PART TWO - THE PRINCIPLE OF GOOD FAITH

The sole Arbitrator in the *Metzger cf Co. Case* (1900) held that "It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements."¹ There was little doubt in the mind of the Arbitrator as to the binding character of the principle of good faith upon individuals living under the rule of law and he held that it was equally binding upon nations. The Permanent Court of Arbitration, in the *Venezuelan Preferential Claims Case* (1904), also expressly affirmed that the principle of good faith "ought to govern international relations."² The sole Arbitrator in the Germano-Lithuanian Arbitration (1936) held that: "A State must fulfil its international obligations bona fide."³ The principle of good faith is thus equally applicable to relations between individuals and to relations between nations. Indeed, the Greco-Turkish Arbitral Tribunal considered the principle of good faith to be "the foundation of all law and all conventions."⁴ It should, therefore, be the fundamental principle of every legal system.

What exactly this principle implies is perhaps difficult to define. As an English judge once said, such rudimentary terms applicable to human conduct as "Good Faith," "Honesty," or "Malice" elude a *priori* definition. "They can be illustrated but not defined."⁵ Part Two will be an attempt to illustrate, by means of international judicial decisions, the application of this essential principle of law in the international legal order.

CHAPTER 3 - GOOD FAITH IN TREATY RELATIONS

THE law of treaties is closely bound with the principle of good faith, if indeed - not based on it; for this principle governs, treaties from the time of their formation to the time of their extinction.

A. Formation of Treaties

"Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which
is recognised in private law and cannot be ignored in international law."\(^1\)

States in negotiating and concluding treaties are, therefore, presumed to have proposed nothing which is illusory\(^2\) or merely nominal.\(^3\) Indeed,

"No construction shall be admitted which renders a treaty null and illusive, nor which leaves it in the discretion of the party if promising to fulfil or not his promise."\(^4\)

Nor can the contracting parties be presumed to have intended anything which would, under the circumstances, have been unreasonable,\(^5\) absurd or contradictory,\(^6\) or which leads to impossible consequences.\(^7\)

As to the terms that a party employs, these are presumed to have been used in the contemporary\(^9\) and general sense in which the other party would have understood them at the time the treaty was concluded.\(^10\) If, therefore, a party wishes to use words in a special or a restricted sense, it must expressly say so. And "when one has made a promise and then excepted from its extent what the words might naturally have conveyed it is evident that he was aware of the effect of his language, and took from its comprehension all that was within his intention to except."\(^11\)

In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.

Thus, in 1903, after three of Venezuela's many creditors had staged a blockade of her ports, Venezuela sent a representative to Washington with full powers to negotiate with the creditor Powers. In the course of the negotiations, the Venezuelan representative proposed to the representatives of the blockading Powers that "all claims against Venezuela" should be offered special guarantees.\(^12\) A controversy arose as to whether the words "all claims" referred to all the claims of the allied and blockading Powers, or to all the claims of every country creditor of Venezuela. The Permanent Court of Arbitration decided:-

"The good faith which ought to govern international relations imposes the duty of stating that the words 'all claims' used by the representative of the Government of Venezuela in his conferences with the representatives of the allied Powers... could only mean the claims of these latter and could only refer to them."\(^13\)

In case of doubt, words are to be interpreted against the party which has proposed them, and according to the meaning that the other party would reasonably and naturally have understood\(^14\) in contracting with a party labouring under a special handicap, e.g., Red Indians, terms should no longer be used in their technical meaning, but only in the meaning which can be understood by that party; for in case of dispute it is not the technical meaning of the terms of the covenant that an international tribunal would enforce, but only the "sense in which they would naturally be understood by the Indians."\(^15\)

How far are States bound in good faith, pending the negotiation for a Special Agreement, to abstain from any surprise action capable of modifying the existing situation at law, or from resort to any tactical measures? The question arose to a limited extent in the *Eastern Greenland Case* (1933), but unfortunately the Permanent Court of International Justice had no occasion to consider it.\(^16\) In the present state of international law, however, it does not seem that such an obligation exists, except perhaps in very special circumstances.
C. Pacta sunt servanda

"A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent."

"It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here."

"It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements."

"From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes."

"Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith."

\[\text{Pacta sunt servanda, now an indisputable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals. Without this rule, international law as well as civil law would be a mere mockery.}\]

A party may not unilaterally "free itself from the engagements of a treaty, or modify the stipulations thereof, except by the consent of the contracting parties, through a friendly understanding." As long as the Treaty remains in force, it must be observed as it stands. It is not for the Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument. The doctrine of clausula rebus sic stantibus has, therefore, no application in international law in the sense that what has been mutually agreed to by the parties can cease to be binding merely on account of changed circumstances. On the other hand, the doctrine, is applicable in the sense that a treaty or contract cannot be invoked to cover cases which could not have been reasonably contemplated at the time of its conclusion.

"Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. It is, indeed, "a general conception of law, that any breach of an engagement involves an obligation to make reparation," however short the breach.

D. Performance of Treaty Obligations

The principle that treaty obligations should be fulfilled in good faith and not merely in accordance with the letter of the treaty has long been recognised by international tribunals and is reaffirmed by the United Nations as an act of faith.

In the North Atlantic Coast Fisheries Case (1910) the Permanent Court of Arbitration expressly affirmed that:
"Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of inter-national law in regard to observance of treaty obligations."\(^{46}\)

This means, essentially, that treaty obligations should be carried out according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning.\(^{47}\)

This is one of the most important aspects of the principle of good faith and is in accordance with the notion that a treaty is an accord of will between contracting parties. As was held by the Franco-Venezuelan Mixed Claims Commission (1902):

"A treaty is a solemn compact between nations . . . . To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties, understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute."\(^{48}\)

Performance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally.

As the ascertainment of this mutual understanding, i.e., the real and common intention of the parties, is a matter of interpretation, it is also said that treaty interpretation is governed by the principle of good faith. Thus the Arbitrator observed in the *Timor Case* (1914), quoting the words of Rivier:

"Above all, the common intention of the parties must be established: id quod actum est . . . . Good faith prevailing throughout this subject, treaties ought not to be interpreted exclusively according to their letter, but according to their spirit . . . . Principles of treaty interpretation are, by and large, and Ynurati8 mutandis, those of the interpretation of agreements between individuals, principles of common sense and experience, already formulated by the Prudents of Rome."\(^{49}\)

Indeed, he considered that there was "entire coincidence of private and international law on this point."\(^{50}\) It should be pointed out, however, that where this common intention has been reduced to writing, it is primarily the common intention as set out in the text which is to be enforced\(^{51}\). The text of a treaty cannot be "enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the treaty, but for which no provision is made in the text itself."\(^{52}\) But "the intention of the parties must be sought out and enforced even though this should lead to an interpretation running counter to the literal terms of an isolated phrase, which read in connection with its context is susceptible of a different construction."\(^{53}\) Moreover, the Permanent Court of International Justice has developed the teleological approach of interpreting the intention of the parties so that it is the real and practical aim pursued by the contracting parties that is enforced.\(^{54}\)

From the fact that it is the common intention of the parties or the spirit of the treaty -that has to be respected, it follows that it is not permissible, whilst observing the letter of the agreement, to evade treaty obligations by -what the Permanent Court has called- "indirect means." If, for instance, it is the intention of the parties that freedom of navigation and commerce should be established in certain parts of their territory, it is not permissible for one party, while respecting the letter of the agreement, to evade its obligations in effect by an exaggerated exercise of its right to manage its national shipping.\(^{55}\) Similarly, if State A has, by treaty with State B, granted to the inhabitants of State B the right; to fish in certain parts of its coastal waters in common with its own nationals, and to enter its bays and harbours for the purpose of repairs, etc., State A may not, by an unreasonable exercise of its sovereign right to legislate for the preservation and protection of its fisheries, deprive the grant of its practical effect\(^{56}\). The unreasonable exercise of a right in such cases constitutes an abuse of right,\(^{57}\) which being an act that is inconsistent with the duty to carry out the treaty in good faith, is considered as unlawful.

Again, if parties agree that disputes shall be submitted to judicial settlement only if they "cannot be settled by negotiation,"
"the condition in question does not mean . . . that resort to the Court is precluded so long as the alleged wrongdoer may profess a willingness to negotiate." A party which is bound by a pactum de contrahendo to negotiate a certain treaty is responsible for the consequences of its acts of bad faith. It may be said that in such cases good faith consists in a sincere and honest desire, as evidenced by a genuine effort, to fulfill the substance of the mutual agreement. It is essentially a moral quality or perhaps what Judge Moore has described as the "ordinary conceptions of fair dealing as between man and man." The enforcement of the principle of good faith may be considered as the enforcement of that degree of morality which is necessary for the functioning of the legal system.

Also, since it is the common intention of the parties and the spirit, rather than the letter, of the treaty which have to be observed, a party may not be allowed to make capital out of inexact expressions or mistaken descriptions in a treaty, when the real and common intention can be ascertained and the error established. *Falsa demonstratio non nocet.*

While the principle of good faith prohibits the evasion of an obligation as established by the common intention of the parties, it also prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty, as, for example, by invoking the treaty to cover cases which could not reasonably have been in the contemplation of the parties at the time of its conclusion. In this limited sense, the doctrine of *clausula rebus sic stantibus* is founded on the principle of good faith and is recognised by international law.

Finally, the principle of good faith requires a party to refrain from abusing such rights as are conferred upon it by the treaty.

**CHAPTER 5 - OTHER APPLICATIONS OF THE PRINCIPLE**

**C. Allegans Contraria Non Est Audiendus**

It is a principle of good faith that "a man shall not be allowed to blow hot and cold -to affirm at one time and deny at another . . . . Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted." In the international sphere, this principle has been applied in a variety of cases. In the case of The Lisman (1937), concerning an American vessel which was seized in London in June, 1915, the claimant's original contention before the British prize court "was not that there was not reasonable cause for seizure, or for requiring the goods to be discharged, but that there was undue delay on the part of the Crown in taking the steps they were entitled to take as belligerents." In a subsequent arbitration in 1937, which took the place of diplomatic claims by the United States against Great Britain, the sole Arbitrator held that:

*"By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim."*
This principle has also been applied, to admissions relating to the existence of rules of international law. Thus in the case of *The Mechanic* (C. 1862), it was held that:

"Ecuador . . . having fully recognised and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation."\(^{16}\)

In the *Meuse Case* (1937), it was held that, where two States were bound by the same treaty obligations, State A could not complain of an act by State B of which it itself had set an example in the past.\(^{17}\) Nor indeed may a State, while denying that a certain treaty is applicable to the case, contend at the same time that the other party in regard to the matter in dispute has not complied with certain provisions of that treaty.\(^{18}\)

This principle was also applied by the German-United States Mixed Claims Commission (1922) in the *Life-Insurance Claims Case* (1924) to preclude a State from asserting claims which, on general principles of law, its own courts would not admit; for instance, claims involving damages which its own municipal courts, in similar cases, would consider too remote.\(^{19}\) Incidentally, this case also shows one of the means whereby general principles of law find their application in the international sphere. A State may not disregard such principles as it recognises in its own municipal system, except of course where there is a rule of international law to the contrary.

In the *Shufeldt Case* (1930), the United States contended that Guatemala, having for six years recognised the validity of the claimant's contract, and received all the benefits to which she was entitled thereunder, and having allowed Shufeldt to continue to spend money on the concession, was precluded from denying its validity, even if the contract had not received the necessary approval of the Guatemalan legislature.\(^{20}\) The Arbitrator held the contention to be "sound and in keeping with the principles of international law."\(^{21}\)

This case is a clear application in the international sphere of the principle known in Anglo-Saxon jurisprudence as estoppel in pais or equitable estoppel, the application of which was also considered in the *Serbian Loans Case* (1929) and in the *Aguilar-Amory and Royal Bank of Canada* (Tinoco) Case (1923). It appears, from the discussion of this principle in the last two mentioned cases, that it precludes person A from averring a particular state of things against person B if A had previously, by words or conduct, unambiguously represented to B the existence of a different state of things, and if, on the faith of that representation, B had so altered his position that the establishment of the truth would injure him.\(^{22}\) An intent to deceive or defraud is, however, not necessary. The principle is yet another instance of the protection which law accords to the faith and confidence that a party may reasonably place in another, which, as mentioned before, constitutes one of the most important aspects of the principle of good faith.

In its Advisory Opinion No. 14, the Permanent Court of International Justice was of the opinion that where States, acting under a multipartite convention, to which they are all parties, have concluded certain arrangements, they cannot, as between themselves, contend that some of the provisions in the latter are void as being outside the mandate conferred by the previous convention.\(^{23}\)

The principle applies equally, though perhaps not with the same force, to other admissions of a State which do not give rise to an equitable estoppel. Thus it has been held that a State cannot be heard to repudiate liability for a collision after its authorities on the spot had at the time admitted liability and sought throughout to make the most advantageous arrangements for the Government under the circumstances.\(^{24}\) Again if a State, having been fully informed of the circumstances, has accepted a person's claim to the ownership of certain property and entered into negotiation with him for its purchase, it becomes "very difficult, if not impossible" for that State subsequently to allege that he had no title at the time.\(^{25}\) If a State, which is the lessee of a property owned by two joint owners, has, after the death of one of them, paid the entire rent to the other,
who claims to have become the sole owner, "this act can not be interpreted otherwise than as a recognition by the authorities of the fact that the righ of ownership of Hassar [the deceased] has passed to Rzini [the claimant]." There a party negotiates for the sublease of a concession granted by a State, it thereby recognises the, validity of the concession and the right of the State to grant it. Again, if a State in the past had dealings with the inhabitants of a certain territory only through, and in the presence of, the representative of another State or if it has applied to that other State for protection against the molestations of its interests or those of its nationals in that territory by the acts of a third State, it should not dispute a claim to jurisdiction over the territory in question advanced by the other State. In the Eastern Greenland Case (1933), the Permanent Court of International Justice held that:-

"Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland."  

In the Anglo-Norwegian Fisheries Case: (1951), the International Court of Justice went further and considered that the "prolonged abstention" of the United Kingdom from protesting against the Norwegian system of straight base lines in delimiting territorial waters was one of the factors which, together with "the notoriety of the facts, the general toleration of the international community, Great Britain's, position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."  

Similarly, in the Eastern Greenland Case (1933), the Permanent Court found that, although Denmark, in some of her Notes to foreign powers, seeking their recognition of Danish sovereignty over the whole of Greenland, used the expression "extension of Danish sovereignty," she was in reality seeking their recognition of an existing state of things, and held that:

"In these circumstances, there can be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonised part of Greenland, nor for holding that it is estopped [empêché] from claiming, as it claims in the present case, that Denmark possesses an old established sovereignty over all Greenland."  

The application of this principle to such cases of admission, sometimes also called "estoppel," or described. under the maxim "non concedit venire contra factum proprium," does not, however, have the same effect as an equitable estoppel mentioned earlier in this section. Unlike the latter, an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an argumentum ad hominem, which is directed at a person's sense of consistency, or what in logic is paradoxically called the "principle of contradiction." An admission is not necessarily conclusive as regards the facts admitted. Its force may vary according to the circumstances. Thus, in the Salvador Commercial Co. Case (1902), the Arbitral Tribunal, in dealing with the Salvadorian contention that the Company did not comply with the terms of the concession, held that:

"It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were procured by fraud or undue influence. No evidence of this kind is introduced."  

In the Kling Case (1930), however, where the United States Government was asserting that a certain occurrence involved
the direct responsibility of Mexico, although one of its consuls had previously reported to the State Department that it was an accident, the Mexican-United States General Claims Commission (1923) held the report to be only ordinary evidence and, in this case, being based on scanty information, to be of little value.\textsuperscript{35}

In this connection, it may be noted that there is a growing tendency among international tribunals not always to regard the recognition of Governments as an admission of the effective status of a regime, but often as a political act grounded on political considerations. In such a case, the recognition or non-recognition carries little evidential weight in regard to the actual status of the regime.\textsuperscript{36} This appears to be the reason why the non-recognition of a Government has been held not to estop a foreign State from subsequently asserting that a regime not recognised by it was the effective Government of a country.\textsuperscript{37}

As regards admissions in general, it may be said that they must have been made by responsible agents of the State acting in their official capacity,\textsuperscript{38} on behalf of the State.\textsuperscript{39} Admissions may be vitiating by duress,\textsuperscript{40} excusable error,\textsuperscript{41} fraud or undue influence. In the \textit{Serbian Loans Case} (1929), the Permanent Court of International Justice was faced with the plea of admission on the ground that for many years the creditors had accepted payment in paper francs. The Court rejected the plea on the ground that: "It does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them."\textsuperscript{43} Conduct, in order to constitute an admission, must not, therefore, be due to an impossibility of acting otherwise.

Finally, it should be added that declarations, admissions, or proposals made in the course of negotiations which have not led to an agreement do not constitute admissions which could eventually prejudice the rights of the party making them.\textsuperscript{44}

\section*{D. Nullus Commodum Capere De Sua Injuria Propria}

"No one can be allowed to take advantage of his own wrong," declared the Umpire in \textit{The Montijo Case} (1875).\textsuperscript{45}

A State may not invoke its own illegal act to diminish its own liability. Commissioner Pinkney, in \textit{The Betsy Case} (1797), called it "the most exceptionable of all principles, that he who does wrong shall be at liberty to plead his own illegal conduct on other occasions as a partial excuse."\textsuperscript{46}

The Permanent Court of International Justice, in its Advisory Opinion No. 15 (1928), said that "Poland could not avail herself of an objection which . . . would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international agreement,"\textsuperscript{47} and in the \textit{Chorzów Factory Case} (Jd.) (1927), the Court held:

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him."\textsuperscript{48}

The application of this principle is well illustrated by the \textit{Chorzów Factory Case} (Jd.) (1927). The Polish Government had appropriated the Chorzów Factory in virtue of her laws of July 14, 1920, and June 16, 1922, without following the procedure laid down in the Geneva Convention of 1922.\textsuperscript{49} As regards procedure, the Convention had provided that no dispossession should take place without prior notice to the real or apparent owner, thus affording him an opportunity of appealing to the Germano-Polish Mixed Arbitral Tribunal (Art. 19). Poland, by failing to follow the procedure laid down in the Geneva Convention, had illegally deprived the other party of the opportunity of appealing to the Milted Arbitral Tribunal. The Permanent Court held that Poland could not now prevent him, or rather his home State, from applying to the Court, on the ground that the Milted Arbitral Tribunal was competent and that, since no appeal had been made to that Tribunal, the Convention had not been complied with.\textsuperscript{50}
Another instance where the same principle was applied is _The Tattler Case_ (1920), where the Tribunal held that:

"It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained."\(^51\)

The refusal was wrongful.

In the _Frances Irene Roberts Case_, the United States-Venezuelan Milted Claims Commission (1903), in rejecting a plea of prescription in a case which, though diligently prosecuted by the claimants for over 30 years, had not yet been settled, held:

"The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose."\(^52\)

No one should be allowed to reap advantages from his own wrong.

The situation is slightly different where a State's acquiescence in a breach of its own law amounts to connivance. In such a case the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defence.\(^53\)

_A fortiori_, where a State has directly requested another to do a certain thing it may not subsequently put forward a claim against the latter founded on this very act. Thus, if the President of a State has requested the naval authorities of another State to help capture a rebel, declared to be a pirate, his State may not afterwards present a claim in respect of his capture. As Commissioner Wadsworth of the Mexican-United States Claims Commission (1868) held, the State would be "estopped."\(^54\) This kind of estoppel is but an application of the principle _nullus commodum capere de sues injuria propria_.\(^55\)

In the Advisory Opinion on the Interpretation of Peace Treaties (2nd Phase) (1950), Judge Read, in a dissenting opinion used the term "estoppel" in the same sense and was of the view that "in any proceedings which recognised the principles of justice," no government would be allowed to raise an objection which would "let such a government profit from its own wrong."\(^56\)

The International Court of Justice, in that case, was concerned with the interpretation of the following provision of the Peace Treaties of 1947:\(^57\):

35 . . . Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member (un tiers membre) selected by mutual agreement of the two parties from nationals of a third country [un pays tiers]. Should the two parties fail to agree within a period of one month upon the appointment of the third member [ce tiers membre], the Secretary-General of the United Nations may be requested by either party to make the appointment."

The majority of the Court, from whom Judge Read and Judge Azevedo differed, was of the opinion that:

"If one party fails to appoint a representative to a Treaty Commission under the Peace Treaties . . . where that party is obligated to appoint a representative . . ., the Secretary-General . . . is not authorised to appoint the third member of the Commission upon the request of the other party to a dispute."\(^58\)

It is submitted that a different interpretation of the Peace Treaties is possible, without recourse to the, principle that no
one can benefit from his own wrong, invoked by Judge Read.

The Court considered that "the text of the Treaties [did] not admit" of the interpretation,

"that the term 'third member' is used here simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member can be appointed only when the two national Commissioners have already been appointed, and that therefore the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General."

But the Court also conceded that "the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners." This interpretation could indeed have been upheld as being more in accordance with both the letter and the spirit of the provision. Contrary to the opinion of the Court, the literal interpretation of the text does not disclose any contemplated "sequence" in the appointment of the three members. Nor, it is submitted, can such a "sequence" be regarded as "natural and ordinary "in view of the "normal practice of arbitration"; for it has possibly been overlooked that the Treaty Commission is by no means a "normal" arbitral commission, where the national Commissioners are appointed as independent arbitrators and not as national representatives. In the case of the Treaty Commission, they are expressly stated to be "representatives" of their respective Governments. Consequently, their position, even though they have the right to vote, is more akin to that of agents than judges, while the neutral member fulfils the function of a sole arbitrator rather than an empire. Although it may be the normal practice to appoint first the arbitrators and then the umpire, it is equally normal first to select the sole arbitrator before appointing the agents. Moreover, as contemplated by the Peace Treaties, the Treaty Commission is the last resort to break any deadlock which might arise between the parties in case of a dispute and it represents a machinery to be set in motion essentially by unilateral action "at the request of either party." This is so with regard to the reference of the dispute to the Commission, and also to the eventual appointment of the third member by the Secretary-General. The intention is that this ultimate means of settlement should not fail on account of either the indifference or the recalcitrance of one of the parties.

It is submitted, therefore, that the interpretation: "the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter, by the Secretary-General," besides being in strict conformity with the terms, of the provision, would be more in accordance with the intention of the parties, and with the principles of good faith, and more in the interest of the rule of law in international relations.

If this interpretation were accepted, the failure of one of the parties to appoint its representative to the Commission would not affect the power of the Secretary-General to make the appointment. That the defaulting party may or may not have thereby violated a treaty obligation thus becomes immaterial and there is, therefore, no occasion for applying the principle nullus commodum capere de sua injuria propria.

The problem of the application of this principle might have arisen, however, if the condition required by the Peace Treaties for the appointment of the neutral member by the Secretary-General is not the failure of the parties to agree upon the appointment, but the failure of the two national Commissioners. In such a case, if one of the parties refuses to appoint its national Commissioner, albeit unlawfully, i.e., in violation of its treaty obligations, it would be necessary to agree with the Court, though perhaps for different reasons, that "nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment."

The Court was not altogether explicit as to the reasons for this statement. It is submitted that the reason is not that the principle that no one can benefit from his own wrong cannot be applied, but that the Secretary-General cannot, on the basis of his power of appointment, assume the right to pass judgment upon the violation vel non by States of their international obligations. It was pointed out by the United States before the Court that in the municipal law of the great majority of nations, " provision is made for the appointment of an arbitrator (often by the court) if one of the parties to a dispute refuses or fails to appoint its arbitrator under an arbitration agreement. It is submitted that this is possible
principally because, generally speaking, a municipal court has jurisdiction over the parties. It can determine their responsibility for any violation of their contractual obligations and has also the power to order relief *in natura*.\textsuperscript{67} Similarly, an international tribunal would also have the power, if it has jurisdiction over the issue,

both *ratione personae* and *ratione materiae*. In such a case, should the defaulting party object that one of the conditions required by the treaty had not been fulfilled, the tribunal would and should hold, as Judge Read said, "that it was estopped from alleging its own treaty violation in support of its own contention."\textsuperscript{68}

**EX DELICTO NON ORITUR ACTIO**

Another manifestation of the principle *nullus commodum capere de sua injuria propria* is that

"an unlawful act cannot serve as the basis of an action in law."\textsuperscript{69}

The principle *ex delicto non oritur actio* is generally upheld by international tribunals\textsuperscript{70} and it may be of interest to illustrate it with a case which lasted nearly 70 years from the date the events occurred, going through four different international tribunals, *viz.*, the case of Capt. Clark, known also as *The Medea* and *The Good Return Cases*.

Capt. Clark was a citizen of the United States, who in 1817, obtained a letter of marque from Oriental Banda (as Uruguay was then called) in the war then being fought between Portugal and Spain on the one side and Oriental Banda and Venezuela on the other. Some of the Spanish vessels captured by Clark were seized by Venezuela. Venezuela later combined with New Granada to form the Republic of Colombia, which, in turn, split into three separate States, New Granada, Venezuela and Ecuador.

When claims commissions were constituted between the United States on the one hand and New Granada, Ecuador and Venezuela on the other hand, the claims of Capt. Clark were successively and separately put forward before these commissions.

These claims were allowed by Umpire Upham before the Granadine-United States Claims Commission (1857).\textsuperscript{71}

The Ecuadorian-United States Claims Commission (1862), however, rejected them. The American Commissioner Hassaurek, after pointing out that the conduct of Clark was in violation of both United States municipal law and treaty provisions between the United States and Spain, the latter considering such conduct as piracy, asked:

"What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian Republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit*. He has violated the laws of our land. He has disregarded solemn treaty stipulations. He has compromised our neutrality . . . . What would be the object of enacting penal laws, if their transgression were to entitle the offender to a premium instead of a punishment? . . . I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands."\textsuperscript{72}

Subsequently a new Claims Commission (1864) was set up between the United States and New Granada (which had by then changed its name to Colombia). Sir Frederick Bruce, the Umpire of this Commission, adopted the views of Commissioner Hassaurek and reversed the decision of Umpire Upham\textsuperscript{73}.

Finally, on the same principle, the case was dismissed by Umpire Findlay before the United States-Venezuelan Claims Commission (1885).\textsuperscript{74}
The principle does not, however, appear to be jus cogens. For although a Government "could not be justified, under the law of nations, in interposing its authority to enforce a claim of one of its citizens growing out of services rendered in violation of its own laws, and its duties as a neutral nation, yet if the nation against whom such claim exists sees proper to waive the objection, and agrees to recognise the claim as valid and binding against it, the tribunal to which it is referred for settlement cannot assume for it a defence which it has expressly waived."\(^75\)

Unless, however, there is such a waiver, the principle is of such a fundamental character that where an award disregarded it, a State, even if the award were in its favour, would hesitate to insist upon its enforcement. In the Pelletier Case (1885), compensation was allowed to an American claimant whose ship was seized by Haiti for an attempt at slave trading. In fact, recommending that it should not be enforced, the United States Secretary of State, Mr. Bayard, took occasion to say:

"Even were we to concede that these outrages in Haitian waters were not within Haitian jurisdiction, I do now affirm that the claim of Pelletier against Haiti . . . must be dropped, and dropped peremptorily and immediately by the . . . United States . . . Ex turpi causa non oritur actio: by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied."\(^76\)

The award was never enforced.\(^77\)

The principle, however, only applies in so far as the claim itself is based upon an unlawful act. It does not apply to cases where, though the claimant may be guilty of an unlawful act, such act is juridically extraneous to the cause of the action.\(^78\)

**E. Fraus Omnia Corrupt**

Fraud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effects of fraud could be recognised by law.

In dealing with the law of necessity, it was seen that where a person has deliberately and fraudulently placed himself in a state of necessity in order to circumvent the law, he can no longer benefit from the immunity accorded to acts done under the *jus necessitatis*.\(^79\) In a previous section, it was also pointed out that a statement would not be regarded as an admission if induced by fraud.\(^80\)

In the present section, discussion will be confined to a few specific instances showing the vitiating effect of fraud in international law.

In the case of *The Alabama* (1872), the question arose as to whether the commissions granted by the Confederates in the American Civil War to vessels originally built in England in violation of English laws gave them the character of public ships *vis-à-vis* Great Britain, so that the latter was prevented from inquiring into their illegal origin, the President of the Geneva Tribunal, Count Sclopis, said:

"The offence of which this vessel was guilty . . . does not disappear as a result of an indecent ruse . . . *Dolus nemini patrocinari debet.*"\(^81\)

The final award of the *Alabama* Arbitral Tribunal seems only to have paraphrased this opinion:

"The offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence."\(^82\)
What normally constitutes a right will, therefore, not be upheld if it is either begotten by fraud or is used to dissemble the effects of another fraudulent act.

Similarly, while a State is in general sovereign in deciding who shall be its subjects and in granting naturalisation to individuals, in relation to another State a naturalisation is not conclusive as to the nationality of an individual, if it can be established that such naturalisation had been obtained by fraud.

A judgment, which in principle calls for the greatest respect, will not be upheld if it is the result of fraud. A State, first of all, has a right to expect from another that "no claim will be put forward that does not bear the impress of good faith and fair dealing on the part of the claimant." A certain amount of exaggeration and even misrepresentation of facts on the part of the individuals whose claim their State espouses is not infrequent and does not of itself invalidate the claim. But when it is alleged that an international tribunal has been "misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them," "no tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has an inherent power to reopen and to revise a decision induced by fraud," as long as it still has jurisdiction over the case. Even where the judgment has passed out of the hands of the tribunal, a State, on discovering that an award made in its favour has been induced by fraud practised upon the tribunal by the claimants, would refuse to enforce it and would restore any money received in execution of the award, as for instance,

in the *La Abra Silver Mining Co. Case* (C. 1868) and the *Benjamin Weil Case* (C. 1868).

And where fraud is proven either with regard to the formation of an international tribunal or with regard to the conduct of its members, the entire proceedings will be regarded as null and void. Even innocent third parties cannot claim a right derived from its decisions.

**PART THREE - GENERAL PRINCIPLES OF LAW IN THE CONCEPT OF RESPONSIBILITY**

**CHAPTER 8 - THE PRINCIPLE OF FAULT**

Negligence, or culpable negligence, is, therefore, the failure to perform a legal duty, i.e., a pre-existing obligation prescribing the observance of a given degree of diligence. Being a default in carrying out an obligation, culpable negligence constitutes fault in the sense described above. In such cases, fault does consist in culpable negligence. But culpable negligence constitutes only one category of fault, namely, default in those obligations which prescribe the observance of a given degree of diligence for the protection of another person from injury. Fault as such, however, covers a much wider field. It embraces any breach of an obligation. There are certain obligations which merely stipulate that a party should do or abstain from doing certain acts. This is so as regards most treaty obligations as well as most contractual obligations in the municipal sphere. The mere failure to comply with such obligations, unless it is the result of *vis major*, constitutes a failure to perform an obligation, and a fault entailing responsibility. In such instances, there is no need to consider whether the failure is accompanied by malice or is due to negligence. A State may often be held responsible for the errors of judgment of its organs, even if such errors be bona fide. In cases of this kind, the unlawful act, the fault, is free from the element of malice or culpable negligence. Thus, whether or not malice or culpable negligence is necessary to constitute an unlawful act depends not upon a general principle covering all unlawful acts but upon the particular pre-existing obligation. Malice and negligence can neither be identified with, nor are they inherent in, the notion of fault. Fault is dependent upon the existence of the will, but not upon that of malice or negligence. Good faith and due diligence are not the limits of all
obligations. Impossibility is. It is only where *vis major* has deprived a person of his free will that there is no obligation, no fault.\textsuperscript{27}

The corollary of the principle of fault, the principle *ad impossibile nemo tenetur*, is also confirmed by the Russian Indemnity Case (1912):

"The exception of *vis major*, invoked as the first line of defence, may be pleaded in public international law as well as in private law."\textsuperscript{28}

As was said by the Rumano-Turkish Mixed Arbitral Tribunal in the case of *Michel Macri* (1928):

"It is axiomatic that *force majeure*, in order to release a person from his obligation, must be of such a nature as to make it impossible for him to fulfil the obligation to which he is subject. It does not suffice that the alleged *casus fortuitus*, without preventing the fulfilment of the obligation, merely makes it more onerous."\textsuperscript{29}

It cannot be doubted that natural impossibility extinguishes any obligation.\textsuperscript{30} With regard to the duty of a State to protect aliens within its territorial jurisdiction, it has frequently been recognised that both in the prevention and in the repression of crimes, a State may be faced with natural limitations, and that the duty of the State does not extend beyond these limits.\textsuperscript{31}

The question of *vis major* has already been mentioned in connection with the Principle of Self-Preservation\textsuperscript{32} where it has been shown that jus necessitatis is recognised in international law to the extent that "if there is absolutely no conceivable manner in which a State can fulfil an international obligation without endangering its very existence, that State is justified in disregarding its obligation, in order to preserve its existence."\textsuperscript{33}

The application of the principle of *vis major* is, however, subject to two important qualifications. First, there must be a link of causality between the *vis major* and the failure to fulfil the obligation. Secondly, the alleged *vis major* must not be self-induced.

Evidence of the first qualification may be found in the cases of the *Serbian Loans* and the *Brazilian Loans* (1929). The Permanent Court of International Justice, considering that the gold clauses in the loan contracts merely referred to gold francs as a standard of value, refused to regard the obligation as dissolved merely because gold francs *in specie* were no longer obtainable.\textsuperscript{34}

In the Spanish Zone of Morocco Claims (1923), the Rapporteur, having declared that "mob violence, revolts, and wars civil or international" constitute cases of *vis major*\textsuperscript{35}

went on to inquire whether "in virtue of the theory of non-responsibility of the State for such happenings, the mere fact, that the damage suffered has certain link with happenings in the nature of a rebellion or war, allows the immediate dispensing with all investigation into the responsibility which the State may have in this regard." His answer was that:-

"Even accepting the view that the responsibility of the State immediately ceases when there is a connection between the damage suffered and a revolt, etc., it would nevertheless be impossible to exclude a limine a claim in respect of such damage; for the question of fact, i.e., the effective connection between the two, must always be examined and decided first. But there is more: the principle of non-responsibility in no way excludes the duty to exercise a certain degree of vigilance. If the State is not responsible for the revolutionary events themselves, it may nevertheless be responsible for what its authorities do or do not do to ward off the consequences, within-the limits of possibility."\textsuperscript{36}

Within the limit of possibility, therefore, the obligation subsists.\textsuperscript{37} Consequently, there must be an effective connection between the *vis major* and the consequences of the failure to fulfil the obligation. This is a point of fact, which must be proved in case of dispute.
Evidence of the second qualification that *vis major* must not be imputable to the obligated party himself may be found in the *Norwegian Claims Case* (1922), where the Permanent Court of Arbitration held that while the exercise of the power of eminent domain by the United States might be used as a defence in disputes between private citizens as a "restraint of princes," the United States could not itself invoke it as against the Kingdom of Norway in defence of a claim by Norway.  

In the *Alabama Arbitration* (1872), the British Arbitrator sustained the British contention that Great Britain found herself in what counsel termed the "political impossibility" of affording greater protection and said, for instance, in his opinion expressed during the discussion of the *Florida (Ex-Oreto)* Case:--

"The equipping of the Oreto not amounting to a violation of neutrality, but simply to a breach of the Foreign Enlistment Act; the (British) Government did not have the right to seize it by the mere exercise of the prerogative of the Crown, or by virtue of any executive power .... There was not evidence on which to seize the Oreto and to ask her condemnation under the Foreign Enlistment Act.

"It was impossible to obtain such evidence, except by the exercise of inquisitorial powers which the Government did not possess.

"Neither was the Government of Great Britain bound to ask for, nor the Parliament to grant to it, powers inconsistent with the established principles of British law and government and with the general institutions of the country."  

The Tribunal did not uphold this view and, in its award, decided that:--

"The government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."  

In the *Michel Macri* Case (1928), the Rumano-Turkish Arbitral Tribunal spoke of a "circumstance which, by itself, excludes the application of the principle of force majeure:"

"Indeed, this principle implies that the nonfulfilment of an obligation of the obligated party must, in order that he may be exonerated, proceed from an extraneous cause which cannot, therefore, be imputed to him."
kept entirely separate from it in any discussion of the subject. Responsibility based on fault, founded on the existence of an unlawful act imputable to the actor, forms an independent juridical concept and is one of the most important institutions in any legal order.\footnote{44}

\section*{CHAPTER 10 - THE PRINCIPLE OF PROXIMATE CAUSALITY}

In May, 1921, an American sent four locomotives into Mexico. Rochin, a Mexican official, wrongfully sent a telegram ordering that they should not be allowed to return to the United States. During their forced stay in Mexico, they became involved in various vicissitudes culminating in their ruin or destruction. Can their fate be regarded as the consequence of the unlawful act of the Mexican official? This was one of the questions that arose in the \textit{H. G. Venable Case} (1927), which came before the Mexican-United States General Claims Commission (1923).

"What was the damage caused by Rochin's telegram? Linked up with subsequent occurrences, his telegram may have been the cause of all the mishap of the claimant relative to the three engines which on September 3, 1921 [date of the telegram], were in good condition, and of part of the mishap with the fourth engine which had been wrecked in August . . . It is clear, however, that only those damages can be considered as losses or damages caused by Rochin which are immediate and direct results of his telegram."\footnote{42}

This case clearly shows that, in law, the term "consequences" has a technical meaning. The use of the adjectives "immediate and direct" is not, however, altogether happy. As the Portugo-German Arbitral Tribunal said in the \textit{Angola Case} (1928, 1930):-

declared that they would not take into consideration this kind of loss. This decision has been criticised, and in subsequent cases, arbitrators have quite often allowed compensation for damages that are not direct. And, indeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links. But, on the other hand, every one agrees that, even if the strict principle that direct losses alone give rise to a right to reparation is abandoned, it is none the less necessary to exclude losses unconnected with the initial act, save by an unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and which he could in no way have foreseen. Otherwise, there would be an inadmissible extension of responsibility. Thus, notwithstanding the provisions of the treaty of August 25, 1921, between the United States of America and Germany, which requires Germany to compensate losses caused to American citizens 'directly or indirectly,' the arbitrators, charged with the application of this treaty, have not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by Germany, also resulted from other and more proximate causes."\footnote{43}

The proper criterion, according to the Portugo-German Arbitral Tribunal is, therefore, not the directness of the consequences, but their foreseeable or proximate causality in relation to the wrongful act. The decisions of the German-United States Mixed Claims Commission (1922) to which this Tribunal referred are \textit{Administrative Decision No. II} (1923) and the Opinion in \textit{War Risk Insurance Premium Claims} (1923), in which the same view is brought out with much greater force. In the latter decision, the Umpire held that the arguments of counsel for the claimants were partly based on "a confusion of the legal concept of the proximate cause of a loss with that of the consequential and indirect damages flowing therefrom."\footnote{44}

In \textit{Administrative Decision No. II} (1923), the Umpire declared:-

\footnote{43}{\it consequence of that act} must have been the loss, damage, or injury suffered . . . This is but an application of the familiar rule of proximate cause -a rule of general application both in private and public law- which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law cannot consider . . .
the 'causes of causes and their impulsions one on another.' Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed.  

"The use of the term [indirect damages] to describe a particular class of claims is inapt, inaccurate and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote.' The distinction is important."  

It is only true to say that in the majority of cases, in which the epithets "direct" and "indirect" are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with "proximate" and "remote".

The decisions of the Portugo-German Arbitral Tribunal (1919) and the German-United States Mixed Claims Commission (1922) categorically show, however, that "indirect damage" -in the strict sense of the term-cannot as a group be excluded from reparation. Moreover, they show that it is "a rule of general application both in private and public law," equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation. In order that a loss may be regarded as the consequence of an act for purposes of reparation, either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss.

Hence the maxim: *In jure causa proxima non remota inspicitur*. Even in cases of "assumed responsibility," with which the German-United States Mixed Claims Commission (1922) was concerned, derogation from this principle is not to be presumed.

In an age when the very principle of causation has been challenged by philosophers, it would seem that the Umpire of the German-United States Mixed Claims Commission (1922) purposely used the phrase "in legal contemplation" when invoking the principle of proximate causality. This principle is a legal nexus of cause and effect and it is necessary to elucidate what is the proper criterion for determining proximate causality in legal contemplation.

It is possible to discern in international judicial decisions the use of two criteria to determine proximate causality, the one objective the other subjective.

The objective criterion, i.e., that the consequences should be normal, seems to be the criterion favoured by the German-United States Mixed Claims Commission (1922). In its decision in the *Life Insurance Claims* (1924), the Commission had to deal with claims of life insurance companies for losses suffered by them through the accelerated maturity of their policies resulting from premature deaths caused by acts of Germany. Speaking of the rules which should govern reparation for injuries causing death, the Commission first recalled the rule of proximate causality which it had laid down in *Administrative Decision No. II* (1923) and then said:-

countries have long recognised losses of this character as proximate results of injuries causing death . . . .

"But the claims for losses here asserted on behalf of life insurance companies rest on an entirely different basis. Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* [italics of the Commission] so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in *legal contemplation remote -not in time- but in natural and normal sequence . . . In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence o f Germany's act in taking the lives, and hence not attributable to that act as a proximate
The contrast in which the German-United States Mixed Claims Commission (1922) placed these two types of consequence brings out with great clarity what the Commission meant by proximate cause in legal contemplation. If a loss is a normal consequence of an act, it is attributable to the act as a proximate cause. If a loss is not the normal and natural consequence of an act, it is not attributable to the act as a proximate cause. As to what constitutes a normal and natural consequence of an act,

an arbitrator or judge may seek guidance and authority from "usages, customs and laws of civilised countries."

Arbitrators or judges may, however, also have recourse to science for determining the normal and natural consequences of a given act. In the Maninat Case (1905), which came before the Franco-Venezuelan Mixed Claims Commission (1902), and arose out of the unlawful infliction of a machete wound, the Umpire said:-

"When it comes to the actual trial of actions for personal injuries, there are two difficult questions, to the solution of which the testimony of the medical expert may be directed. One of these is how far the defendant's negligence is responsible for some subsequently developed infirmity or disease or, in other words, how far a given injury may be said to be the natural and proximate cause of a subsequently developed condition and therefore render the defendant liable for that condition."

Quoting medico-legal authority, the Umpire said:-

"The general rule is easily stated, to wit: if the subsequent disease or infirmity is one which would occur as the natural result of the injury, and it is not shown that any other independent cause existed of which it might have been the result, then the author of the original injury is liable for the subsequent disease or infirmity."

The Umpire, having found on medical evidence that the subsequent death was due to traumatic tetanus, and that the latter was due to the trauma inflicted by the machete, concluded:-

"Since his death resulted through a line of natural sequences from a wound inflicted under the circumstances named, the responsibility of the respondent government is the same as though death had been the immediate result of the machete stroke."

The objective criterion of normality or naturalness of the consequence may be applied not only to damnum emergens but also to lucrum cessans. In the case of The Cape Horn Pigeon (1902), the sole Arbitrator held that:-

"The general principle of civil law, according to which damages ought not only to include compensation for injuries suffered, but also for loss of profit, is equally applicable in international disputes . . . In order that it may be applied, it is not necessary for the amount of the lucrum cessans to be calculable with certainty. It is sufficient to show that the act complained of has prevented the making of a profit which would have been possible in the ordinary course of events (dans l'ordre naturel des choses)."

The principle of proximate causality has indeed sometimes been stated simply as that of normal consequence. Thus in the Antippa (The Spyros) Case (1926), the Greco-German Mixed Arbitral Tribunal said:-

"According to principles recognised both by municipal and by international law, the indemnity due from one who
has caused injury to another comprises all loss which may be considered as the *normal consequence* of the act causing the damage."\(^{16}\)

In addition to this objective criterion based on the normality of the consequences, it is possible to discern the use of a subjective criterion in international judicial decisions - namely, that of foreseeability and intention.

The criterion of foreseeability was applied by Sir Cecil Hurst (then Mr. C. J. B. Hurst) and Mr. R. Newton Crane, British and American Commissioners respectively, in their "Joint Report No. II of August 12, 1904," in connection with the *Samoa Claims Award* (1902). In this Report, they submitted what they considered to be the proper method for computing the damages payable to German nationals as a result of the military II activities of Great Britain and the United States at Samoa in 1899, following the Arbitral Award\(^{17}\) rendered by King Oscar II 4 in 1902 in favour of Germany. As regards remote damages, the Commissioners said:

"4. (vi). On this question of the damages in cases such as the foregoing being too remote, it may be useful if we; state the principles, which, in our opinion should be followed.

"There is, it is true, a striking absence of international precedent or authority that we can appeal to, but in the continual litigation in the courts of our respective countries rules have gradually been established as to the damages that can or cannot be recovered in cases of wrongdoing. We have no ground for thinking that the rules obtaining in foreign countries are different, nor does there seem to be any reason why as between nations liability for wrongdoing should not be assessed in accordance with the rules observed in municipal courts, and which are found to work substantial justice as between all parties.

"We may go further and affirm that so far as the records of International Commissions dealing with claims of a similar character to those under consideration are accessible, they indicate that these principles have been followed in such tribunals.

caused by his action, and cannot be attributed to any other cause, and which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to ensue from his action."\(^{18}\)

While it may be true that the criterion of foreseeability by a reasonable man may be just as objective a test as that of normality, it can hardly be denied that in allowing the judge to determine the relation of cause and effect from the point of view of the wrongdoer at the time and not of a judge investigating the facts after the event, there is a great concession to the subjective elements involved. Moreover we may venture to submit that this criterion comes closer to the *ratio legis* of the principle of proximate causality. Coupled with the principle of fault, it would render a person responsible for all foreseeable and, *a fortiori*, all intended consequences of any of his voluntary acts which are unlawful. That this subjective element of foreseeability and intention is the ratio of the principle seemed to be the view of the Portugo-

German Arbitral Tribunal in the *Angola Case* (1928, 1930). It may be recalled that this Tribunal made the following statement in its first award:-

"And, indeed, it would not be equitable to let the injured party bear *those losses which the author of the initial illegal act has foreseen and perhaps even intended*, for the sole reason that, in the chain of causation, there are some intermediate links. But, on the other hand, every one agrees that, even if the strict principle that direct losses alone give rise to a right to reparation is abandoned, it is none the less necessary to exclude losses unconnected with the initial act, save by an unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and *which he could in no way have foreseen.*\(^{19}\)

While the foreseeability of its consequence by the doer of an act may be regarded as one of the *rationalia* of responsibility, the standard which the law in fact applies is perforce much more objective. The proximate consequences of an act are not necessarily those which its author actually foresaw, but need
only be those which the judges consider he could and should have foreseen. In practice, therefore, it is still the standard of the reasonable man. In the Angola Case, speaking of the causal connection between the unjustified German incursions into Angola and the subsequent native uprising, the Tribunal, after mentioning the responsibility of Portugal for its extension, said:-

"It is certain, however, that the German aggression was, in itself, capable of causing trouble among the native population, that it was in the natural order of things that the blacks, subdued only so few years previously, would avail themselves of the opportunity to revolt. No doubt, the Germans could not have foreseen the spreading of this revolt by reason of the special circumstances which have just been mentioned, but they should have reckoned with the serious effects which their military action, in a country only recently pacified, would have had on the authority of Portugal."

In its Award II (1930), the Tribunal said:-

"This uprising, considered as a harmful act, thus constitutes . . . an injury which the author of the initial act, namely, the German command, should have foreseen as a necessary consequence of its military operations."

For these consequences which should have been foreseen, Germany was held responsible.

By thus introducing what may be called a minimum standard of foreseeability, in the nature of an irrebuttable presumption, the two criteria, objective and subjective, are in practice merged.

While, however, the objective criterion of normality and the subjective criterion of reasonable foreseeability generally coincide in the determination of proximate causality, the subjective criterion alone applies in the case of exceptional consequences intended by the author of the act. If intended by the author, such consequences are regarded as consequences of the act for which reparation has to be made, irrespective of whether such consequences are normal, or reasonably foreseeable.

In the Frances Irene Roberts Case (C. 1903), which concerned an unjustifiable and inexcusable attack upon an American citizen and his family, the United States-Venezuelan Mixed Claims Commission (1903) decided that:-

"The act was committed by duly constituted military authorities of the Government. It was never, so far as the evidence shows, disavowed or the guilty parties punished. Under these circumstances well established rules of international law fix a liability beyond that of compensation for the direct losses sustained. Other consequences are presumed to have been in the contemplation of the parties committing the wrongful acts and in that of the Government whose agents they were. The derangement of Mr. Quirk's plans, the interference with his favourable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained. To the amount hereintofore designated is added, in view of the considerations above mentioned, the sum of $5,000."

The same Commission in the Dix Case, in laying down the principle of proximate causality, made an express reservation with regard to consequences intended 'by the wrongdoer:-

"Governments, like individuals, are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."
In conclusion, it may be said that the principle of integral reparation in responsibility has to be understood in conjunction with that of proximate or effective causality which is valid both in municipal and international law. By virtue of the latter principle, the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all intended damages.

CIRCUMSTANTIAL EVIDENCE

In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence. In the *Corfu Channel Case* (Merits) (1949), before the International Court of Justice, Judge Azevedo said in his dissenting opinion:

"A condemnation, even to the death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses.

"It would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risks of occasional errors, a court of justice must be content." [92]

This part of his opinion is in agreement with the majority decision, which, in admitting proof by inferences of fact (presumptions de fait) or circumstantial evidence, held that:

"This "indirect evidence is admitted in all systems of law, and its use is recognised by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion . . . The proof may be drawn from inferences of fact (presumptions de fait), provided that they leave no room for reasonable doubt." [93]

PRIMA FACIE EVIDENCE

Sometimes, in view of its particular nature, conclusive proof of a certain fact is impossible. With regard to the nationality of claimants, for instance, the British-Mexican Claims Commission (1926) held:-

"It would be impossible for any international commission to obtain evidence of nationality amounting to certitude unless a man's life outside the State to which he belongs is to be traced from day to day. Such conclusive proof is impossible and would be nothing less than probatio diabolica. All that an international commission can reasonably require in the way of proof of nationality is prima facie evidence sufficient to satisfy the Commissioners and to raise the presumption of nationality, leaving it open to the respondent State to rebut the presumption by producing evidence to show that the claimant has lost his nationality through his own act or some other cause." [94]

In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e., prima facie evidence.

"Prima facie evidence has been defined as evidence which unexplained or uncontradicted, is sufficient to maintain the proposition affirmed." [95]

It does not create a moral certainty as to the truth of the allegation, but provides sufficient ground for a reasonable belief in its truth, rebuttable by evidence to the contrary. [96] The absence of evidence in rebuttal is an essential consideration in
the admission of prima facie evidence. Where the opposite party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence before the Commission. As the American Commissioner said in the Naomi Russell Case (1931), when referring to those common-sense principles underlying "the rules of evidence in domestic law:-

"It [the Commission] can analyse evidence in the light of what one party has the power to produce and the other party has the power to explain or contravert. And in appropriate cases it can draw reasonable inferences from the non-production of evidence."  

Again, in the Kling Case (1930), the Mexican-United States General Claims Commission (1923) said:-

be drawn from the non-production of available evidence in the possession of the former. See also the Melczer Mining Co. Case, ibid., pp. 228, 233. The Commission has discussed the conditions under which, when a claimant government has made a prima facie case, account may be taken of the non-production of evidence by the respondent government, or of unsatisfactory explanation of the non-production of evidence. Case of L. J. Kalklosch, ibid., p. 126. [In this case, the Commission said: 'In the absence of official records the non-production of which has not been satisfactorily explained, records contradicting evidence accompanying the Memorial respecting wrongful treatment of the claimant, the Commission can not properly reject that evidence' (p. 1-30)].

Whilst it is true, as the German Commissioner observed in the Lehigh Valley Railroad Co. Case (1936) that:-

"Mere suspicions never can be a basic element of juridical findings," 

where counter-proof can easily be produced but its non-production is not satisfactorily explained,

"It may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto."

The inference in every case must, however, be one which can reasonably be drawn. The situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation. This was regarded as a general principle of law by the American Commissioner who said in his concurring opinion in the Daniel Dillon Case (1928):-

of information exclusively in the possession of another party, and this well-known principle of domestic law is one which it seems to me an international tribunal is justified in giving application in a proper case."

An attempt has been made above to elicit some of the "common-sense principles underlying rules of evidence" as they have been applied by international tribunals. It is quite natural, if not inevitable, that these principles should be the same in different legal systems, since, in the final analysis, they merely represent the concrete embodiment of the long experience of judges in seeking to ascertain the truth. To sum up, the words of the British Commissioner in the Mexico City Bombardment Claims (1930) may be quoted:-

"If, after giving due weight to all these considerations, it [the Commission] feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established."

_In dubio pro reo._

__BURDEN OF PROOF__
We may now turn to the question of burden of proof and inquire whether international tribunals admit the existence of any general principles of law governing its incidence.

In this connection, the *Parker Case* (1926), decided by the Mexican-United States General Claims Commission (1923), needs to be carefully examined; for the language used by the Commission in that case has sometimes given rise to the impression that, contrary to the view generally accepted by international tribunals, it gave a negative answer to the question.\(^8\)

In the first place, the Commission held as follows:-

"The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law," or "the general theory of law," and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with a view of discovering the whole truth with respect to each claim submitted . . . . As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure."\(^9\)

It may, however, be pointed out that, with regard to principles of adjective law in general, the reference in the decision to "universal principles of law," or "the general theory of law," and the "like," relates only to the misuse of these terms to cover municipal restrictive rules of adjective law or of evidence" and in no way excludes a priori the existence of true general principles of adjective law applicable to all legal systems; for the same Commission clearly recognised that "with respect to matters of evidence they [international tribunals] must give effect to common-sense principles underlying rules of evidence in domestic law."\(^10\)

With regard to the incidence of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings. In *The Queen Case* (1872), for instance, it was held that:-

"One must follow, as a general rule of solution, the principle of jurisprudence, accepted by the law of all countries, that it is for the claimant to make the proof of his claim."\(^11\)

It may, therefore, be asked whether the Mexican-United States General Claims Commission (19'3) really maintained that the maxim *onus probandi actori incumbit* did not express a general principle of law or that in any event it was not applicable to international judicial proceedings, thus contradicting *The Queen Case* (1872). The answer would appear to be in the negative. It would seem that the Commission did not use the term "burden of proof" in its usual sense. Thus after saying that "as an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure," the Commission continued:-

"On the contrary, it holds that it is the duty of the respective Agencies to co-operate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented."\(^12\)

From the context of this passage, it is clear that the Commission used the term "burden of proof" in the sense of a duty to produce evidence, and to disclose the facts of the case. But the term is used in a different sense when it is asked on whom the burden of proof falls, or when it is said that the burden of proof rests upon this or the other party.

To illustrate the distinction between these two meanings of the term, the *Taft Case* (1926), decided by the German-United States Mixed Claims Commission (1922) may be mentioned. In this case, the claimants alleged that their ship the *Avon* had been sunk by a German submarine. On behalf of the claimants, "all available evidence tending however remotely to establish the loss of the *Avon* through an act of war has been diligently assembled and presented by able counsel," while on behalf of
the defendant, "a full disclosure has been made to the Commission by the German Agent" of the activities of German submarines operating at the material time in the vicinity of the Avon's projected course. In his conclusion the Umpire held, however, that:-

"Weighing the evidence as a whole . . . , the claimants have failed to discharge the burden resting upon them to prove that the Avon was lost through an act of war."13

Thus although both parties had scrupulously observed the duty of disclosing all material facts relative to the merits of the claim, it was held that the claimants had failed to discharge their burden of proof. Burden of proof, however closely related to the duty to produce evidence, therefore implies something more.14 It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.

The real intention of the Mexican-United States General Claims Commission (1923) may be gathered from what it went on to say, after the above quoted passage:-

failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision."15

This, then, is not so much a denial of the validity of the maxim onus probandi actori incumbit as a general principle of law, but rather a statement that in proper cases the Commission might be satisfied with prima facie evidence whenever the allegations, if unfounded, could be easily disproved by the opposing Party. Strictly speaking, however, this is a question of the quantum of evidence required to sustain an allegation or a claim, and not of the burden of proof.

That the Commission in the Parker Case (1926) was not speaking of burden of proof, and that in practice it admitted the validity of the general principle onus probandi actori incumbit may also be gathered from its decision in the Pomeroy's El Paso Transfer Co. Case (1930). In this case, although the deciding Commissioner was of the opinion that:-

"The Mexican Agency has not fully complied, in regard to evidence, with the duties imposed upon it by this arbitration as defined by the Commission in paragraphs 6, 6, 7 of its decision in the case of William A. Parker,‖16

he disallowed the claim because:-

"In this case it appears that the evidence submitted by the claimant government is not sufficient to establish a prima facie case."17

Indeed, the Commission on several occasions held that:-

"The mere fact that evidence produced by the respondent, government is meagre, cannot in itself justify an award in the absence of concrete and convincing evidence produced by the. claimant government."18

This is all that is meant by the general principle of law that the burden of proof is upon the claimant.

Thus, in spite of appearance to the contrary, the Parker Case (1926), when properly understood, does not deny the validity and applicability of the general principle onus probandi actori incumbit in international judicial proceedings. In the first place, when the Tribunal denied the existence of any general legal principles governing the incidence of the burden of proof, it was not using the term in its commonly accepted meaning. Moreover, the Tribunal in practice applied the principle onus probandi actori incumbit.

Another point raised by the Parker Case (1926) may also be mentioned. The Commission said:-
“The absence of international rules relative to a division of the burden of proof between the parties is especially
obvious in international arbitrations between governments in their own right, as in those cases the distinction
between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the
same time.”

To this the Chevreau Case (1931) provides a ready answer. The case which was between France and Great Britain
concerned alleged unlawful arrest and improper treatment of a French national.

It only shows that there can also be a duty to prove the existence of facts alleged in order to deny responsibility.

Thus, despite the fact that there was no procedural distinction between the plaintiff and defendant, the burden of proof
was laid upon France, who was the claimant in fact.

That, in any given case, it is possible to determine the effective positions of the parties without reference to questions of
procedure is shown by the Corfu Channel Case (Jurisdiction) (1948), where, without considering the form in which the
case was submitted; the International Court of Justice held that:-

“There is in fact a claimant, the United Kingdom, and a defendant, Albania.”

The Corfu Channel Case was first brought before the Court by a unilateral application of the United Kingdom (May 22,
1947). When the Albanian Preliminary Objection to the Court's jurisdiction was rejected by the Court on March 25, 1948,
the two parties notified the Court on the same day of the conclusion of a Special Agreement. That Special Agreement
formed the basis of subsequent proceedings before the Court in that case. But the respective positions of the parties as
regards burden of proof was not thereby altered. As far as the British claim was concerned, the burden of proof was
undoubtedly laid upon the United Kingdom. The Court expressly held that the mere fact that an act contrary to
international law had occurred in Albanian territory did not shift the burden of proof to Albania.

Indeed, it may be said that the term actor in the principle onus probandi actori incumbit is not to be taken to mean the
plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. The ultimate distinction
between the claimant and the defendant lies in the fact that the claimant's submission requires to be substantiated, whilst
that of the defendant does not.

It may in fact happen that the claimant is procedurally the defendant, as in the United States Nationals in Morocco Case
(1952), between France and the United States. In that case, the United States was in fact in the position of a claimant,
in that it claimed special rights and privileges inn the French Zone of Morocco and alleged that certain acts of the
Moroccan authorities were contrary to such rights and privileges. France, in denying the existence of these rights and
privileges and maintaining the legality of the acts of the Moroccan authorities, was in fact. in the position of a defendant;
for she could rely on the principle that neither restridtions on sovereignty nor international responsibility are to be
presumed.

For political reasons, however, the French Government, in order to bring the dispute before the Court, took the initiative
and applied to the International Court of Justice under the Optional Clause, thus abandoning, as it said in its Memorial,
its logical position as defendant and placing itself, from the procedural standpoint, in the position of a plaintiff. Thereupon,
the United States claimed that the burden of proof lay upon France because the latter had assumed the position of
plaintiff, and because of "the nature of the legal issues involved."

This, however, was not the view taken by the Court. What the Court in fact did in its judgment was to examine each of the
United States claims, and rejected them to the extent to which they were not supported by treaties which the United
States . was entitled to invoke against Morocco. The United States also adduced “custom and usage” as a basis for
some of its alleged special rights and privileges. The Court here specifically laid the burden of proof upon the United
States and rejected the allegation for want of sufficient evidence of such a custom binding upon Morocco. In the
operative part of the judgment, the Court referred to only one of the Submissions of the French Government. But, even in
this case, its rejection of the French Submission that the Decree of December 30, 1948, issued by the French Resident
General in Morocco, was lawful, was in fact only a favourable decision on the United States Submission that the Decree
violated the treaty rights of the

United States derived from the Act of Algeciras of 1906 and its treaty of 1836 with Morocco. Thus, notwithstanding ist
procedural position of respondent, the burden of proof was laid upon the United States, the claimant in fact.

There may, however, be cases where there is genuinely no distinction between claimant and defendant. Thus in the case
of a territorial dispute, both parties put forward rival claims. It will then be incumbent upon each party to substantiate its
contention. In the Palmas Case (1928), the Arbitrator held that:-

"Each party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over
the object in dispute."

This is not, however, an exception to the general principle that the burden of proof falls upon the claimant, but is due to
the fact that both parties are, in the position of claimants before the tribunal.

Taking into consideration that the actor, whether termed claimant or plaintiff, is to be determined according to the issues
involved rather than the incidents of procedure, what has been said above shows that there is in substance no
disagreement among international tribunals on the general legal principle that the burden of proof falls upon the claimant,
i.e., "the plaintiff must prove his contention under penalty of having his case refused." Actore non probante reus
absolvitur.

The burden of proof so far discussed relates to the proof of the factual basis of the claim as a whole, although in a single
action, there may be several claims, as well as counter-claims. This may be called the ultimate burden of proof. The term
burden of proof may, however, also be used in a more restricted sense as referring to the proof of individual allegations
advanced by the parties in the course of proceedings. This burden of proof may be called procedural. As has been seen
at the beginning of the present Chapter, in this sense of the term, the burden of proof rests upon the party alleging the
fact, unless the truth of the fact is within judicial knowledge or is presumed by the

Tribunal. In the absence of convincing evidence, the Tribunal will disregard the allegation.

In conclusion, it may be said that the aim of a judicial inquiry is to establish the truth of a case, to which the law may then
be applied. While the greatest latitude is enjoyed by international tribunals in the carrying out of their task, their activity is
nevertheless governed by certain general principles of law based on common sense and developed through human
experience. These principles create certain initial presumptions, guide the weighing of evidence and determine the
incidence of the burden of proof.

CHAPTER 17 - THE PRINCIPLES OF RES JUDICATA

Speaking of the principle of res judicata, Judge Anzilotti stated in his dissenting opinion in the Chorzów Factory Case
(Interpretation) (1927):-

"It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions
and custom, to 'the general principle of law recognised by civilised nations,' mentioned in No. 3 of Article 38 of
the Statute, that case is assuredly the present one. Not without reason was the binding effect of res judicata
expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of
a Permanent Court of International Justice, amongst the principles included in the above-mentioned article
(Minutes, p. 335)."
There seems little, if indeed any question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings. Thus the Trial Smelter Arbitral Tribunal (1935) stated in its Final Award (1941):-

"That the sanctity of res judicata attaches to a final decision of an international tribunal is an essential and settled rule of international law.
"If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end."md

A. Meaning

As to the meaning of res judicata, the Permanent Court of International Justice held in the Société commerciale de Belgique Case (1939), that:-

"Recognition of an award as res judicata means nothing else than recognition of the fact that the terms of that award are definitive and obligatory."md

Res judicata, therefore has two effects. First, that which is res judicata is definitive. Once a case has been decided by a valid and final judgment, the same issue may not be disputed again between the same parties, so long as that judgment stands.

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed, etc.,"md "the essence of the final judgment being, as it has been expressed 'to close the mouth on the one side and the ear on the other.'"

This negative effect of res judicata has long been expressed in the maxim: Non bis in idem or Bis de eadem re non sit actio.m7

It only attaches, however, to a final judgment of a competent tribunal. Where a tribunal has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the same issue from being presented before another tribunal which may be competent.m8

Secondly, res judicata, that is to say, what has been finally decided by a tribunal, is binding upon the parties. As Article 37 II of the Hague Convention for the Pacific Settlement of International Disputes, 1907, provides:-

"Recourse to arbitration implies an engagement to submit in good faith to the award."

The binding effect of the award is thus inherent in the very institution of arbitration or judicial settlement.m9 Furthermore, as the Permanent Court of International Justice held in the Société Commerciale de Belgique Case (1929), between Belgium and Greece:-

"If the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do as they stand."m10

The obligation to carry out a judgment possessing the force of res judicata follows logically from the definitive and obligatory character of the judgment, and the party bound by it cannot seek to subordinate its execution to conditions not
admitted in the judgment. Indeed, in the very first case which came before the Permanent Court, it was decided that the Court neither could nor should contemplate the possibility of its judgments not being complied with. In the case of a judgment declaring an act to be unlawful, this decision entails an obligation on the State which has committed the act to put an end to the illegal situation created thereby. The positive effect of res judicata imposing an obligation on the parties to carry out the judgment is not, however, impaired, if the obligation is prevented from being performed through force majeure, nor does it preclude the possibility of arrangements between the parties concerned modifying by common consent the obligation imposed by the judgment, as, for instance, by taking into account the debtor's capacity to pay.

CHAPTER 18 - EXTINCTIVE PRESCRIPTION

The principle of extinctive prescription has been defined as follows:—

"When a right of action becomes extinguished because the person entitled thereto neglects to exercise it after a period of time, this extinction of the right is called prescription of action."

In the Sarropoulos Case (1929), perhaps not unmindful of a decision reached the previous year by a majority vote of the League of Nations Committee of Experts for the Progressive Codification of International Law, the Greco-Bulgarian Mixed Arbitral Tribunal, while conceding that "positive international law has not so far established any precise and generally accepted rule either as to the principle or to the duration of prescription," nevertheless held that "prescription, an integral and necessary part of every system of law, is deserving of recognition in international law."

Other international tribunals have been more categorical, and the United States-Venezuelan Mixed Claims Commission (1885) described prescription as "an universally recognised principle," "equally obligatory upon every tribunal seeking to administer justice."

The Pious Fund Case (1902), between the United States and Mexico decided by the Permanent; Court of Arbitration, has sometimes been relied upon as showing that the principle of prescription is not recognised in international law. This was done, for instance, by Italy in the Gentini Case before the Italo-Venezuelan Mixed Claims Commission (1903). Jackson H. Ralston, Umpire of the Commission -formerly Agent of the United States in the Pious Fund Case- took occasion to point out that what the United States contended and what the Permanent Court, of Arbitration upheld in that case was that the claim of the United States before an international tribunal could not be defeated by Mexican statutes of limitation, such municipal statutes having no authority whatsoever over international courts. The Umpire went on to say that "the Permanent Court of Arbitration has never denied the principle of prescription, a principle well recognised in international law, and it is fair to believe that it will never do so.

Even here it should be added that, although, as also held in the Spader Case, "it is doubtless true that municipal statutes of limitation can not operate to bar an international claim," based exclusively on international law, this should not be taken to exclude their application to an international claim where certain aspects of the case are properly governed by municipal law.

The controversy surrounding the application of the principle of prescription in international law has involved international tribunals in extended discussion explaining the rationale of prescription as a principle of law recognised by all nations and why, as such, it should be received into, or rather must "by very necessity" form part of, the international legal order.
The following quotation from the opinion of Commissioner Little in the Williams Case, for instance, is not only instructive as to the principle of prescription, but also as to the use of general principles of law in international law. Speaking for the United States-Venezuelan Claims Commission (1885), the learned Commissioner said:-

"The opposition (perhaps as strenuous now as at any former period) to international prescription among modern writers. seems to us to arise in good measure from confusion of terms, and to be therefore largely apparent, rather than real. In other words, the difference between the two schools, as we conceive, partly at least, "lies in the terms. Prescription is confounded with limitation .... They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case, while the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in. the same one, and admits occasional individual injustice . . . . Prescription was recognised when limitation was yet unknown. Bracton knew of it at common law before the English statutes on the subject. Courts of equity, where limitation acts do not apply, have invariably given lapse of time due weight in adjudications. They have always refused to enforce stale demands without undertaking to fix precise times for imparting the infirmity. Each case is left, under general principles, to be adjudged, as to time, according to its own character and circumstances. And the doctrine has been applied to the State acting for its citizens . . . . It is this prescription which underlies, varies from, antedates and, as Phillimore says, forms the model for municipal limitation regulations that the writers asserting the existence of the doctrine in the international law refer to and treat of."[11]

Prescription is, therefore, the principle underlying municipal rules of limitation. It is always necessary to distinguish, as did the Umpire in the Gentini Case, between principles and rules, even though the distinction is only a relative one. The Umpire adopted the following distinction:-

A 'rule' . . . 'is essentially practical and, moreover, binding . . .; there are rules of art as there are rules of government' while principle 'expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.'[12]

Since principles express general truth, general principles of law express general juridical truth. They form the theoretical bases of positive rules of law. The latter are the practical formulation of the principles and, for reasons of -expediency, may vary and depart, to a greater or lesser extent, from the principle from which they spring.[13] The application of the principle to the infinitely varying circumstances of practical life aims at bringing about substantive justice in every case; the application of rules, however, results only in justice according to law, with the inescapable risk that in individual cases there may be a departure from subjective justice.[14]

Since the general principles of law form the basis of positive rules of law, in seeking these principles, there is no inherent reason why they cannot be found by a process of induction from the positive law of any single system, and indeed this always appears to be the inevitable starting point.[15] But the comparative method of studying the legal systems of different nations is no doubt a valuable and even conclusive test whether a given principle represents a general juridical truth and not what has been derisively called the "plaisante justice qu'une rivière borné!"[16]

Nevertheless, whether they are sought in one legal system, or in different legal systems, they cannot be found by stopping short at mere positive rules. It is necessary to go further and fathom their underlying theoretical basis. In other words, the ratio legis must be sought. An explicit example of this process may be found in the following quotation from the Gentini Case, concerning the principle of prescription:-

"On examining the general subject we find that by all nations and from the earliest period it has been considered that as between individuals an end to disputes should be brought about by the efflux of time. Early in the history of the Roman law this feeling received fixity by legislative sanction, In every country have periods been limited beyond which actions could not be brought. In the opinion of the writer these laws of universal application, were not the arbitrary acts of power, but instituted because of the necessities of mankind, and were the outgrowth of a general feeling that equity demanded their enactment; for very early it was perceived that with the lapse of time the defendant, through death of witnesses and destruction of vouchers, became less able to meet demands against him, and the danger of consequent injustice increased, while no hardships were imposed upon the
claimant in requiring him within a reasonable time to institute his suit. In addition, another view found its expression with relation to the matter in the maxim 'Interest republica ut sit finis litium.'

"As appears to the writer, all the arguments in favour of it as between individuals exist equally as well when the case of a national is taken up by his government against another, subject to considerations and exceptions noted at the end of this opinion. For may not a government equally with an individual lose its vouchers, particularly when, if any exist, they are in the hands of far distant subordinate agents? . . . May the claimant against the government, with more justice than if he claimed against his neighbour, virtually conceal his supposed cause of action till its investigation becomes impossible. Does equity permit it?"

The process applied in the Gentini Case of tracing a general principle from rules of positive law universally applied in foro domestico through the general feeling of mankind for the requirements of equity and to equity itself, is a striking reminder of Descamps' proposal for the application in international law of "objective justice" or "equity" as evidenced by the "conscience juridique des peuples civilisés" and confirms the belief drawn from the travaux préparatoires of the Statute of the Permanent Court of International Justice that this proposal is not very different from the ultimately adopted formula of "the general principles of law recognised by civilised nations" in Article 38 I (c) of the Court's Statute.

In the opinion of the Umpire in the Gentini Case, prescription is a principle founded on equity and aimed at the attainment of justice. It has grown out of the necessities of mankind and has been sanctioned by the general juridical feeling of all nations since the earliest times. It may be said that these are the considerations which properly impart to the principle its character of universal validity. The ensemble of circumstances justifying the principle constitutes its raison d'être and, whenever these circumstances are present, the principle applies. Ubi eadem ratio, ibi idem jus. And, as the same Umpire said in a subsequent case:-

"When the reason for the rule of prescription ceases, the rule ceases,"

thus applying the well-known maxim: cessante ratione legis cessat lex.

Before amplifying what the Umpire in the Gentini Case held to be the ratio of prescription, it may be pointed out that the application of the principle in international law may be excluded by express treaty provision as in The Macedonian Case (1863). But in the absence of such positive rules the principle is applicable wherever those circumstances calling for its application, exist.

A review of the various international decisions dealing with the subject will show that the raison d'être of prescription may be found in the concurrence of two circumstances:-

1. Delay in the presentation of a claim; 2. Imputability of the delay to the negligence of the claimant.

[...]

2 Germany, Great Britain, Italy/Venezuela et al., 1 H.C.R., p. 55, at p. 60.
3 Award (1937) 3 UNRIA, p. 1719, at p. 1751. (Transl.).
7 Jay Treaty (Art. VII) Arbitration (1794): The Betsey (1797) 4 Int.Adj., M.S., p.179, at p. 239. In rejecting the British contentions, Commissioner Gore held inter alia that they " raise objections which render the provisions of the article [constituting the Commission] illusory - a consequence not to be admitted in the most trifling contract, if by any way it can be avoided; still more admissible in a solemn bargain between two wise and respectable nations."
of the history of the negotiations leading to Art. IX of the Treaty of Ghent that the "article was only a 'nominal' provision, not intended to have any application," "that the promise has no meaning but was . . . a provision inserted to save the face of the negotiators." The Tribunal refused to subscribe to such an interpretation, and relied on the provision for the decision of the case.


5. PCIJ: Meuse Case (1937), Neth./Belg., D.O. by Anziliotti. He would not enforce what "would be going beyond the reasonable intentions of the Parties " (A/B. 70, p. 47).


7. PCIJ: The Wimbledon (1923) D.O. by Anziliotti and Huber, A. 1, p. 36: "It must not be presumed that the intention was to express an idea which leads to contradictory or impossible consequences or which, in the circumstances, must be regarded as going beyond the intention of the parties. The purely grammatical interpretation of every contract, and more especially of international treaties, must stop at this point."


10. P.C.A.: North Atlantic Coast Fisheries Case (1910) 1 H.C.R., p. 141, at p. 181. "Now, considering that the Treaty used the general term 'bays' without qualification, the tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions prevailing, unless the U.S. can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds ". See also ibid., pp. 184, 187.


13. Ibid., at pp. 60-1.

14. Rum.-Germ. Arb. (1919) : David Goldberg & Sons Case (1928) 2 UNRIAa, p. 901, at p. 907. The question was raised whether § 4 of the annex to Arts. 297 and 298 of the Treaty of Versailles in obliging Germany to make reparation for "acts committed " meant only unlawful acts or any act done by Germany. Held: "The provision in question imposes an obligation on Germany. According to the rule constantly followed by the Rumano-German M.A.T., provisions of this kind should not be extended, by way of interpretation, beyond the meaning which Germany could reasonably have attributed to the text submitted for her acceptance. An ambiguous provision is, in principle, interpreted against the party which has drafted it " (Transl.). PCIJ : Brazilian Loans Case (1929) A.20/21" p. 114: "There is a familiar rule for the construction of instruments that, where they are found to be ambiguous, they should be taken contra proferentem. In this case, as the Brazilian Government by its representative assumed responsibility for the prospectus, which this representative, who had signed the bonds, had 'seen and approved,' it would seem to be proper to construe them in case of doubt contra proferentem and as to give them the meaning which they would naturally carry to those taking the bonds under the prospectus." Cf. Abu Dhabi Oil Arbitration (1951) 1 I.C.L.Q. (1952), p. 247, at p. 251.


35. See e.g., Grotius, De Jure Pacis et Belli, III, xix-xxv ; Bynkershoek, Quaestionum Juris Publici, II, x: "Pacta principum bona fides "; Vattel, Le droit des gens, II, xv, § 220.


39. See infra, pp. 118-119.

40. PCIJ: Chorzów Factory Case (Merits) (1928) A. 17, p. 29.

41. Ibid. 
PCIJ: Oscar Chinn Case (1934), D. O. by Sir Cecil Hurst, A/B. 63, p. 119: "If a State is subject to engagement to do or not to do a certain thing, there cannot be read into it a provision that for short periods there shall be liberty to violate the engagement."

Peruv.-U.S. Cl.Com. (1863): Sartori Case, 3 Int.Arbr., p. 3120, at p. 3123: "On the principle that reparation ought to be made in cases where responsibility is incurred, however small it may be, for non-compliance with the treaty, in order that each Government may place entire confidence in the good faith of the other, it seems to me that an equitable and reasonable indemnity ought to be granted to Mr. Sartori."

U.N. Charter, Art. 2 (2).

 PCIJ: Oscar Chinn Case (1934) A/B. 63, p. 86. The claim was dismissed because "The circumstances in which the impugned measures were taken are such as to preclude any idea that the Belgian Government intended by indirect
means to escape the obligations incumbent on it." See also PCIJ: Free Zones Case (Jgt.) (1932) A/B. 46, pp. 167 et seq. 56

57 See infra, pp. 123 et seq.


59 Cf. Tacna-Arica Arbitration (1925) 2 UNRIAA, p. 921, at p. 930. See also passim, for the repeated emphasis on the
requirement of good faith in executing the obligations resulting from a pactum de contrahendo.


61 See P.C.A.: Timor Case (1914) 1 H.C.R. p. 354, Pt. VI, No. 4; Pt. VII, No. 7 of Award. PCIJ: European Danube
1137-1138.

62 An instance where a State considered it contrary to the principle of good faith for it to insist upon the letter of the treaty
in order to gain advantages not in the mind of the parties at the time of the conclusion of the treaty may be seen from
the Report of the Law Officers of the Crown to Earl Granville, February 24, 1872, quoted in McNair, The Law of Treaties,
British Practice and Opinions, 1938, pp. 190-1; at p. 191. Cf. PCIJ: Meuse Case (1937) Neth./Belg. The Belgian
Government, in its written rejoinder (Ser. C. 81, pp. 180 et seq.), prayed the Court alternatively: "In case the Court should
be unable on certain points to find in accordance with the submissions of the Respondent, to declare in any case that the
Applicant is committing an abuse of right (abus de droit) in invoking the Treaty of May 12, 1863, in order to protect new
interests (the Juliana canal and the canalised Meuse) which were not contemplated at the time of the conclusion of that
Treaty, while the interests which that Treaty was intended to protect are not in any way threatened" (A/B. 70, p. 8). See
Saar Territory Case (1934) 3 UNRIAA, p. 1553, at p. 1566. Abu Dhabi Oil Arbitration (1951) 1 I.C.L.Q: (1952), p. 247,
at p. 253.

1950, p. 4, at p. 17; also in Anglo-Iranian Oil Co. Case (Jd.) (1952) I.C.J Reports, 1952, p. 93, at p. 126; D.O. by Winiański
judges, it is submitted, however, failed to distinguish the two different meanings of the clausula, wherein lies the main flaw
in their argument. See further supra, pp. 113 et seq. and note 38.

1137-1138.


66 3 UNRIAA, p. 1767, at p. 1779.

67 Ibid., at p. 1790.

3226.

69 PCIJ: A/B. 70, p. 25. Cf. also the apparently contradictory attitude of the Netherlands in the same case as to whether
the possibility of an infraction constitutes an infraction (pp. 5 and 8) and the Dutch explanation (Ser. C. 81, pp. 137 et seq.).

70 PCIJ: Mavrommatis Palestine Concessions Case (1924), A. 2, p. 33. Id.: Chorzów Factory Case (Jd.) (1927), A. 9, p.
31.


72 See Case of the U.S., Part II, Point II (Shufeldt Claim, USGPO, 1932, pp: 57 et seq.).

73 Ibid., at pp. 869-70; or 2 UNRIAA, p. 1079, at n. 1094.

(1923), 1 UNRIAA, p. 369, at pp. 383-4. See also Shufeldt Case (1930), Case of the U.S., Part II, Point II (loc. cit.) and
the definition of estoppel by conduct of Ixord Denman C.J. in Pickard v. Sears (1837) (6 Ad. & E., p. 469, at p. 474)
therein cited. See further Halsbury, Laws of England, sub voce Estoppel, §§ 538, 541, 547; Phipson, The Law of
Evidence, 1952, pp. 704-710; Broom's Legal Maxims, 1939; M. Cababe, Principles of Estoppel, 1888; L. F. Everest and

judges, it is submitted, however, failed to distinguish the two different meanings of the clausula, wherein lies the main flaw
in their argument. See further supra, pp. 113 et seq. and note 38.

76 Id., p. 1790.

77 Ibid., at p. 1790.

78 Ibid., at p. 1790.

79 Ibid., at p. 1790.
The recognition was considered as sufficient evidence to establish ownership over the whole property, for the purpose of the particular case, but it was not regarded as irrebuttable. The question of ownership being merely incidental, the Rapporteur made a reservation with regard to the case where the claimant should be evicted from the property by a competent tribunal (see infra, p. 354, note 63).


A/B. 53, pp. 68-9. The various acts constituting admissions and their reaffirmations were, in this case: 1. The formal withdrawal of a claim over the contested territory and the statement that it was lost to Norway (Holst Declaration) (pp. 64-8). 2. During a previous mediation in the matter between the Kingdom of Sweden and Norway on the one hand, and Denmark on the other, the Foreign Minister of the former mentioned in two different communications to the mediator that his sovereign on behalf of Norway renounced all claims to Greenland in favour of the Crown of Denmark (p. 66). 3. The Convention of Sept. 1, 1819, signed by the King of Sweden and Norway in his capacity as King of Norway, and the King of Denmark expressly stated that "everything in connection with the Treaty of Kiel" of 1814, which inter alia reserved Greenland to Denmark, was to be regarded as completely settled (pp. 66-8). 4. Norway reaffirmed her previous admissions by affixing her signature to, and accepting as binding upon herself, bipartite agreements between Norway and Denmark, and various other multipartite agreements to which both Denmark and Norway were parties, in which Greenland was described as a Danish colony or as forming part of Denmark, or Denmark was allowed to exclude Greenland from the operation of the agreements (pp. 68-9).


Dutch and French Boundary Dispute concerning Guiana (1891), 5 Int.Arb., p. 4869, at p. 4870.


the fact that the Argentine Government confirmed the decisions of a mixed commission which wrongly interpreted certain conventions, apparently because the State archives, in which the texts of these conventions were kept, were at that time in the hands of revolutionaries " and it is not surprising that the Commission and the Government did not know the terms of the conventions " (p. 654).


43 A. 20/21, p. 39.


45 2 Int.Arb., p. 1421, at p. 1437.


47 PCIJ: Jurisdiction of the Danzig Courts (1928), Adv.Op., B. 15, pp. 26-27. Poland could not "contend that the Danzig courts could not apply the provisions of the Beamtenabkommen because they were not duly inserted in the Polish national law."

48 A. 9, p. 31.


50 Loc. cit., p. 31.


53 Shufeldt Case (1930) 2 UNRIA, p. 1079. Guatemala cancelled a concession to extract chicle. One of the contentions put forward when the case was submitted to arbitration was that the claimants used machetes instead of a scratcher to bleed the chicle, in violation of Guatemalan law and fiscal regulations. Held: "The Government never having taken any steps to put a stop to this practice which they must have known existed either under the law or by arbitration under the contract, and never having declared the contract cancelled therefor, and having recognised the contract all through, and thus making themselves parteipos in such breach (if any) of the law, cannot now in my opinion avail themselves of this contention" (p. 1097). See also Brit.-U.S. Cl. Arb. (1910) : Yukon Lumber Co. Case (1913) Nielsen's Report, p. 438, at p. 442. Cf. also The Montijo (1875) 2 Int.Arb. p. 1421.

54 Marin Case, 3 Int.Arb., p. 2885, at p. 2886.

55 See Broom's Legal Maxims, 1939, under nullus commodum capere potest de sua injuria propria.

56 ICJ Reports 1950, p. 221, at p. 244.

57 Art. 36 of the Treaty with Bulgaria, to which correspond mutatis mutandis Art. 40 of the Treaty with Hungary and Art. 38 of the Treaty with Rumania. Italies added.

58 ICJ Reports 1950, p. 221, at p. 230.


60 Loc. cit., p. 227.


62 See infra, pp. 279 et seq., esp. pp. 280 et seq.

63 See supra, pp. 105 et seq.


65 Loc. cit., p. 228.


67 See ibid., p. 294.

68 ICJ Reports 1950, p. 221, at p. 244. N.B. in advisory procedure, the Court does not and should not pass judgment on an actual dispute without the consent of the parties. PCIJ : Eastern Carelia Case (1923), B. 5, pp. 27-9 ; ICJ : Interpretation of Peace Treaties (1st Phase) (1950), ICJ Reports 1950, p. 65, at p. 72: "The legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the questions put to it." See also p. 71.


70 e.g., Brit.-U.S. Cl.Com. (1853) : The Lawrence (1855), Hornby's Report, p. 397. Seizure of ship engaged in slave trade, act prohibited by the law of the claimant's own State and by the law of nations. "The owners of the 'Lawrence' could not claim the protection of their own Government, and, therefore, in my judgment, can have no claim before this commission " (p. 398). Mex.-U.S. Cl.Com. (1868) : Brannan Case, 3 Int.Arb., p. 2757, at p. 2758: " The Umpire cannot believe that this international commission is justified in countenancing a claim founded upon the contempt and infraction of the laws of one of the nations concerned." Claim arising out of unequal services rendered in violation of the laws of the claimant's own State.

71 3 Int. Arb., p. 2730.

72 Ibid., p. 2731, at pp. 2738-9.

73 Ibid., p. 2743.

74 Ibid., p. 2743, at p. 2749. Hassaurek's opinion was cited and the same principle was applied in U.S.-Ven. M.C.C. (1903)
Claimants who aided insurgents by supplying arms were estopped from claiming damages for capture of these arms on the high seas by the Spanish Government (pp. 2774, 2775, 2776). "On those principles of equity which the Umpire does not feel at liberty to disregard he is bound to decide that the owners of the ship and cargo are, as such, estopped in their present claim to indemnity for the consequences of their unlawful venture" (p. 2776). Cf. also Mex.-U.S. Cl.Com. (1868) : Cucullu [i.e., Cuculla] Case, 4 Int. Arb., p. 3477, at p. 3479.

U.S. Domestic Commission for Claims against Mexico (1849) : Meade Claim, 4 Int. Arb., p. 3430, at p. 3432. The waiver referred to was deduced from decisions of the Mex.-U.S. Cl. Com. (1830) which dealt with a number of claims arising out of supplies furnished to the Mexican revolutionaries in their struggle for independence against Spain. In these cases, no question was raised by either the Mexican or the U. S. Commissioners as to the admissibility of the claims. The Mexican Commissioners concurred in allowing the claims without discussion, except where questions of evidence gave rise to differences of opinion. In each case, the Commissioners referred to the supplies as having been furnished for "the promotion of the great object aforesaid," viz., the independence and self-government of Mexico. The Meade Claim arose out of similar circumstances. See ibid., pp. 3426-8.

See supra, pp. 145. See also Span.-U.S. Cl.Com. (1871) : The Mary Lowell (1879) 3 Int.Arb., p. 2772.

Fraud was alleged against the American Commissioner on the U.S.-Ven. Cl. Com. (1866) at Caracas both in the choice of the Umpire and in the proceedings. Venezuela protested. The U.S. Administration at first was adamant. But Congress intervened at the instance of the claimants concerned. In its Report of 1883, the Committee for Foreign Affairs of the House of Representatives declared: "The alleged commission was a conspiracy; its proceedings were tainted with fraud. That fraud affects its entire proceedings. It was diseased throughout, and there is no method known to the Committee by which to separate the fraudulent part from the honest part and establish any portion in soundness and integrity . . . . Justice to Venezuela demands these proceedings should be set aside speedily" (2 Int.Arb., p. 1663). Accordingly, a new convention was signed in 1885 creating the Claims Commission of Washington to re-examine all the claims. Cf. also infra, p. 261, where the P.C.A. in saying that the nullity of an award in case of essential error may be partial expressly emphasised that the case was not one where allegations of bad faith had been made against the tribunal.

As to how the claims of alleged bona fide possessors of certificates of award issued by the Caracas Commission were dropped, see U.S.-Ven. Convention of March 15, 1888 (5 Int. Arb., p. 4815), and the interpretation given to it by the Order of the Washington Commission on August 25, 1890 (2 Int. Arb., p. 1675, note 2). Cf. also Mr. Rice's Report, 1885, ibid. p. 1672.

Cf. e.g., Peruv.-U.S. Cl. Com. (1863) : Sartori Case, 3 Int. Arb., p. 3120, at p. 2123. Nor could it be said, for instance, that in The Wimbledon Case (1923) (PCIJ: A. 1), proof of malice or culpable negligence was required in order to establish Germany's responsibility.

See infra, p. 320, note 82, and p. 359.

81 The Alabama Arbitration (1872) U.S.A./G.B., 1 Alabama (Proceedings), p. 178 (Transl.).


85 As to how the claims of alleged bona fide possessors of certificates of award issued by the Caracas Commission were dropped, see U.S.-Ven. Convention of March 15, 1888 (5 Int. Arb., p. 4815), and the interpretation given to it by the Order of the Washington Commission on August 25, 1890 (2 Int. Arb., p. 1675, note 2). Cf. also Mr. Rice's Report, 1885, ibid. p. 1672.


Cf. supra, p. 223 et seq.

See infra, p. 231, note 44, for a discussion of the majority judgment and dissenting opinions of the I.C.J. in the Corfu Channel Case (Merits) (1949), with regard to the notion of fault.

1 H.C.R. p. 532, at p. 546. (Transl.) Both the PCIJ and the PCA use the term "vis major" in a wide sense covering all impossibility preventing the fulfilment of an obligation. See, e.g., PCIJ: Serbian and Brazilian Loans Cases (1929) A. 20/21, pp. 39-40, 120.

27 Transl. Contract claim.

Cf. The Alabama Arbitration (1872), Opinion of President of Tribunal: "I agree that the performance of acts that are naturally impossible cannot be required, that is the case of vis major; ad impossibile nemo tenetur" (1 Alabama (Proceedings), p. 168, at p. 173, Transl.).

Cf. Spanish Zone of Morocco Claims (1923) : Rapport III (1924). The Rapporteur was of the opinion that, because, in
the absence of special authority, it was not possible for an international tribunal to investigate into the origin of riots, revolts, civil or international wars, these occurrences must be regarded as cases of vis major (see infra, p. 228, note 95).

As to crimes committed against foreigners by individuals, bandits or insurgents, the duty of prevention is limited to the observance of diligentia quam in sui, in any case not exceeding the means at the State's disposal (2 UNRIAA, p. 615, at pp. 641 et seq.). Cf., supra, pp. 220-222. With regard to the duty of repression, the Rapporteur said: "It is admitted that, generally speaking, the repression of crime is not only a legal obligation of the competent authorities, but also an international duty of the State, in as much as foreigners are the victims thereof. The repressive action of the State depends essentially upon its own will. But there are important elements in the repression of crime, which have to be taken into account and which are independent of the will of State authorities. The enforcement of criminal justice is, indeed, subject to natural limitations. Being above all directed at individual crimes, it is more or less powerless in case of revolt or civil war. Furthermore, it presupposes a more or less normal state of affairs in social life and organisation. As in the case of prevention, there are thus de facto limits to the prevention of crimes. The enforcement of civil and criminal justice can, therefore, only depend upon the means which are at the State's disposal, and upon the degree of authority which it is able to exercise. The uniform administration of a system of justice conforming to certain minima criteria of international law cannot be required in all circumstances. It must be realised that there are circumstances in which, as in the case of prevention, the activity of the State may be materially limited or even paralysed . . . " (ibid., at p. 646. Transl.). Cf. also Brit.-Mex. Cl. Com. (1926) : Buckingham Case (1931), §§ 2, 3, Further Dec. & Op. of Com., p. 323, at pp. 325-6. See also ICJ: Corfu Channel Case (Merits) (1949), infra, p. 231, note 44.

32See supra, pp. 69 et seq.

33Supra, pp. 73-74.

34A. 20/21, pp. 40, 120.

35This is not inevitably so, since these events may have been caused by the State itself and on account of the second qualification of the principle of vis major they would not then be regarded as such. The Rapporteur no doubt shared this view, except that he said: "In the absence of specific agreements or treaty provisions, the necessary investigation to this end is not permissible. These events must be considered as cases of vis major. The principle of the independence of States excludes the possibility of their domestic or foreign policy being made, in case of doubt, the subject of international judicial enquiry" (Rapport III (1924), 2 UNRIAA, p. 615, at p. 642. Transl.). The Rapporteur's opinion is not, therefore, incompatible with the Michel Macri Case (1928), infra, p. 230.


37The decision of the ICJ: Corfu Channel Case (Merits) (1949) ICJ, Reports 1949, p. 4, is entirely in agreement on all points with the views expressed above. While recognising the obligation of a State in time of peace to notify the presence of minefields in its territorial waters and to warn approaching shipping, the Court held that this obligation depended on the State's having knowledge of the presence of the minefield. Responsibility depended, moreover, upon the possibility, as regards time, of notifying all shipping and warning approaching vessels after having learned of the presence of the minefield. While recognising that it would have been difficult or even impossible to give a general notification to all States the very day the coastal State learned of the presence of the minefield, the Court held: "But this would certainly not have prevented the Albanian authorities from taking, as they should have done, all necessary steps immediately to warn ships near the danger zone, more especially those that were approaching that zone" (p. 23).

382 H.C.R., p. 39, at pp. 56, 73.


401 Int.Ar b., p. 495, at p. 656.

417 T.A.M., p. 981, at pp. 983-4. (Transl.) Cf. supra, p. 228, note 35. See also Fran.-Germ. M.A.T.: Franz Case (1922) 1 T.A.M., p. 781, at p. 785: "It is in fact an undisputed and indisputable principle that no one can invoke, in his own defence, the existence of a fact for which he is himself alone responsible " (Transl.) : Hourcade Case (1922), ibid., p. 786, at p. 788; Lorrain Case (1923) 3 ibid., p. 623, at p. 625. See also Brit.-Turk. M.A.T.: Direction generale de la Navigation turque Séri-Séfain (1928) 8 T.A.M., p. 988, at p. 993. In deciding that the requisition by the British Government constituted a case of force majeure for the defendant company, the Tribunal added: "the supervening impossibility not being imputable to said Company . . . ."

42Supra, pp. 204 et seq.

43Supra, pp. 210-211.

44The question whether or not responsibility requires fault received a certain amount of attention in the Corfu Channel Case (Merits) (1949) (I.C.J. Reports 1949, p. 4), from the dissenting judges who, though predominantly in favour of the principle of fault in international responsibility, were not agreed as to its meaning and application. Before proceeding to examine the dissenting opinions of the various judges, it may be pointed out that the judgment of the Court is in perfect agreement with the views expressed above. The I.C.J., first of all, stated what was the obligation incumbent upon the defendant State (p. 22). Although the Court did not expressly mention the principle of fault, it was clearly of opinion that the duty of fulfilling this obligation would be subordinated to the condition of possibility (pp. 22-3). Finding that the defendant State had made no attempt to fulfil this obligation, the Court held that " these grave omissions involve the international responsibility " of the defendant State (p. 23). The Court's decision, therefore, agrees with the interpretation
of the principle of fault developed above. Moreover, in a passage in which it held that the mere fact that an unlawful act had been committed in territory and waters under its control did not involve the prima facie responsibility of the State nor raise a presumption of responsibility shifting the burden of proof, the Court may be considered as having rejected the theory of objective responsibility. So much for the majority decision. As for the dissenting judges, Judge Krylov and the judge ad hoc of the defendant State, both considered that responsibility required the existence of fault, culpa, but they seemed to attribute to the term "fault" the meaning of dolus or culpable negligence (pp. 72, 127-8). However true this may be as regards the notion of culpa in Roman law (even in Roman law, however, culpa was at first distinguished from dolus), the reason why this is no longer the meaning of the term "fault" in modern systems of law, especially in international law, has already been explained (supra, pp. 225 et seq.). In a sense, therefore, Judge Azevedo was right, when he said in his dissenting opinion, of which he devoted a large portion (pp. 82-96) to an examination of the principle of fault, that: "The notion of culpa (faute) is always changing and undergoing a slow process of evolution; moving away from the classical elements of imprudence and negligence, it tends to draw nearer to the system of objective responsibility." (p. 85). The learned judge did not, however, clearly indicate the exact meaning which he attributed to the term "fault." He upheld the principle of fault, but seemed also willing to admit the system of responsibility based on risk (pp. 86, 92). He started by criticising the view-which was advanced by the parties and applied by the majority judgment-that responsibility is based on the breach of an obligation (pp. 82-3), but he also sought, first of all, to establish that "secret minelaying in time of peace" was unlawful (p. 85). He considered that there existed in international law a system of what may be called "presumed responsibility." Wherever a link of causation could be established between a State and a damage, responsibility was presumed and the State incurred the burden of exculpating itself (p. 86). Judge Azevedo's efforts appeared to be directed towards establishing a system of objective responsibility based on risk, without, however, abandoning the theory of subjective responsibility based on intention and negligence (cf. p. 86). Both the system of objective responsibility and that of "presumed responsibility" were rejected in the majority decision (p. 18). Judge Badawi Pasha was also of a contrary view and, in his dissenting opinion, rejected the theory of objective responsibility based on risk (p. 65). He based international responsibility expressly on the principle of fault (p. 65). Thus he said: "Il faut done établir une obligation internationale à la charge de l'Albanie dont le manquement lui serait imputable et serait la cause de l'explosion" (p. 65). ("The failure of Albania to carry out an international obligation must therefore be proved, and it must also be proved that this was the cause of the explosion." Translation of the Court.) The existence of an obligation must, therefore, be first established. Fault consists in the failure to carry out an obligation, in other words, an unlawful act. If the fault, which has caused damage, is imputable to the State, State responsibility will arise. "Fault," "imputability" (see supra., pp. 180 et seq.) and "causality" (see infra, pp. 241 et seq.) are, therefore, the requisite elements of responsibility. Judge Badawi Pasha's dissenting opinion, in point of law, is in agreement with the majority decision and also with the principle of fault outlined above.

1 Or "effective causality." Cf. infra, p. 253, note 25.
2 Op. of Com. 1927, p. 331, at p. 338. The bulk of the damages was awarded on the ground of gross insufficiency of governmental action subsequent to the Rochin telegram, and not on the ground of this initial unlawful act. The Commission quoted the Lacaze Case (1864), 2 Arb.Int., p. 290, at p. 298: "All compensation for losses should reasonably and equitably include only those which are the immediate and direct consequence of the act which has caused them, without being possible ever to extend to those which are only the mediate or indirect consequence thereof, and still less to expectancies of eventual profits" (Transl.).
3 Award I (1928), 2 UNRIAA, p. 1011, at p. 1031. (Transl.)
7 Cf. e.g., Spanish Zone of Morocco Claims (1923): Claim 25: Rzini-Beni Madan, Cattle (1924), 2 UNRIAA, p. 615, at pp. 696-697. The Rapporteur considered that a lucrum cessans which was "alien" to the act complained of, in other words, had no causal relation therewith, was certainly included in the notion of "indirect or consequential damages " disclaimed by the British representative. In this very case, the Rapporteur clearly indicated, however, that he was guided by the principle of integral reparation, of putting the claimant back "in the same position he would have found himself " had the act complained of not been committed (ibid.). See also Claim I: Rzini-Tetuan, Orchards (1924), ibid., at pp. 651-659. Having held that it was the claimant who had voluntarily renounced the pursuit of his cultivation, the Rapporteur said that the immediate cause of the loss of a harvest was this decision freely taken, which could only have been the mediate consequence of the alleged insecurity in the district. This distinction between mediate and immediate causality is, in substance, the same as the distinction between proximate and remote causality made by the Germ.-U.S. M.C.C. (1922) and the Portugo-German Arbitral Tribunal. With regard to lucrum cessans, the Rapporteur also indicated in the same case that it would not be excluded as indirect or consequential damages if it were shown to have "serious chances" of being achieved. The Mex.-U.S. Cl.Com. (1868) in the Rice Case (4 Int.Arb., p. 3248) seemed to regard "consequential damages " as meaning lucrum cessans: Although differing in terminology from the Rapporteur, the Rice Case was in substantial agreement with him. It allowed damages for loss arising from "the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned according to custom and
business," and disallowed expectancies from "a mere device of speculation, however probable its success would have been or may appear to the projector" (p. 3248). But the sole Arbitrator in the Whaling and Sealing Claims: The Cape Horn Pigeon Case (1902), while in substantial agreement with the above cases, refused to call a fairly certain lucrum cessans an indirect or consequential damage. He said: "In this case, it is not a matter of indirect damage, but of direct damage, the amount of which ought to be assessed" (U.S.F.R. (1902), Appendix I, p. 467, at p. 471. (Transl.) Italics of the Tribunal). See infra, pp. 247-248. A reading of the Lacaze Case (1864) (loc. cit., supra., p. 241, note 2) and the Mallén Case (1927) (Mex.-U.S. G.C.C. (1923) Op. of Com. 1927, p. 254, §§ 13, 14), cited by the Commission in the Venable Case (1927) will show that what the Mex.-U.S. G.C.C. (1923) had in mind was also the effectiveness of the causation rather than its immediacy or mediacy. Cf. also Fran.-Ven. M.C.C. (1902) : Pieri Dominique et Cie (1905), Ralston's Report, p. 185, at p. 206: "There can be no allowance for any losses accruing to the claimant in the sale of his houses, such losses not being the direct and approximate result of any cause of which the respondent Government has responsibility, and it is only for such results that indemnity can be awarded." Direct, approximate, efficient, proximate are, indeed, often used in this connection synonymously. However, proximate damages cannot be identified either with damnum emergens or "necessary" or "inevitable" damages, even grosso modo, as seems to have been assumed by Ecer in I.C.J.: Corfu Channel Case (Compensation) (1949), I.C.J. Reports 1949, p. 244, at p. 254. 8For a discussion of The Alabama Case (1872) which adopted a contrary solution see Germ.-U.S. M.C.C. (1922): War Risk Insurance Premium Claims (1928), Dec. & Op., p. 33, at pp. 48 et seq., under "The Alabama Claims decisions considered and applied."

9See Germ.-U.S. M.C.C. (1922) : War Risk Insurance Premium Claims (1923), Dec. & Op., p. 33. Also Rum.-Hung. M.A.T. : Belgradeanu Case (1928), 8 T.A.M., p. 967, at p. 971. Greco-Germ. M.A.T. : Antippa (The Spyros) Case (1926), 7 T.A.M., p. 23, at p. 28. U.S.A.: Brit. Cl. Arb. (1927) : The Lisman (1937), 3 UNRIAA, p. 1767, at p. 1792. 10Dec. & Op., p. 103, at pp. 133-4. Italics added. 11See also, e.g. id.: Beha Case (1928), Dec. & Op., p. 901. Claims on behalf of American holders of insurance policies who failed to obtain the full amount of their insurance claims because of the insolventcy of the Norske Lloyd Insurance Co., Ltd., due to the destruction by Germany of property insured by it belonging to other than American nationals. Held: "Assuming the truth of the facts upon which this argument rests, the vice in it is that the inability of these American policyholders to collect from the Norwegian insurer indemnity in full loss not the natural and normal consequences of the acts of Germany in destroying property not American owned which happened to be insured by the same Norwegian insurer . . . . The destruction by Germany of non-American-owned property insured by this Norwegian insurer which resulted in its insolvency cannot, to legal contemplation, be attributed as the proximate cause of damages sustained by American nationals resulting from their inability, because of the insurer's insolvency, to collect full indemnity for the loss of their property not touched by Germany" (pp. 902-3). For other illustrations of the distinction between the proximate and the remote consequences of an act, see id.: Eisenbach Brothers & Co. (1925), Dec. & Op., p. 267. The sinking of a ship is the proximate consequence of the planting of a mine. Id.: Neilson (The Mohegan) Case (1926), Dec. & Op., p. 670. Chased by a submarine, a merchantman strained its engines. The damage is the proximate consequence of the act of the submarine. See also id.: Order of May 7, 1925, Announcing Rules applicable to Debts, Bank Deposits, Bonds, etc., Dec. & Op., p. 854. 12Ralston's Report, p. 44, p. 77. 13Id., at p. 77, quoting Allan McLane Hamilton and others, 2 A System of Legal Medicine, p. 379. 14Id., at p. 78. Cf. Mex.-U.S. G.C.C. (1923) : Mallén Case (1927), Op. of Com., 1927, p. 264, § 18. 15U.S.F.R. (1902), Appendix I, p. 467, at p. 470-1. (Transl.) Italics added. Cf. PCIJ: Chorzów Factory Case (Merits) (1928), A. 17, p. 47: "Re-establish the situation which would, in all probability, have existed if that act had not been committed." See also pp. 53 et seq. The Court was definitely of the opinion that lucrum cessans may be taken into account in assessing compensation, based on the "normal development" of the undertaking. Cf. Brit.-U.S. Cl. Arb. (1910) : The Wanderer (1921), Nielsen's Report, p. 459; The Favorite (1921), ibid., p. 515; The Kate (1921), ibid., p. 472; The Horace B. Parker (1925), ibid., p. 570, at p. 571: "It is enough to say that a long line of decisions of international tribunals has established as the measure of damages for such cases loss of use of the vessel, to be measured by the loss of probable catch. For this purpose the catch of other vessels or the average catch under the conditions at hand has often been taken as the measure. Indeed this tribunal has so held in three prior cases. The Wanderer . . . ; The Favorite . . . ; The Kate . . . ." Cases of interference with fishing vessels. The basic criterion is the same as with other cases of lucrum cessans. What is normal in one case is normal in another only when conditions are the same. In accordance with the principle that damages should not be a source of profit to the injured person, prospective gains are not allowed when they are highly problematical or when special circumstances show that the injured person would probably not obtain what others might. Cf., e.g., The Canada (1870), 2 Int. Arb., p. 1733. Seizure of a whaling ship. "But the undersigned can in no case admit a right to prospective profits; for the ship and the whole capital might have been lost in the voyage, or the expedition might have been entirely unsuccessful and without profit. In this particular case the objection is still stronger, because the Canada was commanded by a captain who, very little after sunset, when darkness could have hardly set in, ran his vessel upon a reef, with the existence and position of which he ought to have been well acquainted" (p. 1746). The distinction is clearly drawn in the Rice Case (C. 1868), 4 Int. Arb., p. 3248, at p. 3248: "As to the portion of the
damages claimed which may be imagined to arise out of consequential damages, the umpire desires to lay down as one of the "requisites for consequential damages, that there must be a manifest wrong, the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned according to custom and business. A mere device of speculation, however probable its success would have been or may appear to the projector, cannot enter into the calculation of consequential damages." See also Shufeldt Case (1930), 2 UNRIAA, p. 1079, at p. 1099: "The damnum emergens is always recoverable, but the lucrum cessans must be the direct fruit of the contract and not too remote or speculative."

167 T.A.M., p. 23, at p. 28. (Transl.) Italics of the tribunal.


169 M.S., U.S. Department of State, National Archives, 210 Despatches, Great Britain, Ambassador Choate to Secretary Hay, August 18, 1904, No: 1429, enclosure. Quoted at some length in Whitemen, 3 Damages, at pp. 1778-80.

170 2 UNRIAA, p. 1011, at p. 1031. (Transl.) Italics added.

171 Ibid., at p. 1032. (Transl.)

172 Ibid., at p. 1075. (Transl.)

173 Award I (1928), ibid., at p. 1032.

174 Ven.Arb. 1903, p. 142, at p. 145. Italics added. Soldiers under the command of officers pillaged claimant's plantation, and threatened "to return and kill the claimant and destroy the place." Superior authorities unable to afford the protection sought, claimant left his plantation thus sacrificing property and very promising prospects. Cf. Spanish Zone of Morocco Claims (1923) : Claim I: Rzini-Tetuan Orchards (1924), 2 UNRIAA, p. 615, at pp. 651-659 (see supra, p. 243, note 7).

175 Ven.Arb. 1903, p. 7, at p. 9. In the course of a civil war, claimant, to escape possible further requisitions, sold his cattle at a loss. The claim was for compensation to cover this loss. Held: "The military authorities, under the exigencies of war, took part of his cattle, and he is justly entitled to compensation for their actual value. But there is in the record no evidence of any duress or constraint on the part of the military authorities to compel him to sell his remaining cattle to their parties at an inadequate price. Neither is there any special animus shown against Mr. Dig, nor any deliberate intention to injure him, because of his nationality" (ibid., at p. 9). This part of the claim was disallowed. Cf. Belgo-Germ. M.A.T.: De Maret Case (1924), 4 T.A.M., p. 103, at p. 105. Germany was held not responsible for loss sustained through stocks of raw material being sold by their Belgian owner to avoid German requisition. It is interesting to compare these cases with the F. I. Roberts Case quoted above. See also Germ.-U.S. M.C.C. (1922): Life-Insurance Claims (1924), Dec. & Op., p. 103, at p. 137: "The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any intent of disturbing or destroying such contractual relations." See supra, pp. 245-246. See also Id.: Hickson Case (1924), Dec. & Op., p. 439.

176 It is possible to consider the nexus between an act and all its consequences "in legal contemplation" as one of "effective causality," reserving the term "proximate causality" to the normal and reasonably foreseeable sequence of events. As long as the meaning of the terms is properly understood, the choice of the name is of little importance.

177 ICJ Reports, 1949, p. 4, at pp. 90-91.

178 Ibid., at p. 18. Italics of the Court. From the established fact that Albania kept a strict watch over the Corfu Channel during the whole period when the mines could have been laid there, and the established fact that any laying of mines in the Channel during that period would have been detected from the observation posts set up in Albania, the "Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government" (p. 22). In other words, knowledge by the Albanian Government was considered proved. Judge Badawi Pasha and also the ad hoc judge in their dissenting opinions, concurred in the use of circumstantial evidence, although both emphasised that the conclusion adopted must be the only rational one to be drawn from the established circumstances (pp. 60, 120). Judge Krylov alone doubted if State responsibility could be proved by indirect evidence (p. 69). In cases before the Brit.-Mex.Cl.Com. (1926), knowledge of the Mexican authorities of certain acts was inferred from their public notoriety in the locality. See McNeill Case (1931), Further Dec. & Op. of Com., p. 96, at

84Lynch Case (1929), Dec. & Op. of Com., p. 20, at p. 21. The Commissioners were of the opinion that where a fact can be more easily and conclusively established, e.g., birth, death, etc., a stricter degree of proof would be required (ibid.). See, also, Hungaro-Serb.-Croat.-Slovene M.A.T.: Cie pour la Construction du Chemin de Fer d'Ogulin à la Frontière, S.A., Case (1926), 6 T.A.M., p. 505. Restitution of articles under Art. 250, Treaty of Trianon. Claimants having produced sufficient proof to establish at least a presumption in favour of their ownership, the Tribunal could not admit "that the Serb.-Croat.-Slovene State is legally entitled to exact the absolute proof of ownership, this probatio diabolica being generally impossible" (p. 509. Transl.).


86E.g., Brit.-Mex. Cl.Com. (1926) : Lynch Case (1929), Dec. & Op. of Com., p. 20, at p. 22. In the absence of evidence impugning the accuracy of a consular certificate, this, although it "cannot be considered as absolute proof of nationality," was "accepted as prima facie evidence." Compare this case with the Cameron Case (Demurrer) (1929), decided by the same Commission, ibid., p. 33, at p. 36: "The certificate of consular registration put in by the British Agent does raise a presumption of British nationality, though that presumption is rebutted by another document put in by the Mexican Government." Though the latter was not conclusive, the former was considered weakened to such an extent that British nationality was considered not to have been established.

87Cf. Fran.-Ven. M.C.C. (1902) : Brun Case, Ralston's Report, p. 5 at p. 25; "The Umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent Government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question."


89Op. of Com. 1931, p. 36, at pp. 44-5. See other cases therein cited. See also Aguilar-Amory and Royal Bank of Canada (Tinoco) Case (1923) 1 UNRIAA, p. 369, at p. 393.


92Cf. ICJ: Corfu Channel Case (Merits) (1949), ICJ Reports, 1949, p. 4, at pp. 32, 129.


98Ibid., at p. 39.

99See supra, p. 308.


101Op. of Com. 1927, p. 35, at p. 39. The following passages from the same decision are to the same effect: "The Parties before this Commission are sovereign Nations who are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them" (p. 40). "Article 75 of the said Hague Convention of 1907 affirms the tenet adopted here by providing that the parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case" (p. 40).


103The Mex.-U.S. G.C.C. (1923) itself seems also to have accepted this view, since, despite the fact that it identified the principle it enunciated with Art. 75 of the Hague Convention of 1907, it said that that Convention contained no provision as to burden of proof (loc. cit., p. 40).


1/3/B. 78, p. 175.
5/Brit.-U.S. Cl.Arb. (1910): The Newchwang (1921) Nielsen's Report, p. 411, at p. 415. See also Aslop Case (1911) 5 A.J.I.L. (1911), p. 1079, at p. 1085. The Trail Smelter Arbitral Tribunal, in its Final Award (1941), referred to the Fabiani Case decided by the Fran.-Ven. M.C.C. (1902). It mentioned, amongst other contentions of the claimants in the Fabiani Case, that: "It was argued, on behalf of claimants, that 'the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of res judicata upon the foundation of the law' "("Foundation of the law": "Le fonds du droit," "i.e., "The merits of the case"). The Trail Smelter Arbitral Tribunal went on to say: "Umpire Plumley rejected these contentions" (3 UNRIAA, p. 1905, at p. 1951). Neither from the above quoted passage, nor from Umpire Plumly's decision in the Fabiani Case, should the inference be drawn that he rejected, as such, the principle invoked by the claimants. He only held that it was not applicable to the claimants' case. The Fabiani claim had previously been submitted to the President of the Swiss Confederation and an award was made in 1896. Certain items of the claim which were dismissed in 1896 were submitted to the Fran.-Ven. M.C.C. (1902), of which Plumley was Umpire. What Plumley rejected was the contention that the previous arbitrator dismissed some of the claims through lack of jurisdiction: "It is the opinions of the Umpire that the hon. arbitrator had complete and absolute dominion over the whole Fabiani controversy" (Ralston's Report, p. 81, at p. 125). On the point here under discussion, Umpire Plumley's decision is adequately summed up by the head note which he himself prepared for the Report: "The Umpire holds ... that no jurisdictional questions were before the Swiss arbitrator; none were urged by either party, and none in fact were determined" (ibid., p. 81. See actual decision, ibid., at pp. 125-7). Umpire Plumley's opinion, therefore, was that the previous arbitrator, had dismissed the claims on the merits of the case and not for lack of jurisdiction. There
was, therefore, res judicata. The validity of the principle invoked by the claimants was not questioned. See infra, p. 344, note 28 and p. 355, note 66.

8

See Rum.-Hung. M.A.T.: Ungarische Erdgas A.G. Case (1925), 5 T.A.M., p. 951, at p. 955: “The very fact that a State takes part in the establishment of an international tribunal and consents to submit to its jurisdiction implies already the willingness of the part of the State to take its place among those amenable to the Court's jurisdiction. It is precisely by an exercise of its sovereignty that it voluntarily and willingly assumes this position, which by its nature, carries not only rights but also duties, such as ... compliance with judgments that will be given” (Transl.).

9

A/B. 78, p. 176.

10

Ibid. See also supra, p. 337, note 7.

11

PCIJ: The Wimbledon (1923), A.1, p. 32.

12

ICJ: Haya de la Torre Case (1951), ICJ Reports 1951, p. 71, at p. 82. See infra, p. 347. See further, supra, pp. 233 et seq.

13


14

e.g., Société commerciale de Belgique Case (1939), A/B. 78, p. 176. In this case, the Court, in view of the declarations of both parties agreeing to such a course, even commented: "Such a settlement is highly desirable" (p. 178). In PCIJ: Serbian Loans Case (1929), A. 20/21, there was a provision (Art. II) in the Special Agreement itself which provided for the eventual modification of the obligation imposed by the judgment, either by mutual agreement or arbitration to be based on pure considerations of equity (pp. 15-6).

15

1

Ital.-Ven. M.C.C. (1903) : Gentini Case, quoting Savigny, Ven.Arb. 1903, p. 720, at p. 726. (Transl.) See also U.S.-Ven. M.C.C. (1903) : Spader Case, quoting Vattel : "Prescription is the exclusion of all pretensions to right-an exclusion founded on the length of time during which that right has been neglected" (Ven.Arb. 1903, p. 161, at p. 162).

2

To the effect that extinctive prescription did not form part of international law and, therefore, did not need to be considered as a subject for codification Minutes of the 4th Session, 1928, pp. 18-22. See also pp. 47, 48. Cf. also U.N. International Law Commission, 2nd Session, Report on Arbitration Procedure, A/CN.4/18, March 21, 1950, para. 75. See further the present writer's "General Principles of Law as a subject for International Codification," 4 Current Legal Problems (1951), p. 35, at pp. 46 et seq. The cases cited herein show that, in fact, the principle has often been invoked and applied in international adjudications as part of positive international law.

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4


5

1 H.C.R., p. 429.

6

Gentini Case, loc. cit., at p. 725. Case concerned with claim for alleged forced loans, etc., presented for the first time after thirty years since their alleged occurrence. Case dismissed because "claimant has so long neglected his supposed rights as to justify a belief in their non-existence" (p. 730).

7

Loc. cit., at p. 725.

8

Ibid.

9


10

See Mex.-U.S. G.C.C. (1923): Cook Case (1927), Op. of Com. 1927, p. 818, at p. 319. Belgo-Germ. M.A.T.: Joestens Case (1927) 7 T.A.M., p. 564. Incidentally, the criticism of the Cook Case (1927) in Lauterpacht, The Function of Law, 1933 (pp. 93-4) does not seem justified. The Commission, far from denying the principle of prescription was precisely referring to it when it spoke of a "well-recognised principle of international practice." It only said that "there is, of course, no rule of international law" of the character of a municipal statute of limitation, a statement which is perfectly correct. Cf. infra the Williams Case and the Gentini Case.

11

4 Int.Arb., p. 4199, at p. 4203. By reason of the above "universally recognised principle," the Commission dismissed the claim on which, in the words of the Umpire, the claimants had been "sleeping . . . for nearly half a century" without any endeavour to collect it.

12

H.C.R., p. 429.

13

Gentini Case, loc. cit., at p. 725. Case concerned with claim for alleged forced loans, etc., presented for the first time after thirty years since their alleged occurrence. Case dismissed because "claimant has so long neglected his supposed rights as to justify a belief in their non-existence" (p. 730).

14

Loc. cit., at p. 725.

15

Ibid.
21 2 Int.Arb., p. 1449. The Convention of November 10, 1858, excluded the plea of prescription from the consideration of the Arbitrator (5 Int.Arb., p. 4691). Cf., however, how the Arbitrator in computing damages nevertheless took into consideration the initial delay with which the claimant Government first brought the claim against the defendant Government (pp. 1464-5).

**Referring Principles:**

- I.1.1 - Good faith and fair dealing in international trade
- I.1.5 - No advantage in case of own unlawful acts
- I.1.2 - Prohibition of inconsistent behavior
- IV.1.2 - Sanctity of contracts
- IV.5.4 - Interpretation against the party that supplied the term
- IV.7.1 - Invalidity of contract that violates good morals ("<em>boni mores</em>"
- IV.9.1 - Limitation periods
- VI.3 - Force majeure
- VII.2 - Principle of foreseeability of loss
- XII.1 - Distribution of burden of proof
- XII.3 - Circumstantial evidence
- XIII.4.5 - Conclusive and preclusive effects of awards; res judicata