of the Commission* (1926), I, p. 37).

The Treaty of July 27, 1868 does not afford any exception to the rule of the loss of American nationality following the naturalization in Württemberg of minor children included in their father's change of nationality. There is therefore no ground for inserting it in the text of the Treaty and taking it for granted; "*ubi lex non distinguit, nec nos distinguere debemus*". Such is the wisdom of centuries.

A teleological interpretation of the aforesaid Treaty does not lead to a different result. As the genesis of the Bancroft Treaties discloses, the main concern of the United States in concluding these treaties was to put a stop to the evil usage and inconveniences of dual nationality, by adopting the rule that every naturalization in the United States accompanied by a permanent residence, entailed as a consequence, automatically, the loss of the former allegiance; and the United States succeeded in obtaining this result only by admitting, in their turn, by way of reciprocity, that American nationality would not continue to exist following naturalization, accompanied by permanent residence, of an American national abroad. Therefore, the principal purpose of these treaties is to link every naturalization in a State, the seriousness and sincere character of which is proved by a durable residence, with expatriation in the other State.

A search for the agreed intent of the contracting Parties, at the time the Bancroft Treaties were concluded, does not lead to another result.

In German law, in the interest of the unity and nationality of the family, the naturalization of the father as well as his expatriation was extended to his wife under his marital control and authority, and to his children under his fatherly control and authority (paragraph 11, 14a, 19, 21 sub-paragraph 2 of the German nationality law of June 1, 1870 that was applicable at the time of Samuel Flegenheimer's naturalization in the United States in 1873 and in Würtemberg in 1894).

The same conditions applied in the United States where, beginning with the first Naturalization Act of March 26, 1790, it was admitted that the naturalization of the parents was extended to their minor children who resided with them in the United States.

The same collective effects on the nationality of minor children were attributed to the expatriation of Americans, heads of families, following naturalization abroad. In the case of Baldura Schmidt, who was included in the naturalization of his father in Germany, in 1923, Secretary of State Stimson affirmed:

The Department knows of no sufficient ground for contending that the nationality of a minor child cannot be changed, without the child's consent, by the act of a parent in obtaining naturalization in a foreign State, especially in view of the fact that the law of this country provides for the naturalization of a parent in the United States, without requiring the consent of the child . . . Such being the case, it would be inconsistent for this government to hold that Americans who have been naturalized in foreign countries during minority through naturalization of their parents have retained their American nationality. (*Hackworth's Digest*, III, p. 238).

It was nevertheless admitted in Steinkauler's case in 1875, that the native born child of a naturalized parent, subsequently included in the restoration of the latter into his country of origin, has the right to elect American nationality upon reaching majority, provided he returns to the United States. Several Instructions of Secretaries of State in this direction were given to American diplomatic representatives abroad (*Moore, Arb.*, III, p. 542-544, 548).

Although this right of election was not included in any positive law, at that time, it was considered as a legal rule constantly admitted and sanctioned by the Supreme Court in the *Perkins vs. Elg* Case in 1939, subject to the provisions contained in international treaties.

This right of option was never analysed very thoroughly by American jurists, so that it was not possible to establish whether for the minor children involved, it is a question of loss of American nationality under a resolving condition of option and of return to the United States, or of reintegration in their American nationality suspensively conditioned upon option and return to the United States. In the first case, these minors would lose their American nationality as a result of the naturalization of their father abroad, and would only be vested with the nationality of their father during the whole of their minority, but could re-acquire their American nationality by an option entailing the cancellation of the loss which had previously occurred; in the second case these minor children would maintain their nationality during their minority, they would thus have simultaneously the quality of American nationals and of nationals of the country of naturalization of their father, but would still be required to elect in favour of American nationality and to return to the country of their birth; failing the option, they would lose this latter citizenship and would remain vested only with the nationality acquired by their naturalized father.

The Commission must note that the Treaty of 1868 with Würtemberg contains no reservation in favour of this right of option. If it had been the intent

of the contracting parties to admit it, they would have introduced certain provisions in their agreement which the Commission cannot presume. It is in fact the custom of introducing in international conventions, directed at combating or preventing dual nationality, special rules if the right of option is reserved to minor children naturalized with their parents in one of the contracting countries, as is particularly the case in the Franco-Swiss Convention of July 23, 1879, and of establishing, very accurately, this right of option which must be made use of within certain time limits and before certain designated authorities.

The gap of the Treaty in this connexion leads the Commission to note that Würtemberg has always applied, in its municipal law, the principle of naturalization and expatriation with collective effects, and that the same principle was generally followed by the United States until 1939, and this fact appears, *inter alia*, from the Tobiassen case which, although criticized by the Supreme Court in the *Perkins vs. Elg* Case, establishes the status of American law prior to 1939. The Tobiassen Case involved a minor child (a girl), an American national who, when eight years old, was included in her father's re-acquisition of Norwegian nationality; this case was brought before the United States Courts in 1932, where Attorney General Mitchell affirmed:

The law of Norway . . . is analogous to our statutes . . . by virtue of which foreign born minor children of persons naturalized in the United States are declared to be citizens of this country . . . Inasmuch as under our laws a foreign-born minor child obtains a citizenship status through the naturalization of the father, it seems to me inconsistent . . . to deny a like effect to similar laws of Norway. (36 op. Attys. Gen. 535 (1932).)

The Commission concludes therefrom that the contracting Parties did not so much intend to deviate from this principle in a treaty, like the Bancroft Treaty concluded on January 28, 1868, as they intended to do away with cases of dual nationality and the abuse which had arisen therefrom.

It is impossible for the Commission to admit that Albert Flegenheimer retained the nationality of the United States and that he was consequently vested with German-American dual nationality from 1894 until the German decree of April 29, 1940 under which he forfeited his German nationality, when the clear text of an international treaty classifies him in the category of Americans expatriated by naturalization and when proven facts establish that he considered himself as vested with German nationality alone.

In any event, the principle of collective expatriation was only recently clearly specified in paragraph 401 (a) of the 1940 Nationality Act in the following terms and established that Albert Flegenheimer forfeited his right of option since 1913, should this law be applicable to him, which is not the case, however:

A person who is a national of the United States, whether by birth or through naturalization shall lose his nationality by: (a) Obtaining naturalization in a foreign State, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* that the nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States.

Even under this principle, the legal position of Albert Flegenheimer would not be modified.

54. Hence, on this point the Commission reaches the conclusion that Albert

Flegenheimer, following his naturalization in Germany in 1894, lost his American nationality and that he was never simultaneously vested with both German and United States nationality.

55. D. *On the question as to whether Albert Flegenheimer recovered, subsequent to his naturalization in Germany, his title to United States nationality.*

The Agent of the Government of the United States and his Counsel, after having denied that the Bancroft Treaties could have caused the loss of American nationality of minor children included in their father's naturalization in Germany, lay heavy stress on the right of election recognized to these minors, after reaching majority, in favour of United States nationality provided they establish their permanent residence in that country.

In this connexion they invoke numerous American judicial precedents, and among these the *Perkins vs. Elg* Case, adjudicated in 1939, and the *Mandoli vs. Acheson* Case, adjudicated in 1952, both of them by the United States Supreme Court.

56. The Claiming Party attaches a decisive importance to the *Perkins vs. Elg* precedent, because it was decided in favour of a minor person, falling under the provisions of the Bancroft Treaty of May 26, 1869, concluded between the United States on the one hand and Sweden and Norway on the other, and because the Supreme Court specifically recognized, in the person concerned, a right of election, after reaching majority, in favour of American nationality.

Miss Elg's position in fact and in law is not the same as that of Albert Flegenheimer.

Miss Elg was born in New York in 1907 of Swedish parents who had acquired United States nationality by naturalization in 1906. In 1911, at the age of four, her mother took her to Sweden where she resided until 1929. In 1922 her father went to Sweden in this turn and never returned to the United States; in 1934 he made a statement before an American Consul in Sweden, under the terms of which he expatriated himself voluntarily, because he did not wish to preserve his American nationality and intended to remain a Swedish national.

In 1928, shortly before reaching majority, Miss Elg inquired at an American Consulate in Sweden what the possibilities were to receive an American passport in order to return to the United States; in 1929, eight months after her twenty-first birthday, she obtained this passport and returned to the United States as a national of that country, where she permanently resided. In 1935-1936 her title to American nationality was challenged by the American authorities and the legal proceedings which followed terminated in a decision of the Supreme Court wherein Miss Elg was recognized to be an American national.

The Court based its opinion on the administrative precedents wherein an American minor, born in the United States, who had acquired a foreign nationality through his father, had been recognized the right to elect between this and the American nationality, at the age of twenty-one, by his return to the United States, in view of the fact that expatriation, except for treaties, can only be the consequence of voluntary naturalization abroad and is not extended to minor children who are passively included in that of their parents. The Supreme Court admitted that this administrative practice was a consequence of the constitutional provision conferring title to nationality to all persons born in the United States and submitted to its jurisdiction.

The Court, after formally reserving contrary conventional rules, examined the Bancroft Treaty of 1869 between the United States and Sweden and Norway, and in view of the fact that the case involved the return of a naturalized person to the United States, his country of origin, took as a basis Article III

of that Treaty and the Protocol annexed thereto; the aforesaid Article III reads as follows:

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored in his former citizenship, the government of the last named country is authorized to receive him again as a citizen *on such conditions as the said government may think proper.*

In connexion with this Article the Protocol provides:

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship.

In interpreting these texts, the Supreme Court admitted that they specifically authorized the United States to receive "as a citizen on such conditions as the said Government may think proper" a child born in America and who, taken to Sweden when he was still a minor, chose to return to the United States upon reaching majority. The Court further affirmed:

And if the Government considers that a native citizen taken from the United States by his parents during minority is entitled to retain his American citizenship by electing at majority to return and reside here, there would appear to be nothing in the treaty which would gainsay the authority of the United States to recognize that privilege of election and to receive the returning native upon that basis. Thus, on the facts of the present case, the treaty does not purport to deny to the United States the right to treat respondent as a citizen of the United States, and it necessarily follows that, in the absence of such a denial, the treaty cannot be set up as a ground for refusing to accord to respondent the rights of citizenship in accordance with our Constitution and laws *by virtue of her birth in the United States.* (U.S.R. 307 (1939) p. 338.)

This Commission believes that this precedent, the importance of which it does not deny, is applicable, in the interpretation of an international treaty to the specific case of election of American nationality by a minor child born in the United States territory, of parents who were naturalized in the United States, and later taken by them to their country of origin where the latter re-acquired, by virtue of a special applicable authorization of the Bancroft Treaty, their nationality of origin, under conditions established at the discretion of the Government of that country, hence without a naturalization procedure; election of nationality must be accompanied by a return to the United States shortly after the minor child reaches majority.

None of these particular circumstances have occurred in the instant case. Albert Flegenheimer's position in fact differs from that which appeared in the *Perkins vs. Elg* case, on essential and numerous points.

(a) In the first place, Miss Elg was born in the United States of parents who resided in that country. She thus had the status of a *jure soli* native born American national, by virtue of the Constitution of the United States, whereas Albert Flegenheimer was born in Germany of a father who had been a resident of that country for many years and who had been formerly naturalized in the United States; he thus acquired American nationality *jure sanguinis*, by virtue of Section 1993 of the Revised Statutes.

(b) In the second place, Miss Elg was taken to Sweden by her mother when she was four years old, while her father remained in the United States until

she was fifteen years old; it has not been established that she was included in the Swedish decree of naturalization granted to her father, because the latter confined himself to declare he no longer wished to retain his American nationality; whereas Albert Flegenheimer who was specifically included in his father's act of naturalization in Wurttemberg, resided uninterruptedly with his parents in Germany during the whole of his youth and, after attaining majority, until 1937, that is a total of 47 years; he left Germany because of the political events which disturbed Germany after the coming into power of the national-socialist régime; the reasons of his emigration are comprehensible, but do not prevent the Commission from noting that all his family and business interests were in Germany where he created a family, where his children were born, that he received a German education, that he never lived in America until he was almost fifty and that his assimilation into the American people and life had not even begun in 1939, when he filed his first application for recognition of his American nationality.

(c) In the third place, even before reaching majority, Miss Elg secured information on her American nationality and went to the United States shortly after her twenty-first birthday. She proceeded without delay in her election of nationality, thus giving proof of a real attachment to the country of her birth; she resided permanently in that country, and her nationality was challenged only six years later; whereas Albert Flegenheimer did not make an election in favour of American nationality until he was 49 years old, under the pressure of political events and in the furtherance of his business.

In the *Perkins vs. Elg* decision the Supreme Court many times stressed the fact that the right of election in favour of American nationality must be exercised "on attaining majority" (p. 329, 334, 338, 339, 340 and 346), and although no peremptory time limit is provided by positive law, the decision affirms that Miss Elg "promptly made her election and took up her residence in this country accordingly". Albert Flegenheimer tries to explain away the delay in his election of American nationality and comes to the conclusion that he is not barred from this privilege. He explains it on the following grounds:

In the first place, he contends that he was unaware of his father's naturalization in 1873 and of his own *jure sanguinis* title to American nationality until 1933, after the death of his father, when he learned of the latter's American passport; he claims he can furnish proof of this by the numerous affidavits and statements introduced in the records of the case. This Commission, by virtue of its freedom of evaluation of evidence, is all the less inclined to recognize the probative force of *ex parte* affidavits and statements established by third parties, inasmuch as it is difficult to reconcile them with the birth certificate of the individual concerned wherein it is stated that his father, Samuel Flegenheimer, was naturalized in Württemberg in 1894 together with his family; although this document does not show the American nationality of his father it seems hardly likely that Albert Flegenheimer did not have the slightest curiosity in this respect and did not try to discover what the former nationality of his father was, a fact which he could have very easily discovered by consulting the register of marriages, which is public in Germany, and in which Samuel Flegenheimer's American nationality is mentioned; it also seems strange that he never had knowledge of Württemberg's Kreisregierungs attestation establishing his own naturalization in that State.

Subsequently, Albert Flegenheimer refers to the requests for information made by him at various United States Consulates and an Embassy in Europe, between 1933 and 1939, which, in his opinion, establishes his election of American nationality. But these were intermittent steps, devoid of all legal

ing, because no trace of them was ever discovered in the files of the State Department, prior to this formal application submitted to the United States Consulate in Winnipeg on November 3, 1939. Even if one were to accept Albert Flegenheimer's version with regard to his late discovery of Samuel Flegenheimer's naturalization in the United States, his election of American nationality, which occurred 49 years after his birth, 28 years after reaching majority, and 6 years after the date on which he claims he discovered he had a right of election, would appear to the Commission to be too dilatory to justify the application to his case of the jurisprudence of the Supreme Court in the *Perkins vs. Elg* Case, and, consequently, of Article 78 of the Treaty of Peace with Italy.

(d) In the fourth place, the Bancroft Treaty concluded with Sweden and Norway confers a discretionary power on the contracting State, which applied to Miss Elg's case, for establishing the conditions of reintegration of a naturalized person in her nationality of origin, whereas the Bancroft Treaty with Württemberg contains very clear and precise provisions to the contrary, namely, the naturalized person who returns to his country of origin can recover the nationality thereof only "in the same manner as other aliens in conformity to the laws and regulations which are there established" (Protocol and Art. IV of the Treaty).

This Commission holds that, unlike what was admitted by the Supreme Court in the *Elg* Case, Albert Flegenheimer was never vested with dual nationality and that, therefore, the *Perkins vs. Elg* Case is not applicable to his case by reasons of fact and of law.

Albert Flegenheimer's nationality was established by the special provisions of the Bancroft Treaty with Württemberg which do not harmonize with those of the Treaty concluded by the United States with Norway and Sweden on the point analysed herein; they lead to a conclusion other than the one admitted in the *Perkins vs. Elg* Case.

57. One could object that since April 6, 1917 this Treaty is no longer in force and that it could therefore no longer prevent the dilatory exercise of the right of election by Albert Flegenheimer on November 3, 1939. But the Commission has already pointed out that, in order to determine the conditions and the effects of a naturalization, the legal and conventional provisions at the time the act was accomplished apply, an issue which is in any event admitted by the Agent of the United States and his Counsel. Now, from 1894, the date of Albert Flegenheimer's naturalization, until he attained majority in 1911, and even later during a period of five years, until April 1917, the Bancroft Treaty with Württemberg was actually in force and definitively established the nationality of the individual concerned. The Commission is of the opinion that, even if only by way of hypothesis the jurisprudence developed by the Supreme Court in the *Perkins vs. Elg* Case were to apply, he lost his American nationality before the repeal of the aforesaid Treaty.

In analysing the practice followed by the Department of State subsequent to the principles affirmed by the Supreme Court in the *Perkins vs. Elg* Case, it was not contended that no retroactive application thereof was made by the Administration to cases which had been dealt with many decades before. The practice of the Department of State was modified soon after the subject decision was rendered by the Supreme Court, and it is summed up in the following manner in a judgment of the District Court of New Jersey of November 17, 1953, concerning the *Rueff vs. Brownell* Case (116 F. Supp. 298, 302-303, 1953):

... a minor, being a citizen of the United States who acquired derivatively the nationality of a foreign state through the foreign naturalization of a parent

will not, in the absence of specifically applicable treaty stipulations, be considered by the Department as having lost his or her citizenship of the United States *provided shortly before or shortly after attaining majority the person concerned manifests his or her election to retain American citizenship and to return to the United States to reside.* (Emphasis by the Court.)

The Commission recalls that Section 504 of the Nationality Act of 1940, to which it already has had occasion to refer, specifically preserves that nationality status previously established by a person, whether this person has acquired or lost American nationality, and does not confer any retroactive effects on the provisions of the new law. Finally, the Commission notes that Albert Flegenheimer's older brothers, who were in the identical legal position in which he stood, very logically came to the conclusion that they could not acquire American nationality by election and applied for and secured their naturalization in the United States, in 1944 and 1947 respectively. This was the only method to be followed in order to regularly obtain the status of American nationals.

58. The second precedent of the Supreme Court, invoked by the Plaintiff Party, is of no interest in the solution of the dispute submitted to the Commission.

The *Mandoli vs. Acheson* Case, adjudicated in 1952, involved a conflict between a *jure soli* and a *jure sanguinis* nationality. Mandoli was born in the United States of parents who had not been naturalized in that country; he thus had the status of a native born citizen by virtue of American law, and that of an Italian national, in application of Italian law. His parents returned to reside in Italy when he was still a minor; when he was 15 years old he made unsuccessful attempts to return to the United States; he renewed these attempts when he was 29 or 30 years old and, later, twice during the following eleven years. He finally obtained permission to enter the United States in order to obtain judicial recognition of his title to American nationality. On the basis of these facts, the Court decided that Mandoli had not expatriated himself, a solution which was unavoidable because the individual concerned had been vested with two nationalities since birth and the *Perkins vs. Elg* doctrine on the expatriation of minors included in the naturalization of their parents abroad was not involved, it was not a question of election in favour of American nationality, but the recognition of title to nationality acquired *jure soli* in the United States and which had given rise to a dispute. The Commission does not consider this precedent to be pertinent for the purpose of resolving the question of Albert Flegenheimer's nationality.

59. The judicial decisions rendered by the lower courts of the United States, cited by the Plaintiff Party in support of its conclusions, are not pertinent; they were, in any event, all rendered subsequent to the Nationality Act of 1940.

The case which has the greatest similarity with the Albert Flegenheimer case, is the *Rueff vs. Brownell* judgment, which was decided by the District Court of New Jersey on November 17, 1953. The Petitioner was born in Germany in 1910 of United States native born nationals, and she herself was a *jure sanguinis* United States national; she was naturalized in Germany during minority, in 1918, together with her mother who had emigrated to that country. Following several steps taken at American Consulates, beginning in 1934, she applied, in 1939, shortly after the *Perkins vs. Elg* decision, for an American passport which was refused; she went to the United States in 1945 and renewed her request to be issued a certificate of nationality in 1949. Following another refusal by the Administrative authorities, she submitted her request to the American courts. The District Court held she was an American national by virtue of Section 1993 of the Revised Statutes.

The *Rueff vs. Brownell* Case is similar to the Albert Flegenheimer Case because of certain peculiarities in common: birth of the person involved outside of the United States, collective effects of naturalization abroad, delay in election of American nationality. But they differ, on the other hand, on some very important points: American origin of Rueff's parents, whereas Samuel Flegenheimer was a naturalized American of Baden origin who promptly abandoned the United States; tardiness in the exercise of the right of election overstepping all tolerable measures in the Albert Flegenheimer Case; and, above all, absence of a nationality treaty stipulation in the Rueff Case, since all Bancroft Treaties concluded with the various German States were repealed on April 6, 1917, prior to her mother's naturalization. This precedent is therefore not pertinent to the case submitted to this Commission.

The other decisions invoked by the Plaintiff Party were rendered by United States Courts of Appeals, and they too do not appear to have sufficient analogy with the instant case for them to be considered by the Commission.

The *Perri vs. Dulles* Case, decided by the Court of Appeals on July 24, 1953, involved an Italian, born in Italy in 1913 of a father of Italian origin, naturalized as an American national, later reintegrated in his Italian nationality in 1926 together with his son, then a minor. The nationality of the latter was not established by treaty stipulation because Italy concluded no Bancroft Treaty with the United States. The Court considered him to be exactly like a dual national, namely, an American national *jure sanguinis* and an Italian national by the collective effects that Italian law attributes to the reintroduction of the father in Italian nationality; the Court applied the Nationality Act of 1940 and sent the case back to the District Court for examination as to whether or not the individual concerned could benefit by the supplementary delay in election provided for in Section 401 (a) of said Act.

The *Lehmann vs. Acheson* Case was decided by the Court of Appeals on July 29, 1953; here too a dual nationality was involved. Lehmann, a Swiss who was born in the United States in 1921, was brought to Switzerland in 1924; his father remained in America and was naturalized as an American national without thereby losing his Swiss nationality. The son, who also had title to Swiss citizenship, performed his military service in Switzerland and the Court decided that this compulsory service did not have the effect of depriving him of his American nationality with which he was vested *jure soli*. There are no treaty stipulations on nationality between the United States and Switzerland, but merely a convention of November 11, 1937, relating to the military obligations of certain dual nationals.

The *Podea vs. Acheson* Case, decided on January 10, 1950, and the *Richter vs. Dulles* Case, decided on May 17, 1957, only concern questions of expatriation as a result of oaths taken to foreign States by native born Americans and do not raise any naturalization problem.

#### 60. E. On the inadmissibility of the Petition on grounds other than the absence of United States nationality.

The Commission, taking as a basis the Bancroft Treaty concluded on July 27th, 1868, between the United States and Württemberg, is of the opinion that Albert Flegenheimer lost his American nationality through the naturalization of his father in Württemberg, in 1894, and that he never subsequently recovered it, either because he did not have a legal possibility to do so by virtue of laws which were applicable at the time of his naturalization in Germany, or, in the hypothesis most favourable to him, because it must be admitted that the right of election he claims he had in favour of American nationality was exercised too late by him.

The Commission can therefore dispense with entering upon the remedy of law based on expatriation, resulting from an absence of *animus redeundi*, of persons naturalized in the United States, as the result of prolonged residence in their country of origin or in another foreign State. In the interest of an exhaustive analysis of Albert Flegenheimer's position vis-à-vis the United States, the Commission nevertheless considers it its duty to investigate whether the other remedies of law invoked are well founded or groundless.

61. The Commission is of the opinion that it can reject outright the argument of the Respondent Party affirming that, by virtue of Section 2 of the Act of March 2, 1907, Albert Flegenheimer lost his title to American nationality, to all intents and purposes of law, for having taken an oath of allegiance to the Kingdom of Württemberg, because a clear, categorical and convincing evidence of this oath has not been submitted. The Italian Government assumes this oath was taken because the Constitution of the Kingdom of Württemberg of September 25, 1819, which remained in force until May 20, 1919, required that the oath of allegiance was to be taken by all native born Württemberg citizens, upon attaining the age of 16, or by all naturalized citizens on the date of their naturalization (Constitution of the Kingdom of Württemberg, Chapter III, Article 20).

The Commission is of the opinion that Albert Flegenheimer, who was born in Württemberg as a United States national, does not fall under the category of persons who were to take the oath of allegiance when 16 years old; on the other hand, as he was four years old on the date of his naturalization, he could not have taken the oath at that time; it is possible that the subject oath was required of his father, Samuel Flegenheimer, but no document has been introduced in the record proving that this oath was actually taken by him. The Commission could not be satisfied with evidence based on inference in order to determine the nationality of the individual concerned.

62. The Respondent Party attaches much importance to the theory of effective nationality, according to which, even supposing that Albert Flegenheimer was solely an American national, this nationality could not be productive of effects in the intercourse with Italy in order to obtain the application of Article 78 of the Treaty of Peace, in view of the fact that, during half a century, the individual concerned was considered as and considered himself to be a German national by his conduct, his sentiments, his interests. The Respondent Party contends that a nationality is not effective when it confines itself to establishing a nominal link between a State and an individual, and is not supported by a social solidarity resulting from a veritable solidarity of rights and duties between the State and its national. As was decided by the International Court of Justice in the Nottebohm Case, between Liechtenstein and Guatemala, in its Decision of April 6, 1955, and from which Italy intends to gain advantage:

Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connexion with the State which has made him its national. (*Recueil C.I.J.*, 1955, p. 23.)

Italy therefore considers that no effective bond of nationality exists between the United States and Albert Flegenheimer, even if it were to be admitted that he was an American national on purely legal and nominal grounds. Italy concludes by saying that, on the international level, and whatever Albert Flegenheimer's position may be in connexion with American municipal law, the United States is not entitled to exercise, in his behalf, the right of diplomatic protection, nor can they resort to the Commission to plead his case.

The Agent of the Government of the United States and his counsel rebut this argument in pointing out that their Opponents cannot, inasmuch as they are in a position of a third State, raise the question of effective nationality, because Italian nationality is not at stake, and, furthermore, if it were intended to apply this doctrine, it would be necessary to admit, at least beginning from the forfeiture of German nationality decreed in 1940 by the German authorities against the individual concerned, that American nationality was the only effective nationality, because Albert Flegenheimer left Germany definitively in 1937 to take up residence in the United States in 1941, the seat of his domicile, of his family and business interests.

The Commission is of the opinion that it is doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the Nottebohm Case, that there must exist as effective link between the person and the State in order that the latter may exercise its right of diplomatic protection in behalf of the former. The Court itself restricted the scope of its Decision by affirming that the acquisition of nationality in a State must be recognized by all other States,

subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

The Court further clarified its thought by affirming:

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. (*Recueil C.I.J.*, 1955, p. 17)

The Court has thus distinctly affirmed the relative nature of its decision, and this Commission is of the opinion that the doctrine in support thereof cannot be opposed to the Government of the United States in this dispute.

The theory of effective or active nationality was established, in the Law of Nations, and above all in international private law, for the purpose of settling conflicts between two national States, or two national laws, regarding persons simultaneously vested with both nationalities, in order to decide which of them is to be dominant, whether that described as nominal, based on legal provisions of a given legal system, or that described as effective or active, really based on legal provisions of another legal system, but confirmed by elements of fact (domicile, participation in the political life, the centre of family and business interests, etc.). It must allow one to make a distinction, between two bonds of nationality equally founded in law, which is the stronger and hence the effective one.

Application thereof was made in cases of dual nationality, like the Carnavaro Case, decided on May 3, 1912, by the Court of Permanent Arbitration, between Italy and Peru,<sup>1</sup> as well as in many decisions rendered by Mixed Arbitral Tribunals established under the Treaties of Peace from 1919 to 1923, especially the Franco-German Tribunal in its decision of July 10, 1926, in the *De Barthez de Monfort vs. Treuhändler* Case, and the Hungary-Jugoslav Tribunal in its Decision of July 12, 1926, in the Baron de Born Case. (*Revue générale de droit international public*, 1913, p. 329; *T.A.M.* vol. VI, p. 806, 809 et p. 499, 503)

The 1930 Hague Convention concerning certain questions relating to the conflicts of nationality laws has, likewise, placed this theory at the basis of its

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<sup>1</sup> *U.N.R.A.*, vol. XI, p. 397.

Article 5, which is strictly limited to cases of multiple nationality and which reads as follows:

In a third State, the individual possessing more than one nationality shall be treated as if he were vested with one nationality only. Without prejudice to the rules of law applied in the third State in matters of personal status and subject to the conventions in force, this State may, in its territory, recognize exclusively amongst the nationalities possessed by such individual, either the nationality of the country in which he mainly and principally resides, or the nationality of the State to which, according to the circumstances, he appears to be more attached in fact.

The theory of effective or active nationality was nevertheless limited in its application by the principle of the unopposability of the nationality of a third State, which, in an international dispute caused by a person with multiple nationalities, permits the dismissal of the nationality of the third State, even when it should be considered as predominant in the light of the circumstances; this was the decision rendered on June 8, 1932, by the Arbitral Tribunal in the Salem Case, disputed between the United States and Egypt, when this latter country invoked the Persian nationality which the claimant possessed, besides Egyptian nationality, to obtain a rejection of the claim of the United States (*U.N.R.A.*, vol. II, p. 1188).

Reference should also be made, in the same sense, to the decision rendered on June 10, 1955, by the Italian-United States Conciliation Commission, completed by a Third Member, de Yanguas Messia, in the Strunsky Mergé Case<sup>1</sup> involving a native born American national who had married an Italian subject whose nationality she had acquired, without however losing her American nationality, and was hence in the legal position of a person vested with dual nationality; the Commission took into consideration the Italian nationality which it held to be predominant, but pointed out that effective nationality does not allow a Respondent State to invoke, against the Plaintiff State that accords protection to one of its nationals, the fact that the latter is also in possession of the nationality of a third State; the result is that American subjects who are not in possession of Italian nationality, but, of the nationality of a third State, can be considered as United Nations nationals under Article 78 of the Treaty of Peace, even when the predominant nationality is that of the said third State (Archives of the Commission, No. 55).

But when a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law. There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.

The Commission wishes to specify that it is by virtue of the rules of state positive law, and not on the grounds of social, family, sentimental or business effectiveness, that it is led to objectively determine that Albert Flegenheimer

<sup>1</sup> *Supra*, p. 236.

who was never vested with dual nationality, lost title to his American nationality, in application of the international treaties concluded by the United States. Likewise, it is also on the basis of an American state law that he acquired American nationality at birth through a German father who became a naturalized American.

63. The Agent of the Italian Government and his Counsel, in connexion with the foregoing, have further contended that, always working on the assumption that Albert Flegenheimer had preserved his American nationality, the United States Petition should be rejected by virtue of what they describe as apparent nationality. The explanation of this theory lies in the fact that the allegedly injured individual, at the time of the March 18, 1941, transaction, availed himself of his German nationality in order to obtain, in matters of transfer of currency, certain advantages which were reserved by Italy to countries that were her allies; they contend that because Albert Flegenheimer, always used a German passport, even after his *ex autoritate* denationalization in Germany, in 1940, he could not now avail himself of his American nationality in order to benefit by the advantages which the Treaty of Peace guarantees to United Nations nationals. Italy envisages therein additional grounds for affirming that the proceedings instituted in behalf of the protection of Albert Flegenheimer's interests are inadmissible even if the latter's nationality was effective and at the same time the only legal one.

The Agent of the Government of the United States and his Counsel deny the existence of a rule of public international law permitting the granting of predominance to a nationality invoked by an allegedly injured party when he does not possess that nationality.

The Commission cannot follow, on this point, the Italian Government's arguments; they appear to be unfounded in fact and in law.

In fact, the Commission has noted that Albert Flegenheimer's German nationality was not a decisive factor when the Italian Ministry of Exchange and Foreign Currency, on June 6, 1941, authorized the payment of 277,860.60 dollars in New York, because the said Ministry described the Flegenheimer brothers in its authorization as *Ebrei ex-germanici* (former German Jews) and had knowledge at that time of the fact that Albert Flegenheimer had lost his German nationality (see *supra*, the considerations of fact No. 15).

From the legal viewpoint, the Commission notes that the doctrine of apparent nationality cannot be considered as accepted by the Law of Nations. In international jurisprudence one finds decisions based on the *non concedit venire contra factum proprium* principle which corresponds to the Anglo-Saxon institution of estoppel; it allows a Respondent State to object to the admissibility of a legal action directed against it by the national State of the allegedly injured party, when the latter has neglected to indicate his true nationality, or has concealed it, or has invoked another nationality at the time the fact giving rise to the dispute occurred, or when the national State has made erroneous communications to another State thus fixing the conduct to be followed by the latter.

Wilson Case, *Moore Arb.* vol. III, No. 2, p. 555; Decision of July 26, 1927, of *C.P.I.J.* Chorzow industrial plant Case (jurisdiction), *C.P.I.J.*, series A, No. 9, p. 31. See also Borchard, *Ann. Inst.* 1931, I, p. 368 and 399 *et seq.*

The Rothmann precedent invoked by the Respondent Party seems to be of little pertinence. That case which was adjudicated by the tripartite Commission between the United States, Austria and Hungary in 1928, concerned a former Austrian national who had been naturalized in the United States, had

returned to Austria where he had resided for a number of years posing as an Austrian and had been drafted into military service in Austria during World War I, after the American diplomatic mission in that State had affirmed, upon being questioned by the Austrian authorities, that Rothmann had lost his American nationality by virtue of the Act of 1907. When the war was over, Rothmann was reintegrated in his American nationality, by virtue of Section 2, paragraph 2 of the Act of 1907, by rebutting the presumption of voluntary expatriation following a prolonged sojourn in his country of origin. The United States accorded him its protection for obtaining from Austria compensation for the damages he had suffered as the result of having been drafted in the Austrian Army. Judge Parker rejected the Petition filed by the United States, without referring to any so-called doctrine of apparent nationality, but merely taking as a basis the fact that on the date on which the damage occurred, the American authorities did not consider Rothmann as a United States national. Judge Parker affirmed:

The Commissioner rejects the contention that the subsequent overcoming of the presumptions (of expatriation) can affect the nationality of this claim which has arisen during the time when the claimant was not entitled to recognition and protection as an American citizen; especially as the very existence of the claim turns on the state of claimant's citizenship at the time it arose. (*Am. J. Int.* 1929, vol. XXIII, p. 182 *et seq.* (186).)

If the predominance of an apparent nationality over every other nationality were a rule of general international law, Judge Parker could have all the more easily adopted it in that the legal appearance of the loss of American nationality had been created by an official statement of the American authorities later claiming compensation for their national who was injured by that very statement. In this case there is no apparent nationality artificially created either by a third State, Germany, or by the individual concerned, Albert Flegenheimer; the latter was in good faith when he used his German passport, subsequent to the issuance of a decree of which he was unaware and under which he forfeited his German citizenship, because he was vested with German nationality and German nationality alone from 1894 to 1940.

The predominance of apparent nationality over legal nationality, on the other hand, was dismissed in the *Wildermann vs. Stinnes* Case, by the decision of the Mixed German-Rumanian Tribunal of June 8, 1926, which refused to give any importance to the non-fraudulent use of a foreign passport; in this decision it is affirmed that:

It is an established fact that the petitioner was requested to lecture at Oxford University, that until 1922 he passed himself off as a Russian and that in 1922 he had his Russian passport renewed in England. The Minister of Home Affairs did not envisage thereby a tacit renunciation of Rumanian nationality. . . . On the other hand, so long as the petitioner did not succeed in having his Rumanian nationality recognized, he was forced to use the only passport which he could obtain, that is to say, a Russian passport. The compulsory renewal of this Russian passport could have no meaning and the petitioner's whole attitude, beginning from the time when he gained knowledge of his rights in Rumania, manifestly rules out his alleged tacit renunciation to his Rumanian nationality." (*T.A.M.*, vol. IV, 485 *et seq.* (495).)

Barring cases of fraud, negligence or serious errors which are not proved in the instant case, the Commission holds that there is no rule of the Law of Nations, universally recognized in the practice of States, permitting it to recognize a nationality in a person against the provisions of law or treaty stipulations,

because nationality is a legal notion which must be based on a state law in order to exist and be productive of effects in international law; a mere appearance cannot replace provisions of positive law governing the conditions under which a nationality is granted or lost, because international law admits that every State has a right, subject to treaty stipulations concluded with other States, to sovereignly decide who are its nationals.

64. *On the question of the applicability to Albert Flegenheimer of Article 78, paragraph 9 (a) sub-paragraph 2 of the Treaty of Peace with Italy.*

Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace with Italy of February 10, 1947, places persons who were treated as enemies in Italy during World War II on the same level as United Nations nationals; it reads as follows:

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

In its Order of February 18, 1956, the Commission decided to examine the question of Albert Flegenheimer's nationality firstly. In the Brief submitted by the Agent of the United States on this question on May 30, 1956, resuming the arguments already developed in its Reply of November 17, 1952, the question of the applicability of this provision was raised; the Agent of the Italian Government dealt with this question in his Reply Brief, filed on October 15, 1956, and the two Agents conclusively explained their respective positions on this point in their final Rebuttal Observations, by the Agent of the Government of the United States on October 28, 1957, and in the final Counter Reply, by the Agent of the Italian Government on November 9, 1957. The Commission intends all the more to affirm that this question cannot be eliminated from the discussions in that it is closely linked with the question of Albert Flegenheimer's nationality, by virtue of the Treaty of Peace itself.

65. The Agent of the Government of the United States contends that the aforesaid Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace has the effect of including in the expression "United Nations nationals" all individuals, who were not necessarily "treated" as enemies, but considered as such under the legislation in force in Italy during the war.

He bases this interpretation on the Russian text of the afore-mentioned article, where the word "*rassmatrivat'*" which is used therein has only one meaning, that of "considering" because the expression "treated" can be obtained in Russian by the words "*obchoditsia*" or "*podvergnut dejstviyu*", which terms are not employed in the Russian text of the Treaty. As Article 90 of the Treaty considers the English, French and Russian texts as authenticated originals, the United States Agent contends that the Russian text also should be taken into consideration in order to obtain the exact meaning of Article 78, paragraph 9 (a), sub-paragraph 2, and in this connexion he refers to Decision No. 32 of the French-Italian Conciliation Commission of August 29, 1949,<sup>1</sup> which affirmed:

whatever the genesis of the two texts may be, it is not lawful to give exclusive consideration to one of these texts (French and English); the interpreter should rather try to clarify one by making use of the other. (*Recueil des décisions*, 1<sup>er</sup> fasc., p. 100.)

He justifies the preference to be given to the Russian text by the Italian translation of the Treaty, where the term "traités", or "treated", is translated

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<sup>1</sup> Volume XIII of these *Reports*.

by the expression "considérante", which corresponds exactly with the Russian text. Although the Italian translation does not have the value of an authenticated original, the United States Agent contends that it can be opposed to the Italian Government in the instant case, in that it expresses in a clear and unequivocal manner the meaning attached by it to that Article of the Treaty. He reaches the conclusion that the word "*traités*" or "treated", was intended by the contracting Parties to mean "considered" and that the Italian Government is not allowed, by virtue of the doctrine of estoppel, to give that provision another meaning in order to modify the extent of its obligations.

On the basis of this argument, the Agent of the United States invokes Article 3 of the Italian War Law (Law Decree 1415) of July 8, 1938, establishing the two following conditions under which a person, who is not a national of an enemy State, can nevertheless be considered as an enemy subject: (1) if said person is stateless; (2) if said person resides in an enemy country. He draws the conclusion therefrom that on the date of the conclusion of the allegedly vitiated contract as the result of duress, that is March 18, 1941, Albert Flegenheimer fulfilled these two conditions because he had forfeited his German nationality and resided in Canada, a country then at war with Italy; in his opinion, Albert Flegenheimer is thus entitled to the benefits of Article 78 of the Treaty of Peace.

The Italian Government denies the correctness of this argument and contends that the mere possibility of being considered as enemy is not sufficient to entitle one to the restitution and restoration imposed by this Treaty on Italy, but that it is necessary that these actually have been treated as enemy, and invokes the jurisprudence established by the Conciliation Commission in similar cases.

66. This Commission holds that the arguments of the Plaintiff Party are not well founded because:

(a) The Commission does not deny that the texts of the Treaty, prepared in three languages, all have the same value of authenticated originals, and that the interpreter must reconcile them one with the other.

In French, the *Litttré* dictionary gives no less than twenty-three meanings to the word "*traiter*", none of which has the purport of "*considérer*"; that which comes closest is that of "giving such and such qualification"; but it is not the usual meaning. It is universally admitted in international law that the natural meaning of the terms used must be taken as the starting point of the *processus* in interpreting treaties. In its natural sense, the word "*traiter*" in French means: "to act towards a person in such and such a manner". The usual meaning of the English word "treat" is no different, according to the Harraps Standard French and English Dictionary. The expression "*considére*" in French, may have five meanings, according to the *Litttré* dictionary, and the following are those that could be taken: "have regard to, take into account, believe, esteem"; the same applies in English.

Therefore, the expression used in the Russian text cannot be reconciled exactly with the French and English texts of the Treaty; it would mean that the said Treaty would have to be applied to persons who, under the provisions of the laws in force in Italy, were believed, or seemed to have been enemies. Article 78, paragraph 9 (a), sub-paragraph 2 would not be thereby devoid of meaning, but it must be admitted that it would lead to a solution which would conflict with the other provisions of the Treaty. The preference accorded to the Russian text by the Plaintiff Party is the result of a true and proper vicious circle, because it offers as proof of the correctness of its solution the very opposition from which it started.

On the other hand, it is not admissible to take the Italian translation of the Treaty to corroborate one of the three authenticated originals, nor to contend that the Italian Government is bound by the Italian text, on the grounds that this translation should be an indication of the manner in which Italy has understood her obligations arising out of the Treaty. The Commission holds that the principle of "estoppel" or "*non concedit venire contra factum proprium*", could be opposed to the Respondent Party only if, by declarations to the contracting States, or by conclusive acts, or even by an attitude regularly taken towards them, it had given Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace an interpretation corresponding to the Russian text, but not by a translation devoid of official value, and which, according to the allegations of the Agent of the Italian Government, is, in actual fact, the collective work of all the contracting States, who purposely refused to give it any character of authenticity. It is therefore devoid of all international legal significance and Italy has never accepted the meaning resulting out of the Russian text.

It cannot be denied that the interpretation of the text of a treaty can be made only by using the versions that have been declared to be authenticated originals by the Treaty itself.

(b) When the texts of an international treaty prepared in different languages cannot be exactly reconciled with one another, the Commission, according to the teachings of international law, believes that adjustment should be made on the basis of a common denominator which answers the meaning of all the texts stated to be authenticated originals by the Parties. It is universally admitted that treaties can confer rights and impose obligations on the contracting States only within the limits within which the intent of these States became manifest in a concordant manner. It is clear that the expression "*considérés*" of the Russian Treaty, includes "*traités*" or "*treated*", because a person who was not a United Nations national, but who was treated as enemy by the Italian Government, must have forcibly been first considered as enemy by the aforesaid Italian Government, whereas the reverse proposition is not correct.

(c) The true and proper meaning of all international treaties should always be found in the purpose aimed at by the Parties.

The Russian text of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, does not seem to answer the intent of the contracting Parties, at the time they drew up the Part VII concerning property, rights and interests, particularly Nos. 1 to 4 of Article 78, for the purpose of assuring restoration to persons injured by exceptional war measures introduced in Italian legislation. A restoration of property, rights and interests is not conceivable unless these were previously injured in such a manner as to engage the responsibility of the Italian State, subject only to material and direct war damages caused by military operations.

This is especially evident in Article 78, No. 3 of the Treaty of Peace which provides:

The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

A person can be "believed to be, or esteemed to be" an enemy without any injury resulting thereby either to himself or to his property, rights or interests; for such injury to materialize, it is necessary that there be a concrete course of action by the state authorities, having prejudicial consequences for

the person against whom such course of action is taken. The negotiators did not aim at creating an "enemy status", whereby it would be sufficient for the subject conditions to materialize under Italian law to make the provisions of the Treaty of Peace applicable. The meaning to be given to the Article in question is hence one of concrete, effective treatment, meted out to a person by reason of his enemy status, and not by abstract considerations envisaging the mere possibility of subjecting him to a course of action by the State of such a nature as to cause injury on the grounds that such a person would fulfil the conditions for being considered, under the terms of a legal provision of municipal law, as an enemy person.

(d) It should be furthermore considered that the provision contained in Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, is a rule of an exceptional character, in that it extends the diplomatic protection of the United Nations to persons who are not their nationals; like every exception, it must be interpreted in a restrictive sense, because it deviates from the general rules of the Law of Nations on this point. Likewise for this reason the English and French texts of the Treaty answer the intentions of the co-contracting Parties better than the Russian text.

(e) The interpretation of the Article in question of the Treaty of Peace through Article 3 of the Italian War Law of July 8, 1938, does not lead to the conclusion proclaimed by the Plaintiff Party. If it is correct that the Treaty refers to this law for determining who are non-enemy persons and can nevertheless be held to be an enemy "under the terms of the legislation in force in Italy during the war", it adds, in the French and English texts, which the Commission considers to be the correct expression of the intent of the Parties, that they must have been treated as enemies. Two conditions must hence be simultaneously fulfilled for entailing the application of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace:

(1) A regulation of principle, contained in Italian legislation in force during the war, of considering certain persons as enemies, even though they did not possess the nationality of a State at war with Italy; this is the case of stateless persons residing in enemy countries;

(2) Implementation of this provision by actual treatment meted out to a person because he is enemy.

67. The interpretation set forth herein confirms in full the interpretation which had already been given this article in several previous decisions of the Italian-United States and the French-Italian Conciliation Commissions.

In the Bacharach Case (No. 22),<sup>1</sup> decided on February 19, 1954, by agreement of the Representatives of the United States and Italy, without resort to a Third Member, this viewpoint was adopted in the following terms:

The Agent of the Government of the United States of America refers also to the provisions of Art. 3 of the Italian War Law which declares that stateless persons residing in enemy countries are considered enemy nationals; but this provision contains an abstract statement which is not sufficient in itself alone to constitute treatment as enemy; this provision could become important only in the event that it were the basis for any restrictive measure that may have been taken against the claimant or her property, which does not seem to be the case. . . . To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of

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<sup>1</sup> *Supra*, p. 187.

action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals. (Archives of the Commission.)

The Agent of the Government of the United States points out that this decision refers to a position of fact which differs from that of Albert Flegenheimer, because Mrs. Bacharach was a Jewish person who left Italy before war broke out, on September 7, 1938, for fear of the racial persecutions, and left her furniture in a storage room in Milan where it was destroyed as the result of an air raid on August 12-13, 1943; in the Albert Flegenheimer case, the cancellation of a derogatory contract is involved. The Commission believes that if the facts are different, the applicable principles are the same, because the property of the person concerned were not subjected to sequestration or other measures of control on the part of the Italian Government or its agents.

The argument contained in the Bacharach decision with respect to the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, was confirmed by three decisions rendered by the Italian-United States Conciliation Commission, completed by a Third Member, on September 26, 1956; these decisions involved the Treves,<sup>1</sup> Levi<sup>2</sup> and Wollemborg<sup>3</sup> cases, in which the Commission distinctly established that the applicability of this Article presupposes a concrete course of action by the Italian authorities on the basis of the legislation in force in Italy during the war, actually subjecting the person concerned to measures intended for enemy nationals (Archives of the Commission). The French-Italian Conciliation Commission, completed by a Third Member, adopted the same interpretation in the Case of Società Generale dei Metalli Preziosi, in its decision No. 167 of March 9, 1954;<sup>4</sup> this case involved a company established under Italian law, but attached by the Italian authorities by reason of the importance of a French Company's participation in its capital stock. The Commission affirmed:

Because the measures, described above, were taken against her in Italy, the Società Generale dei Metalli Preziosi, under Article 78, paragraph 9 (a), sub-paragraph 2, must be considered as having been treated as enemy by the Italian Government. (*Recueil des Décisions*, 5<sup>e</sup> fasc., p. 12.)

68. The Agent of the United States has nevertheless tried to establish that Albert Flegenheimer was actually treated as enemy during the war, under the Italian laws. He points out, a fact which cannot be denied, that beginning on April 29, 1940, Albert Flegenheimer became a stateless person because his German nationality was forfeited, and that furthermore, as he had resided in Canada in 1940 and in 1941, he was domiciled at that time in a State that was at war with Italy, thus fulfilling the conditions required by the Italian War Law of 1938 for the purpose of treatment as enemy. As proof of actual treatment as enemy by the Italian authorities, the Agent of the United States cites the three documents, described below, connected with the sale of Albert Flegenheimer's 47,907 shares of the Società Finanziaria Industriale Veneta:

(a) A letter dated June 15, 1940 written by his general attorney, Mr. Valenti, in Milan, to Mr. Montesi, reading as follows:

I have been informed that ISTCAMBI, because of the measures taken against subjects of enemy States, has *deferred* the transfer of the Finanziaria shares.

<sup>1</sup> *Supra*, decision No. 144, p. 262.

<sup>2</sup> *Supra*, decision No. 145, p. 272.

<sup>3</sup> *Supra*, decision No. 146, p. 283.

<sup>4</sup> Volume XIII of these *Reports*.

I have, in turn, hastened to explain to the informer that no restrictive measures can be applied against Mr. Flegenheimer, a German national, because the circumstance that he resides in Canada is irrelevant.

(b) A certificate of the Italian Consul General in New York dated September 18, 1940, affirming that Albert Flegenheimer submitted a German passport from which it appeared that he was a German national and resided at 1795 Riverside Drive, New York.

(c) A letter dated March 11, 1941, written by the Ministero Scambi e Valute to the Società Finanziaria Industriale Veneta, the most important excerpts of which are the following:

We refer to your letters of February 26th ult., with which you have forwarded a list of the foreign Corporations which will purchase, cash payment, your shares owned by the Flegenheimer brothers, Albert and Joseph, Jewish persons formerly German nationals, and at present deposited in Italy in the "Foreign Jews' dossier".

. . . In connexion with the foregoing, we confirm our agreement to the operation indicated above, while, in order that appropriate instructions may be issued to the competent bodies, we request you to specify the amounts for which the subject shares are to be transferred to the "Distilleria di Cavazere".

69. The Plaintiff Party believes that Albert Flegenheimer, on the basis of these documents, inasmuch as he was a stateless person residing in an enemy country during World War II, fulfilled the conditions of Article 3 of the Italian War Law of 1938, and that it was for this reason that the Italian authorities, prior to the derogatory contract of March 18, 1941, impeded the first business transaction plan, and, after its conclusion, raised difficulties in connexion with the transfer of the price of the sold shares, because the authorization to pay the \$277,860.60 in New York was given only three months after the conclusion of the contract, namely on June 11, 1941; he was thence actually treated as enemy at a time when the Italian authorities could no longer consider him as a German national because they themselves qualified him as a Jew, formerly a German national.

The Agent of the Government of the United States contends that the Italian Government, after alleging in the course of these proceedings, that the remittance in dollars to New York had been possible only because Flegenheimer had deceived the Italian Government by invoking his German nationality in order to benefit by a treatment reserved to the nationals of an allied State, can now no longer justify a measure it had taken in favour of the person by stating that it was once more misguided by the fact that Albert Flegenheimer had told the Italian Consul General in New York that he was domiciled in that city, at a date (June 1941) when the United States was not yet at war; the principle of estoppel would oppose this.

He concludes therefrom that the Italian authorities treated Albert Flegenheimer as enemy twice, first in 1940 and then in 1941; insofar as necessary, he formulated his conclusions in this connexion under No. V.

70. This Commission fails to discover, either in these documents or in these allegations, proof of a treatment as enemy meted out to the individual concerned by the Italian authorities.

Lawyer Valenti's letter of June 15, 1940, refers to a former deed of sale of May 1, 1940, with the Société Générale de Sucreries et Raffineries Roumaine, in Brussels (a Company of the Montesi Group); this sale related to the same 47,907 shares of the Società Finanziaria Industriale Veneta which were the property of Albert Flegenheimer; the price of \$239,535 was to be paid to the

Société Générale de Belgique in Brussels as soon as possible, in favour of the Bank of Manhattan Company at New York. The shares were to remain on deposit with the Banca Popolare Cooperativa Anonima di Novara until confirmation was received by this Italian bank from the aforesaid Société Générale de Belgique that the amount in dollars had been received. A stake of 1,400,000 lire was the object of a supplementary contract of May 16, 1940. It had been agreed that if within the time limit of ten days after the Italian bank had received the sold shares, the amount due in dollars was not paid, the contract would be cancelled and considered null and void. In the supplementary contract, it was furthermore provided that the amount in lire was to be paid "as soon as Istituto Nazionale per i Cambi con l'Estero had confirmed . . . the authorization to effect the operation already given by the Ministero Scambi e Valute in its communication of April 1, 1940 . . . and April 30, 1940 . . . against the withdrawal of the sold shares". It was further stipulated that the sale of the shares would be revoked and cancelled if the remittance of the sold shares was not made within the time limit of one month beginning from May 16, 1940, and that the contract would likewise be invalidated and cancelled if the purchasing company did not effect payment of the \$239,535 due to the Société Générale de Belgique, or failed to obtain from this latter company a statement establishing that it had effected remittance of this sum to the Bank of Manhattan Company at New York.

As Italy entered the war on June 10, 1940, these contracts do not fall under the provisions of Article 78, paragraph 3 of the Treaty of Peace which contemplates only contracts concluded during the war, under force or duress exerted by the Italian Government or its Agents. Lawyer Valenti's letter of June 15, 1940, does not furnish proof that the Italian authorities ordered the withholding of the transfer of Albert Flegenheimer's shares; the difficulties which were pointed out were in any event promptly removed as the result of the German nationality which was at that time attributed to the individual concerned. There is no indication permitting one to admit that he was treated as enemy by reason of his statelessness, because the Italian authorities were unaware at that time, as Flegenheimer himself was unaware, of the fact that he had lost his German nationality a few days before the conclusion of the contract, namely on April 29, 1940, because the forfeiture decreed against him by the authorities of his country of origin was published in the *Deutscher Reichsanzeiger und Preussischer Staatsanzeiger*, No. 103, only on May 4, 1940, thus subsequent to the conclusion of the principal contract of May 1, 1940. This lack of knowledge as to the true status of the individual concerned appears also from the statement of the Italian Consulate General in New York of September 18, 1940, affirming Albert Flegenheimer's German nationality on the basis of the German passport submitted by the latter and affirming, further, that he was domiciled in New York. It appears that the Agent of the United States wishes to take advantage of this incorrect information in order to rebut the theory of apparent nationality propounded by Italy; but this criticism is badly directed, because it is not a question of ascertaining whether the individual concerned made improper use of his German nationality, but whether or not the Italian authorities treated him as enemy, notwithstanding his apparent nationality, because he was a stateless person and was residing in an enemy country at the same time. This question must be settled negatively.

In actual fact, the execution of the former contract was impeded by the German invasion of Belgium, which began on May 10, 1940, as the purchasing Company's head office was in Brussels. Neither Albert Flegenheimer's statelessness, nor his domicile in Canada were the cause of the impediment. Proof of the foregoing is found in lawyer Valenti's letter of July 16, 1940, wherein it

is noted that the Istituto Nazionale per i Cambi con l'Estero had authorized the transfer of Albert Flegenheimer's 47,907 Finanziaria shares. The impossibility to pay the price of the sale at Brussels in favour of a New York bank is due to the measures taken by the occupying Power in Belgium during World War II, and it is as the result of the application of the stipulations concurred by the parties that the contracts of May 1 and May 16, 1940, became null and void and could not be carried out.

They were replaced by the contract of June 6, 1941, which was concluded with an Italian company of the Montesi group, before the United States entered the war on December 8, 1941, at a time when Albert Flegenheimer resided there. His status of statelessness was known on that date, but he was not domiciled in a country that was Italy's enemy. He thence did not fulfil the necessary conditions for being considered as an enemy person under the terms of Article 3 of the Italian War Law of 1938, and, in fact, he was not treated as such. The letter dated March 11, 1941, of the Ministero per gli Scambi e per le Valute, invoked by the Agent of the Government of the United States, establishes that the operation of the sale had not been hindered by the Italian Government or its agents; on the contrary, the latter authorized the payment to the Bank of Manhattan Company at New York of the price established in the new contract of sale, namely, \$277,860.60 which sum, however, was immediately blocked upon arrival because the American nationality of the individual concerned had not been recognized by the United States, which country he had entered on a German passport.

Treatment as enemy, according to the final written observations (Rebuttal) of the Plaintiff Party would flow from a delay of less than three months in the transfer of dollars to the New York bank, effected on June 6, 1941, while the second contract was dated March 18, 1941, delay which the Plaintiff attributes to the knowledge of Albert Flegenheimer's statelessness by the Italian authorities and to his residence in Canada, an enemy country, so that, in their opinion, he automatically fell, under the terms of the Italian legislation, within the category of persons considered as enemy. This argument does not appear to be sufficient to establish that the individual concerned was treated as enemy by Italy, as the 1938 War Law provided that enemy nationals, or individuals considered as such, were under prohibition to perform any operation in connexion with their securities or property (Article 312), under penalty of having their securities or property sequestered (Article 295) or, possibly, of submitting these securities or property to forced sale and sequestration of the proceeds. It is not alleged that any such measure was taken against the individual concerned by the Italian authorities, who, on the contrary, authorized a bank transfer of the price in dollars, in free currency and without any reduction, and liberated the securities owned by Albert Flegenheimer from the blocking applied to all foreigners, under the Italian laws on currencies, without consideration of their nationality or religion. The Commission fails to see in this three months' delay, which appears to be normal in time of war, a hostile treatment, as this must have the characteristics of a discriminatory and prejudicial treatment which was not applicable to all non-Italian property, rights or interests.

71. This Commission is of the opinion that the English and French texts of Article 78, paragraph 9 (a), sub-paragraph 2, of the Treaty of Peace with Italy, correspond better than the Russian text to the intention of the negotiators and the conditions which they intended to settle and, therefore, these must prevail over a less adequate text drawn up in another language.

Furthermore, as the Plaintiff has not established that Albert Flegenheimer

was even plausibly treated as enemy by the Italian authorities, under the terms of Italian legislation, the Commission holds as non-pertinent the conclusion directed at obtaining from the Italian Government the production of all the acts and documents in the possession of the Italian authorities, for the years 1940 and 1941, concerning foreign exchange operations of the Società Finanziaria Industriale Veneta, of the corporations controlled by the said Company, as well as those concerning Mr. Montesi personally, particularly those relating to the purchase of Albert Flegenheimer's ownership interest in Finanziaria.

72. In the Lovett-Lombardo Agreement, concluded on August 14, 1947, and described as "Memorandum of Understanding between the Government of the United States of America and the Italian Government concerning the settlement of certain wartime claims and related matters", invoked by the Plaintiff Party, the Italian Government, as a result of the waiver by the Government of the United States of certain claims based on the Treaty of Peace and the concession by the latter of certain advantages to Italy, in particular that of allowing her to rebuild the tonnage of her commercial fleet, consented to a broad extension of the protection accorded by Article 78 of the aforesaid Treaty to American nationals who claimed the restitution of their property and interests which had been transferred as the result of measures of seizure or control on June 10, 1940, or thereafter.

The Commission is of the opinion that in the instant case this Agreement cannot obtain the effect of giving Article 78, of which it is only a broad interpretation, the authority of according American nationals, on certain claims, an extension of protection; this protection, in fact, rests, completely on the fundamental condition established by this Article, that is, title to United States nationality with which the individual concerned must be vested in order that he may avail himself of the subject Agreement. It therefore presupposes that the injured party must be in a position to submit evidence, to the full satisfaction of law, of his status of United Nations national, a condition which the Commission cannot hold as having been fulfilled in Albert Flegenheimer's case.

73. G. *On the relevant dates for the applicability of Article 78 of the Treaty of Peace with Italy.*

Article 78, paragraph 9 (a), sub-paragraph 1, of the Treaty of Peace with Italy, provides:

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

Therefore, the dates which serve as criteria are September 3, 1943 and September 15, 1947 (coming into force of the Treaty).

The Lovett-Lombardo Agreement contains another solution in its Article V:

For the purpose of this *Memorandum of Understanding*, the term "nationals" means individuals who are nationals of the United States of America, or of Italy, or corporations or associations organized under the laws of the United States of America and Italy, at the coming into force of this *Memorandum of Understanding*, provided that under Article 3 above, nationals of the United States of America shall, for the purpose of receiving compensation, also have held this status either at the time at which their property was damaged or on September 3, 1943, the date of the Armistice with Italy.

A lengthy dispute arose between the High Parties to these proceedings on the question as to whether the admissibility of a Petition for restoration or restitution is subject to proof of United Nations nationality:

- (a) on the date on which the damage was suffered by one of their nationals as well as on the other two dates established by the Treaty of Peace; or
- (b) on the dates of September 3, 1943 and September 15, 1947, if this nationality was acquired subsequent to the date of the damage; or
- (c) alternatively, either on the date of the damage, or on that of the Armistice (Lovett-Lombardo Agreement); or even
- (d) only on the date of the coming into force of the Treaty of Peace (September 15, 1947), when the damage occurred after the Armistice, because the military operations continued until the surrender of the German troops in Italy.

The Government of the United States contends that no consideration should be given to the date of the damage and that it is sufficient that the claimant was in possession of the nationality of the United Nations on the dates specified by the Treaty of Peace in order that he be admitted to the benefits of Article 78 of this Treaty, whereas the Italian Government contends, on the contrary, that the date on which the damage occurred must always be given consideration and that the claim of the United States in behalf of Albert Flegenheimer, who alleges to have suffered injury by a contract concluded under duress on March 11, 1941, cannot be accepted by the Commission because of the absence of a fundamental condition of the general Law of Nations requiring that the injured party be a national of the claiming State on the date on which he sustained damage.

The Commission holds that this question can be left open in the instant case because it would be important only if Albert Flegenheimer's title to American nationality were proved to the satisfaction of law, which in the Commission's opinion it is not, in which case consideration would have to be given to the German nationality of the individual concerned, by virtue of either the effective nationality theory or the apparent nationality theory, which the Commission also rejects. It is sufficient for the Commission to note that Albert Flegenheimer has failed to prove that he was a United Nations national on either of the dates specified in Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace, namely on September 3, 1943 and September 15, 1947. It would be the same if, in application of the Lovett-Lombardo Agreement, consideration were to be given to the date of the damage, June 11, 1941, or to the date of the Armistice with Italy, September 3, 1943.

#### CONCLUSIONS:

On the basis of the foregoing considerations of fact and of law, this Commission concludes:

1. that Albert Flegenheimer acquired by filiation the nationality of the United States, at birth, in Wurttemberg on July 4, 1890;
2. that he acquired German and Würtemberg nationality as the result of his naturalization in Würtemberg on August 23, 1894, and thereby lost, after five years' residence in his new home country, his American nationality, under the Bancroft Treaty concluded on July 2, 1868, between the United States of America and Wurttemberg;
3. that he never re-acquired his American nationality after reaching majority;

4. that he was therefore vested solely with German and Württemberg nationality, after five years' residence in Germany, that is, beginning from 1895 until the German decree of April 29, 1940, published on May 4, 1940, declaring he had forfeited that nationality;
5. that he became stateless beginning from this latter date, but that he did not prove that he was treated as enemy by the Italian authorities during his stay in the countries at war with Italy, Canada first and later the United States;
6. that he was never naturalized in the United States since he took up residence in that country in 1941/1942;
7. that the certificate issued to him by the United States authorities on July 10, 1952, subsequent to the filing of the Petition in the instant case with this Commission, on June 25, 1951, and after the new administrative investigations by the American authorities in 1952, which were also held subsequent to the date of the pending legal action, is not of a nature to prove, to the full satisfaction of law, that Albert Flegenheimer fulfils the conditions required by Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace with Italy, for the purpose of being considered as a United Nations national; nor does he fulfil the conditions required by Article V of the Lovett-Lombardo Agreement;
8. that it is not established that he fulfils the conditions of Article 78, paragraph 9 (a), sub-paragraph 2 of the aforesaid Treaty of Peace.

For the foregoing reasons, and dismissing all contrary conclusions of the High Parties to this dispute,

**DECIDES :**

- I. That Albert Flegenheimer cannot be considered a United Nations national for the purposes of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace with Italy;
- II. That Albert Flegenheimer cannot be considered a United Nations national within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace with Italy;
- III. As a consequence, the Petition filed in his behalf on June 25, 1951, by the Government of the United States is rejected on grounds of inadmissibility;
- IV. That this decision is final and obligatory.

The dispositions of this decision are adopted by unanimous vote, although on some points of law the Representative of the United States of America is not in agreement.

DECIDED at Geneva, at the domicile of the Third Member, on this 20th day of September, 1958.

*The Third Member*

Georges SAUSER-HALL

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

DI CURZIO CASE—DECISION No. 184 OF 20 JANUARY 1959<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—War damages sustained by enemy property in Italy—Evidence of existence, ownership and loss of personal property—Value of Acts of Notoriety as a form of proof—Reference to Decision No. 11 rendered in Amabile case—Jurisdiction of Conciliation Commission—Article 83 of Peace Treaty—Want of jurisdiction to adjudicate claim not previously presented to Italian Government.

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Demande en indemnisation au titre de l'article 78 du Traité de Paix — Domages de guerre subis par des biens ennemis en Italie — Preuve de l'existence, de la propriété et de la perte de biens mobiliers — Valeur d'actes de notoriété comme moyen de preuve — Rappel de la décision n° 11 rendue dans l'affaire Amabile — Compétence de la Commission de Conciliation — Article 83 du Traité de Paix — Incompétence de la Commission de connaître d'une réclamation non antérieurement présentée au Gouvernement italien.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America, and Antonio Sorrentino, Representative of the Italian Republic, is acting on a Petition filed on March 22, 1957 by the Agent of the Government of the United States of America on behalf of the claimants, Nazereno Di Curzio and Vitalina Di Curzio, his wife *versus* The Italian Republic;

The claim of Nazereno Di Curzio was presented to the Italian Ministry of the Treasury on June 30, 1953. The Ministry, by letter dated March 15, 1956, informed the Embassy that the claim had been rejected because the claimant had failed to prove his ownership of the real property in question and had not submitted any evidence to prove the existence, value and loss of the personal property.

On March 22, 1957 the Agent of the United States of America presented a Petition to the Commission on behalf of the claimants, Nazereno Di Curzio and his wife, Vitalina Di Curzio, in which he alleges that Vitalina Di Curzio had failed to present her claim to the Italian Ministry of the Treasury because of a misunderstanding on the part of her legal representative in Italy. The United States Agent requests the Commission to consider and adjudicate her claim. The claimants are each one-half owner of a parcel of real property located in Frosinone, Italy which was damaged during the war. The claimant, Nazereno Di Curzio, was also the owner of personal property located in Frosinone, Italy which he claims was lost as a result of the war.

## CONSIDERATIONS OF LAW:

The evidence presented by Nazareno Di Curzio clearly establishes that he is the one-half owner of the real property which he alleges was damaged during

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<sup>1</sup> *Collection of decisions*, vol. VI, case No. 277.

the war, the other half being owned by his wife, the co-claimant, Vitalina Di Curzio. With regard to the personal property, of which Nazereno claims to be the sole owner, the only form of proof offered is his own self-serving declaration in the original claim and an Act of Notoriety, signed by four persons, attesting to the fact that he was the owner and that said personal property was lost as a result of the war.

The Commission considered the value of Acts of Notoriety as a form of proof in its Decision No. 11 (*The United States of America ex rel Norma Sullo Amabile vs. The Italian Republic*, Case No. 5)<sup>1</sup>. The Commission held, therein, that said acts could be received into evidence but that it was a matter for the Commission to decide the amount of weight which would be given to them. In the case at bar the Commission, after having considered all the evidence presented, concluded that the claimant, Nazereno Di Curzio, has failed to establish the existence, ownership and loss of the personal property.

The co-claimant, Vitalina Di Curzio, has never presented her claim to the Italian Government. Her failure to do so, as is explained in the Petition, was caused by a misunderstanding on the part of her legal representative in Italy. The Petition, in effect, requests the Commission to overlook her failure to present her claim to the Italian Government and to assume that a dispute between the two Governments has arisen with regard to said claim.

Article 83 of the Treaty of Peace, which gave rise to the creation of this Commission, clearly defines the jurisdiction of Conciliation Commissions. Paragraph 2 of said Article states that the Commission "shall have jurisdiction over all disputes which may thereafter arise between the United Nation concerned and Italy in the application or interpretation of Articles 75 and 78 . . ." Vitalina Di Curzio has the right to receive and the Italian Government has the obligation to pay for the damages incurred to her property as a result of the war under the provisions of Article 78. However, before the matter can be presented to this Commission it is necessary that the facts prove to be such as to allow the Commission to exercise its jurisdiction. The Treaty of Peace specifically grants jurisdiction to the Commission only in those cases in which a dispute has arisen. The framers of the Treaty clearly spelled this out when they entitled Article 83, "Settlement of Disputes". In the past, all of the disputes arose by presentation of the claim to the Italian Government, followed either by their rejection on legal or factual grounds or by the claimant's rejection of the Italian Government's offer of settlement. It is pointed out that in the case at bar the Italian Government has never had the opportunity to examine Vitalina Di Curzio's claim prior to the presentation of her Petition and, therefore, it was never placed in a position to either recognize or deny its obligation under the Treaty. Therefore, the Commission concludes that it lacks jurisdiction to adjudicate this phase of the Petition.

Nazereno Di Curzio requested an award of 104,000 lire for the damages done to the portion of real property owned by him. The Italian Government appraised said damages at 18,000 lire. The Commission, after having examined the records of the case and acting in the spirit of conciliation, awards the sum of 50,000 lire for real property damage, and

DECIDES :

1. The claimant, Nazereno Di Curzio, is entitled to receive from the Government of the Italian Republic under the provisions of Article 78, for the damages to the portion of real property owned by him, the sum of fifty thousand (50,000)

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<sup>1</sup> *Supra*, p. 115.

lire in full settlement of his claim, without any reduction of one-third as may be applicable under said Article 78.

2. Nazereno Di Curzio's claim for personal property damages is rejected.
3. The claim of the co-claimant, Vitalina Di Curzio, is rejected without prejudice.
4. The amount stated in paragraph No. 1 shall be paid within sixty (60) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.

This Decision is final and binding and its execution is incumbent on the Government of the Italian Republic.

Rome, January 20, 1959.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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#### GRANIERO CASE—DECISION No. 186 OF 20 JANUARY 1959<sup>1</sup>

Claim for compensation under Article 78 of Peace Treaty—Dual nationality—Determination of dominant nationality—Treatment as enemy—Burden of proof—Obligation of claimant—Failing proof of establishing treatment as enemy under laws in force in Italy during war—Rejection of claim.

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Demande d'indemnité au titre de l'article 78 du Traité de Paix — Double nationalité — Détermination de la nationalité dominante — Traitement comme ennemi — Charge de la preuve — Obligation du réclamant — Non-production par le réclamant de preuve suffisante pour établir qu'il a été traité comme ennemi aux termes de la législation en vigueur en Italie pendant la guerre — Rejet de la demande.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America, and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or inter-

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<sup>1</sup> *Collection of decisions*, vol. VI, case No. 241.

prelative thereof, which was submitted, on March 20, 1952, to the Italian Ministry of the Treasury by Adelaide Comini Graniero through the Embassy of the United States of America at Rome. The Italian Government did not take any action on the claim for more than four years and the United States Agent, considering the delay as tantamount to a rejection, filed a Petition with the Commission on April 23, 1956, in which he alleges the American citizenship of the claimant and damages to the real property owned by her in Italy. The Italian Agent filed an Answer, on June 4, 1956, stating that the Commission lacks jurisdiction because a dispute between the two Governments did not exist. Subsequently, on October 30, 1956, the Interministerial Commission of the Italian Ministry of the Treasury rejected the claim because of the dominant Italian nationality of the claimant and because of her residence in Italy, with her husband, from 1930 to 1948. On December 27, 1956, the Commission ordered the Italian Agent to produce all documentary evidence on which said rejection is based. Thereafter, the Italian Agent filed two statements by the Intendenza di Finanza of Frosinone, one of which states that the claimant's husband was in Italy from 1930 to 1948 and the other of which states that the claimant was married in 1922 and that she emigrated to America in 1946.

The American Agent, in his observations of March 20, 1957, points out that the claimant, in fact, returned to the United States in 1946, and that previously, during their stay in Italy, she was treated as enemy under the laws in force in Italy during the war. He further points out that the claimant and her husband were placed in a concentration camp and were otherwise ill-treated by the Fascist authorities. In support of these allegations, the American Agent submits a letter written by the claimant's American attorney and another letter written by the Pastor of a church in Ausonia. The former sets forth the following facts; Mrs. Graniero went to the United States in 1922 and acquired American citizenship at that time based on her husband's citizenship; she remained in America from 1922 to 1931 and gave birth to three children during that period; in 1931 she went to Italy with her husband and children because her husband's help was needed by his family; in 1939 the claimant made application, at the American Consulate in Rome, to return to the United States and executed the necessary administrative documents; shortly thereafter, and before clearance for her return could be obtained, the war broke out and she and her family were stranded in Italy; prior to the Allied liberation of Rome she and her family were harrassed to the point where they were forced to abandon their home and flee to the hills; subsequently they were placed in a concentration camp in Rome but were able to escape one at a time; shortly after the war the entire family returned to the United States. The Pastor's letter states, in effect, that the Graniero family was ill-treated during the war by the Fascist authorities because they possessed American nationality and that they suffered a great deal "prior to and after the concentration camp".

The Italian Agent, on November 8, 1947, in reply to the American Agent's observations, points out that no concrete proof has been presented that measures were actually taken against the claimant sufficient to establish "treatment as enemy" and that the claimant's Italian nationality is, in any event, her prevalent nationality.

#### CONSIDERATIONS OF LAW :

The Commission must consider this case under two aspects. The first in light of the claimant's dual nationality and the second under the "treatment as enemy" provision of Article 78, paragraph 9.

Mrs. Graniero was an Italian citizen at birth and by virtue of the Italian

Nationality Law No. 555 of June 13, 1912, she lost said citizenship when she became a naturalized American in 1922. Under the same Italian Law she re-acquired her Italian nationality, by operation of law, in 1933 by residing in Italy for a period in excess of two years. Thus, in 1933 she possessed both American and Italian nationality.

The Commission must then determine which of the two nationalities is dominant. The claimant resided in Italy from 1931 until 1946, the year of her return to the United States. She came to Italy with her children to be with her husband. She alleges that she made an attempt, in 1939, to return to America and in that regard made an application at the American Consulate in Rome. However, before obtaining clearance for her return the war broke out, leaving Mrs. Graniero and her family stranded in Italy. Her attempt to return to America in 1939 is merely set forth in a letter by the claimant's attorney, but no proof is presented to substantiate it. An examination of the Rome Consulate files reveals, on the contrary, that no such application was made by Mrs. Graniero in 1939. Investigation further revealed that, in connexion with a passport application at the same Consulate, Mrs. Graniero executed an affidavit, in March 1946, to overcome the presumption of noncitizenship. She states therein that the reason for her foreign residence was to be with her husband in Italy. She makes no mention whatsoever of any previous application to return to America, even though it would have been most logical to do so at that time. Furthermore, the claimant's husband, in a similar affidavit executed in January 1945, states: that he owned a mill in Italy which he operated during his stay there; that he did not have the intention of returning to the United States until 1945; that the reason he did not previously apply for a passport was because he was not ready to leave Italy; that he also owned some land and a house, in which he and his family lived while in Italy. It should also be pointed out that the claimant's husband lost his American citizenship in 1933 when he manifested a voluntary acceptance of Italian nationality by virtue of his membership in the Fascist Confederation of Artisans. From that date he possessed only Italian nationality,

These facts clearly establish that the claimant, who was in possession of both nationalities but who was married to an Italian, was more closely related since 1931 with Italy than she was with America. Not only her conduct in economic, social, civic and family life, but also her husband's habitual residence, the centre of his business interests and of his professional life, clearly show that she was a dominant Italian national.

With regard to the second aspect of this case, the claimant tries to spell out "treatment as enemy" under the laws in force in Italy during the war. As proof of this fact, she submits a statement made by her American attorney and a statement by the Pastor of a church in Ausonia, Italy. The former merely alleges that the claimant and her family were placed in a concentration camp in Rome and that subsequently they were able to escape therefrom. The latter is a certification that the Graniero family "had much to suffer both at Ausonia and Rome prior to and after the concentration camp", and that they were ill-treated and abused by the Fascist Italian authorities because they possessed American nationality. Both of these statements deal in generalities which are hardly acceptable as a form of proof. The statement by the American attorney is obviously a repetition of what was told to him by the claimant and, as such, is no more than a self-serving declaration. The name and exact location of the concentration camp are omitted, as is also any document to establish the alleged internment, or the reason for same. In any event, the claimant has the burden of establishing treatment as enemy and she must do so by clear and convincing proof. Even if she were not able to produce any document of

her internment she should have explained her failure to do so. Even if it is assumed that she was placed in a concentration camp, there is no evidence that she was so placed because of her American nationality. At the very most there is a remote and very dubious inference that that was the reason. The Pastor's letter is but a very general repetition of the facts alleged by the claimant. It does not refer to any specific act of enemy treatment nor does it furnish the necessary details which would substantiate his statement. Because of this lack of proof the Commission must hold that the claimant has failed to submit sufficient evidence to benefit by the provisions of Article 78, paragraph 9, subparagraph 2 of the Treaty; i.e., she has failed to prove that she was treated as enemy under the laws in force in Italy during the war. Therefore, the Commission

**DECIDES :**

1. The petition filed by the Agent of the United States of America in behalf of Mrs. Adelaide Comini Graniero is rejected.
2. This Decision is definitive and binding.

Rome, January 20, 1959.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

**COLAPIETRO CASE—DECISION No. 187 OF 4 FEBRUARY 1959<sup>1</sup>**

Claim for compensation—War damages sustained by property in Italy—Whether damaged property belonged to claimants, United Nations nationals—Lack of proof—Rejection of claim.

Demande en indemnité — Dommages de guerre subis par des biens en Italie — Question de savoir si ces biens appartenaient aux réclamants, ressortissants d'une Nation Unie — Absence de preuve — Rejet de la demande.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of

<sup>1</sup> *Collection of decisions*, vol. VI, case No. 279.

America and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

This dispute arose out of the rejection of a claim, by the Italian Ministry of the Treasury, submitted through the Embassy of the United States by Angelo and Giuseppe Colapietro, American nationals. They had requested compensation for the war damages sustained:

(a) by a building used as dwelling quarters composed of three rooms, located at Via Madonna della Pace, Ceccano, referred to under No. 1135 in the property records certificate;

(b) by one room located in a building used for dwelling purposes, also in the aforesaid Via Madonna della Pace, and referred to in the property records certificate under No. 3282. Claimants affirm they are the owners of one half of this room.

By letter No. 409097 dated October 30, 1956, the Italian Ministry of the Treasury informed the Embassy of the United States that, acting in concurrence with an opinion rendered by the Interministerial Commission, the claim was rejected in that the investigations made had disclosed that under deed of sale of October 11, 1935, the claimants had sold the real property for which they were now claiming compensation.

In the Petition filed with this Commission, the Agent of the United States says that the deed of transfer of 1935 refers to the ownership of one-half of the afore-mentioned room, registered under No. 3282; that this part of the claim was hence withdrawn by the Parties concerned. But that no sale had been effected with respect to the three rooms registered under No. 1135.

The Agent of the United States hence concluded by requesting that the obligation of the Italian Government to compensate the claimants for the damages sustained by the afore-mentioned building be asserted. On July 9, 1953 these damages had been estimated at 1,074,181 lire, plus 35,000 lire representing expenses incurred in establishing the claim.

On the basis of the information supplied by the Agent of the United States in the Petition, the Italian Ministry of the Treasury re-examined the claim, but the Ministry, as appears from the communication of the Agent General for all Conciliation Commissions, acting concurrently with an opinion rendered by the Interministerial Commission, again rejected the claim. In particular, the afore-mentioned Ministry of the Treasury, on the basis of the investigations made by the competent Ufficio Tecnico Erariale, assumed that map 1135, Sect. IV, is identical to map 3282 of the property records now in force, and the subject of the transfer effected under deed dated March 10, 1934, drawn up by notary Scalzone at Corona (U.S.A.) deposited on October 11, 1935 with notary Peruzzi at Ceccano, in behalf of Luigi Giudici and Maria Colapietro of Angelo (the latter later deceased).

#### CONSIDERATIONS OF LAW:

The question which the Commission must decide concerns the exact scope of the Scalzone deed of March 10, 1933 deposited with the records of notary Peruzzi in Ceccano on October 11, 1935. Under this deed the claimants, Angelo and Giuseppe Colapietro sold to Luigi Giudici and Maria Colapietro, among other things, "ownership title on the building at Ceccano, city map 3282, sub. 1, surface measuring 32 centiares, under the direct domaine of De Nardis, with all such rights over this property as are declared by us".

The claimants contend that, because the notarial deed refers only to map 3282, the sale should be considered as limited to the room which was registered

with the property records under this number. The Commission holds that this argument is unfounded.

The property records certificate dated November 16, 1957 submitted by the United States Agent, shows that the underground room which was added to map 1135-1 under No. 3282 in 1884, was subsequently transferred to the rural property records.

Conversely, in the more recent records, No. 3282 no longer refers to the ground room (see copy of note of transcription dated January 21, 1924 in favour of the claimant, following inheritance from the mother and grandmother).

In any event, the Commission considers as decisive the reference made in the 1933 deed of sale to De Nardis' long-term lease rights; from the documents submitted it appears that these rights encumbered the entire building at Via Madonna della Pace and not the ground room originally registered under No. 3282.

In any event it appears that the deed, at the time the transcription was made in favour of Luigi Giudici and Maria Colapietro, was interpreted in the sense appearing from the note of transcription connected therewith and introduced in the records of the case.

Consequently, the claimants have failed to prove that they are still the owners of the building for which they request war damage compensation, and, therefore, the Commission

**DECIDES :**

That the Petition filed by the Agent of the United States of America in behalf of Messrs. Angelo and Giuseppe Colapietro is rejected.

This Decision is final and binding.

Rome, February 4, 1959.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

**TUCCIARONE CASE—DECISION No. 188 OF 12 FEBRUARY 1959<sup>1</sup>**

Claim for compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Cases of American women married to Italian nationals—Test of dominant nationality—Reference to Decision No. 55 rendered in Mergé case—War damages—Burden of proof—Failure to prove existence and ownership of property and damage thereto—Rejection of claim.

Demande en indemnité présentée au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Cas des femmes américaines mariées à des ressortissants italiens — Recherche de la nationalité dominante — Recours aux principes établis par la décision n° 55 rendue dans l'affaire Mergé — Dommages de guerre — Fardeau de la preuve — Défaut de preuve quant à l'existence, la propriété et la perte des biens — Rejet de la demande.

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<sup>1</sup> *Collection of decisions*, vol. VI, case No. 256.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs. Alexander J. Matturri, Representative of the United States of America, and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted, on June 30, 1950, to the Italian Ministry of the Treasury by Concetta Tucciarone through the Embassy of the United States of America at Rome.

On September 1, 1951, the Ministry informed the Embassy that the claim was rejected because the claimant's Italian nationality prevails over her American nationality, which she acquired in 1938, in the application of Article 78 of the Treaty of Peace, especially in light of the fact that her husband was solely an Italian national until he also acquired American nationality in 1945, more than a year after the damage occurred. Subsequently, the claim was again submitted to the Ministry for re-examination and the Ministry once again rejected it.

The Agent of the United States filed a Petition with the Commission on July 12, 1956, in which he alleged the following facts: the claimant, an Italian at birth, married an Italian national in 1913; on November 21, 1938 she became a naturalized American citizen; she resided in the United States for fifteen years prior thereto and continuously from 1933 to the aforesaid date of naturalization; she continued to reside thereafter in the United States until 1948 when she went to Italy and remained there for two years; her husband was naturalized as an American on February 26, 1945 and is still an American citizen; she seeks compensation for the loss, as a result of the war, of personal property located in five apartments of a building situated in Scauri.

On August 17, 1956, the Italian Agent filed an Answer in which he alleged that the claim had not been officially rejected and therefore the Commission lacks jurisdiction since no official controversy exists.

On October 30, 1956, the Ministry of the Treasury sent official communication to the American Embassy rejecting the claim on the following grounds: The claimant has failed to prove the existence and ownership of the personal property which is said to have furnished apartments owned by the claimant's husband and damaged because of the war; investigations revealed that Mr. Tucciarone filed a claim with the Intendenza di Finanza of Latina, in December 1956, for damages done, as a result of the war, to this very same real and personal property.

The Commission, on April 17, 1957, ordered the Italian Agent to produce the documents on which said rejection was based. On July 2, 1957 the Italian Agent filed the documents in compliance with the said Order.

#### CONSIDERATIONS OF LAW:

The Commission finds that the claimant and her husband have had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States. Thus this case comes within the meaning of paragraph 7 (c) of the Mergé Decision (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Decision No. 55)<sup>1</sup> in which the American nationality shall be considered

<sup>1</sup> *Supra*, p. 236.

prevalent. Therefore, since Mrs. Tucciarone's American nationality was her dominant one during the pertinent dates of the Treaty she is entitled to compensation for the damages to her property in Italy as a result of the war.

However, in order to obtain the benefits of Article 78 it is also necessary for the claimant to sustain the burden of proving not only the existence and ownership of the property but also the fact that said property was damaged or lost as a result of the war. The Commission, after having examined all the records of the case, finds that the claimant has failed to prove the existence, ownership or loss of the property and therefore,

DECIDES:

1. That the Petition filed by the Agent of the United States of America on behalf of Concetta Tucciarone *née* Carcone is rejected.

2. This Decision is final and binding.

Rome, February 12, 1959.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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GANAPINI CASE—DECISION No. 196 OF 30 APRIL 1959<sup>1</sup>

Compensation under Article 78 of Peace Treaty—Nationality of claimant—Dual nationality—Cases of dual nationality involving American women married to Italian nationals—Test of dominant nationality—Reference to principles established by Decision No. 55 handed down in Mergé Case—Nationality of the “head of the family”—Scope of this expression.

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Indemnisation au titre de l'article 78 du Traité de Paix — Nationalité du réclamant — Double nationalité — Cas des femmes américaines mariées à des ressortissants italiens — Recherche de la nationalité dominante — Recours aux principes établis par la décision n° 55 rendue dans l'affaire Mergé — Nationalité du «chef de la famille» — Portée de cette expression.

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace and composed of Messrs.

<sup>1</sup> *Collection of decisions*, vol. VI, case No. 283.

Alexander J. Matturri, Representative of the United States of America, and Antonio Sorrentino, Representative of the Italian Republic, finds it has jurisdiction to adjudicate the rights and obligations of the parties to this dispute.

The dispute between the two Governments arose out of a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof, which was submitted, on April 30, 1949, to the Italian Ministry of the Treasury by Orsola Racchetti Ganapini through the Embassy of the United States of America in Rome.

The Italian Ministry of the Treasury, by letter dated November 9, 1953, informed the Embassy that the claim had been rejected on the grounds that the claimant, naturalized as an American in 1929, re-acquired her original Italian nationality following her residence in Italy from 1930 to 1940 and by virtue of her marriage to an Italian national.

On December 28, 1955 the Agent of the United States again submitted the claim to the Ministry of the Treasury for its reconsideration and alleged the following facts: the claimant, who was born in Italy, went to the United States in 1920; in 1929 she became an American citizen and resided in the United States continually, except for brief visits to Italy, until 1952; her husband, an Italian citizen, went to Italy in 1937 because of ill health and has remained there ever since; she supported her husband from 1937 on because his health did not permit him to work; she also supported her daughter who resided with her father in Italy; the claimant resided in Italy from 1952 to 1955 because of illness.

The Ministry of the Treasury again rejected the claim on the grounds that her family, which she supported by her work in the United States, resided in Italy and thus the centre of her family and economic interests was in Italy.

On April 10, 1957 the Agent of the United States filed a Petition with the Commission and alleged, in addition to the foregoing facts, that the claimant's real property in Italy was completely destroyed as a result of the war. The Answer of the Agent of the Italian Government reaffirms the opinion of the Ministry of the Treasury and requests that the claim be rejected.

#### CONSIDERATIONS OF LAW:

In paragraph 7 of the Mergé Decision (*The United States of America ex rel. Florence Strunsky Mergé vs. The Italian Republic*, Decision No. 55) it is stated: "It is considered that in this connexion the following principles may serve as guides" . . . for determining the dominant nationality of individuals vested with both nationalities at the same time, i.e., the Italian and American nationalities. In sub-paragraph (c) of the aforesaid paragraph reference is made to the nationality of the head of the family; but if the husband should be normally considered as the head of the family, there are nevertheless certain instances in which, even though this principle holds firm, it must be adapted to the particular circumstances of the case.

This is the proposition occurring in the instant case wherein it has been ascertained that Mrs. Ganapini, who supported her husband and daughter from 1937 to 1952, actually was the head of the family.

Having noted that during the entire period specified above the claimant has worked and resided uninterruptedly in the United States and that the business interests and the professional life of the family were established, therefore, in the United States, the Commission holds that the claimant's American nationality should be considered as dominant, wherefore she is entitled to receive the compensation provided for in Article 78 of the Treaty of Peace.

The Commission has examined the evidence submitted by both Agents with

regard to the damages sustained by the claimant and, after having taken into consideration the devaluation of the lira since the presentation of said evidence, finds that the said damages sustained by her amount to 6,700,000.00 (six million seven hundred thousand) lire and therefore

**DECIDES:**

1. That the claimant, Orsola Racchetti Ganapini, is entitled to receive from the Government of the Italian Republic, under the provisions of Article 78 of the Treaty of Peace, the sum of 4,666,667.00 (four million six hundred sixty six thousand six hundred sixty seven) lire, representing two thirds of the sum of 6,700,000.00 (six million seven hundred thousand) lire, as compensation for the damages suffered by her property in Italy as a result of the war.
2. That the claimant is also entitled to receive the sum of 300,000.00 (three hundred thousand) lire as reimbursement for the expenses sustained in the preparation of her claim.
3. That the total of the sums specified in paragraphs 1 and 2 above shall be paid within 60 (sixty) days of the date on which the Government of the United States has presented a request for payment to the Italian Government.

This Decision is final and binding and its execution is incumbent on the Italian Government.

Rome, April 30, 1959.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*Ths Representative of the  
Italian Republic*

Antonio SORRENTINO

**BAER CASE—DECISION No. 199 OF 12 DECEMBER 1959<sup>1</sup>**

Compensation for war damages caused to enemy property—Exemption from special progressive tax on property—Active right to claim under Article 78 of the Treaty of Peace—Claimant naturalized “United Nations national” subsequent to 3 September 1943—Whether this date implied in second part of paragraph 9 (a) of the aforementioned Article—Interpretation of treaties—Principles of—Good faith—Treatment as enemy—Meaning and scope of expression “laws in force in Italy during the war”—State responsibility for acts of local *de facto* Government.

Indemnité pour dommages de guerre subis par des biens ennemis — Exemption d'un impôt extraordinaire sur le patrimoine — Droit d'action ouvert par l'article 78 du Traité de Paix — Acquisition par le réclamant du statut de «ressortissant des Nations Unies» à une date ultérieure au 3 septembre 1943 — Question de savoir si cette date est tacitement prévue par la seconde partie du paragraphe 9 a) de l'article 78 du Traité — Interprétation des traités — Principes d'interprétation — Bonne foi — Traitement comme ennemi — Signification et portée de l'expression «législation en vigueur en Italie pendant la guerre» — Responsabilité de l'Etat en raison d'actes d'un gouvernement de fait local.

<sup>1</sup> *Collection of decisions*, vol. VI, case No. 284.

The Italian-United States Conciliation Commission established by the Government of the United States of America and the Government of the Italian Republic, pursuant to Article 83 of the Treaty of Peace with Italy dated February 10, 1947, composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member chosen by mutual agreement between the United States and Italian Governments.

Having seen the Petition dated May 28, 1957, filed on the same date by the Agent of the United States of America with the Joint Secretariat of the Commission *versus* the Government of the Italian Republic on behalf of Ludovico Baer, the claimant;

Having seen the Answer filed by the Agent of the Italian Government on October 1, 1957;

Having seen the *Procès-verbal* of Non-Agreement dated December 10, 1947, signed by the Representatives of the two Parties to the dispute, wherein it is stated that recourse shall be made to a Third Member, as provided for in Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, in order that the controverted issues raised by the instant case be resolved;

Having noted that the Agents of both Parties, as stated in their joint declaration of November 25, 1959, voluntarily relinquish the oral discussion of the case, so that the Commission is enabled to render a decision on the basis of the written pleadings and defences filed during the course of the proceedings in the instant case;

Having seen that, in his Petition, the Agent of the United States concludes by requesting:

That this Conciliation Commission:

(a) Decide that the claimant has the status of a United Nations national within the meaning of the second sentence of paragraph 9 (a) of Article 78 of the Treaty of Peace;

(b) Decide that the claimant is entitled to receive, under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, two-thirds of the sum necessary at the time of payment to make good the loss suffered, which sum was estimated to be, as of November 15, 1954, 9,897,538 lire, as well as the entire sum of 500,000 lire representing the reasonable expenses incurred in Italy by the claimant in establishing the claim;

(c) Decide that the claimant is entitled to be exempted from the Extraordinary Progressive Patrimonial Tax under paragraph 6 of Article 78 of the Treaty of Peace as well as to the reimbursement of any sums which have been or may hereafter be collected from him by the Italian Government in connexion with said tax.

Having noted that the Agent of the Italian Government, in his Answer, concludes by requesting that the Petition be rejected.

#### STATEMENT OF THE FACTS:

1. The claimant, who is of Italian origin and professes the Jewish faith, acquired, by naturalization, title to United States citizenship on November 20, 1944 and has since then preserved his American nationality uninterruptedly to date. He is at present domiciled at Springfield, Massachusetts (U.S.A.). The regularity of his naturalization, resulting from an official certificate thereof,

attached to the record of the case, has not given rise to any disagreement between the two Parties to this dispute, and the Commission's jurisdiction to adjudicate the case is therefore unchallenged.

2. The claimant is the owner of an industrial building situated at Via G.B. Vico No. 30, Milan, which he acquired by purchase on February 11, 1930. This building was almost completely destroyed as a result of the air raids over Milan which occurred on February 14 and August 15, 1953. The sum necessary to repair the damages so caused was estimated, as of the date of November 19, 1954, to be 9,897,538 lire by the expert named by Ludovico Baer for the purpose of making this estimate.

3. By Decree dated April 27, 1944 (No. 2034/257) the Chief of the Province of Milan, implementing the Legislative Decree No. 2 of January 4, 1944 of the Head of the Government of the Italian Social Republic, known as the Salò Republic, published in the *Official Gazette* No. 6 of January 10, 1944 and the provisions for implementing this Legislative Decree adopted by the Ministry of Finance in its circular No. 4032 B of February 12, 1944, ordered the seizure of the industrial building owned by the claimant and situated at Via G.B. Vico No. 30, Milan, as well as the installations, machines, raw materials, furniture, tools, stock and any and every other property, whatever the nature thereof and wherever situated, and all other assets such as furnishings, floating funds, shares of stock, credits, etc.

All the property so seized was transferred, for the management and subsequent sale thereof, to the Ente di Gestione e Liquidazione Immobiliare known as E.G.E.L.I., a special agency established by the Italian Government for the management and settlement of property owned by Jews or by enemy nationals.

4. On January 28, 1955 the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic, on behalf of Ludovico Baer, a claim for compensation for the war damages suffered by his property in Italy, on the basis of Article 78 of the Treaty of Peace with Italy and the agreements supplemental thereto or interpretative thereof.

But, by letter No. 401994 dated March 13, 1957 the Minister of the Treasury rejected this claim on the grounds that Ludovico Baer did not fulfil the conditions required by the aforesaid Treaty for the purpose of being entitled to receive compensation in that he was not vested with the nationality of the United States either on the date of the Armistice, September 3, 1943, or on the dates on which the property was damaged by air attacks (February 17 and August 15, 1943) and, furthermore, because the claimant had not been treated as enemy under the laws in force in Italy during the war so that he did not fulfil the conditions required by Article 78, paragraph 9 (a) of the Treaty of Peace for the purpose of benefiting by the advantages accorded to a "United Nations national".

5. A Special Progressive Tax on Property was established in Italy under Legislative Decree of the Provisional Head of the State No. 143, dated March 29, 1947.

On September 1, 1947 the Provisional Head of the State approved and enacted Law No. 828, dated September 1, 1947, "ratifying with amendments and complements Legislative Decree of the Provisional Head of the State No. 143, dated March 29, 1947, concerning the establishment of a Special Progressive Tax on Property".

On December 27, 1956 the III Ufficio Distrettuale delle Imposte Dirette of Milan served on the claimant a notice of assessment of this Special Progressive Tax on Property owned by him in Italy and requested him to pay the sum of 1,417,660 lire.

On February 19, 1957, the claimant submitted a request for exemption from this tax to the III Ufficio Distrettuale delle Imposte Dirette invoking Article 78, paragraph 6 of the Treaty of Peace; subsequently, by letter dated February 8, 1957, the Embassy of the United States of America in Rome supported this request in resorting to the good offices of the Italian Agent General of this Commission.

As no action was taken on these requests, the Agent of the United States of America submitted the subject claim to this Commission.

#### CONSIDERATIONS OF LAW:

6. In his Answer dated October 1, 1957 the Agent of the Italian Government made a brief reference to the other cases pending before this Commission which, in substance, are identical to the claim of Ludovico Baer. These cases are: Fubini (No. 272)<sup>1</sup> and Falco Bolasco (No. 270),<sup>2</sup> both of which were adjudicated by this Commission on December 12, 1959, on the basis of a reasoning that is very similar to that already adopted by the Commission in its three previous decisions, all of them rendered on the same day, that is, on September 24, 1956, in the Treves (No. 95),<sup>3</sup> Levi (No. 96)<sup>4</sup> and Wollemborg (No. 109)<sup>5</sup> cases.

In the light of such a well established jurisprudence, the Commission does not believe it necessary to repeat *in extenso* the grounds on which the decisions involved were rendered and confines itself to setting forth the principles of law on which it (the jurisprudence) is based and to referring to the aforementioned decisions in their support.

7. It is not denied by the Parties that Ludovico Baer, the claimant, does not fulfill the conditions of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace in order that his American nationality entitle him to receive compensation for the damages suffered by him as a result of the war and to be exempted from the Special Progressive Tax on Property, because, as he was naturalized in the United States in 1944, he was not vested with the nationality of this country on September 3, 1943, the date of the Armistice, although he did possess the status of a United States national on September 15, 1947, the date on which the Treaty of Peace came into force.

He could therefore benefit by Article 78, paragraph 4 (a), second sentence and paragraph 6 of the Treaty of Peace only if it were established that he was treated as enemy under the terms of the legislation in force in Italy during the war (Article 78, paragraph 9 (a), sub-paragraph 2).

8. The Commission cannot admit that the aforesaid Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace should be interpreted in the light of sub-paragraph 1 and that treatment as enemy of a person who was not vested with the nationality of one of the States at war with Italy could actually have taken place only if it occurred before the Armistice of September 3, 1943; this interpretation would lead to introducing into Article 78, paragraph 9 (a), sub-paragraph 2, a restriction which is not to be found therein and which would altogether change the very text thereof, and this the Commission does not feel authorized to do in light of the fundamental rules of the Law of Nations on the art of interpreting international treaties (see Advisory Opinion of Sep-

<sup>1</sup> *Infra*, decision No. 201, p. 420.

<sup>2</sup> *Infra*, decision No. 200, p. 408.

<sup>3</sup> *Supra*, decision No. 144, p. 262.

<sup>4</sup> *Supra*, decision No. 145, p. 272.

<sup>5</sup> *Supra*, decision No. 146, p. 283.

tember 15, 1923 of the Permanent Court of International Justice on the interpretation of Article 4 of the Treaty regarding Polish minorities of June 28, 1919, in the matter of acquisition of Polish nationality, *Recueil C.P.J.I.*, serie B. No. 7, p. 20).

9. Also, this Commission cannot admit that the notion of "laws in force in Italy during the war" adopted in Article 78, paragraph 9 (a) sub-paragraph 2 of the Treaty of Peace should not include the laws, decrees and acts emanated by the Italian Social Republic after the Armistice; 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.

10. The Commission cannot, furthermore, admit that the notion of "laws in force in Italy during the war" should not be made to include provisions containing racial discrimination on the grounds that these have no connexion with the contingencies of war and that they were only directed at Italian nationals and not at enemy nationals.

The Commission is of the opinion that the connexion between the Italian legal provisions concerning racial persecution and the war cannot be denied. These provisions preceded the establishment of the Salò Republic and go back to Decrees No. 1390 and No. 1630 of September 5 and 23, 1938, which were enacted by the legal Italian Government at the time of their adoption. They served as a basis for a whole series of legislative measures directed against the Jews in Italy and to the persecutions which were made worse by point 7 of the Programme of Action of the First Assembly of Republican Fascism, which was the legislative authority of the Italian Social Republic, and which, as a matter of policy, stated (November 1943):

Those who belong to the Jewish race are aliens. During the war they are enemy nationals.

This hostility towards the Jews materialized in Law Decree No. 2 of January 4, 1944, which was applicable in the whole of the territory over which the Italian Social Republic could exercise its authority, and which led many Chiefs of Provinces to issue decrees of confiscation of Jewish owned property, based on the rule that "Jews are considered to be the subjects of an enemy State".

11. The facts of the instant case show that Ludovico Baer was the victim of measures of confiscation directed against all his assets in Italy, covering his

real and personal property and his industrial installations, as well as his funds, his shares of stock, credits, etc., wherever these different items of property were situated; the confiscation was complete and effective and was not of a merely symbolic nature.

It was decreed and executed under the legislation in force in Italy during the war.

This Commission, consequently, establishes that Ludovico Baer was treated as enemy in Italy under the terms of the legislation there in force during the war and that he therefore fulfils the conditions required by Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace for the purpose of being qualified as a "United Nations national". He is hence entitled to benefit by the provisions of Article 78, paragraph 4 (a), second sentence, and of paragraph 6 of the aforesaid Treaty.

12. The claimant concludes by requesting that the Italian Government reimburse him the reasonable expenses incurred by him in establishing his claim; the amount requested is 500,000 lire. The Commission reserves unto itself the right of making a final decision on this point. On the foregoing grounds,

DECIDES,

by a majority vote of the Members on the Commission, the Italian Representative dissenting on certain questions of principle:

1. The claimant, Ludovico Baer, is entitled to avail himself of the quality of "United Nations national" within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace with Italy of February 10, 1947.

2. It therefore follows that he is entitled to receive, in lire, from the Italian Government, under Article 78, paragraph 4 (a) of the Treaty of Peace, compensation to the extent of two-thirds of the sum necessary, at the date of payment, to make good the losses suffered as a result of the war by the building situated at Via G.B. Vico No. 30, Milan, of which he is the owner.

3. The Italian Government shall submit, within an unextendable time-limit of three months, beginning from the date on which this Decision is notified to him, his observations on the amount of compensation to be awarded to Ludovico Baer for the war damages specified in paragraph 2 above.

4. Ludovico Baer is entitled, under Article 78, paragraph 6 of the Treaty of Peace, to be exempted from the Special Progressive Tax on Property, established by Law No. 828 of September 1, 1947 of the Italian Republic.

5. Within a time-limit of sixty days, beginning from the date on which this Decision is notified, the Italian Government shall refund to the claimant any sums which he may have already paid as a result of the notice of assessment of this tax served on him on December 27, 1946.

6. This Decision is final and binding; its execution is incumbent on the Italian Government.

7. It shall be notified to the Agents of the two Governments concerned.

DONE in Rome, at the seat of the Conciliation Commission, on this 12th day of the month of December nineteen hundred and fifty-nine.

*The Third Member*  
G. SAUSER-HALL

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

*The Representative of the  
Italian Republic*  
Antonio SORRENTINO

FALCO CASE—DECISION No. 200 OF 12 DECEMBER 1959 <sup>1</sup>

Claim for compensation for war damages and for exemption from special progressive tax on property—Active right to claim—Applicability of second part of paragraph 9 (a) of Article 78 of Peace Treaty—Treatment as enemy—Meaning and scope of expression “laws in force in Italy during the war”—State responsibility for acts of insurrectional Government.

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Réclamation présentée au titre de l'article 78 du Traité de Paix — Indemnité pour dommages de guerre — Exemption d'un impôt extraordinaire progressif sur le patrimoine — Droit d'action — Applicabilité de la seconde partie du paragraphe 9 a) de l'article 78 du Traité de Paix — Traitement comme ennemi — Signification et portée de l'expression «législation en vigueur en Italie pendant la guerre» — Responsabilité de l'Etat en raison d'actes d'un gouvernement insurrectionnel.

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The Italian-United States Conciliation Commission established by the Government of the United States of America and the Italian Government, pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government and Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member, chosen by mutual agreement between the United States and Italian Governments;

Having seen the Petition dated November 30, 1956, filed on the same date by the Agent of the Government of the United States of America with the Joint Secretariat of the Commission *versus* the Government of the Italian Republic in behalf of Mrs. Ada Falco Bolasco; claimant, and Renzo Falco, co-claimant.

Having considered the Answer filed by the Agent of the Italian Government on April 27, 1957;

Having seen the *Procès-verbal* of Non-Agreement dated May 17, 1957, signed by the Representatives of the two Parties to this dispute, wherein it is stated that recourse shall be made to a Third Member, as provided for by Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, for the purpose of resolving the disputed questions that have arisen in this case;

Having heard the Agents of the two Parties during the oral discussions of the case which were held in Rome, at the seat of the Commission, on April 3, 1959;

Having noted that the Agent of the United States, in his Petition, concluded by requesting:

That this Conciliation Commission

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<sup>1</sup> *Collection of decisions*, vol. VI, case No. 270.

(a) Decide that both the claimant and the co-claimant are United Nations nationals within the meaning of the second sentence of paragraph 9 (a) of Article 78 of the Treaty of Peace, in that they were treated as enemy under the laws in force in Italy during the war;

(b) Decide that the claimant is (or the co-claimant, or both are) entitled to receive from the Italian Government under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof two thirds of the sum necessary at the time of payment to make good the loss suffered as a result of the damages to property "A", hereinbefore described, which sum was estimated as of August 8, 1956 to be 14,857,500 lire, subject to any necessary adjustment for variation of values between that date and the date of final payment;

(c) Decide that the claimant is entitled to receive from the Italian Government under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof the entire amount necessary at the time of payment to make good the loss suffered as a result of the damages to property "B", hereinbefore described, which sum was estimated as of August 8, 1956 to be 877,100 lire, subject to any necessary adjustment for variation of values between that date and the date of final payment;

(d) Decide that the claimant and the co-claimant are entitled under Article 78 of the Treaty of Peace to be exempted from the Extraordinary Progressive Patrimonial Tax on all of their properties in Italy; that the claimant is entitled to the refund of the first instalment of said tax collected from her by the Italian Government, in the sum of 185,944 lire and that both the claimant and the co-claimant are entitled to the refund of such other sums as they may have been heretofore or hereafter compelled to pay to the Italian Government in connexion with said tax;

(e) Decide that the claimant and the co-claimant are entitled to receive from the Italian Government the sum of 800,000 lire, representing the reasonable expense incurred by them in Italy in establishing their claim.

Having noted that the Agent of the Italian Government concludes his Answer by requesting that the Petition be declared inadmissible, or, in any event, rejected;

#### A. CONSIDERATIONS OF FACT:

1. The Petition submitted by the Agent of the United States Government on November 30, 1956, includes, in point of fact, three claims:

(a) The first concerns Mrs. Ada Falco Bolasco, the claimant, and her father, Renzo Falco, the co-claimant, jointly; this claim is directed at obtaining payment of compensation for the war damages suffered by two buildings in Italy, one of which the claimant owns in full, and in the other she has a remainder interest, the co-claimant having secured for himself a life interest therein.

(b) The second claim concerns immunity, in favour of the claimant, from the Special Progressive Tax on Property established in Italy by Legislative Decree No. 143 of the Provisional Head of the State, dated March 29, 1947 and Law No. 828 of September 1, 1947.

(c) The third claim is directed at obtaining immunity from this same tax in favour of the co-claimant.

2. The buildings with respect to which Mrs. Ada Falco Bolasco believes she is entitled to receive compensation for war damages, are the following:

(a) A building located at Via Buniva 2, Turin, which was donated to her by her father, Renzo Falco, under deed drawn up on July 22nd 1939 by the notary Hilda Dorio at New York, filed with the notary Alessandro Billia, at Turin, and later amended by a deed dated October 17, 1939, drawn up by the latter notary. This donation is registered with Public Real Property Records (Conservatoria dei Registri Immobiliari di Torino) (cadastral heading). The donation of a remainder interest was made, the donor, Renzo Falco, having reserved for himself a life interest in the building, with exemption from providing security. It was furthermore conditioned upon the following termination clause:

This donation shall be *ipso jure* revoked . . . if and when, during the lifetime of the donor, the laws placing restrictions on the ownership of building by Italian nationals of the Jewish race should be repealed. (Exhibit 6 annexed to the Petition.)

As the donee was still a minor on the date the donation was made, the Tutelage Judge of Turin appointed Counsellor Buscaglino as her special guardian and authorized the acceptance of the donation "with the reservations and under the conditions referred to in the proceedings", on October 12, 1939.

When the racial laws were repealed in Italy, this building remained recorded under the name of Ada Falco Bolasco. The damages suffered by this building amount to 4,245,000 lire, revalued; by an increase coefficient of 3.5, to 14,857,500 lire in 1956.

(b) A building located at Via Artisti 22, Turin, which also originates from a donation made by Renzo Falco, the claimant's father, under deed drawn up by the notary Massa at Turin, dated September 29, 1938 (Exhibit 5); the records do not show that this deed was conditional, nor burdened by any right to a life interest; it must therefore be admitted that this donation transferred full ownership title.

The amount of the damages suffered by this building amounted to, as of September 27, 1948, 250,600 lire, which, revalued on the basis of an increase coefficient of 3.5, amounted to 877,100 lire in 1956.

Certain parts of the building located at Via Buniva 2 in Turin were sold by Mrs. Ada Falco Bolasco and Renzo Falco to Mrs. G. Prunetti-Scagliotti on February 16, 1952; the deed of sale reserves the right to receive war damage compensation to the sellers; hence, this right has not been alienated.

Mrs. Ada Falco Bolasco, on August 31, 1951, submitted to the Italian Ministry of the Treasury, through the medium of the Embassy of the United States of America, a claim for war damage compensation; but this claim was rejected, on November 8, 1952, on the grounds which shall be analysed in the considerations of law of this decision. Renzo Falco appears in this Petition only as co-claimant for the building located at Via Buniva 2, in which he has a life interest, and a conditional full ownership interest, in order to set aside, insofar as necessary, any doubts as to the ownership of the damaged property.

3. Under notice of assessment served on August 24, 1953, the Ufficio Distrettuale imposte dirette of Turin notified Mrs. Ada Falco Bolasco that she was to pay, under the Special Progressive Tax on Property, the amount of 1,942,000 lire, that is, 10.33% of her taxable property in Italy, estimated at 18,810,000 lire. The appeal made by the taxpayer to the Commissione Distrettuale per le Imposte Dirette at Turin, produced no results.

4. Under notice of assessment served on March 31, 1952, the Ufficio Distrettuale Imposte Dirette of Turin notified Renzo Falco, the co-claimant, that he was to pay, under the Special Progressive Tax on Property, the sum of

504,060 lire, that is, 8.13% of his taxable property in Italy, estimated to be 6,200,000 lire. The appeal made by him to the Commissione Distrettuale per le Imposte Dirette at Turin, was no more successful than the appeal submitted by the claimant.

5. Both parties in interest are of Italian origin; they took up permanent residence in New York (U.S.A.) immediately prior to the outbreak of World War II, and both acquired United States nationality by naturalization, to wit:

Mrs. Ada Falco Bolasco on May 21, 1945 and Renzo Falco on January 22, 1945.

They have never lost their American nationality since then.

It is not denied that Renzo Falco is of the Jewish race.

However, his daughter, Mrs. Ada Falco Bolasco, is not Jewish. It is, in effect, indicated in the act amending the deed of donation, and its acceptance, dated October 17, 1939, that the claimant, who at that time was a minor, was of the Aryan race because she was the issue of a mixed marriage between her father and Elida Drollet, her late mother, who was an Italian national and did not profess the Jewish faith since prior to October 1, 1938 and whose children shall not, therefore, be considered as belonging to the Jewish race; this statement was made by Counsellor Jose' Benedetti, in behalf of his principal, Renzo Falco, before the notary Alessandro Billia of Turin, and which was repeated by the latter in the request submitted by him to the Tutelage Judge of Turin for the purpose of appointing a special guardian for the instant claimant during the notarial proceedings for the real estate donation (Exhibit No. 6). This statement caused no objection to be raised on the part of the Tutelage Judge and the Commission feels it is free to evaluate the scope thereof.

#### B. CONSIDERATIONS OF LAW:

6. Under the terms of Article 78, paragraph 4 (a), second sentence, of the Treaty of Peace with Italy signed on February 10, 1947 and which came into force on September 13, 1947:

In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent or two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered.

Article 78, paragraph 6 of this Treaty says:

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

Following the decision of the French-Italian Conciliation Commission of August 29, 1949, No. 32<sup>1</sup> (*Recueil*, fascicule I, pp. 99 *et seq.*), it is no longer disputed between the signatory Parties to the Treaty of Peace that the special taxes established in Italy by Legislative Decree No. 143 of March 29, 1947 and Law No. 828 of September 1, 1947, fall under the provisions of Article 78, paragraph 6 of the Treaty of Peace. Within the limits of this provision, the

<sup>1</sup> Volume XIII of these *Reports*.

exemption from the Special Progressive Tax on Property was acknowledged in Italian-American intercourse, by note dated June 13, 1950, addressed by the Ministry of Foreign Affairs of the Italian Republic to the Embassy of the United States of America in Rome (see Decision of the Commission dated September 24, 1956 in the Levi case, No. 96).<sup>1</sup>

Article 78, paragraph 9 (a) of the aforesaid Treaty gives the following definition of "United Nations nationals":

"United Nations nationals" means individuals who are nationals of any of the United Nations . . . provided that the said individuals . . . also had this status on September 3, 1943, the date of the Armistice with Italy.

The term "United Nations nationals" also includes all individuals . . . which, *under the laws* in force in Italy during the war, *have been treated as enemy*. (Emphasis supplied.)

7. The Italian Ministry of the Treasury, in a letter written to the Embassy of the United States of America on November 8, 1952, rejected the claim of Mrs. Ada Falco Bolasco for war damage compensation, which the Embassy had submitted to the Ministry, for lack of the right to claim since the claimant's real property was not sequestered under the War Law and the claimant herself was not a United Nations national either on the date of the Armistice or on the date on which the damage occurred, and, lastly, she was not considered as enemy within the meaning of the Italian legislation in force during the war.

In his Answer dated April 27, 1957 to the Petition filed by the Agent of the United States, the Agent of the Italian Government makes a brief reference to the Italian Representative's dissenting opinion in the Treves case (No. 95)<sup>2</sup> to which he had already directed attention in the Fubini case (No. 272)<sup>3</sup> and comprised in his arguments the various grounds on which the claims of the parties in interest are based, that is, both those concerning war damage compensation and those concerning fiscal immunity.

8. It is clear that neither the claimant nor the co-claimant fulfill the conditions of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace in order that the nationality of the United States, which they acquired in 1945 by naturalization, may confer upon them an active right to claim, as nationals of the United States, because neither of them was already vested with this quality on September 3, 1943, the date of the Armistice, because the United States nationality which they possessed on September 15, 1947, the date of the coming into force of the Treaty of Peace, is not considered to be sufficient under the terms of Article 78, paragraph 9 (a), sub-paragraph 1 thereof.

Therefore, they can benefit by the quality of "United Nations nationals" only if they can establish that "they were treated as enemies under the laws in force in Italy during the war".

The admissibility of their claims depends thereon.

It is necessary to refer to the Conciliation Commission's well established jurisprudence on the conditions which must be fulfilled, in order that, under the terms of the Treaty of Peace, a person can be considered as having been "treated as enemy" with the result of making him or her a "United Nations national".

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<sup>1</sup> *Supra*, decision No. 145, p. 272.

<sup>2</sup> *Supra*, decision No. 144, p. 262.

<sup>3</sup> *Infra*, decision No. 201, p. 420.

It is required:

(a) that there has been a positive and concrete course of action on the part of the Italian authorities actually subjecting a person, who, juridically, was not vested with the nationality of any one of the Allied and Associated Powers, to measures which were applicable against enemy nationals: this jurisprudence was clearly established in Decisions No. 167, the Società Generale dei Metalli Preziosi case (French-Italian Commission)<sup>1</sup> No. 20, the Flegenheimer case,<sup>2</sup> and, above all, in Decision No. 22, the Bacharach case<sup>3</sup>;

(b) that the treatment as enemy have occurred on the basis of the legislation in force in Italy during the war, consisting not only in the Italian War Law of July 8, 1938 and the legislative acts amending or completing it, but also in all such other legal provisions as were aimed at subjecting persons who were affected thereby to measures which were substantially equivalent to those concerning enemy nationals; this jurisprudence, which was outlined in the Bacharach case, was subsequently developed further in the Treves case (No. 95),<sup>4</sup> Levi case (No. 96)<sup>5</sup> and Wollemborg case (No. 109).<sup>6</sup> Decisions, the three of them dated September 24, 1956, and confirmed, on this date, by the Decision of the Commission in the Fubini case (No. 272).<sup>7</sup>

#### 9. On the claims of Mrs. Ada Falco Bolasco

For the purpose of establishing that the claimant was treated as enemy during the war by the Italian authorities, the Agent of the Government of the United States refers to two letters written by the Turin branch of the Banco di Roma.

The claimant had 2,500 Società Italgas shares on deposit with this Bank as well as a checking account showing a credit balance of 7,292 lire.

In its first letter, dated March 24, 1942, written to Counsellor Benedetti, attorney for Renzo Falco, the co-claimant, the Bank advised that it had declared the subject property to the Prefecture of Turin, with the following notation:

This declaration is made in that it is not possible to ascertain whether or not Falco Ada is, at this date, still in possession of Italian nationality.

The letter indicates that claimant's property was frozen under the war legislation.

In its second letter, dated September 12, 1955, written to Renzo Falco the Bank said that the claimant, who was in New York at that time, had been declared by the Bank to be vested with United States nationality because it had not been possible to verify whether or not she was still an Italian national.

The Agent of the Government of the United States believes that these letters are evidence of the fact that the claimant was treated as enemy, in application of Articles 309 and 311 of the Italian War Law of July 8, 1938 (No. 1415) which provisions were substituted by the stricter ones of Law No. 1994 of December 19, 1940 on the treatment of enemy-owned property and on business relations with persons of enemy nationality. He concludes therefrom that the claimant is entitled to the benefits provided by the Treaty of Peace for persons who were "treated as enemies" under the laws in force in Italy during the war.

The Commission has given this argument very careful consideration.

<sup>1</sup> Volume XIII of these *Reports*, decision No. 167.

<sup>2</sup> *Supra*, decision No. 182, p. 327.

<sup>3</sup> *Supra*, p. 187.

<sup>4</sup> *Supra*, decision No. 144, p. 262.

<sup>5</sup> *Supra*, decision No. 145, p. 272.

<sup>6</sup> *Supra*, decision No. 146, p. 283.

<sup>7</sup> *Infra*, decision No. 201, p. 420.

Article 309 of the War Law No. 1415 of July 8, 1938, obligated private persons in Italy, who were the debtors of persons of enemy nationality or who held in custody property owned by the latter, to declare them in writing to the Prefect, as was done by the Banco di Roma, in connexion with Mrs. Ada Falco Bolasco's securities and credit balance. This declaration was to be followed by an attachment by the authorities, within the time-limit of thirty days, failing which, the property could be forwarded or payment could be made to the parties entitled to such property or payment (Article 311 of the War Law).

The rules contained in Articles 309 *et seq.* of the War Law of 1938 were broadly developed and made stricter by Italian Law No. 1994 of December 19, 1940. In Article 1 thereof, the obligation to declare enemy property in Italy was made more extensive; Article 22 of this law specifically states that Article 311 of the War Law of 1938 ceased to be applied while, Article 2 provides:

...Italian nationals who are debtors, no matter on what grounds, of sums of money owed to enemy nationals, wherever they may be residing, or are bound to make delivery of securities of valuables in favour of these aforesaid enemy nationals, are absolutely forbidden to fulfill their obligations.

There does not seem to be any doubt that, following the enactment of the provisions of Law No. 1994 of 1940, a mere declaration entailed the freezing of property owned by enemy nationals in Italy, because the latter, whether creditors or owners, no longer had disposition thereof, under reservation of a specific authorization of the Minister of Finance in special circumstances. This law in fact differs, on an important point, from the preceding War Law No. 1415 of 1938 in that, under this latter law, the declaration made to be Prefect only caused a thirty-day deferment of the payment of the credits or the delivery of the property and, unless sequestration was ordered by the authorities concerned within this time-limit, private individuals could proceed with making such payment or delivery. According to the Law of 1940, No. 1994 the mere declaration of property or credits entailed, on the contrary, prohibition on the part of the debtors to pay any sums due or deliver any property over to their owners.

All persons subjected to this prohibition were nevertheless "authorized to deposit any such sums as were owed by them to enemy nationals, or any securities or valuables they were to deliver to the aforesaid persons, with the Bank of Italy or with any other Bank empowered to act as agent for the Bank of Italy . . ." (Article 3, Law No. 1994 of 1940); but this deposit also entailed a blocking of these properties and valuables by the Bank of Italy, and hence by the Government, in that this Bank was a State organization. Any breach of these obligations met with very severe penalties so that it is undeniable that these measures were of a discriminatory nature.

Nevertheless, in the instant case, one cannot overlook the fact that, in its declaration, the bank had expressed some doubt on the American nationality of the claimant. It is neither deniable, nor denied, that on the date her property was frozen in 1942, Mrs. Ada Falco Bolasco had preserved her Italian nationality and that she was vested with no other; she was not, therefore, an enemy national and did not fulfil the condition of the law in force in Italy for the purpose of being treated as enemy. However, the prefectoral authorities of Turin took no action on the Bank's observation.

The Commission holds that it cannot possibly admit that the claimant was treated as enemy in application of Article 295 of the War Law No. 1415 of 1938; this Article reads as follows:

sequestration . . . can be ordered also with regard to property in connexion with which there is sound reason to suspect that it belongs to enemy nationals, even though it appears to be recorded in the name of persons of another nationality.

It was therefore aimed at cases where enemy property was held in custody by Italian or neutral intermediary persons, and not the cases which the Commission is called upon to deal with, namely of an error of the nationality of the party entitled. It is therefore not admissible that the claimant was treated as a suspected person under the War Law.

At all events, Article 295 only concerns sequestration of enemy property and, under Article 296, "sequestration is ordered by the Prefect, by decree that is effective on the day of issue thereof". Now, it is not denied that the declaration of the claimant's property made to the Prefecture of Turin, in accordance with the letter of the Banco di Roma of March 24, 1942, was never followed by a decree of sequestration, so that it is not even possible to establish the date beginning from which Mrs. Ada Falco Bolasco's property and credit balance are alleged to have been subjected to measures depriving her of her control thereof.

On the other hand, the Commission cannot find that the argument of claimant's counsel contained in his memorandum of September 14, 1956 (page 3 of Annex 2 to the Petition) is correct, namely, his assertion that Mrs. Ada Falco Bolasco was considered as enemy in Italy and treated as such under Article 3, chapter 2 of War Law No. 1415, which provides:

For the purpose of this law, one is considered as an enemy national . . . 2. who, subsequent to the implementation of the law, acquires the nationality of an enemy State, even though he at the same time possesses the Italian nationality or the nationality of another State.

This provision is not applicable to the claimant for the evident reason that, naturalized in the United States on May 21, 1945, she acquired the nationality of this State only after the cessation of hostilities which came to an end, in actual fact, upon the death of Mussolini, which occurred on April 28, 1945, and the capitulation of the German forces in Italy from April 29 through May 2, 1945; the acquisition of the right to American nationality occurred therefore too late to confer upon her the status of enemy national.

Lastly, no measures were adopted against her by the authorities of the Italian Social Republic after the Armistice, either because they never admitted that she belonged to the Jewish race, or because their attention was never directed to her case.

The question as to whether or not claimant was treated as enemy in 1942 must therefore be resolved negatively, in the Commission's opinion, because if discriminatory measures were in fact taken against her property these were not taken under the Italian legislation in force during the war, but, in view of her Italian nationality, the only one with which she was vested at that time, in opposition with the aforesaid legislation. This Commission has no intention of being satisfied with a formal proof of application of the subject Italian law, but must reserve for itself the right of searching as to whether or not the measures objected to were materially in conformity with the Italian legislation in force during the war. The Commission reaches the conclusion that this was not so in the instant case.

The Commission does not believe that this conclusion is invalidated by the fact that the unblocking of the claimant's property could be affected only following the authorization given by the Ministry of the Treasury, in its letter dated July 4, 1946 (No. 157.142). The text of this letter—the existence of which

is admitted in the Banco di Roma's letter of September 12, 1955—could not be attached to the records by the Italian Office of Allied and Enemy Property; it is merely the question of a formal procedure that must be followed, for procedural purposes, in all cases of unblocking, even if the blocking occurred in contrast with the laws in force in Italy during the war, and which in no way affects the merits of the case.

10. As treatment as enemy is not in conformity with the legislation in force in Italy during the war, the claimant is not entitled to benefit either by compensation for the war damages suffered by her real property in Italy or by the exemption from the Special Progressive Tax on the property she owns in that country, because she does not fulfill the conditions of Article 78, paragraph 9 (a) sub-paragraphs 1 and 2 of the Treaty of Peace.

11. *On the claim of Renzo Falco*

The Petition filed by the Government of the United States, concerning the co-claimant, is also based on the fact that he was treated as enemy under the laws in force in Italy during the war; in this connexion, his position is not the same as that of his daughter.

Renzo Falco was a creditor of the Turin branch of the Banco di Roma in the amount of 17,012.25 lire and he had deposited several shares of stock with this bank, valued at 48,975 lire. In 1944 this property was declared by the aforesaid bank to the Istituto di San Paolo, E.G.E.L.I.'s deputy for handling property owned by persons of the Hebrew race, and blocked in favour of the aforesaid Istituto di San Paolo by decree of the Head of the Province of Turin, dated September 12, 1944, No. 23.520/557 in accordance with letter dated December 6, 1944 written by the Istituto di San Paolo (see letter of the bank written on September 12, 1955, Exhibit No. 12). This property was ultimately unblocked.

Renzo Falco was also the owner of a plot of land located in the municipality of Valtornanzo (Province of Aosta) which was confiscated by decree of June 2, 1944 (No. 5731 of the Head of the Province of Aosta. This confiscation appears from the annexes attached to a previous claim for war damage compensation submitted by the party in interest, on the basis of Article 78, paragraph 4 of the Treaty of Peace, which claim was rejected by the Ministry of the Treasury because of the lack of the active right to claim on the part of the party in interest, but which was subsequently submitted to the Italian-United States Conciliation Commission; the Commission, following an agreement reached by the Representatives of the two Governments, settled the case in stating that "Renzo Falco is entitled to receive from the Government of the Italian Republic, under Article 78 of the Treaty of Peace, the sum of 1,500,000 lire". (Decision of September 30, 1955, case No. 143.)

The blocking of Renzo Falco's securities and bank valuables, as well as the confiscation of his real property were effected under the legislation in force in Italy during the war, that is, the legislation enacted, after the Armistice, by the Italian Social Republic.

Point 7 of the policies of the program approved by the First Assembly of Republican Fascism in the month of November 1943, affirmed that: "persons of the Jewish race are aliens. During the war they are enemy nationals." This concept found its full development in Legislative Decree No. 2, of January 4, 1944, published in *Official Gazette* No. 6 of January 10, 1944. Article 1 thereof provides that Italian nationals of the Jewish race in Italy are deprived, in the Italian territory, of the right of being the owners of real property and of being in possession of securities, valuables, credits and interest ownership, whatever the nature thereof; Article 7 provides that all their property located in the territory of the State shall be confiscated in behalf of the State and handed over

to E.G.E.L.I. for management, and, in accordance with Article 8, that the Head of the Province, having jurisdiction over the territory concerning each particular item of property, is the competent authority for ordering, by decree, that these severe measures be adopted.

It is in application of these provisions of the laws in force in Italy during the war that Renzo Falco's rights over his property located in Italy were impaired, whereas the measures adopted against Ada Falco Bolasco's rights were taken in contrast with the laws in force in Italy during the war and could not bring about the conditions foreseen by Article 78, paragraph 9 (a), subparagraph 2 of the Treaty of Peace conferring the quality of "United Nations national" on persons who did not fulfil the conditions of nationals of one of the United Nations, at the critical dates specified in Article 78, paragraph 9 (a), subparagraph 1 of the Treaty.

The Agent of the Italian Government denied that Article 78, paragraph 9(a), sub-paraphraph 2 was applicable to the case of Renzo Falco, in his Answer of April 27, 1957, wherein he principally invoked three grounds of law which have been exhaustively examined by this Commission in its decision, of this date, in the Fubini case (No. 272)<sup>1</sup>, which confirms the Commission's case law in the Treves (No. 95),<sup>2</sup> Levi (No. 96)<sup>3</sup> Wollemborg (No. 109)<sup>4</sup> and Feldman (No. 23)<sup>5</sup> cases, to which specific reference is made herein. The Commission does not therefore deem it necessary to repeat in full the grounds on which these decisions were based, and will confine itself to pointing out:

(i) The argument invoked by the Honourable Agent of the Italian Government, maintaining that only treatment as enemy imposed on a person before the Armistice of September 3, 1943 under the laws in force in Italy must come under consideration, would result in an amendment of the very text of Article 78, paragraph 9 (a), sub-paraphraph 2 of the Treaty of Peace, which the Commission does not consider itself authorized to bring about, by virtue of the fundamental rules of the law of nations on the interpretation of treaties between States.

(ii) The argument invoked by the aforesaid Agent that the expression "laws in force in Italy during the war" contained in Article 78, paragraph 9 (a), sub-paraphraph 2 does not include the laws, decrees and acts enacted by the Italian Social Republic after the Armistice, is contrary to the principle of effectiveness admitted in the Law of Nations and by virtue of which when a local Government and an insurrectional Government share power in a State, the laws enacted by each one in the parts of the territory which they respectively occupy are considered as laws in force, which obtain validity, under the Law of Nations, from the effective power which each of the two Governments exercises over the territory wherein it is in a position to assure the execution of its determinations. The result is that, in all parts of Italy subjected to the power of the Italian Social Republic, the legislative acts of this Republic fall within the concept of "laws in force in Italy during the war", contained in the aforementioned Article of the Treaty of Peace; this was the intent of the signatory Powers, such as can flow from a teleological interpretation of this provision which aims at extending the benefits of the Treaty of Peace to persons whose property, rights or interests sustained damages under the laws in force in Italy during the war.

<sup>1</sup> *Infra*, decision No. 201, p. 420.

<sup>2</sup> *Supra*, decision No. 144, p. 262.

<sup>3</sup> *Supra*, decision No. 145, p. 272.

<sup>4</sup> *Supra*, decision No. 146, p. 283.

<sup>5</sup> *Supra*, decision No. 28, p. 212.

(iii) The contention of the aforesaid Agent that the expression "laws in force in Italy during the war" cannot be made to include the provisions contained in the racial discrimination provisions on the grounds that these have no connexion with the contingencies of war and that they did not concern enemies, but Italian nationals, disregards the scope and meaning of Decrees No. 1390 and 1630 of September 5 and 23, 1938, which were the starting points of a series of legislative measures enacted in hatred of the Jews and persecutions which were rendered stricter by the fundamental policy which inspired the Italian Social Republic to declare that persons of the Jewish race were aliens and that, during the war, they were enemy nationals; this hostility found its expression in the Law Decree No. 2 of January 4, 1944, which was applicable in all of the territory subjected to the Italian Social Republic, which gave rise to a considerable number of decrees by Heads of Provinces, based on the rule that "Jews are considered to be the subjects of an enemy State" (see, among other decrees, that of December 28, 1940 of the Head of the Province of Brescia sequestering the haberdashery stores of Vittorio Coen, *Official Gazette of Italy* of January 8, 1944), so that the connexion between racial persecution and the war cannot be denied.

The Commission is therefore of the opinion that Renzo Falco was treated as enemy under the laws in force in Italy during the war and that, as a result, he has the quality of "United Nations national" within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace.

12. *On the financial and fiscal effects on the claims of both the claimant and co-claimant.*

The refusal to acknowledge in Mrs. Ada Falco Bolasco the quality of a "United Nations national" has the effect of depriving her of any right to compensation for the war damages suffered by the building located at Via Artisti 22, Turin; of which she is sole and full owner. It also entails the consequence that she is not entitled to be exempted from the Special Progressive Tax on Property, in connexion with this building and her possessions in securities and checking account with the Turin branch of the Banco di Roma.

The position of the second building, located at Via Buniva 2, which was the subject of a notice of assessment dated August 20, 1953, served by the III Ufficio Distrettuale delle Imposte Dirette of Turin on Mrs. Ada Falco Bolasco, is more doubtful in that the claimant is not, in point of fact the owner. The annulment clause encumbering her father's act of donation of this building actually materialized with the repeal of the racial laws in Italy, so that the donation is, in fact, automatically revoked under the terms of the act of donation of July 22, 1939, as modified on October 17, 1939 (Exhibit No. 6) so that Renzo Falco has again acquired full and sole ownership title. As Renzo Falco became a co-claimant for the purpose of being prepared to meet this very eventuality, the Commission has no difficulty in according to him, personally, in connexion with this building, the right, assured to him by Article 78 of the Treaty of Peace, to receive war damage compensation and to be exempted from the payment of the Special Progressive Tax on Property, leaving the party in interest to make the necessary adjustments with the Italian fiscal authorities. This same immunity must be allowed to the co-claimant in connexion with this other property, particularly his valuables and checking account credit balance with the Turin branch of the Banco di Roma.

13. Claimant and co-claimant request that, under Article 78, paragraph 5 of the Treaty of Peace and Article 13, sub-section (vi) of the Rules of Procedure, they be paid by the Italian Government the sum of 800,000 lire as reimbursement of the reasonable expenses sustained by them in establishing their

claims. The Commission reserves unto itself the right of making a final decision on this point.

On the foregoing grounds,

DECIDES,

with a majority vote, the Italian Representative dissenting on certain questions of principle, that:

1. As Mrs. Ada Falco Bolasco was not treated as enemy under the laws in force in Italy during the war, she does not possess the quality of a "United Nations national" within the meaning of Article 78, paragraph 9 (a), second sub-paragraph of the Treaty of Peace with Italy of February 10, 1947, which came into force on September 15, 1947.

2. It therefore follows that she is not entitled to claim compensation for the war damages suffered by the building located at Via Artisti 22, Turin, of which she is sole and full owner.

3. She is not entitled to be exempted from the Special Progressive Tax on Property assessed on the value of the building located at Via Artisti 22, Turin, as well as on her bank securities and checking account, and she cannot claim reimbursement of all the sums heretofore advanced to the Italian Government, for this tax, following adjustment of her notice of assessment.

4. As Renzo Falco was treated as enemy under the laws in force in Italy during the war, he has the quality of a "United Nations national" within the meaning of Article 78, paragraph 9 (a), second sub-paragraph of the aforesaid Treaty.

5. It therefore follows that he is entitled to receive, in lire, from the Italian Government; as compensation under Article 78, paragraph 4 (a) of the Treaty of Peace, two-thirds of the sum necessary, at the time of payment, to make good the loss suffered as a result of the war damages sustained by the building, of which he is the sole and full owner, located at Via Buniva 2, Turin.

6. The Italian Government shall submit, within the absolute time limit of three months from the date on which this decision is notified, their observations on the amount of compensation to be allowed to Renzo Falco for the war damages referred to in paragraph 5 above.

7. Renzo Falco is entitled, under Article 78, paragraph 6 of the Treaty of Peace to be exempted from the Special Progressive Tax on Property in connexion with all the property owned by him in Italy, particularly on the value of the building, of which he is the owner, located at Via Buniva 2, Turin, and on all securities and checking accounts, and he is eventually entitled to receive a refund of any and all such sums as he may have heretofore been forced to pay, to date, to the Italian Government in connexion with this tax.

8. This Decision is final and binding and its execution is incumbent on the Italian Government.

DONE in Rome at the seat of the Commission, Via Palestro 68, on this 12th day of December 1959.

*The Third Member*

Georges SAUSER-HALL

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

FUBINI CASE—DECISION No. 201 OF 12 DECEMBER 1959<sup>1</sup>

Exemption from special progression tax on property—Active right to claim—Applicability of second part of paragraph 9 (a) of Article 78 of Peace Treaty—Whether time-limit of 3 September 1943 implied therein—Interpretation of treaties—Rules of—Natural and ordinary meaning of terms employed—Literal interpretation—Interpretation by reference to Preamble of Treaty—Meaning and scope of the expression “laws in force in Italy during the war”—Whether the expression includes acts and measures enacted or taken by the Italian Social Republic—Co-existence in a State of legal Government and insurrectional Government—Effects on Peace Treaty provisions—Principle of effectiveness—Wartime occupation—Effects on sovereignty of occupied State—Conditions required in order to be considered as having been “treated as enemy”.

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Exemption d'un impôt extraordinaire progressif sur le patrimoine—Droit d'action — Applicabilité de la seconde partie du paragraphe 9 a) de l'article 78 du Traité de Paix — Question de savoir si la date du 3 septembre 1943 est tacitement prévue par cette partie — Interprétation des traités — Règles d'interprétation — Sens naturel et ordinaire des termes employés — Interprétation littérale — Recours au préambule du Traité — Signification et portée de l'expression « législation en vigueur en Italie pendant la guerre » — Question de savoir si cette expression comprend les actes du Gouvernement de la République sociale italienne — Coexistence, dans un Etat, d'un gouvernement légal et d'un gouvernement insurrectionnel — Effets sur les dispositions du Traité de Paix — Principe de l'effectivité — Occupation de guerre — Effets sur la souveraineté de l'Etat occupé — Conditions requises pour être considéré comme ayant été « traité comme ennemi ».

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The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy, pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of Italy, and Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member, chosen by mutual agreement between the United States and Italian Governments;

Having considered the Petition dated December 20, 1956 of the Agent of the Government of the United States of America, filed on the same date with the Joint Secretariat of the Commission *versus* the Government of the Italian Republic in behalf of Eugenio Fubini, Gino Fubini and Mrs. Anna Fubini Ghiron, claimants;

Having considered the Answer of the Agent of the Italian Government dated April 27, 1957;

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<sup>1</sup> *Collection of decisions*, vol. VI. case No. 272.

Having considered the *Procès-verbal* of Non-Agreement dated May 17, 1957, signed by the Representatives of the two Parties to the dispute, wherein it is decided to resort to a Third Member, as provided for in Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, in order to resolve the disputed issues raised by the case under review;

Having considered the Memorandum filed on June 6, 1958 with the Joint Secretariat of the Commission by the Agent of the United States of America, unopposed by the Agent of the Italian Government;

Having heard the Agents of both Parties during the oral hearings held in Rome, at the seat of the Commission, on April 2, 1959;

Having noted that the Agent of the United States has submitted the following requests, in his Petition, that the Commission:

- (a) Decide that the claimants are to be considered United Nations nationals within the meaning of paragraph 9 (a) of Article 78 of the Treaty of Peace;
- (b) Decide that the claimants are entitled to the exemption from the Extraordinary Progressive Patrimonial Tax imposed on their property by the Italian Government;
- (c) Order that any sums heretofore or hereafter paid by the claimants to the Italian Government under the tax assessment dated August 24 and October 5, 1953 be refunded to the claimants within 60 days of the date of the decision;
- (d) Decide that the claimants are entitled to receive from the Italian Government the sum of 115,000 lire, representing the reasonable expenses incurred in Italy in establishing their claim.

Having noted that the Agent of the Italian Government concludes his Answer by requesting that the Petition be declared to be inadmissible, or that it be, in any event, rejected;

#### A. CONSIDERATIONS OF FACT:

1. The claimants, Eugenio Fubini, Gino Fubini and Mrs. Anna Fubini Ghiron, originally Italian nationals, domiciled at New York, are respectively the sons and the widow of Professor Guido Fubini, a well-known mathematician and Professor Emeritus of the Polytechnical School of Turin.

As a result of the racial laws enacted by the then Fascist Government of Italy (Law No. 1779 of November 15, 1938 and Law No. 1024 of July 13, 1939), Professor Fubini was deprived of his professorial chair at the aforementioned school and his two sons were expelled from the University of Turin and deprived of the possibility of following the engineering profession, to which they intended to devote themselves. Because he was a renowned scientist, Professor Fubini was sent for by the Institute of Advanced Studies of the University of Princeton, New Jersey, in the United States, where he died in 1952.

His sons, Eugenio Fubini and Gino Fubini, continued to study in the United States and became naturalized citizens of that country. The former acquired naturalization on May 2, 1945 and the latter on March 25, 1946. Their mother, Mrs. Anna Fubini Ghiron, was naturalized in the United States on December 13, 1944. The three claimants thus acquired American nationality on the aforementioned dates, a fact that is not denied by the defendant Party; nor is it denied that they have all preserved their American nationality, uninterruptedly, to date. Certificates of American nationality, issued in their names, are included in the records of the case. The jurisdiction of this Commission to adjudicate this case is undeniable.

2. The claimants were compelled to abandon all the property they owned in Italy, just like other Jews who were forced to leave Italy as a result of the racial persecution.

The Italian Government, by decree of the Chief of the Province of Turin, No. 23519/44, of March 2, 1944, sequestered and took possession of all the real and personal property located in the municipality of Turin owned by the brothers Eugenio and Gino Fubini.

By another decree of the Chief of the Province of Turin, No. 23519/30, of February 29, 1944, Mrs. Anna Fubini Ghiron's property was also placed under sequestration because she belonged to the Jewish race.

All this property was transferred to Ente di Gestione e Liquidazione Immobiliare, known as E.G.E.L.I., a special agency established by the Italian Government for the administrative management and liquidation of property belonging to Jews and foreign enemy nationals; the latter entrusted the Istituto di San Paolo of Turin with the care and management of the property owned by the claimants.

Following the Armistice of September 3, 1943 and the conclusion of the Treaty of Peace, signed on February 10, 1947 between the Allied and Associated Powers, on the one hand, and Italy, on the other, and which came into force on September 15, 1947, all the sequestered property under the care of the aforementioned Istituto di San Paolo of Turin, acting as E.G.E.L.I.'s delegate, was returned to the claimants, who were the owners thereof.

3. A special progressive tax on property was established in Italy under Legislative Decree of the Provisional Head of the State, No. 143, dated March 29, 1947.

On September 1, 1947, the Provisional Head of the State approved and enacted a law, dated September 1, 1947, No. 828, of "ratification with amendments to and complements of the legislative decree of the Provisional Head of the State No. 143 of March 29, 1947, concerning the establishment of a special progressive tax on property".

4. On August 25, 1953 and on October 5, 1953, the Office of the 3rd District of Direct Taxes of Turin served on each of the two Fubini brothers and on Mrs. Fubini Ghiron a notice of assessment of the Special Progressive Tax on Property on the property owned by them in Italy, and requested them to pay the following sums:

	<i>Lire</i>
Eugenio Fubini . . . . .	329,810
Gino Fubini. . . . .	345,150
Mrs. Anna Fubini Ghiron. . . . .	764,720
	<hr/>
	1,439,680

The claimants submitted their claim to the Agent of the United States of America before this Commission. They did not fail, at the same time, to exercise their right of recourse before the Italian authorities, in accordance with Italian fiscal laws; their claims were rejected by the Municipal Commission and by the Provincial Tax Commission of Turin; they are still pending before the Central Tax Commission, as the Italian Government has refused to take action on a request for suspension of payment submitted by the Agent of the Government of the United States during the proceedings before this Commission. The claimants deemed it advisable to make these claims within the time limit provided for by Italian fiscal legislation in order not to be exposed to the

objection of having acquiesced to these impositions, at a time when they were forced to take such action for the sole purpose of avoiding a restraint on their property.

#### B. CONSIDERATIONS OF LAW :

5. Following the decision of the French-Italian Conciliation Commission of August 29, 1949 (No. 32<sup>1</sup>, *Recueil*, fascicule I, pp. 99 *et seq.*) it is no longer disputed between the signatory Parties to the Treaty of Peace that the special taxes established in Italy by Legislative Decree No. 143 of March 29, 1947 and Law No. 828 of September 1, 1947, fall under the provisions of Article 78, paragraph 6 of the Treaty of Peace. Within the framework of this provision, the exemption from the special progressive tax on property in Italy was acknowledged in Italian-American intercourse, by a note dated June 13, 1950, addressed by the Ministry of Foreign Affairs of the Italian Republic to the Embassy of the United States of America in Rome (see Decision of the Commission dated September 24, 1956 in the Levi case, No. 96, typewritten text, p. 4).<sup>2</sup>

By letter dated August 6, 1955 the Italian Ministry of the Treasury advised the Embassy of the United States that it could not proceed with the request for exemption submitted by the Fubini brothers and by Mrs. Fubini Ghiron, on the basis of certain arguments which were repeated before this Commission by the Agent of the Italian Government. In his Answer dated April 27, 1957, the Italian Agent submitted a defence which textually incorporated and espoused the dissenting opinion written by the Representative of the Italian Republic on the Commission, in connexion with the decisions rendered on September 24, 1956 in the Treves (No. 95)<sup>3</sup>, Levi (No. 96)<sup>2</sup> and Wollemborg (No. 109)<sup>4</sup> cases. He invoked the following grounds of law:

(i) The claimants do not fulfil the conditions required by Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace in order to claim the benefit of the exemption from levies, taxes or other charges of an exceptional nature that is afforded to United Nations nationals under Article 78, paragraph 6 of the aforesaid Treaty, because, even assuming that they were treated as enemies, such treatment is said to have occurred subsequent to the Armistice of September 3, 1943.

(ii) The conception of "laws in force in Italy during the war" would not include the acts and measures enacted or taken by the Italian Social Republic, also known as Republic of Salò.

(iii) The treatment as enemy which allowed, by virtue of Article 78, paragraph 9 (a) sub-paragraph 2 of the Treaty of Peace, the inclusion of persons who were the victims of said treatment within the meaning of "United Nations nationals", cannot be extended to persons who were subjected to measures of racial discrimination, in view of the fact that these measures were based exclusively on their membership in the Hebrew race and irrespective of the nationality of the persons injured.

6. Article 78, paragraphs 6 and 9 (a) of the aforesaid Treaty, read as follows:

<sup>1</sup> Volume XIII of these *Reports*.

<sup>2</sup> *Supra*, decision No. 145, p. 272.

<sup>3</sup> *Supra*, decision No. 144, p. 262.

<sup>4</sup> *Supra*, decision No. 146, p. 283.

Paragraph 6: United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

Paragraph 9 (a): "United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

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

7. Before proceeding with a careful analysis of these various grounds of law, the Commission notes that it is not denied that the Fubini claimants do not fulfil the conditions of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace in order that the American nationality with which they are now vested may authorize them to benefit, as nationals of the United States of America, from the exemption from the Special Progressive Tax on Property. Naturalized in 1944, 1945 and 1946 respectively, none of the claimants fulfils the condition of Article 78, paragraph 9 (a), sub-paragraph 1, that is, none of them was vested with this nationality on September 3, 1943, date of the Armistice with Italy, although they were United States nationals on September 15, 1947, the date on which the Treaty of Peace came into force.

8. *On the first ground of law.*

Since it is a question of interpreting Article 78, paragraph 9 (a), sub-paragraph 2, which declares that the expression "United Nations nationals" also includes persons who, under the laws in force in Italy during the war, "were treated as enemies", the Agent of the Italian Government contends, in the first place, that the treatment as enemy cannot be assimilated to the nationality of one of the United Nations unless it occurred prior to the date of the Armistice, on September 3, 1943. In other words, this date, referred to in sub-paragraph 1 of Article 78, paragraph 9 (a) of the Treaty of Peace, should, in his opinion, be implied in sub-paragraph 2 which is said to be a special case of the preceding paragraph.

He maintains that the aforesaid Article 78, paragraph 9 (a), sub-paragraph 2, is only apparently clear and that its veritable meaning cannot be discovered by a mere literal interpretation of the terms used but should be inferred from logical elements which modify its content. In his opinion, a restrictive interpretation should be forcibly resorted to if one bears in mind what practical possibilities there were to treat effectively a person as enemy in Italy after the political and military events that occurred at the beginning of September 1943, and he believes that the victorious Powers must have taken them into consideration when they drafted the Treaty of Peace. He points out that after September 3, 1943, the Italian Government, that is, the only legitimate Government, could only sequester German owned property and that a literal interpretation of the subject provision would lead to this absurd consequence, namely, that the application of Article 78 could be claimed in favour of a German, who was treated as enemy in Italy subsequent to September 3, 1943, but who at a later date further became, in some manner or other, a United

Nations national. He infers therefrom that the rule must necessarily have a more restrictive meaning than that which is conferred on it, *prima facie*, by the words used and that there are, therefore, grounds for giving a restrictive interpretation to Article 78, paragraph 9 (a), sub-paragraph 2, in that only persons treated as enemy in Italy before September 3, 1943 are entitled to benefit by Article 78, paragraph 6.

The Commission does not deem this argument to be conclusive.

The rules on the art of interpreting international treaties require that the interpreter rely, first of all, on the text that must be applied, in giving the terms employed by the contracting States their natural meaning. In that direction is the Resolution of the Institut de droit international of April 19, 1956, Grenade session (*Annuaire*, vol. 46, p. 365):

The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the Treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.

In its jurisprudence, the Permanent Court of International Justice rendered the same opinion and refused to give any consideration to the provisions that were not to be found in the text.

The Advisory Opinion of September 15, 1923 on the interpretation of Article 4 of the Treaty regarding Polish minorities of June 28, 1919 (matter of the acquisition of Polish nationality) contains the following passage:

The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the matter of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might, with advantage, have been added or substituted for it. (*Recueil C.P.J.I.*, serie B, No. 7, p. 20.)

Advisory Opinion of May 16, 1925 relating to the Polish postal service at Danzig:

It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd. (*Recueil C.P.J.I.*, serie B, No. 11, p. 39).

The jurisprudence of the present International Court of Justice is in no way different.

Advisory Opinion of May 28, 1948 concerning the conditions of admission of a State as a member of the United Nations (*C.I.J. Recueil* 1947-1948, p. 62); Decision of November 20, 1950 in the matter of the right of asylum (*C.I.J. Recueil* 1950, p. 279).

Nevertheless, these rules of interpretation hold good insofar as they do not lead to unreasonable or inconsistent results.

The Commission is of the opinion that the Agent of the Italian Government has not established that such was the case. The reasoning, by which he contends that a literal interpretation of Article 78, paragraph 9 (a) leads to an inconsistent conclusion, is the result of a *petitio principii*, because it originates from an assumption given as certain, whereas it would need proof to support it. He asserts that, subsequent to the Armistice of September 3, 1943, only the legitimate Italian Government could sequester enemy property and this property could only be German owned; he forgets that the Allied and Associated Powers, in conditioning the quality of "nationals of the United Nations", of persons who were not vested with this nationality, on the fact that they were treated as enemy during the war, evidently also foresaw the cases which oc-

curred after the Armistice and which arose from the measures adopted by Italian authorities other than those of the legitimate Government; these Powers were not unacquainted with the provisions of the Italian War Law of July 8, 1938 (law-decree No. 1415) which conferred the quality of enemy nationals to persons who did not have the nationality of an enemy State, but are stateless persons formerly vested with enemy nationalities or whose parents possessed or had possessed enemy nationality, or lastly that reside in enemy territory, nor the measures of racial persecution directed against the Jews by the insurrectional Government of the Italian Social Republic. It is these victims of the treatment as enemy that Article 78, paragraph 9 (a), sub-paragraph 2 intends to protect in assuring them the same restoration of their rights and interests and the same restitution of their property as that provided for United Nations nationals, in conformity with Article 78, paragraph 1, which governs the whole question of restoring the injured persons in their property, rights and interests.

A literal interpretation of Article 78, paragraph 9 (a), sub-paragraph 2, which was criticized by the Agent of the Italian Government, hence does not necessarily lead to the inconsistent conclusion pointed out by him. It is undoubtedly that, after Italy entered the war on the side of the Allied and Associated Powers on October 13, 1943, Germans treated as enemy at that time in this country were so treated in conformity with the rules of the law of nations and even if one were to assume that any one of them might have subsequently succeeded in acquiring the nationality of one of the United Nations, it is clear that such individual could not claim the benefits of Article 78 of the Treaty of Peace with Italy, because there would not be here involved non-enemy persons treated as enemies, but actually enemy persons treated as such. Nevertheless, the Commission is not aware that such an eventuality actually occurred in practice, after the Armistice, so that the observations of the Hon. Agent of the Italian Government would appear to be of a rather academic character.

In conformity with the jurisprudence already adopted in the Treves,<sup>1</sup> Levi<sup>2</sup> and Wollemborg<sup>3</sup> precedents, this Commission finds it can much the less restrict the protection accorded by Article 78 of the Treaty of Peace, in only taking into consideration the treatment as enemy inflicted, prior to September 3, 1943, on a person who was not a United Nations national, in that the introduction of that date in Article 78, paragraph 9 (a), sub-paragraph 1 does not have the meaning conferred on it by the Agent of the Italian Government, as United Nations nationals are entitled to benefit by the protecting provisions of Article 78 of the Treaty of Peace, even if the measures adopted against them or their property were taken after September 3, 1943, but during the war.

In point of fact there is no ground for interpreting Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace in the sense that the date appearing in sub-paragraph 1 of this Article is implied in sub-paragraph 2 in order to limit, in time, the treatment as enemy that accords to the injured person the benefits of the protective provisions of the Treaty of Peace.

As has already been pointed out by the Commission in its decisions in the Treves, Levi and Feldman<sup>4</sup> cases (No. 23, December 1954), the two sub-paragraphs of this Article have very different aims. The former sub-paragraph rules, in principle, that the national of the United Nations must have this quality at the date of the coming into force of the Treaty of Peace, September 15, 1947;

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<sup>1</sup> *Supra*, p. 262.

<sup>2</sup> *Supra*, p. 272.

<sup>3</sup> *Supra*, p. 283.

<sup>4</sup> *Supra*, p. 212.

but in order to avoid that, for the purpose of benefiting by the provisions regarding property, rights and interests, certain persons should take the initiative of fraudulently changing their nationality between the conclusion of the Armistice and the coming into force of the Treaty of Peace, the Treaty requires that claimants were already vested with the nationality of one of the United Nations on September 3, 1943, the date of the Armistice. There is therefore here involved a measure of defence in Italy's favour enabling her to discard all claimants that acquired the nationality of one of the United Nations only after the Armistice. This provision is not based on the idea of mitigating Italy's responsibility but on the necessity of fighting against any *fraus legis*.

The second sub-paragraph assimilates to United Nations nationals all such persons who never were United Nations nationals, but who were treated as enemies under the laws in force in Italy during the war; as this treatment does not originate from their initiative, the signatory Powers did not have to concern themselves with fixing a term after which this treatment would no longer have any effect, because said term was necessarily automatically established by the end of the war with Italy, because treatment as enemy had to occur under the laws in force in Italy during the war.

All the foregoing consequences of a literal interpretation of the text of Article 78, paragraph 9 (a), sub-paragraph 2 are highly reasonable and do not lead to any inconsistent result. This Commission finds it has no authority to introduce in this conventional provision the addition recommended by the Agent of the Italian Government, nor to decide that all treatment as enemy which occurred subsequent to the Armistice should not be taken into consideration for the purpose of placing the victims thereof on the same level as United Nations nationals.

#### 9. On the second ground of law.

The Agent of the Italian Government contends that it is impossible to admit that the claimants were treated as enemies under the legislation "in force in Italy during the war", for the reason that the rules which were applied to them, enacted by the Italian Social Republic, do not involve the responsibility of the Italian State recognized by the Associated and Allied Powers who have signed the Treaty of Peace with it, and could not be qualified as "Italian legislation" within the meaning of this Treaty.

It makes a rather subtle distinction between, on the one hand, the damages suffered by the property, rights and interests of the United Nations and their nationals in Italy during the war (*causa damni*), which would be an objective condition of restoration or restitution, and, on the other hand, the treatment as enemy of a person who is not vested with enemy nationality, which would be a subjective condition, and which must be fulfilled by an injured person in order to be entitled to benefit by Article 78 of the Treaty, and which can only be the result of a short-coming engaging the responsibility of the Government which committed it.

He contends that it is sufficient to read the Preamble of the Treaty of Peace in order to note the limits of the responsibility which the Allied and Associated Powers intended to impose on Italy, became it [the Preamble], reads:

Whereas Italy under the Fascist régime became a party to the Tripartite Pact with Germany and Japan, undertook a war of aggression . . . and bears her share of responsibility for the war; and whereas . . . the Fascist régime in Italy was overthrown on July 25, 1943, . . . and whereas after the said Armistice Italian armed forces . . . took an active part in the war against Germany, and Italy declared war on Germany as from October 13, 1943, and thereby became a co-belligerent against Germany . . .

The Agent of the Italian Government infers from this text that the victorious Powers agreed to differentiate between sequestrations made before and those made after the Armistice so as not to hold Italy responsible for the acts performed by the Government of the Italian Social Republic against whom Italy was at war side by side with the Allied and Associated Powers.

He adds that the sentence "legislation in force in Italy during the war" could not include the acts and decisions of the Salò Government as the concept of "Law" requires a power of legality which that Government lacked entirely.

All the foregoing arguments could be supported by certain moral motives, but these the Commission fails to find pertinent at the legal level.

In the law of nations it is certain that the Preamble of Treaties may serve as an interpretation thereof, in that they often supply an indication in connexion with the aims the Parties intended to achieve. But, in the instant case, the Commission fails to find in the Preamble of the Treaty of Peace with Italy any elements in support of the interpretation suggested by the Agent of the Italian Government. From the reference made to Italy's share of responsibility in the war, to the overthrow of the Fascists, to Italy's participation in the war against Germany after the Armistice, it is possible to draw certain inferences with regard to the general tendency of this Treaty, but not, unless one seeks support in the texts, an explanation as to whether or not Article 78, paragraph 9 (a), sub-paragraph 2 is applicable to persons who, although not vested with the nationality of one of the United Nations, are, by a fiction, considered to be so vested because they suffered injury under the laws or by the acts or decisions of the agents of the Italian Social Republic.

With regard to the position of the latter subsequent to September 28, 1943, the date on which Mussolini was reinstated into power, up to his demise and capitulation of the German forces in Italy (April 28 and April 29—May 2, 1945), with regard to its actual existence, its extension, its organization, the powers it exercised, at first over the greater part of the peninsula and then over territories which grew smaller and smaller as the Forces of the Allied and associated Powers gradually advanced, decisions No. 144 (*Treves case*)<sup>1</sup> and No. 145 (*Levi case*)<sup>2</sup> rendered by the Conciliation Commission contained exhaustive accounts, and this Commission can confine itself to refer thereto, because the considerations therein contained have not given rise, with regard to the facts, to any exception on the part of the Agent of the Italian Government.

The condition which thus materialized in Italy is not unknown in international law; it is one of the co-existence of a legal Government and an insurrectional Government fighting one another over the possession of power in a State. It is by an application of the general principles of international law that this condition must be judged and that its effects on the provisions of the Treaty of Peace must be determined.

The rules of the law of nations in this field are controlled by the principle of effectiveness which plays a fundamental part in establishing the legal order of the insurgents. In view of the fact that there did exist, during a period of nineteen months, two Governments in Italy, each of which denied the power of the other, the question arises whether the laws enacted by the insurrectional Government must be considered as part of the laws in force in Italy during the war, within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace.

This question must undoubtedly be solved in the affirmative on the following grounds:

<sup>1</sup> *Supra*, p. 262.

<sup>2</sup> *Supra*, p. 272.

First of all, the Italian Social Republic cannot, as was contended by the Agent of the Italian Government during the proceedings of the Levi case (decision No. 145), be considered as an agency of the German Reich whose armed forces occupied, at that time, a part of the Italian territory.

Wartime occupation is a well defined institution in international law. It does not entail the disappearance of the sovereignty of the occupied State and must be distinguished from a trustee occupation, such as that established in Germany after the surrender of its armies in 1945, by the Allied and Associated Powers. The sovereignty of the occupied State is only held in suspense during the time when enemy military forces are actually present in parts of its territory. Wartime occupation confers only certain powers on the occupying power, that are in keeping with the nature of war; adoption of necessary measures for the safety of its troops and the maintenance of public order, enactment of martial laws, suspension of certain particular points of the laws of the occupied State when unavoidable war requirements so demand, etc. (see Articles 42 to 56 of the Rules of The Hague of 1907 on the laws and customs of war on land). But it does not have the right to substitute its own sovereignty for that of the Government, or of one of the Governments, of the occupied State. It is therefore irrelevant, in the law of nations, that the Italian Social Republic was established by Germany and that its Government, when making decisions, had to reckon with, up to a certain point, the intent of its ally because it never acted in the name of the latter (this is the opinion contained in the decision of January 17, 1953, Mossé case, No. 144 of the French-Italian Conciliation Commission, *Recueil*, IVe fascicule, p. 125).<sup>1</sup>

It has occurred several times in history, that a rival Government was established in an occupied State, either with the recognition of the occupying authorities, or against them and the national Government that had accepted defeat; in that case there exist three simultaneous powers in one and the same State; the power of the legal Government, the power of the rival Government, which is a *de facto* Government, and the limited power of the military occupant which is not to be identified with that of the *de facto* Government. This condition occurred in France, in Norway and in Yugoslavia; it also occurred in Italy. It has not the effect of changing a rival Government into an agency of the occupying State when it had allied itself to the latter, nor the occupant into a *de facto* Government. The powers of a *de facto* Government and the powers of a war occupant are entirely different in international public law (see Sauser-Hall "L'occupation de guerre et les droits privés", *Annuaire Suisse de droit international*, 1944, vol. I, p. 70-73).

Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace does not say by whom measures equivalent to treatment as enemy were to be adopted, which were to confer on an individual, who did not possess it at the time these measures were applied against himself or his property, the status of United Nations national. The Commission holds, in conformity with the letter and the spirit of the aforesaid Treaty as well as the teachings of general international law, that these measures emanated from the Government which, in fact, exercised the political power over that part of the Italian territory where the parties in interest (if personal measures were involved) or the sequestered or confiscated property (if measures against property were involved) were located.

The Italian Social Republic, established on September 28, 1943, had its own Government, which was a local Government, but aimed at becoming a general Government; it exercised its powers in a positive manner through

<sup>1</sup> Volume XIII of these *Reports*.

its own administrative and judicial organs; the rules it decreed were obligatory for all those who were in actual fact subjected to that legal order and liable to penalties, bearing in mind the conditions resulting from an international and civil war, both of which raged in Italy.

The principle of effectiveness plays a part of primary importance in the law of nations in establishing the status of an insurrectional Government. Professor Guggenheim expresses the same opinion, to wit:

The seizure of power by belligerents and insurgents in a part of the territory of the State conflicts with State positive law, entails the creation of a new provisional legal order. It is what one often describes as "a local *de facto* Government". The latter may establish international law intercourse with the Central Government, as well as with third States, on the condition that its legal order be an effective one. (*Traité de droit international public*, I, p. 203.)

This opinion is confirmed by Prof. Balladore Pallieri, in the citation set out hereunder, which appears in the decision rendered in the Mossé case (No. 144 of January 17, 1953) by the French-Italian Conciliation Commission (*Recueil*, IV<sup>e</sup> fascicule, p. 126), and which would not be unavailing to reproduce here:

The international organization to which the international system refers is that which, *de facto*, really exists within the State. International law does not consider as a system, in this respect, that system which should exist according to domestic rules, but those which effectively and positively do exist. An international revolutionary movement can, in a violent manner and without legal continuity, substitute new systems for those which formerly existed, but as far as the international order is concerned it is not important that these agencies have no basis in the former regime and that they assert themselves to be Government agencies only *de facto*, by the success of the revolution that has brought them to power. It is this fact which is important, and without any limitation whatever, with regard to both international law and the international order . . . The imputation concerns whoever is in possession of real public authority in the interior of the State and, consequently, . . . those who, whatever the reason, come to be in a similar position, become agencies of the State. (*Diritto internazionale pubblico*, p. 92).

It flows from this principle of the law of nations, which must be resorted to when interpreting an international treaty, that the measures constituting "treatment as enemy" can have been adopted by the Government which, in fact, exercised political power over that part of Italian territory where the property owned by the Fubini brothers and Mrs. Fubini Ghiron was located. The sequestration which was ordered appears as a measure adopted by authorities which, from an international standpoint, effectively exercised political power over Turin, namely, the organs of the Italian Social Republic who enacted the rules permitting such a procedure and gave them execution. Hence, under the principle of effectiveness, these rules were part of the legislation in force in Italy during the war (this is the meaning of decision dated January 31, 1959 rendered by the Commission in the Turin district for taxation of direct and indirect imposts in the Tedeschi case).

There is proof that the drafters of the Treaty adopted this viewpoint in the fact that the obligation to make restitution of the property sequestered by the Italian Social Republic is incumbent on the legitimate Government, who fulfilled it, thus making it clear that it is not possible to allow the distinction which the Agent of the Italian Government has tried to establish, on the basis of the Preamble of the Treaty of Peace, between the objective responsibility of

the Italian Government for the losses and injuries suffered by the property, rights and interests of nationals of the United Nations and the subjective responsibility of this same Government which arises in cases where there has been "treatment as enemy" of an injured person not vested with the nationality of one of the United Nations. The very purpose of the provision of Article 78, paragraph 9 (*a*), sub-paragraph 2 permits one to establish that the existence of the legislation of the Italian Social Republic was considered by them as a fact conditioning the right, accorded by the Treaty of Peace to persons who were the victims of discriminatory measures, of invoking against Italy the same protection accorded to nationals of the United Nations.

#### 10. *On the third ground of law.*

Finally, the Agent of the Italian Government denies that Jews in Italy could have been treated as enemy, because the racial discriminatory measures concerning them were completely independent from the contingencies of war and differed from the measures which were applicable to nationals of enemy Powers, under the Italian War Law of July 8, 1938 (Law-Decree No. 1415). He does not admit that treatment as enemy could originate from measures other than those based on assimilation with a national of a country at war with Italy.

In support of his contention he cites the decision of the Italian-United States Conciliation Commission, No. 22, rendered on February 19, 1954 in the Bacharach case,<sup>1</sup> with which the three decisions in the Treves,<sup>2</sup> Levi<sup>3</sup> and Wollemborg<sup>4</sup> cases appear to him to be in conflict. He asserts that the Treaty of Peace does not contain any clause which would permit one to believe that the Allied and Associated Powers, over and above protecting the property, rights and interests of their nationals, also intended protecting persons subjected to racial persecutions. In this connexion, he refers to Article 78, paragraph 1 of the aforesaid Treaty which only concerns restoration of property, rights and interests to the United Nations and their nationals; this fundamental provision of the Treaty contains no reference to the victims of racial persecution.

These criticisms do not appear, to this Commission, to be better founded than those previously analysed.

If it is correct that the Treaty of Peace contains no provision referring specifically to the property, rights and interests of the victims of racial persecution, it is certain that, by its very definition of United Nations nationals, it embraces them in the broad protection it intends to extend to all those who have suffered as a result of discriminatory measures adopted by Italy during the war.

Article 78, paragraph 1 of the Treaty is, in fact, the fundamental provision assuring this protection to the United Nations and their nationals. But paragraph 9 (*a*), sub-paragraph 2 of this Article specifically includes in the concept of "United Nations nationals", individuals, corporations or associations who, under the laws in force in Italy during the war, were treated as enemy. This provision is directed at individuals who fulfilled the conditions of the Italian War Law of July 8, 1938 to be considered as enemies, or the conditions of the other laws which resulted in subjecting persons of non-enemy nationality to a treatment similar to that meted out to enemy nationals. This was not only the case of stateless persons (Article 3 of the War Law), but also of the victims

<sup>1</sup> *Supra*, p. 187.

<sup>2</sup> *Supra*, decision No. 144, p. 262.

<sup>3</sup> *Supra*, decision No. 145, p. 272.

<sup>4</sup> *Supra*, decision No. 146, p. 283.

of racial persecution, Jews whether Italian or neutral nationals. These cases were known to the Allied and Associated Powers at the time the Treaty of Peace was drafted and it is for the very purpose of covering them, as it is held in the three decisions in the Treves, Levi and Wollemborg cases, that the definition of national of the United Nations was expanded. It must be acknowledged, without any reticence, that this expansion cannot be made to cover all cases. But the numerical consequences of a provision contained in a Treaty are irrelevant in determining the legal scope on the basis of a search for the intent of the contracting Parties.

In this connexion, the well established case-law of the Conciliation Commission requires that the fulfilment of two conditions be obtained in order that a person "had been treated as enemy" within the meaning of the Treaty of Peace, with the effect of falling within the concept of "United Nations nationals". It is necessary:

(i) that there have been a positive and concrete course of action on the part of the Italian authorities actually subjecting a person who, legally, was not vested with the nationality of one of the Allied and Associated Powers, to measures which were applicable to enemy nationals, and that it does not suffice that such individual fulfil, in an abstract manner, the conditions of Italian legislation in force during the war, in order to be considered as enemy; this case-law was clearly defined in decisions No. 167,<sup>1</sup> Società Generale dei Metalli Preziosi case (French-Italian Conciliation Commission, *Recueil*, fascicule V, p. 12), No. 20, Flegenheimer case,<sup>2</sup> and, above all, in the Bacharach case<sup>3</sup> wherein the Italian-United States Conciliation Commission ruled as follows:

... To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not the abstract possibility of adopting one) ... (Archives of the Commission)

(ii) that such treatment as enemy occurred on the basis of the legislation in force in Italy during the war, which term must not be considered to include only the Italian War Law of July 8, 1938, and the legislative acts that either amended or completed it, but also all such other legal provisions as were intended to subject a person thereby affected to measures which were substantially equivalent to those concerning enemy nationals, as the drafters of the Treaty intended to exclude measures which were, for instance, the outcome of the arbitrary conduct of an official; this case-law was already outlined in the Bacharach case, in the following terms:

... To be treated as enemy necessarily implies ... on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals ... (Archives of the Commission).

It was subsequently further developed in the three decisions concerning the Treves, Levi and, above all, the Wollemborg cases wherein the Commission affirmed that for the purposes of the application of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, it is not required that the law specifically declared as enemies, and subjected, as such, to the Italian War Law, certain Italian nationals; it suffices that it (the law) provided the adoption of measures, in their respect, which, substantially, entail a treatment as enemy.

<sup>1</sup> Volume XIII of these *Reports*.

<sup>2</sup> *Supra*, decision No. 182, p. 327.

<sup>3</sup> *Supra*, decision No. 24, p. 187.

As this Commission has no grounds for doubting the correctness of the foregoing, it is bound to confirm it.

It is certain that in the Fubini brothers and Mrs. Fubini Ghiron cases, these two conditions are fulfilled.

As regards the former condition, it is established that the real and personal property located in Italy, owned by the claimants, was sequestered under Decrees of the Head of the Province of Turin No. 23519/30 of February 29, 1944 and No. 23519/44 of March 2, 1944, and that it was turned over to E.G.E.L.I. for management thereof, which organization, in turn, handed this property over to the Istituto di San Paolo at Turin for custody and management thereof. The claimants were thus deprived of the free management and disposition of their property in Italy, exposed to measures of confiscation and placed on the same level as enemy nationals; they were manifestly treated as enemies, the Italian War Law of 1938 providing for a preservation attachment of enemy property (Article 295).

Regarding the latter condition, the measures adopted against the property of the claimants are based on legal provisions in force in Italy during the war, namely, the Legislative Decree of the Head of the Government of the Republic of Salò No. 2, dated January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944, which finds support in the legislation previously enacted by the preceding legitimate Government, reading as follows:

The Duce of the Italian Social Republic, Head of the Government;

Having considered the absolute necessity of urgently taking action;

Having seen Law Decree No. 1728 of November 17, 1939 containing provisions for the protection of the Italian race;

Having seen Law Decree No. 739 of February 9, regarding the rules implementing and completing the provisions contained in Article 10 of Law Decree No. 1728 of November 17, 1938, concerning the limitations on real property owned and on industrial and business activity performed by Italian nationals of the Jewish race;

Having heard the Council of Ministers:

*Hereby decrees:*

Article 1. Nationals belonging to the Jewish race . . . cannot, in the territory of the State:

(a) . . .

(b) be the owners either of plots of land or of buildings and incidentals thereto.

(c) own securities, valuables, credits and title to ownership interests, whatever the nature thereof, nor can they be owners of other real property whatever the nature thereof;

Article 7. Real property and incidentals thereto, personal property, industrial and commercial enterprises and any other source of profit or revenue existing in the territory of the State, owned by Italian nationals of the Jewish race . . . shall be confiscated by the State and turned over to E.G.E.L.I. for management thereof.

Article 8. The confiscation decree shall be issued by the Chief of the Province having jurisdiction over the territory wherein the individual property is located. . . .

Article 13. The sale of the property confiscated under Article 7 shall be effected by E.G.E.L.I. . . .

Article 15. Any sums collected under Article 14 above shall be paid into the State as partial reimbursement of the expenses incurred for assisting and paying out subsidies and war damage compensation to persons injured by enemy air attacks.

These legal provisions served as a legal basis for the anti-semitic measures which had already been contemplated, as a policy to be followed, in Point 7 of the programme of action of the First Assembly of Republican Fascism, which was the legislative authority of the Italian Social Republic; it was in fact stated therein:

Those who belong to the Jewish race are aliens. During the war they are enemy nationals.

This Commission cannot escape the evidence and must note that the claimants were actually treated as enemies in Italy, under the legislation in force in that country at the time when severe measures were adopted against their property and that they fulfil, consequently, the conditions of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace for the purpose of being considered as "United Nations nationals" within the meaning of the Treaty.

11. The Plaintiff Party concludes by requesting that the Italian Government reimburse any reasonable expenses incurred by the claimants in establishing their claim.

This request is based on Article 78, paragraph 5 of the Treaty of Peace which charges the Italian Government with expenses of this nature; the claimants have fixed them at 115,000 lire, which is considered to be fair by the Commission.

DECIDES,

with a majority vote, the Italian Representative dissenting, that:

1. The claimants, Eugenio Fubini and Gino Fubini, as well as Mrs. Anna Fubini Ghiron, are entitled to avail themselves of the quality of "United Nations nationals", within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace with Italy of February 10, 1947.

2. The three claimants named in the foregoing paragraph are therefore exempted from payment of the Special Progressive Tax on Property, established by the Italian Republic under Law No. 828 of September 1, 1947.

3. Within a time limit of sixty days, beginning from the date on which this Decision is filed, the Italian Government shall refund any and all such sums as the claimants may have already paid as a result of their having been subjected to this tax, notice of assessment of which was served on the claimants on August 24, 1953 and October 5, 1953, as well as the sum of 115,000 lire settled as reimbursement of expenses incurred in establishing this claim.

4. This Decision is final and binding.

5. The Agents of the two Governments concerned shall be notified of this Decision.

DONE in Rome; at the seat of the Conciliation Commission, on this 12th day of the month of December, nineteen hundred and fifty-nine.

*The Third Member*

G. SAUSER-HALL

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

SELF CASE—DECISION No. 202 OF 27 JANUARY 1960<sup>1</sup>

Compensation for war damages—Whether indemnity owned to claimant under Peace Treaty exempted from inheritance tax—Supremacy of Treaty over domestic law—Scope of the rule laid down in Article 78 paragraph 4 (c) according to which “compensation shall be paid free of any levies, taxes or other charges”—Interpretation of treaties—Principles of—

Indemnité pour dommages de guerre — Question de savoir si l'indemnité due au réclamant en vertu du Traité de Paix est exempte des droits de succession — Primaute du Traité sur le droit interne — Portée de la règle établie par l'article 78, par. 4 c), selon laquelle « l'indemnité sera versée, nette de tous prélèvements, impôts, ou autres charges » — Interprétation des traités — Principes d'interprétation.

The Italian-United States Conciliation Commission, established by the Government of the Italian Republic and by the Government of the United States of America under Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government, in Rome, Alexander J. Maturri, Representative of the Government of the United States of America, in Rome, and Plinio Bolla, Morcote (Ticino, Switzerland), President Emeritus of the Swiss Federal Court, Third Member chosen by mutual agreement between the Italian and United States Governments.

In the case pending pursuant to the Petition dated April 1, 1955, submitted by the Agent of the Government of the United States of America, and filed on the same date with the Secretariat of the Commission, versus the Italian Government in behalf of Miss Harriet Louise Self.

## STATEMENT OF FACTS:

A. Mr. Edward Danforth Self, born in the United States on January 18, 1866, a United States national since birth, was the owner in Italy, and more particularly in the province of Florence, of a villa known as “La Pagliaiuola”, located in the municipality of Fiesole, at Via Faentina and Via delle Palazzine, and of a farm known as “La Camereta”, with farmhouse, located in the municipality of Florence, municipal highway “della Piazzola” No. 60, as well as personal property existing in the aforesaid buildings.

Mr. Self's property in Italy was sequestered under the War Law, by decree of the Prefect of Florence dated September 15, 1942; Ente Gestioni Liquidazioni Immobiliari (E.G.E.L.I.) was appointed as sequestrator, which organization delegated the Credito Fondiario del Monte dei Paschi di Siena which took possession of the property by a *procès-verbal* dated November 18, 1942.

The sequestered property was damaged during the war, as the result of the

<sup>1</sup> Collection of decisions, vol. VI, case No. 152.

occupation by troops, shelling, explosion of grenades and looting by the military.

The subject property was returned, in its damaged condition, to Miss Harriet Louise Self, daughter of and attorney for the owner, by *procès-verbal* dated December 10, 1947.

Subsequently, Mr. Edward Self had his property repaired.

B. On January 16, 1952 the Embassy of the United States of America in Rome submitted a claim to the Italian authorities under Article 78 of the Treaty of Peace, in behalf of Mr. Edward Self, requesting that he be granted an indemnity for the damages suffered by his property in Italy during the war.

In point of fact, Mr. Edward Self had died four days earlier, namely, on January 12, 1952, naming as heir in his will his daughter, Harriet Louise Self, born on January 10, 1899, also a United States national since birth.

Upon investigating the case, the Italian Commission established under Article 6 of Italian Law No. 908 of December 1, 1945, during its session of July 19, 1954, after hearing Miss Harriet Louise Self, and in view of the fact that it was considered advisable that all disputes be settled amicably, proposed to pay Miss Harriet Louise Self the sum of 3,000,000 lire as indemnity, having been reduced by one-third as provided for in Article 78 of the Treaty of Peace, net of any amount which may be due to E.G.E.L.I. for compensation in connexion with the temporary administration of the property, which is the subject of the claim, plus 250,000 lire as reimbursement for the expenses incurred in the presentation of the aforesaid claim, namely, a global net sum of 3,250,000 lire in full settlement of every and any claim under Article 78 of the Treaty of Peace and in settlement of any credit she may have against the Italian State.

C. In its note dated August 17, 1954 the Italian Ministry of the Treasury, referring to the settlement agreed upon on July 19, 1954 with Miss Harriet Louise Self, approved the settlement and advised the American Embassy in Rome that, in connexion with the subject claim, payment of the sum of 3,250,000 lire would be effected to Miss Harriet Louise Self, as specified above, upon her (or her legal representative in possession of a special power of attorney) producing a formal statement—on untaxed paper, certified by a Notary or the Mayor or the American Embassy and legalized free of charge under the terms of Article 78 of the Treaty of Peace—accepting the amount specified above in full settlement of every and any claim based on the aforesaid Article 78 and in settlement of any matter with E.G.E.L.I. that might still be pending. In this statement she was also to attest to the fact that, in connexion with the damages specified in the claim, no State Agency or public corporation had paid out any contributions, funds, indemnities, advances etc. In the aforesaid statement there should also have been indicated the section of the Provincial Treasury at which the order of payment was to be made payable. The aforementioned power of attorney was also to confer authority for collecting the amount involved and issuing a receipt therefor, in the event that the claimant did not intend to or could not collect the subject indemnity herself (in that event the paternity of the attorney-in-fact, in whose name the order of payment was to be made out, was to be indicated). Also, the possible power of attorney could have been issued on untaxed paper and endorsed and, if necessary, certified free of charge, in view of the fact that war damages were involved.

Upon receipt of this note of August 17, 1954 of the Italian Ministry of the Treasury, Miss Self, on October 13, 1954, sent to the Ministry her declaration

of acceptance of the settlement proposed by the aforementioned Commission at its hearing of July 19, 1954.

D. However, on December 14, 1954, by letter addressed to Miss Harriet Louise Self, a copy of which was sent to the American Embassy in Rome, the Italian Ministry of the Treasury expressed an additional requirement and requested Miss Self to produce a certificate of the competent Ufficio del Registro attesting to the fact that a declaration of succession had been made with regard to the sum of 3,250,000 lire which had been granted as compensation for war damages and that the related taxes had been paid on this sum.

In referring to the contents of this communication, Miss Self, on December 22, 1954, advised the Italian Ministry of the Treasury that when she went to the competent Ufficio del Registro in Florence she had been given formal assurance that she would not have to pay any tax on the amount of 3,250,000 lire accorded to her as war damage compensation. Miss Self quoted Article 78, paragraphs 4 (c) and 9 (b) of the Treaty of Peace; pointed out the fact that she was a national of the United States of America, like her late father; noted that succession taxes on compensation for war damages had been implicitly paid, because it had been calculated on the estimated value of the property already repaired and furnished by the decedent; threatened to consider herself no longer bound by the compromise settlement reached with the Italian Commission, having accepted it "only because she had been formally assured by His Excellency Papaldo that the proposed indemnity was to be net of any levies, taxes or other charges".

On December 27, 1954 the American Embassy wrote to the Italian Ministry of the Treasury along the same lines:

The Embassy believes that the Ministry's decision to subject payment of the compensation to the submission of this certificate is in conflict with the provision of paragraph 4 (c) of Article 78 of the Treaty. Therefore, the Embassy believes that in respect to the above-mentioned decision a dispute has arisen under Article 83 of the Treaty of Peace which will be duly submitted to the Italian-United States Conciliation Commission established under the aforesaid Article.

On January 19, 1955 the Italian Ministry of the Treasury answered the Embassy's letter dated December 27, 1954 and confirmed its request for a certificate from the competent Ufficio del Registro attesting to the fact that the heirs had made a declaration of succession with respect to the amount representing the indemnity agreed upon in full settlement of the claim and that the related tax had been duly paid thereon. The Italian Ministry of the Treasury then stated that, in its opinion, the provisions contained in Article 78, paragraph 4 (c), referred to deductions for income tax, supplementary income tax, taxes on receipts, incidental rights, etc.:

that, under the laws in force, are made at the time the sums owed to the creditors of the State are paid. As is known, instead, payment of indemnities settled in favour of United Nations nationals, under Article 78 of the Treaty of Peace, are ordered, unlike the normal payments effected by the State, to be made without any deductions of this nature and this, in fact, is done in application of the afore-mentioned paragraph.

The Italian Ministry of the Treasury continued as follows:

In cases concerning succession taxes, instead, a taxation affecting the payment made by the State is not involved but a taxation which, under Italian domestic law, affects transfers *mortis causa* of property constituting the estate. It is furthermore obvious that the indemnity, as regards inheritance, is one of the sources of

funds intended to replace the property lost by the decedent or to make good the damage suffered by him. In the event that a United Nations national, the owner of property damaged by the war, dies after the coming into force of the Treaty of Peace, the heirs do not derive the right to claim against the State *jure proprio* but *jure successoris* and it is apparent, therefore, that the rules on fiscal matters governing transfers *mortis causa* in Italy should be applied and, in particular, Article 389 of the Istruzioni Generali sui servizi del Tesoro, which conditions the payment of sums in favour of heirs on the submission of a certificate of the competent Ufficio del Registro attesting to the fact that the inheritance was declared, as required by law—in the instant case the inheritance is represented by the amount of the settled indemnity—and that the tax due thereon was paid. There is therefore not here involved a tax which is levied at the time of payment, but a finding of fact, at the time payment is ordered, with regard to whether or not the heirs have complied with the fiscal obligations required by law. In view of the foregoing considerations, it does not appear that the instant case should become the subject of a dispute to be submitted to the Conciliation Commission established under Article 83 of the Treaty of Peace.

E. As the Italian Government and the Government of the United States of America maintained their respective positions, the Agent of the United States of America before the Conciliation Commission established under Article 83 of the Treaty of Peace, on April 1, 1955, resorted to the aforesaid Commission on behalf of Miss Harriet Louise Self, and requested that it decide:

(a) that the demand of the Italian Government that the claimant pay the Italian inheritance tax in connexion with and prior to collecting compensation on her claim is in conflict with the provisions of Article 78, paragraph 4 (c) of the Treaty of Peace and contrary to the offer of settlement made to her by the Italian Interministerial Commission on July 19, 1954;

(b) that the claimant is entitled to receive from the Italian Government two-thirds of the sum necessary, at the time of payment, to make good the losses and damages sustained by the property at Via delle Palazzine 2, Fiesole, Florence, Italy, which sum was estimated on January 16, 1952 to be 6,871,072 lire, and the entire sum necessary to make good the losses and damages suffered by the farm and farmhouse at Florence, Italy, which sum was estimated to be 751,401 lire on January 16, 1952; as well as the entire amount of 1,037,016 lire, representing the reasonable expenses incurred in Italy in establishing her claim up to the submission of this Petition, subject to any necessary adjustment for variation in values between January 1952 and the final date of payment;

(c) that the claimant is entitled to receive payment of such compensation as may be awarded to her by the Conciliation Commission free of any levies, taxes or other charges.

F. On May 9, 1955 the Agent of the Italian Government before the Italian-United States Conciliation Commission filed his Answer, dated May 5, 1955, with the Secretariat of the Commission, in which he concludes by requesting that the Petition of the Agent of the Government of the United States of America be rejected on the grounds already invoked by the Ministry of the Treasury in its letter dated January 19, 1955.

G. On May 27, 1955 the Representative of the Italian Republic and the Representative of the United States of America signed a *Procès-verbal* of Non-Agreement and decided to resort to a Third Member in order that the questions raised by the case of Harriet Louise Self be solved.

Both Governments agreed to designate, as Third Member, Dr. Plinio Bolla, President Emeritus of the Swiss Federal Court, at Morcote (Ticino, Switzerland). Dr. Bolla accepted the appointment.

H. The Agents of the two Governments, assisted by *ex parte* counsellors, namely, the Agent of the United States by Prof. Cesare Tumedei and Angelo Corsi, Esq., and the Agent of the Italian Republic by Prof. Bruno Tenti, after exchanging memoranda, proceeded with an oral discussion of the case in Rome, on May 12, 1959, during which they confirmed their earlier conclusions.

#### CONSIDERATIONS OF LAW:

1. A compromise settlement had been agreed upon during the hearing of July 19, 1954 of the Interministerial Commission established under Article 6 of Italian Law No. 908 of December 1, 1945, which hearing was also attended by Miss Harriet Louise Self; by this agreement the indemnity by the Italian Government to Miss Self was established in the amount of 3,250,000 lire, under the terms of Article 78, paragraph 4 (b) and Article 78, paragraph 5 of the Treaty of Peace, as compensation for the losses suffered during the war by the property formerly owned by her late father, in the province of Florence, and for reimbursement of reasonable expenses incurred in the processing of her claim in Italy.

This agreement was confirmed by the Italian Ministry of the Treasury and by Miss Self.

It subsequently appeared, however, that in the opinion of the Italian Government the aforementioned settlement did not exempt Miss Self from the obligation, incumbent upon her according to that Government, to declare the amount granted to her of 3,250,000 lire to the competent Italian Ufficio del Registro, in that this money was a part of her father's estate, and to pay the succession tax related thereto.

On the other hand, Miss Self felt the indemnity of 3,250,000 lire agreed upon was to be paid to her, in accordance with Article 78, paragraph 4 (c) of the Treaty of Peace, free of any levies, taxes or other charges and therefore, in her opinion, net of any inheritance tax.

Miss Self contends that, under the circumstances, her acceptance of the compromise settlement of July 19, 1954 is to be considered as vitiated and therefore the settlement itself is null and void and the Italian Government must pay her, under the terms of Article 78, paragraph 4 (b) and Article 78, paragraph 5 of the Treaty of Peace, the sums which, under these terms, she claimed prior to the compromise settlement of July 19, 1954 or, in any event, whatever sums may be awarded to her, under the aforesaid terms, by the Italian-United States Conciliation Commission.

One could no longer talk of a defect in the consent given by Miss Self, which would have consisted in a legal error, if, in actual fact, the indemnity of 3,250,000 lire accorded to her under the compromise settlement of July 19, 1954 were to be paid to her, under the terms of the Treaty, net of any inheritance tax. In that event Miss Self would not have incurred an error nor would she be allowed to go back on her agreement of July 19, 1954 to accept the compromise settlement offered to her by the competent Italian Commission, in order to annul the agreement itself.

It therefore appears advisable that this Conciliation Commission render a preliminary opinion on the question as to whether the Italian Government, irrespective of any stipulation made with the claimant, can condition the payment of the related Italian succession tax on the payment to Miss Harriet Louise Self of the indemnity owed to her under the terms of Article 78 of the

Treaty of Peace, for the damages sustained in Italy during the war by the property then owned by her late father, Mr. Edward Danforth Self.

2. The jurisdiction of the Italian-United States Conciliation Commission in this case is to be found in Article 83 of the Treaty of Peace. The issue in this case, in fact, involves the application and interpretation of Article 78, paragraph 4 (c), which, in the Italian translation thereof, provides that "*L'indennità sarà versata, al netto da ogni imposta, tassa o altra forma d'imposizione fiscale*" (compensation shall be paid free of any levies, taxes or other charges). It is not within the scope of the Italian-United States Conciliation Commission to say whether or not domestic Italian legislation, considered as such, would authorize the Italian Government to collect the Italian inheritance tax on the indemnity owed by the Italian Government to Miss Harriet Louise Self for the subject war damages; even if the answer to this query were to be in the affirmative, but should the interpretation given by the Government of the United States of America to Article 78, paragraph 4 (c) of the Treaty of Peace be correct, the provision of Italian law, from which the obligation to pay originates in the domestic system, should, in the international system wherein this Commission acts, yield priority to the conventional conflicting stipulation of Article 78, paragraph 4 (c) of the Treaty of Peace.

3. The Treaty of Peace, particularly Article 78 thereof, deals with United Nations property and nationals in Italy, such as they existed on June 10, 1940. It charges Italy, first of all, with the obligation to make restitution, the terms of which are laid down in paragraphs 1, 2 and 3. But, in certain specific cases, it also charges Italy with the obligation which, according to the circumstances, substitutes or completes the former, to pay an indemnity, for example:

... In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy ... (Article 78, paragraph 4 (a).)

And this was exactly the case of Mr. Edward Danforth Self, a United States national at the coming into force of the Treaty of Peace. Since he died before the indemnity in question was acknowledged and paid to him, the right to claim such an indemnity was acquired by his daughter and heir under his will as the "successor of the owner" and at the same time a United Nations national, as provided for in Article 78, paragraph 9 (b) of the Treaty of Peace.

The Italian Government admits that "successor of the owner", in accordance with paragraph 9 (b) of Article 78 of the Treaty of Peace, always means a *mortis causa* successor; this decision can leave unresolved the questions as to whether this expression also includes *inter vivos* successor and whether, in both cases, the successor is entitled to receive compensation even if he is not a United Nations national, should the transfer have occurred after the coming into force of the Treaty of Peace; in the instant case it is, in point of fact, undoubtedly that Miss Harriet Louise Self, heir and successor in interest of the late Mr. Edward Danforth Self, is a United States national.

4. In all cases where an indemnity is due, under Article 78 of the Treaty of Peace (see, in addition to paragraph 4 (a), also paragraph 4 (d) concerning losses or damages sustained by United Nations nationals' property as a result of the application of discriminatory measures), the rule laid down in the aforesaid Article, paragraph 4 (c), is applicable, according to which "compensation shall be paid free of any levies, taxes or other charges".

This rule, which only speaks of payment of indemnity, is not applicable in cases of complete restitution of property, and the reason is obvious in cases where restitution is made, without there having been any loss consequent to

injury or damage as a result of the war, the owner regains possession of his entire property in Italy; on the other hand, in cases where indemnity is paid, this amounts to only two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered (Article 78, paragraph 4 (a)); this same measure of two-thirds is controlling in the hypothesis of Article 78, paragraph 4 (d). The negotiators of the Treaty of Peace clearly intended that the indemnity accorded to United Nations nationals, already reduced to two-thirds of the damage to be indemnified, when bearing in mind Italy's financial potentiality, which was limited as a result of the war, should not be further curtailed as the result of fiscal measures, even if of a general nature, already in force or enacted by Italy. Therefore, the conclusion which the Agent of the Italian Government wishes to draw from the fact that if Mr. Edward Self's property, which later passed to his daughter by inheritance, had not sustained any war damage and had been fully returned to its owner and, after his demise, passed into the hands of his sole heir, the Italian inheritance tax would have had to be paid by her on this property, is untenable; because in that event Mr. Self, and indirectly his daughter, would not have had to suffer the curtailment of one-third, provided for in cases where indemnity is paid.

The preliminary reports of the Treaty of Peace show that the rule concerning the exemption of the indemnity from all fiscal charges made its first appearance subsequent to and as a consequence of the idea of limiting the said indemnity to a fraction of the damage. Little does it matter that the exemption was not proposed by the Russian delegation, which had been the first to suggest that a full reparation of the damage should be renounced, and that it (the exemption) was not proposed at the same time this renunciation was suggested; the cause and effect relation between the renunciation on the part of the United Nations to a hundred per cent reparation of the damage and the fiscal exemption imposed on Italy is not thereby removed.

5. Paragraph 4 (c) of Article 78 of the Treaty of Peace leaves no room for doubt as to the scope of the rule, which is drawn up in a clear and unequivocal manner. The payment of the indemnity must be made "free of any levies, taxes or other charges". The pronoun "any" undoubtedly indicates that the drafters intended to exclude *all* levies, taxes or other fiscal charges that could be invoked, as a set-off, at the time the indemnity was paid. The logical procedure adopted is that of exhaustion: it was intended to exhaust all possible cases of deduction. Little does it matter that Italian national legislation speaks of levy or of tax or of tribute or otherwise; it suffices that a fiscal charge is involved, no matter how named, which could deploy its effects at the time indemnity is paid. In view of the terms adopted, if the drafters of the Treaty had intended to introduce an exception in favour of the Italian Government for a specific fiscal charge, such as the inheritance tax for example, they should have said so expressly, but they did not. Nor can one believe that it was an oversight with respect to the inheritance tax; it had to be clear to all that a translation into concrete facts of Article 78 of the Treaty of Peace would be a matter of years (in certain cases it has required more than ten years); it could be no less clear to the drafters of the Treaty of Peace that, in the meanwhile, and in the natural course of events, United Nations nationals entitled to receive an indemnity under the terms of Article 78 of the Treaty would die before collecting the sums assigned to them by Italy or awarded to them by the competent international Conciliation Commission; the hypothesis of succession *mortis causa* is, in any event, expressly contemplated, under another consideration, by Article 78, paragraph 9 (b) of the Treaty of Peace.

No less clear than the Italian translation are the original French and English texts of the provision which is here being interpreted; the French text reads "*l'indemnité sera versée, nette de tous prélèvements, impôts ou autres charges*", while the English text reads "compensation shall be paid free of any levies, taxes or other charges". In the original French text the word "*prélèvements*" refers to the operation of deduction of one sum from another and not the slightest hint is made, by way of a restriction, to the right of curtailment.

In conclusion, the Treaty of Peace resorted to the most general terms possible and these terms render ineffectual, in the opinion of the Conciliation Commission, any attempt to introduce, in a text that excludes them *a priori*, distinctions which would provide a special treatment for the inheritance tax and one which would be much more favourable to the interests of the Italian fiscal authorities.

Particularly, these terms, in view of their general nature, are in opposition with the Italian Government's contention, i.e., that the provision contained in Article 78, paragraph 4 (c) of the Treaty of Peace intended to refer to deductions for income tax, tax on receipts, incidental rights etc. which, within the meaning of the rules in force, are apparently given execution in Italy at the time when sums due to the creditors of the State are paid. Such enumeration which, moreover, cannot do without a final "etc.", does not appear in Article 78, paragraph 4 (c) even for the purpose of exemplification.

6. The text of Article 78, paragraph 9 (b) of the Treaty of Peace intentionally disregarded the title of the fiscal imposition and quite specifically in no way required that the imposition should originate from the payment of the indemnity or that it be connected therewith in order to give rise to the exemption. The Treaty provides that the indemnity shall be paid "free of any taxes, levies or other charges" without making a distinction according to the nature of the charge, its title or the cause therefor. The initial words of the paragraph ("The indemnity shall be paid . . .") make reference solely to the time at which the exemption is called upon to deploy its effects, but does not restrict these (the effects) to the charges inherent to the fact of the payment. It suffices, for the provision to appear warranted by a legitimate interest, that the tax deploys its effects at the time of the payment of indemnity, and the instant case proves that such a condition can very well materialize with respect to the inheritance tax. On the other hand, this situation is bound to occur again in every case where the heir of a United Nations national, owner of damaged property in Italy, is accorded an indemnity to which he is entitled and is called upon to collect it subsequent to the time he has inherited the estate and has paid the Italian inheritance tax thereon; in this hypothesis, and should its interpretation of Article 78, paragraph 5 of the Treaty be correct, the Italian fiscal authorities would have no other alternative than to affect the credit for the indemnity as a supplementary addendum and this is, in fact, what it intends to do. In reality, even if one considers that the inheritance tax in Italy does not affect the credit as such, but the net estate, the Italian fiscal authorities, in calculating this tax, pursuant to a clear provision of the Treaty of Peace, must disregard the active addendum which otherwise would consist of the credit against the Italian Government for an indemnity due under Article 78 of the Treaty of Peace.

When the Italian Government contends that it has no intention of charging Miss Self with any deductions, at the time payment is made, but merely of ascertaining whether the party in interest has abided by the Italian fiscal laws, it makes a statement that contrasts with both its letter written to Miss Self on December 14, 1954, requesting her to produce a certificate affirming not only

that she had made a declaration of inheritance of the credit of 3,250,000 lire assigned as compensation for war damage, but *also that payment of the taxes connected therewith had been effected*, and the construction placed by it (the Italian Government) on Article 389 of the Italian General Instructions on the Services of the Treasury in the Ministry of the Treasury's answer of January 19, 1955 to the Embassy of the United States in Rome; in the aforesaid answer it is in fact stated that "Article 389 conditions the payment of sums to heirs on the production of a certificate of the competent Ufficio del Registro attesting to the fact that a declaration of the inheritance has been made as provided for by law—in the instant case the inheritance is represented by the amount of compensation assigned—and that the tax connected therewith has been paid"; it is therefore the intention of the Italian Government to make, at the time of payment, a deduction from the indemnity due, equal to the amount of the inheritance tax on the compensation assigned, and this is in violation of the provision contained in paragraph 4 (c) of Article 78 of the Treaty of Peace.

7. Nor can greater weight be given to the Italian Government's argument, according to which the only tax exemption granted by the Treaty would be in connexion with any tax of a special nature to which the Italian Government or other Italian authority subjected the capital assets of United Nations nationals in Italy during the period comprised between September 3, 1943 and the coming into force of the Treaty of Peace, for the specific purpose of meeting expenses resulting from the war effort or to meet the cost of the occupation forces or of the reparations to be made to any one of the United Nations (Article 78, paragraph 6 of the Treaty of Peace). The exemption granted by the Treaty of Peace to United Nations nationals, with respect to their capital assets in Italy, from taxation introduced in Italy during a specific period and for specific exceptional purposes, co-exists, in the Treaty itself, with the limitations imposed on the Italian fiscal sovereignty with regard to the indemnity to which, on the strength of the Treaty of Peace, United Nations nationals are entitled because of the property they owned in Italy and of the damages sustained by this same property or because of the discriminatory measures taken against them during the war. There is no incompatibility whatever between such exemption and such limitations.

8. The Agent of the Italian Government further contends that, had Mr. Edward Self died after collecting the indemnity owed to him by the Italian State pursuant to Article 78, paragraph 4 (c) of the Treaty of Peace and had his daughter and heir found, in the estate in Italy, the amount corresponding to this indemnity, she would have had to declare it and pay the Italian inheritance tax thereon. This observation does not take into consideration the advantage which Mr. Self would have derived, in that event, from the possibility of investing the indemnity as he wished, perhaps even in such a manner as to escape the Italian inheritance tax either by a transfer abroad, insofar as this was permitted by Italian law, or by the purchase of Treasury Bonds or other State Loan Bonds, which are exempt from every and any inheritance tax, Mr. Self even could have immediately used this money in repairing his damaged property in which case only the increased value of the buildings as the result of having been repaired would have fallen under the inheritance tax and not the indemnity received.

Nor, with the interpretation given herein to Article 78, paragraph 4 (c), would the effects thereof be extended *ad infinitum*, as the Agent of the Italian Government claims. It must be admitted that the financial property represented by the indemnity does not enjoy a permanent and universally valid *rei inhaerens* tax exemption. As the Agent of the Italian Government rightly ob-

serves, the Treaty of Peace, for the purposes of the application of direct taxes, does not consider the property of United Nations nationals, damaged by the war and indemnified, to be permanently reduced by a sum equal to the amount of the indemnity nor does it accord, for purposes of assessing and levying indirect taxes on the transfer of wealth, a perpetual franchise to the whole chain of property transactions (purchases, investments, mortgages etc.), the first link of which was the paid indemnity. But a franchise is granted to property transactions, determined by inheritance, in that these transfers occur before the indemnity is paid to the person entitled thereto; if the indemnity is paid to the person entitled thereto, his heir cannot avail himself of the exemption provided for in Article 78, paragraph 4 (c) of the Treaty of Peace which can be invoked by the successor only insofar as the indemnity has not been settled and paid to his predecessor in interest. The United Nations had a clear interest in introducing in the Treaty of Peace a provision which would act as a stimulus for the Italian Government to make a prompt determination and payment of the indemnities provided for under Article 78 of the Treaty of Peace, thus preventing the right to indemnity from globally undergoing an excessive curtailment as the result of subsequent passages from the owner to his first successor, from the latter to his successor and so forth.

DECIDES:

1. The Petition submitted on April 1, 1955 by the Government of the United States of America in behalf of Miss Harriet Louise Self is partially admitted in that:

(a) the requirement of the Italian Government that Miss Harriet Louise Self submit a certificate of the competent Ufficio del Registro attesting to the fact that she has declared, as inheritance, the amount of the credit owed to her by the Italian Government under the terms of Article 78, paragraph 4 (a) of the Treaty of Peace and that she has paid, on this amount, the Italian inheritance tax, is recognized to be in conflict with Article 78, paragraph 4 (a) of the Treaty;

(b) Miss Harriet Louise Self is entitled to receive from the Italian Government the sum of 3,250,000 lire, under the terms of Article 78, paragraph 4 (a) of the Treaty of Peace, free of any levies, taxes or other charges, and particularly net of the Italian inheritance tax on the estate of the late Edward Danforth Self.

(c) the sum of 3,250,000 lire, mentioned in paragraph (b) shall be paid within sixty (60) days from the date on which a request for payment is presented to the Italian Government by the Government of the United States of America.

This Decision is final and binding.

DECIDED at Morcote (Ticino, Switzerland), on this 27th day of January 1960.

*The Representative of the  
United States of America*

Alexander J. MATTURRI

*The Third Member*

Plinio BOLLA

DISSENTING OPINION OF THE REPRESENTATIVE OF THE ITALIAN REPUBLIC IN  
THE HARRIET LOUISE SELF CASE

The decision adopted by the majority Commission in this case is unconvincing to me. I therefore consider it my duty to express briefly, hereunder, the grounds on which my dissent is based.

The fundamental argument on which the majority decision rests is of a literal nature: it is stated that the exemption is accorded by the Treaty in terms so broad that no distinction can be made between one fiscal charge and another.

I might recall, preliminarily, that the clarity of a rule is no grounds for preventing the interpreter from searching as to whether or not the meaning thereof might not, perchance, differ from that which appears from the literal expressions.

But this is not the question. The Italian theory does not contend that there are certain charges or deductions that escape the rule of exemption; I unquestionably agree that there is no limitation or restriction on the scope of the exemption.

Instead, another argument seems to me to be decisive.

The Treaty unequivocally speaks of *payment* (of the indemnity) and provides that it shall be made net of any deduction; the fact that no charge related to the payment is applicable does not authorize the interpreter to hold that the exemption covers such operations, acts, transactions to which the creditor gives rise and which have no connexion with the creditor-debtor State relation, that is, those which are completely unrelated to the *payment* specified in the Treaty.

This, it seems to me, is the manner in which the question should be set forth; it therefore follows that the letter of the rule supports, and does not contradict, the Italian theory.

The decision admits that the exemption refers to any charge "which could deploy its effects at the time the indemnity is paid". The weakness of the decision, in fact, consists in holding that these charges also comprise the inheritance tax which, instead, like all other taxes on business transactions, that is, the fiscal charges affecting all transfers of property, credits, rights, is completely unrelated with the time of payment to the creditor of the indemnity transferred.

The misunderstanding was engendered by the Italian Government's claim to verify, at the time of payment, under certain internal Rules (General Instructions on the Services of the Treasury, which are not even State laws), that the amount had been paid. It is clear, however, that the observance of these instructions does not alter the nature of the inheritance tax nor does it change the legal title from which it originates; there does not even exist a time identity; the obligation to pay succession tax arises at the time the estate is transferred.

The Italian Treasury could even have disregarded the observance of those internal rules; it could have normally paid the sum agreed with Miss Self and, subsequently, the fiscal office would later have applied, of its own accord, the tax. Rather, in point of fact, the heir's obligation had arisen before, namely, at the time the inheritance materialized.

At the legal level, the two moments are logically distinct: the payment of a debt is one matter, while the payment of the fiscal charge on the transfer thereof is another. If one considers them separately, and they should be separate, one finds that the payment, specified in Article 78, is unrelated to the question and the decision does not establish that the payment should be made net of inheritance tax but that United Nations nationals, besides the other exemptions, also enjoy—on certain conditions—an exemption from the inheritance tax on

credits originating from war damages; and this, to my mind, is not provided for in the Treaty.

Nor, to my mind, can any probative value be given to the argument drawn from the coincidence of the insertion into Article 78 of the Treaty of Peace of the two rules referring, respectively, to the reduction to two-thirds of the indemnity and the exemption of the indemnity from all fiscal or other charges. I can go so far as to admit that there is a logical connexion between the two rules and that the Representatives of the victorious Powers, when reducing the amount of the indemnity, also intended that it was to be paid free from taxation. That which still remains to be proved, however, is that the exemption is extended to facts which have nothing in common with the indemnity, namely, to charges of a personal nature, such as the inheritance tax, and that the drafters of the Treaty took into consideration circumstances which were mere possibilities, such as the death of the creditor while the payment of the indemnity was still pending.

Because, had they intended to provide for and govern this type of events, an introduction concerning the exemption from inheritance tax, which, I repeat, is of a personal and not a real nature, similar to that contained in the same Article regarding the extraordinary tax, would have been more logical; for, otherwise, there remains the incongruity which was pointed out by the Agent of the Italian Government, namely that the successor is or is not exempted from the tax (often a very heavy tax) depending on whether the creditor dies one day before or one day after the payment.

Morcote (Ticino, Switzerland), January 27, 1960

*The Representative of the  
Italian Republic*

Antonio SORRENTINO

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