SAMBIAGGIO CASE [1]

(By the Umpire:)

Revolutionists are not the agents of government and a natural responsibility does not exist.

Their acts are committed to destroy government and no one should be held responsible for the acts of an enemy attempting his life.

The revolutionists (in this case) were beyond governmental control and the government can not be held responsible for injuries committed by those who have escaped its restraint.

The word "injury" occurring in the protocol imports legal injury; that is, wrong inflicted on the sufferer and wrongdoing by the party to be charged.

[1] U.S. Statutes at Large, vol. 30, p. 1691.

[2] *Supra*, p. 492.

[3] The general subject involved in this opinion is discussed by Ch. Calvo, in Revue de Droit International, vol. 1 (1869), p. 417, and by Prof. L. de Bar in the same magazine, vol. 1 (second series, 1899). p. 464. See also Annuaire de l'Institut de Droit International, vol. 17 (1868), pp. 96-137, and Ch. Wiesse's Le Droit Inter-

As rules of interpretation the umpire accepts that: *(a)* If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted; *(b)* the sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer; *(c)* two meanings being admissible, preference is given to that which the party proposing the clause knew at the time was held by the party accepting it; *(d)* doubtful stipulations should be interpreted in the least onerous sense for the party obligated; *(e)* conditions not expressed can not be invoked by the party who should have clearly expressed them.

Treaties are to be interpreted generally mutatis mutandis as statutes and, in the absence of express language, are not given a retroactive effect.

The " most-favored-nation " clause contained in the Italian treaty does not oblige this Commission to follow, in favor of Italian subjects, the interpretation made by other Commissions of their protocols.

Venezuela being recognized as a regular member of the family of nations, the universally accepted rules of international law must be applied to her and no intendment can be indulged in against her.

Under a treaty which (as in this case) authorizes the decision of questions before the Commission according to " justice " and " absolute equity," it is its duty to apply equitably to the various cases submitted the well-established principles of international law.

AGNOLI, *Commissioner* (claim referred to umpire):

That in favor of the Italian citizen, Salvatore Sambiaggio, resident of the parish of San Joaquín, who claims 5,135.50 bolivars on account of requisitions and forced loans exacted of him by revolutionary troops, an award be made of 4,591.50 bolivars (the claimant having adduced no proof whatever of a further loss of 544 bolivars, which he claims to have suffered), plus the interest thereon from the date of the loss to the date of the award, the following considerations are submitted in support of said request.

The Commission has before it the question as to whether the Venezuelan Government is materially responsible to the claimant, Sambiaggio, and other Italians established in Venezuela, on account of damages inflicted upon them by revolutionary authorities or troops. The Italian Commissioner holds that such responsibility exists when, as in the case under consideration, the said authorities exercise a de facto power or when the said troops have a recognized military organization for the purpose of overthrowing the legal government, though the damage alleged may have been inflicted by detached bodies of

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national Appliqué aux Guerres Civiles. The subject herein considered is also discussed herein by the American-Venezuelan Commission, p. 7, the English-Venezuelan Commission, p. 344, the German-Venezuelan Commission, p. 526, the Netherlands-Venezuelan Commission, p. 896, and p. 903' the Spanish-Venezuelan Commission, p. 923, and by this Commission in the Guastini case, p. 730.

Baron Blanc, of Italy, wrote August 17, 1894, to the minister of Italy in Brazil:

"L'ingérence diplomatique ne doit pas être excessive. Le cas de dommages provenant d'actes qui, en violation du droit des gens, ont été commis par les autorités ou les agents dépendant du gouvernement contre lequel on réclame, est bien différent du cas des dommages qui ont d'autres origines, comme seraient ceux occasionnés par des opérations de guerre ordinaires, ou par des actes provenant de révolutionnaires, ou de malfaiteurs de droit commun.

"Quant aux premiers il n'y a pas doute que l'État ne doive en être tenu pour responsable; mais quant aux secondes, il manque toute base rationnelle d'une responsabilité gouvernementale, à moins que le gouvernement ou ses agents n'aient, d'une manière évidente, omis de remplir leurs propres devoirs en ce qui concerne la possibilité de prévenir le dommage dont on se plaint." So says Rev. Gen. de Droit International Public, 1897, p. 406.

troops (guerrillas), and that, on the contrary, such responsibility may be excluded when it is shown that such acts are committed by marauders who style themselves revolutionists solely that they may with impunity prosecute their nefarious calling.

This opinion is based upon the following heads:

1. The rights common to all Italians in Venezuela, and to claimants and Sambiaggio in particular, under the terms of the treaty between Italy and Venezuela and of the Washington protocols.

2. The general principles of international law, special legislation, and precedent arbitral decisions in cases analogous to the one under discussion; and

3. Considerations of fact and principles of equity.

As to the first head: In the protocol of February 13, 1903 (Art. 1), Venezuela recognizes in principle the justice of the claims presented by His Majesty's Government in the name of Italian subjects, and has besides admitted (Art. IV) that all claims, excepting only those of the first rank (Art. III), may be examined by a mixed commission which, with regard to damages to person or property or to unjustifiable taking, simply establish the truth of the facts and decide the amount of the award.

What is the meaning, the true reason, of these two dispositions, and more particularly of the first?

The meaning, the true reason, is that the Venezuelan Government recognized at Washington its responsibility for acts of revolutionists resulting in damages to Italian subjects; otherwise it would have formulated a special reservation.

Was it, indeed, at all necessary that the Venezuelan Government recognize damages inflicted by its authorities or agents?

Certainly not. The Government has never thought to deny such responsibility, and to specially insist thereon in the first clause of the Washington protocol, one which animates the whole, in order to reassert a principle which has never been questioned, would have been puerile. The justice of Italian claims for indemnity on account of acts of the revolutionists is what was sought to be established — a justice which Italy has always *in principle* upheld and which the Venezuelan Government has always *in principle* denied.

The consequences of this divergence in ideas are what were sought to be eliminated. There has never been any question as to the other point.

The first article of the protocol of February 13, and the above-quoted portion of the third not having, therefore, been created with a view to claims for damages inflicted by the Government or its agents, and it being unreasonable to suppose that they were called into being for no specific and well-defined purpose it follows that they must undoubtedly refer to claims styled " revolutionary ".

The Commissioner for Venezuela urges, however, that had these claims been in view, explicit mention of them would have been made; to which the Commissioner for Italy observes, as before, that even though special reference to them has not been made, it is equally true that no reservation or exclusion was stipulated in regard thereto, and insists that his interpretation of the articles mentioned is the only logical one that may be given.

In this connection it is worthy of note that the German-Venezuelan protocol drawn up for similar causes, under identical conditions and having the same scope as ours, contemplates claims originating in the existing "civil war" in Venezuela, and the French-Venezuelan treaty of the 19th of February, 1902, relative to claims of French citizens against the Venezuelan Republic, considers "damages suffered from the fact of insurrectional events."

The " civil war " in Venezuela, in which the revolutionary troops have

never been recognized as belligerents, and "the insurrectional events" are nothing more nor less than the revolution, and the damages inflicted by it on German and French subjects will be passed upon by the respective Commissions; indeed, the French-Venezuelan Commission has already decided that such losses must be indemnified.

Under the international treaty of July 19, 1861, Italy is guaranteed the treatment accorded the most favored nation. A broad interpretation has been given by Article VIII of the protocol of February last to articles 4 and 26 of the said treaty, according to which Italians in Venezuela and Venezuelans in Italy shall in all matters, and particularly in the matter of claims, enjoy the rights accorded by the abovementioned clause. Now, as has been stated, the French-Venezuelan Mixed Commission has recognized the principle of the responsibility of the local government for damages caused French subjects by the revolutionists, according to the provisions of the treaty of Paris of 1902. The Italians have therefore right to similar consideration.

The Washington protocol contains (Art. VIII), however, another important clause, that which provides that the Italian-Venezuelan treaty may not in any case be invoked as against the provisions of the protocol. It may, however, be invoked in favor of the treaty, since it contains no provision contrary thereto, and the Commissioner for Italy accordingly so invokes in favor of the claimant Sambiaggio, as he will for other claimants whose cases are analogous to the one under consideration, the clause relative to the most favored nation.

But why was it agreed at Washington that the Italian-Venezuelan treaty could not be invoked against the provisions of the protocol?

A careful study of these two diplomatic documents will clearly show an intention that article 4 of the treaty should not be invoked as against the protocol, according to which treaty only damages inflicted by the constituted authorities of the country could have given rise to claims for indemnity. What other motive could there have been (and we must assume there was a motive) for the stipulation of Article VIII of the protocol?

It was evidently the intention that all, absolutely all, the claims arising from civil war in Venezuela should be examined and adjudicated ex bono et æquo by the Commission; and if such was the intention, it could not have been contemplated that those arising from revolutionary acts should be thrown out on the raising of a technical objection such as was advanced by the Commissioner for Venezuela in the present case of Sambiaggio, an exception which, even if founded in equity, should not, under the terms of the protocol, be admitted.

The protection and security of person and property which the Venezuelan Government explicitly guarantees by article 4 of the treaty of 1861 to Italians residing in Venezuela would be a mockery did it not include indemnity for injuries inflicted on Italian subjects by the frequent revolutions, against the abuses of which so far no adequate steps have been taken, either preventive or repressive. From the sole fact that Venezuela does not sufficiently and for long periods protect the persons and property of Italians resident in her territory, and has failed of fulfilling the obligations imposed on her by article 4 of the treaty of 1861, there arises the right to claim compensation for damages. (Bluntschli, art. 462.)

This is no new and exceptional theory. The very recent decision of the French-Venezuelan Commission has already been referred to, but there are many others. Mr. Robert Bunch, the English minister at Bogotá and umpire in the claims of the United States *v.* Colombia in the case of the steamer *Montijo*,[1] stated in his decision that:

[1] Moore, p. 1444.

It was, in the opinion of the undersigned, the clear duty of the President of Panama, acting as the constitutional agent of the Government of the union, to recover the *Montijo* from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad.

Protection is promised to those whom the Government has consented to admit to its territory, and means must be found to render said protection effective. If the Government fails therein, even though it be through no fault of its own, it must make the only reparation in its power — i.e., it must indemnify the injured party.[1]

The United States demanded and obtained by arbitral decision of March 1895, an indemnity for the seizure of the North American vessels *Hero*, *San Fernando*, and *Nutrias*, for the unlawful arrest of United States citizens, and for other damages inflicted by the legal Government and by revolutionists. (Moore, Hist. and Dig. of International Arbitrations, etc., pp. 1723, 1724.) The same theory was sustained by the United States *v.* Peru, which on that occasion obtained an indemnity of $19,000 in favor of an American citizen, Dr. Charles Easton, for material damages and maltreatment inflicted on him by a body of partisans of a rebel chieftain seeking to overthrow the constitutional Government of Peru. (Moore, pp. 1629, 1630.)

In the case of the " Panama riot and other claims " was recognized the " liability, arising out of its privilege and obligation, to preserve peace and good order along the transit route," of the Government of New Granada, now the State of Colombia, which, in that decision, was obliged to pay an indemnity for the damages inflicted by revolutionists. (Moore, pp. 1361 et seq.)

Fiore, a noted authority on international law and a writer of most liberal views (chap. 4, sec. 660), says:

> A state may be declared responsible for acts committed on its territory, even by private individuals, if injury to a state or to strangers results therefrom.

and in section 666, same chapter, he says:

> Let us assume that a government has failed to take proper steps to obviate certain disturbances. * * * In these and similar cases justice and equity require that the state be held to an account and compelled to pay the damages.

In a treatise by the same author (chap. 4, sec. 672) is found this maxim, which deserves the special attention of the Commission, as it synthetizes all the present argumentation:

> The question of the responsibility of a state is, therefore, a complex one, and requires for its solution not only the principles of law but an investigation of the facts and an appreciation of the circumstances.

If, therefore, in this matter international law does not establish fixed maxims, but follows different and at times contradictory decisions, it is because such questions, when submitted, were solved according to equity.

Now, the Commissioner for Italy believes he is justified in asserting in all confidence that in the case of the Venezuelan revolutions equity demands that the interests of the claimants injured by revolutions be not neglected.

Grave indeed would be the responsibility assumed by the Commission if it

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[1] The exact language of the umpire in this case was as follows:

> If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.

decided to the contrary, especially from the point of view of the discouragement of immigration to Venezuela.

Was it not from considerations of equity that France, on the occasion of the massacre at Aigues-Mortes of a number of Italian operatives by French citizens, indemnified the families of the murdered, and that Italy, under similar conditions, indemnified resident French merchants who had suffered damages from an outburst of popular indignation aroused by the above-mentioned massacre?

And was it not perhaps the same decisions in equity that inspired existing laws in Germany and other European states, according to which municipalities are held to the indemnification of peaceful citizens in cases of mob violence and revolutions?

But, setting aside all reference to the foregoing precedents, it surely would not be just to establish an absolute parallel between the treatment that may be demanded in favor of foreigners in cases of mob violence and revolutions in countries where the administrative and military organization is complete and where acts of rebellion against constituted authority are an exception and may be considered as unfortunate accidents, and that which may be invoked in others where revolution is a frequent and persistent political phenomenon.

From a condition of fact essentially different arises a situation which has peculiar and distinctive characteristics, and upon this is based the question of responsibility, and thence the obligation to grant indemnity.

Requisitions and forced loans exacted from foreigners by the military or administrative authority *à main armée*, and often with threat, are not merely abuses, but constitute crimes which the Government of Venezuela is of its own motion and by the requirements of its internal laws bound to visit upon the offenders without awaiting report or denunciation from the injured parties. This it has not as yet done, except in rare instances, and then more from a policy of political order than from any desire to punish the perpetrators of illegal acts.

It is true there have been frequent confiscations of property from revolutionary leaders, but it is not shown that the product of such confiscation has ever been applied to the indemnification of the injured citizens or foreigners.

If this is always the attitude of the Government of Venezuela, it is because such requisitions and forced loans are by it considered as political acts incident to general condition of the country, and being morally responsible for the consequences, it should be held to a material responsibility therefor.

That such is the light in which such acts are viewed by the Government is shown by the amnesty granted to those revolutionists who lay down their arms and become reconciled, without any provisions whatever for the restitution of property unlawfully taken by them. It is true that restitution is not made to natives more than to foreigners, but this does not invalidate the principle of right, and it is logical that these latter should invoke diplomatic intervention which, as well as the protection of local laws, they have an undoubted right to claim. The one in no wise excludes the other, and in this they are on a parity with Venezuelans residing in Italy or other foreign country.

It is not sought to place in doubt the sincere desire of the Venezuelan Government to maintain political order; but judging from the results it must be admitted that the means employed by it for so doing are, to say the least, inefficient, and from this its responsibility is deduced as a logical sequence, and this is the better established in cases where revolutionists have taken property from and maltreated foreigners within the observation of Government authorities or troops who encouraged them thereto.

The Commissioner for Italy can not possibly distinguish in any manner

between damages caused by the acts of successful revolutionists and of those who failed in their attempt.

Success is an accident, and in no respect argues the worth of the cause fought for, the only moral element which could possibly justify a difference in the treatment of those who had been injured by a successful party and those who had been despoiled by an unsuccessful one.

It would be necessary to prove that the revolution broke out in defense of a high humanitarian principle or in vindication of a great political or social idea in order to prove the presence of this moral element.

The struggle between those in power and those seeking to overthrow it has no monopoly of this characteristic, and triumph depends generally upon the force of arms, the skill and foresight of commanders, as well as on other accidental circumstances.

It would, besides, furnish to foreigners a strong incentive for violating the laws of neutrality to make the distinction above mentioned, as in such a case it would be to their interest to side with one or the other faction, and to render more apparent the absurdity of the distinction they would be inclined to side with their despoilers, since with the success of these latter would lie their own chance for securing future compensation for their losses.

And even admitting the principle of such distinction, would we not thereby enter into a very labyrinth of difficulties in cases of sufficient frequency where this or that group of contestants passes from the side of the revolutionists to that of the Government, and vice versa? For example, in which category should be classed the damages caused by General Hernandez, who initiated the last successful revolution, then withdrew therefrom, and now is again reconciled with it?

The Government should be stimulated in the adoption of energetic means whereby to establish order in all the provinces of the Republic now in the hands of the revolutionists, and to maintain peace in the future by holding to the principle of its responsibility in case of claims for damages caused by this same revolution.

It should likewise be considered that on each success of the revolutionists there is established a government de facto, which collects taxes and imposes duties and in various other ways harasses both natives and foreigners.

During the last political crisis there have been several provincial governments which have exercised several, if not all, of the functions of a legal government, and as the sums collected by them can not be demanded from them it is to the Government we must look for redress, as it is the only body with which diplomatic relations may be held with regard thereto. It would be unjust that the property of foreigners should be converted without adequate compensation, to the profit of the country, and there would be danger in conceding that future revolutions might with impunity exist at the expense of foreigners.

These latter may not take part in local politics, and if the principle that they are entitled to compensation for damages inflicted by revolutionists be rejected they will be in a worse position than the natives, as they will have no means of or right to armed defense, and at the same time no one will be held responsible for damages suffered by them from revolutionists.

It has already been remarked that several localities of the Republic are in the hands of the revolutionists. Let it once be known in those localities that it has been decided that the damages inflicted on foreigners there can not be made subject to indemnity and in what a critical position will not those foreigners be placed? What possible guaranty will there be for them against further aggressions?

The political situation in Venezuela has certain special characteristics

which the Commission should duly consider in judging of the consequences from the point of view of the claimants and of the compensation. The Commission is not specially called to decide questions of international law, except as it may do so incidentally. Its principal duty is the consideration of facts from the standpoint of moderation and absolute equity, and to compensate in a reasonable degree the Italians who have been injured from the abnormal political situation of the country, planting itself on the provisions of the Washington protocol, which do not distinguish between damages caused by revolutionists, whether triumphant or not, and those caused by the Government, and holding in view the fact that the Venezuelan plenipotentiary has recognized in principle and without reservation or discrimination the justice of claims which the Commission is called upon to decide.

Resting upon these considerations of law, and especially of fact, the Italian Commissioner insists that the claim of Salvatore Sambiaggio be admitted and the Venezuelan Government be held responsible in the sum of 4,591.50 bolivars, with the interest accruing thereon.

P.S. — The Italian Commissioner asks in addition that there be taken in consideration and decided the later claim for damages in the sum of 171.63 bolivars, this day presented by the royal Italian legation, to whom the claimant Sambiaggio transmitted it after having forwarded the claim already submitted to the Commission.

ZULOAGA, *Commissioner:*

It is a generally accepted principle of international law that strangers can not expect, in any country, better treatment than is accorded the nationals. Were this otherwise foreign immigration, instead of being a source of prosperity and grandeur, might become, to quote from Nesselrode's celebrated note, a true lash for the natives.

A foreigner who takes up his domicile in a country can not expect more than the justice of that country, more than the laws of that country, more security than it offers, or more than its civilization and well-being will afford him; in a word, more than the political organization of the place in which he lives will give him. This order of ideas is so founded on the condition of society and on absolute equity that to insist thereon seems superfluous.

The foreigner who comes to this part of America knows and implicitly accepts the fact that here at times society is politically perturbed, just as he knows that its soil is subject to upheavals which may engulf its inhabitants; just as he knows that fever lurks in every bush and pool of its exuberant nature. But if these are its drawbacks, there are also its compensations and advantages. Here life is easier than it is in the great European aggregations, and here fortune is more readily achieved. It would be absurd to pretend that all societies offer equal security and benefits, and hence to expect from each the same grade of civilization.

If this is true, it must be equally true that each government, as such, should be responsible for its acts, in that it constitutes a juridical entity, endowed with rights and duties.

The principle of the responsibility of governments is not otherwise founded, in the opinion of law writers, than on the rule of civil law that each individual is responsible for the acts of himself and his subordinates. (Authorities, articles 1116 of the Venezuelan and 1151 of the Italian code.) In private life the matter of responsibility is easily determined; but not so with the state. The motives which impel the action of the latter are many and various; and when, from whatsoever cause, political society is deeply stirred, it may be necessary for the state to adopt extraordinary, though entirely rational, measures for the

reestablishment of order and safety. Numerous are the reasons for a state's action in such case, and the canons of civil law can not apply to it save in a restricted sense.

These premises once established, it seems to me quite possible to appreciate the true meaning of Article III of the Washington protocol. Venezuela holds (art. 9 of the law of 1873, Seijas, Vol. I. p. 57), that the nation can not be considered responsible for damages, injuries, or expropriations not committed by the constituted authorities operating in a *public capacity*. The responsibility of the Government is therefore limited by and dependent on proof that the acts for which indemnity is claimed have been committed by the authorities while in the discharge of their public functions.

The protocol seems to have desired to avoid these discussions, and the Government admits, in principle, its responsibility; but only in so far as its agents are concerned; not for the acts of individuals — i.e., revolutionists — as that would be an extension of responsibility not contemplated by law, which is not supposable in a public treaty, or juridically deducible, as, according to the fundamental rule of interpretation, every exceptional clause is to be taken *restrictively*.

Governments, according to the authorities, are not responsible for the acts of individuals in rebellion, precisely because they are in rebellion. (Seijas, Vol. I, p. 50.) A government would be responsible, in the concrete, where it had been negligent in the protection of individuals; but in such case the responsibility would arise from the fact that the government, by its conduct, had laid itself open to the charge of complicity in the injury. The acts of revolutionists are outside of the government.

> It is not sufficient for a state to prove that it has been injured by individuals residing in another state to entitle it to hold this latter responsible and exact indemnity from it. It is necessary to prove that the prejudicial act is morally chargeable to the state, which ought to or could have prevented it, and has voluntarily neglected to do so. (Fiore, Vol. I, p. 582, sec. 673, Rule g.)

These are the principles which I find applicable to revolutionists when their political character is clearly demonstrable, as in the case of regular forces who follow a definite political purpose. In regard to guerillas, the question appears to me even more simple. These are, generally speaking, men who take advantage of the disturbed state of the country to commit depredations. They are often individuals who seek to satisfy passion or to wreak a personal or local vengeance. Others, again, are simply robbers who operate as such under the guise of revolutionists. We have had in this Commission the case of a band of robbers operating on the road to La Guaira, and calling themselves revolutionists. To hold the state responsible for the acts of such individuals would be impossible, as they would naturally come under the jurisdiction of criminal courts, in common with bandits of any country.

Regarding violations of private property, there exists in the law of 1873 (see Seijas, Vol. I, p. 57) the following provisions:

> ART. XI. All persons who unofficially order contributions or forced loans or any act of plunder whatsoever, shall equally with the perpetrators, be held personally and directly responsible to the injured parties.

For cases occurring in war coming before the Commission there has been no amnesty, so that the question is not presented. But in my opinion, even supposing a case in which amnesty has covered everything (which has not been the case), the Government would not be responsible if in its judgment such action had been dictated by motives of high public policy.

It is erroneous to assert that Venezuela covers with the shield of amnesty

the acts of violence committed by revolutionists against individuals. Only political amnesty has been granted, following the policy usual in such cases and it is generally so stated in the decrees issued.

The honorable Commissioner for Italy invokes in support of his argument Article I of the Washington treaty. I do not believe that this article has any such meaning, and even less before a tribunal of jurists called upon to decide questions of absolute equity. This article refers only to claims already presented by Italy, and this article of the treaty, given the condition under which it was signed by Venezuela, was simply a means of ending the blockade. Venezuela was compelled to subscribe to the payment of claims the justice of which she denied, and even to admit that they were just. *Quod scripsi, scripsi.* True, but even Italy, by the mouth of one of her greatest geniuses, has taught the world how much value may attach to a confession wrung by force, and his "*E pur si muove*" is to-day in the mouths of Venezuelans. Article I of the Washington treaty has, I repeat it, no meaning which may strengthen the claims last presented, as it can not be conceived that that which is unknown may be declared just.

The interpretation given by the honorable Commissioner for Italy to the third article of the Washington protocol would give a marked preference in favor of Italian subjects over the claims of the subjects of other countries who are equally entitled to a share in the 30 per cent set apart for the settlement of all claims. If such radical difference had in fact existed the other nations would not have failed to note it.

Article 462 of Bluntschli's Codification of International Law, invoked by the honorable Commissioner for Italy in support of his contention that as Venezuela had not fulfilled her obligation toward Italy the latter nation could claim indemnity for damages, is in my opinion, wrongfully appealed to. It is not true that Venezuela has violated its treaty obligations with the former country. Article 4 of said treaty does not and could not offer to Italians more protection than is afforded Venezuelans, and as in case of revolution or internecine war the Italians only have a right to be indemnified for injuries inflicted upon them by the constituted authorities on the same terms as those granted by existing law to Nationals, Italy can not say that Venezuela has treated Italians less favorably than her own citizens. Article 4 claims no more than this, and it can not be pretended that more protection is due Italians than is accorded Venezuelans. This article anticipates the case of Italians injured in internecine war, and provides that they shall be treated the same as Venezuelans. As the Washington treaty confers an advantage on Italians over Venezuelans in that it creates this Commission, before which they may appear without the necessity of previously having recourse to the tribunals of the country, and provides for the payment of their claims in gold out of the 30 per cent, the protocol takes care to state that the treaty of 1861 may not be invoked. This is the only object of the article referred to, and nowhere in it does it appear that there was any wish to consider the question of the responsibility for the acts of revolutionists. Neither does it appear, so far as I can see, that the "most-favored-nation" clause of the treaty of 1861 gives Italy the right to claim damages for such acts. It does not appear that any such agreement was made with any power, and if any reference is made therein to claims for damages arising in insurrectionary events, it is without doubt to such as are caused by the acts of the Government or governmental authorities.

To take as precedents the decisions of a mixed commission as though they were the clauses of a treaty is an error. A mixed commission gives its decision in each case and with especial reference to all its circumstances. If, therefore, such decisions were regarded as having the force and effect of a treaty, giving

to Italy the right to an advantage equal to the decision in any one identical case, it would be necessary to accord to the decisions in favor of Venezuela corresponding advantages. That is to say, decisions in favor of Venezuela in other commissions would be invoked by her in her favor and against Italy in this Commission. This would lead to the absurdity of submitting this tribunal to the decisions of all the mixed commissions.

The " most-favored-nation " clause referred to by the honorable Commissioner for Italy is absolutely inapplicable in this Commission and has no relevancy.

The decisions of this Commission are not governed by any rule other than that established by Article II of the Washington protocol; that is to say, they will be based on absolute equity, without regard to objections of a technical nature or the provisions of local legislation. This absolute equity is what is understood by the Commissioners to be such, and in the event of their disagreeing the decision of the umpire will be final.

Equity seems to me to be nothing more than the natural application of those rules of reason and justice which nations recognize as surest and which international law recommends in cases submitted for consideration. This is a tribunal of full and absolute jurisdiction and one which has no need to occupy itself with the decisions of other mixed commissions, which may or may not rest on equity, according to the principles governing and applicable only in each case. Furthermore, this tribunal may not be held subject to the precedent of an anterior decision, but is obliged to apply the principles of equity in each case, and if, for an unforeseen cause, a decision has been, in our judgment, incorrect, it is our duty not to perpetuate the error so committed. This is the rule of action of every tribunal.

The cases which the honorable Commissioner for Italy cites in support of his contention (the vessels *Montijo v.* Colombia, *Hero* and *San Fernando v.* Venezuela, and Easton *v.* Peru) do not seem to me to serve as precedents. In the two first, which refer to the seizure of vessels, there is a mingling of juridical questions which complicate and obscure the cases and render them quite distinct in principle from a simple case of injury to the property of a foreigner domiciled in this country. In the case of Easton *v.* Peru that country agreed with the United States to pay the sum awarded, but Moore assigns no ground for such agreement.

Fiore, the authority quoted by the honorable Commissioner for Italy, holds in his writings opinions which, when taken in sequence, support the position taken by me in this case. As quoted, the extracts cited do not correctly render the opinions of that learned writer, who maintains that a state may be held responsible if its system of laws is so grossly imperfect as to be evidently unfit for proper administration. The laws of Venezuela — penal, civil, and of procedure — have been inspired by those of Italy, and in so far as concerns the general order of their principles there is but little disparity between them. It would be difficult for Italy, according to equity and the principles laid down by Fiore, to cast imputations of inefficiency in Venezuela in this respect. The responsibility of a government is in proportion to its ability to avoid an evil. A government sufficiently powerful in all its attributes to prevent the occurrence of evil, but by negligence permitting it, is doubtless more accountable for the preservation of order than one not so endowed. It is on this basis that Fiore determines the responsibility of a government to be in direct ratio to its ability to foresee and avoid danger.

A few final considerations and I have done.

This Commission has not, in my opinion, the right to enter into a general discussion as to the merits of the policy of the Venezuelan Government. That

would be an act of intervention into its national life not warranted by the principles of international law. Venezuela is a sovereign state, recognized as such by all civilized nations, and is not accountable to any foreign power concerning the motives of its political action.

We here are simply acting as judges in the settlement of claims for damages, according to the merits and circumstances of each individual case — nothing more — and I repel the observations of the honorable Commissioner respecting the general policy and administration of the affairs of this country. Venezuela is a member of the family of nations according to the principles of international law, and admitted as such without question. I can not therefore see that there is any necessity for the discussion of this matter. Venezuela, though occupying a very modest position among the civilized powers, may say, in spite of her recent political misfortunes, that her people have a right to consideration as a cultured people for whom there is a brilliant and promising future. Her history is inferior to that of none of the South American states. To four of them her armies have given independence and furnished statesmen. From her soil have sprung Americans who may well be called eminent. Her institutions, though not as yet fully developed, as they surely will be in time, are most generous and liberal and progressive. She enjoys to the fullest degree liberty of conscience, of religion, of thought, and of education. On her shores the stranger enjoys the same measure of civil rights as does the native. Surely a country in which such conditions exist is entitled to consideration and esteem, and should not be judged by the standard of accidental occasions of political perturbations in which damage to property is suffered. Were so ignoble a criterion to be adopted in our estimate of nations, more than one now held in high regard in Europe would appear far otherwise.

Force of circumstances has drawn us into a general discussion of national responsibility for revolutionary acts, but the truth is that such principles are not needed except as the circumstances of each particular case may require.

This should be the procedure of judges, more especially of judges sitting in equity.

In accordance with the ideas expressed by me in the foregoing, I feel constrained to reject and deny the claim of Salvatore Sambiaggio.

ZULOAGA, *Commissioner* (supplementary opinion):

The government is not responsible to individuals for damages caused by factions, revolutions, or mobs in any manner against the constituted authority. It is true that the government should confer protection and security, but only in so far as is permitted by the means at its disposal and according as the circumstances may be verified. So many and so various are the causes which may render a government more or less culpable that it would be impossible to formulate a general idea on the subject. Moreover, so complicated are the circumstances that the solution of this problem in a perturbed state of society is a question of political tact which few statesmen are capable of settling.

There are times when the use of extreme energy and implacable repression may be a great error, serving only to feed the fires of the insurrection.

Revolutions are not here, more than elsewhere, always occasioned by the faults or errors of the government or by a simple spirit of uprising among the revolted. They obey multiple causes, and not infrequently there is in the political horizon of a people a condensation of revolutionary clouds that the patriotism of the best citizens of the government or of the opposition is unable to prevent, so deeply is the reason hidden in political or economical causes.

Europe itself, so proud of the internal peace which its states have succeeded in preserving during the latter half of the past century, sees with alarm, in

spite of the strength of the organization of its governments, the swelling of the socialistic forces and the affiliation therewith of the working masses.

Governments are constituted to *afford* protection, not to *guarantee* it, and it is out of the question that this tribunal should assume to investigate the causes of injury from the general standpoint of interior policy, without running the risk of undertaking to judge not merely the cases of claims for damages submitted to it, but also the very government and country itself, which would be an act of interference wholly unwarranted by the principles recognized by all countries.

It has, however, been maintained by various governments and authorities that in certain particular cases and under certain circumstances thereof a state might properly be charged with responsibility for damages to an individual, in the event of its being demonstrated that the state had been wholly negligent in furnishing the protection which could be reasonably expected from it. In accordance with this theory the government is not responsible for lack of protection not resulting from a culpable neglect so great as to equal an act of its own against private property.

Whosoever, therefore, makes claim against the state in such case must establish two things —

1. That he has actually suffered the damage alleged.

2. That the state is in a certain manner responsible, through its negligence, for the damage committed.

This is the doctrine laid down by Fiore: [1]

> It is not sufficient for a state to prove that it has suffered a damage from the acts of individuals residing in another state to charge the latter with responsibility and exact a reparation. It must be proved that the prejudicial act is morally imputable to the said state, or that it could or should have prevented the injury and was voluntarily negligent of its duty in not having done so.

This is nothing more than the application of common law that the burden of proof rests on the plaintiff.

In the application of these principles of indirect responsibility it is necessary to take into account that the government of a country in a state of war meets with graver difficulties and problems than it does in a state of peace; that the means at its command and its especial attention are preferably directed to the reestablishment of order, and that its responsibility is in direct ratio to its ability for so doing.

Speaking of neutrality, Fiore says: [2]

> The inability of a neutral state to prevent the violation of the laws of neutrality *always* excludes the liability of the government, and consequently the right of the belligerent to consider the neutral state responsible for said violation.

Now, if this rule is so clearly expressed in regard to neutrality, in which the obligations of neutral governments are in a certain way direct, what shall we say when it is a case coming within the internal life of a state?

This principle of the responsibility of a state by reason of its negligence is moderated, however, by that which holds that foreigners can not in any territory expect to receive more than is accorded the nationals, and according to the law of Venezuela the state is not responsible for the acts of revolutionists.

Setting aside all discussion as to principles of international law, to which we were brought by the necessity of understanding the meaning of certain statements in the Washington protocol, and keeping strictly within the principle of absolute equity, I would ask, Is it equitable that foreigners domiciled in

[1] See Vol. I, sec. 673, p. 582.

[2] See sec. 1569.

Venezuela should expect to escape the political condition of the country, and obtain, as an advantage over the natives, not only payment for damages inflicted on them by the Government, but for those caused by the rebels the Government was combatting, and against whom it was expending all its energies, blood, and treasure? Is it equitable that, as between a Venezuelan and a foreigner, the former should say, " My home is in mourning for cherished members of my family who have perished in defense of the state; I myself am ruined from the enforced neglect of my business: I have been the victim of the enemy," while the foreigner may say, " I have lost nothing by the war; I am as safe as in times of peace; not only does the government (which I do not defend) pay me for the losses which it has inflicted on me but for those occasioned by its enemies as well."

I believe that in equity such claims should be rejected.

RALSTON, *Umpire:* [1]

The Commissioners for Italy and Venezuela differing as to the right of recovery in the above-mentioned case, the same was duly referred to the umpire for decision under the protocol.

The claimant, Salvatore Sambiaggio, a resident of San Joaquín Parish, State of Carabobo, demands the sum of 5,133.52 bolivars for forced advances made to, property taken by, and damages suffered from revolutionary forces under command of Colonel Guevara on or about July 27, 1902, with the additional amount of 171.63 bolivars for costs and interests.

The immediate and most important question presented is as to the liability of the existing government for losses and damages suffered at the hands of revolutionists who failed of success.

Let us treat the matter first from the standpoint of abstract right, reserving examination of precedents, the treaties between the two countries, and the question whether there be anything to exempt Venezuela from the operation of such general rule as may be found to exist.

We may premise that the case now under consideration is not one where a state has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists; but simply where there exists open, flagrant, bloody, and determined war.

The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical.

But, speaking broadly, are revolutionists and government so related that as between them a general exception should exist to the foregoing apparently axiomatic principle?

The interest of a government, like that of an individual, lies in its preservation. The presumed interests of revolutionists lie in the destruction of the existing government and the substitution of another of different personnel or controlled by different principles.

To say that a government is (as it naturally must be) responsible for the acts it commits in an attempt (for instance) to maintain its own existence, and to require it at the same moment to pay for the powder and ball expended and

[1] For a French translation see Descamps-Renault, *Recueil international des traités du XX*ème *siècle*, 1903, p. 808.

the soldiers engaged, in an attempt to destroy its life, is a proposition difficult to maintain, and yet it is to this point we arrive in the last analysis if governments are to compensate wrongs done by their would-be slayers when engaged in attempts to destroy them.

A further consideration may be added. Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition. When we bear in mind that for six months previous to the taking complained of in the present case a bloody and determined revolution demanding the entire resources of the Government to quell it had been raging throughout the larger part of Venezuela, it can not be determined generally that there was such neglect on the part of the Government as to charge it with the offenses of the revolutionists whose acts are now in question.

We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists because —

1. Revolutionists are not the agents of government, and a natural responsibility does not exist.

2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.

3. The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restraint.

Let us now discuss the decisions of courts and commissions relative to the question at issue.

The case of Prats *v.* The United States was presented before the American and Mexican Mixed Commission of 1868, and was for the destruction of a brig by the Confederate forces during the American civil war.

> Nonresponsibility on the part of the United States [said Mr. Wadsworth, speaking for the Commission], for injuries by the Confederate enemy within the territories of that Government to aliens did not result from the recognition of the belligerency of the rebel enemy by the stranger's sovereign. *It resulted from the fact of belligerency itself* and whether recognized or not by other governments. * * * The naked question therefore remains: Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, transient or dwelling? We have no difficulty in answering that question in the negative.
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> The principle of nonresponsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted. (Moore's Digest, Vol. 3, pp. 2886-2892.)

As will appear by reference to Moore, Volume 3, page 2900, the same Commission followed this rule in various cases like in principle.

The United States was not held liable to foreigners for contracts entered into between them and the Confederate States during the civil war. (Moore, Vol. 3. pp. 2900-2901.)

A somewhat like principle was invoked when the American and Mexican Claims Commission of 1868 refused to hold Mexico responsible for the acts of the Maximilian government which was striving to accomplish its overthrow. (Moore, Vol. 3, p. 2902.)

The case of Daniel N. Pope was presented before the American and Mexican Claims Commission of 1859 for damages inflicted by a sudden insurrectionary movement which was soon quelled by the authorities. Mexico was not held responsible. (Moore, Vol. 3, p. 2972.)

So losses inflicted upon a foreigner by a government not recognized as de facto were not recompensed. (Schultz *v.* Mexico, American and Mexican Claims Commission of 1868, Moore, Vol. 3, p. 2973.)

In the Cummings case, before the same Commission, the umpire, Sir Edward Thornton, held that if the parties inflicting the damage were rebels, the Government was not responsible for the loss. (Moore, Vol. 3, p. 2977.)

In the case of Walsh, for imprisonment by rebels, the same umpire held that the Mexican Government could not be held liable. (Moore, Vol. 3, p. 2978.)

Like principles to these laid down in the foregoing cases were followed in the cases of Wyman and Silva. (Moore, Vol. 3. pp. 2978, 2979.)

The case of Divine (Moore, Vol. 3, p. 2980) is notable in that the American agent contended that Mexico should be held responsible as she had pardoned the revolutionist and had conferred high office upon him; but the umpire held that

> other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels,

and dismissed the claim.

Still other commissions have followed the same rule. In the case of McGrady et al. *v.* Spain (Spanish and American Commission of 1871), a claim merely setting up wrongs and injuries committed by insurgents was dismissed. (Moore, Vol. 3, p. 2981. See to like effect Zaldivar *v.* Spain, Moore, Vol. 3, p. 2982.)

Before the American and British Claims Commission of 1871 was heard the oft-cited case of Hanna, for destruction of cotton by the Confederate forces during the American civil war. After thorough discussion, the Commission unanimously held —

> that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control and which acts they had no power to prevent. (Moore, Vol. 3, p. 2982.)

The same principle was followed in the cases of Laurie and others (Moore, Vol. 3, p. 2987) and Stewart (p. 2989).

The last Commission to consider the point under discussion and decide thereon was the Spanish Treaty Claims Commission, formed by act of the American Congress dated March 2, 1901.[1]

The treaty of December 10, 1898, between the United States and Spain [2] provided that "The United States will adjudicate and settle the claims of its citizens against Spain and relinquished in this article," and to render effective this provision the Commission was constituted.

The article referred to released all claims that had arisen in favor of the nationals of either country against the other "since the beginning of the late insurrection in Cuba."

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[1] Stats. at L., vol. 31, p. 1011.
[2] Art. 7, Stats. at L., vol. 30, p. 1754.

After the most thorough discussion of the question now before the umpire and the most ample consideration by the Commission it was decided by a majority — the minority apparently not dissenting from the statement of principle, but regarding it as abstract or qualified by certain treaty stipulations or other matters not in point here — that —[1]

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense, which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government the general rule is that such government is not responsible for damages done to foreigners by the insurgents.

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States, and in war between Spain and the United States, passed from the first beyond the control of Spain, and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities, by the exercise of due diligence, might have prevented the damages done, Spain will be held liable in that case.

We may now consider the opinion of public men and international law writers.

Without discussing in detail the expressions of American Secretaries of State, in the opinion of the umpire they are correctly summarized in the head notes of section 223 of Wharton's Digest of International Law, as follows:

A sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control or whom the claimant government had recognized as belligerents.

Says Hall, in his work on International Law, page 231:

When a government is temporarily unable to control the acts of private persons within its dominions, owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the population which has broken loose from control. When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the government can have no control, and they can not demand compensation for losses or injuries received, both because, unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state.

In a note to the foregoing he remarks that during the American civil war the British Government refused to procure compensation for injuries inflicted by the United States forces on British subjects, remitting them to American courts for such remedies as were open to American citizens.

While the exact point at issue is not discussed by Bluntschli, he approaches it when he says (see sec. 380,bis):

Par contre, les États ne sont tenus d'accorder d'indemnités pour les pertes ou les dommages subis par les étrangers aussi bien que par les nationaux à la suite de troubles intérieurs ou de guerre civile.

[1] Opinion No. 8.

The British minister at Bogotá, on August 23, 1887, wrote, with relation to claims for destruction of property at Panama in 1887, as follows:

From the information obtained by Her Majesty's Government it is clear that the destruction of Colon was entirely due to the action of the insurgents who had declared themselves against the Government, and who, having succeeded in obtaining for a short period complete possession of and mastery over that town, proceeded to set fire to it in several places; nor does it appear to be open to question that at the time when these events occurred the Colombian Government was entirely powerless to prevent, although they eventually succeeded in quelling, the rebellion.

In these circumstances there is not, in the opinion of Her Majesty's Government, sufficient ground for contending that the destruction of Colon was so directly due to any default on the part of the Colombian Government as to justify a demand for compensation on behalf of those British subjects who, like yourself, have unfortunately incurred losses through the fire. (U.S. Senate Doc. 264, 57th Cong., 1st sess., p. 163.)

Whether the assumptions of fact contained in the foregoing are correct or not the statements of law may be accepted as a summary of the British position.

We may appropriately quote Escriche, who describes a fortuitous case for which no responsibility exists, as follows:

Caso fortuito es el suceso inopinado, ó la fuerza mayor, que no se puede preveer ni resistir. Tales son las inondaciones, torrentes, naufragios, incendios, rayos, violencias, *sediciones populares*, ruinas de edificios causadas por alguna desgracia imprevista, y otros acontecimientos semejantes.

According to Seijas, Volume III, page 538:

El gobierno inglés, como el ruso, el francés, el italiano y el espagñol, han proclamado y sostenido la irresponsabilidad del estado por perjuicios ocasionados á extrangeros por tropas revolucionarias, y aún por las constitucionales, quando el daño no ha sido voluntario y deliberadamente causado.

While M. Despagnet does not more than touch the subject in his "Droit International Public," he says (p. 353):

Mais les étrangers peuvent souffrir un préjudice à la suite d'une guerre, d'une révolution, ou d'une émeute éclatant dans le pays où ils se trouvent; il est universellement admis aujourd'hui que la protection diplomatique ou consulaire ne peut être invoquée en pareil cas, parce qu'il s'agit d'un accident de force majeure, dont les étrangers courent le risque absolument comme les nationaux du pays. Ce serait, d'ailleurs, trop restreindre la liberté d'action des belligérants ou du gouvernement qui combat les insurgés que de les obliger à respecter les biens et les personnes des étrangers, alors surtout qu'il est souvent impossible de les distinguer dans une lutte violente.

Calvo remarks (sec. 86) that:

Les étrangers établis dans un pays en proie à la guerre civile et auxquels cet état de choses a occasionné des préjudices n'ont eux-mêmes aucun droit à des indemnités, à moins qu'il ne soit positivement établi que le gouvernement territorial avait le moyen de les protéger et qu'il a négligé d'en user pour les mettre à l'abri de tout dommage. Ces principes ont dans plus d'une circonstance été reconnus explicitement par les gouvernements d'Europe et d'Amérique.

To support the above statement he cites Grotius, book 2, chapter 25, section 8; Vattel, book 2, chapter 4, section 56; Wheaton, Part I, chapter 2, section 7; Kent, Volume I, sections 23 et seq.; Twiss, section 21; Rutherford, Institutes, book 2, chapter 9; Puffendorf, book 8, chapter 6, section 14; Bynkerschoek, book 2, chapter 3; Wildman, Volume I, pages 51, 57, 58; Halleck, chapter 3, section 20; Martens, sections 79-82; Lawrence, Part I, chapter 2, section 7;

Pinheiro Ferreira, Volume II, pages 5 et seq.; Lawrence's Wheaton, note 16; Dana's Wheaton, note 15; Hall, pages 27-30.

In the work of J. Tchernoff, entitled " Protection des Nationaux Résidant à l'Étranger," page 337, the question is touched upon as follows:

> On se trouve en présence d'insurgés qui ne sont pas reconnus. Ils commettent des acts qui d'une part sont accomplis en violation des lois de la guerre, et d'autre part sont de nature à causer des dommages aux sujets neutres. On ne peut parler de la responsabilité internationale des insurgés puisqu'ils n'existent pas pour le droit international public. Nous savons, nous venons de dire pourquoi, on ne peut rendre responsable de leurs actes le gouvernement légal.

Certain cases have been or might be cited contrary, or presumed to be contrary, to the enunciations of principle already indulged in by the umpire. They should be enumerated.

The first mentioned by the honorable Commissioner for Italy is the Montijo case, cited in 2 Moore, pages 1421 et seq. In this case the steamer *Montijo* was taken possession of by State revolutionists. After a short career they surrendered to the regularly constituted authorities of the State, which, according to the opinion of Umpire Sir Robert Bunce, granted them amnesty and stipulated as one of the conditions of peace that the State would pay for the use of the vessel. This contract, the umpire held, bound the Colombian Government. He went further, and in addition held that the Government had failed to perform its duty in that it had not recovered the *Montijo* and returned her to her owners, following with some general observations as to the duties of governments, which, however well meant, were not necessary to the decision of the case and not discussed by the parties. That the final result was correct is not doubted.

The next citation made by the honorable arbitrator for Italy is of the Venezuela Steam Transportation Company against Venezuela. Unfortunately, the grounds of the decision are not stated in the award. We learn from the agent's report (p. 11) that among the contentions of the United States were the following:

> 1. That the seizure, detention and employment of the three steamers of complainant and the imprisonment of its officers * * * was—
> *(a)* An invasion of the rights of the complainant in derogation of principles of international law; *(b)* was contrary to equity and justice; *(c)* and was in violation of the special privileges conferred by Venezuela upon the complainant under provisions of the act of Congress of May 14, 1869.
> 2. That by reason of the invasion of these rights and privileges Venezuela was internationally liable and is bound to indemnify complainant pecuniarily to the extent of the damage proven.

Considering the multiplicity of contentions advanced on behalf of the United States and the absence of reasoning in the decision, it is impossible to say on what principle the case was decided, although it is fair to remark that it might be inferred from the dissenting opinion of Commissioner Andrade that the case affords support for the theory of the honorable Commissioner for Italy.

Reference is next made to the case of Easton and others, supported by the United States, against Peru. As appears by the report in Moore, page 1629, the injuries complained of were inflicted by revolutionists, and a claim therefor presented before the United States and Peruvian Claims Commission. The question of Peru's liability for acts of revolutionists seems not to have been discussed, the Commissioners simply disagreeing as to the amount of the award, and the case going to the umpire, whose opinion is not given. Whether there were or not circumstances withdrawing the case from the usual rule does not appear.

The honorable arbitrator for Italy next cites the Panama riot claims (2 Moore pp. 1361 et seq.); but it seems clear that the citation is not in point, these claims having grown out of an assault in which the police themselves took part, and the Government being held liable for failure of its officers to do their duty, nothing approaching the present revolutionary question appearing.

The opinion of the honorable Commissioner for Italy invites attention to Bluntschli, article 462, and Fiore, sections 645, 651, and 657.

Bluntschli, in the article indicated, lays down conditions which would justify forcible interference by one state in the affairs of another; but the present situation does not seem to be such as to make his words applicable.

The positions taken by Fiore may be regarded as being in direct accord with the theory of the present decision. Furthermore, we may accept, as, in fact, has already been accepted, in principle, the words of Fiore (sec. 656), when he says:

Non é facile stabilire regole astratte per determinare quando la mancanza di diligenza per parte di un governo nel calcolare le conseguenze possibili e previdibili del proprio sistema di leggi e di procedure, posse costituire una omissione voluntaria, o tale da rendere lo Stato responsabile. Tutto dipende dal rapporto tra il dovere astratto dello Stato e le circostanze di fatto, e tra il pericolo del danno e la previdibilità.

La diligenza colla quale un governo deve provedere a che siano rispettati i doveri internazionali dovrà certamente essere maggiore quando per la forza degli avvenimenti siano posti in giuoco molti interessi, quando la società internazionale sia agitata, quando il pericolo che accadano fatti a danno di un Stato amico, sia maggiore. Di maniera che la solerzia colla quale dev' essere tenuto un governo é in ragione diretta delle circostanze che rendono più o meno imminente ed il danno che si puó provvedere ché i terzi possono soffrire; la sua responsabilitá effetiva poi in ragione diretta del dovere di essere solerte dei mezzi dei quali poteva disporro, e dei quali sei servito per allontanare il pericolo. (See Fiore, Droit Int. Privé, Antoine's ed., sec. 671.)

There is, however, the broad difference hereinafter pointed out between indulgence in a settled presumption, on the one hand, and an investigation of the facts and appreciation of the circumstances in each case.

It is suggested, in the opinion of the honorable Commissioner for Italy, among other things, first, that the Italian protocols impliedly recognize the obligation of Venezuela to pay for injuries committed by revolutionary troops; and, second, that under a proper reading of Article VIII of the protocol of February 13, bearing in mind that France and Venezuela, by the protocol of February 19, 1902, had expressly recognized damages arising from "insurrectionary events," and that the German protocol refers to claims resulting from the present Venezuelan civil war, Italy, under the " most favored nation " clause appearing in such article of her protocol, is entitled to be paid for injuries inflicted upon her subjects, and of the nature above indicated.

To fully understand these contentions a recital of the facts with relation to the diplomatic situation between Italy and Venezuela seems essential.

By article 4 of the treaty between the two nations, dated June 19, 1861, it was provided, among other things, as follows:

ART. 4. The citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property, and shall have in this respect the same rights and privileges accorded to the nationals, and shall be subject to the conditions imposed on the latter. * * *

In cases of revolution or internecine war the citizens and subjects of the contracting parties shall have the right, in the territory of the other, to be indemnified for loss or damage to person or property inflicted by the constituted authority in the same measure as would, under similar circumstances, be granted nationals according to the laws which are or may be in vigor.

Article 26 provides:

It is agreed between the high contracting parties that in addition to the foregoing stipulations the diplomatic and consular agents, all citizens, vessels, and merchandise of each state, respectively, shall enjoy the full right in the other to the franchises, privileges, or immunities accorded the most favored nations, gratuitously if the concession has been gratuitous, and on similar terms if the concession was a conditional one.

Discussions, the nature of which will be alluded to hereafter, arising between the two countries, by Article VIII of the protocol of February 12, 1903, it was provided as follows:

ART. VIII. The treaty of amity, commerce, and navigation between Italy and Venezuela of June 19, 1861, is renewed and confirmed. It is, however, expressly agreed between the two governments that the interpretation to be given to articles 4 and 26 is the following:

"According to article 4, Italians in Venezuela and Venezuelans in Italy can not in any case receive a treatment less favorable than the natives, and according to article 26, Italians in Venezuela and Venezuelans in Italy are entitled to receive in every matter, and especially in the matter of claims, the treatment of the most favored nation, as is established in the same article 26."

If there is any doubt or conflict between the two articles, the article 26 will be followed.

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present protocol.

Article IV of the present protocol reads as follows:

ART. IV. The Italian and Venezuelan Governments agree that all the remaining Italian claims, without exception, other than those dealt with in Article VII hereof, shall, unless otherwise satisfied, be referred to a Mixed Commission, to be constituted as soon as possible in the manner defined in Article VI of the protocol, and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The Venezuelan Government admit their liability in cases where the claim is for injury to persons and property, and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases will only be:

(a) Whether the injury took place or whether the seizure was wrongful; and,

(b) If so, what amount of compensation is due.

In other cases the claims will be referred to the Mixed Commission without reservation.

It is evident that the protocol last mentioned does not directly recognize any obligation on the part of Venezuela to pay for injuries inflicted by revolutionary troops, and the first question is whether it does so by implication. It seems clear that under the treaty of 1861 revolutionary claims could not have been entertained, for the obligation recognized by Italy and Venezuela reciprocally was to indemnify for the loss or damage inflicted by the constituted authority of the country, and then only in the same measure as nationals would be.

Consequent upon the revolutionary events of 1896 to 1900, injuries inflicted upon Italian citizens were the subject of the diplomatic discussion between the countries. A careful examination of the correspondence shows that it did not relate to the questions of liability or nonliability for the acts of revolutionists, but rather to the power of Venezuela under its decree of February 14, 1873, republished January 24, 1901, to remit Italians and other foreigners to the local authorities for relief. Bearing in mind the fact that the only treaty obligations then existing were to indemnify against injury by the constituted authorities of the country we can readily understand why it was that in the

diplomatic correspondence, as stated, no reference whatever exists to the question of liability for damages from acts of unsuccessful revolutionists, and none of the Italian claims submitted to the Venezuelan foreign office were for such injuries.

The article does not in itself refer to any specific classes of acts, and a natural and logical interpretation would be that it charged Venezuela with the fullest responsibility for the acts of her authorities of whatever nature, legal or otherwise, or other acts for which she might be responsible from the standpoint of international law, not for the acts of those over whom she had no control. This interpretation would not necessarily render the words meaningless or superfluous when we remember that at the time they were written there existed in full force the law of February 14, 1873, which provided only a limited responsibility, as follows:

ART. 9. En ningún caso podrá pretender que la Nación ni los Estados indemnicen daños, perjuicios, ó expropiaciones, que no se hubieron ejecutado per autoridades legítimas, obrando en su carácter público.

Article 14 of the constitution of Venezuela of April, 1901, contains the foregoing provision, but with the words applying it " tanto los nacionales como los extrangeros," while article 13 provides:

ART. 13. Los extrangeros gozan de todos los derechos civiles que gozan los nacionales. Por tanto, la Nación no tiene ni reconoce á favor de los extrangeros ningunas otras obligaciones ni responsabilidad que las que á favor de los nacionales se hayan establecido en igual caso en la constitución y en las leyes.

Venezuela, in addition, denied in principle the right of a foreigner to present any claims save before her own forums, and permitted that only for a limited time. About these points alone the discussion between the two Governments turned. It is therefore inconceivable that Venezuela by the protocol should have admitted liability for a large class of claims never contended for by Italy, her admission so naturally relating to a liability denied by both laws and constitution.

An interpretation which would extend the liability of Venezuela under her admission to acts of revolutionists would enlarge its limits to include any liability, no matter how generally denied by internationalists, and whether the damages were the result of private wrongs or unexpected brigandage, were committed by a power invading Venezuela or were the effect of an accident in the international sense as applied to war; in every case must Venezuela pay — a conclusion manifestly impossible. In the umpire's opinion, there must properly be the premise always understood that the claim is of a nature to create liability under international law — in other words, it must be for a legal injury. (See Webster's Dictionary, title Injury.)

Let us accept for a moment the interpretation insisted upon by Italy and see the result. Venezuela would be bound not alone for her own acts, but generally for all acts — bound for the acts of those seeking to destroy constituted government as well as to defend it; bound for every claim of damage the royal Italian legation might see fit to present. She would be held to have abandoned the usual position of a contracting party and to have consented to place herself within the judgment of those claiming against her, leaving only the amount of the claim to be determined. The Commission would no longer determine whether the (legal) injury took place, for all claimed offenses, no matter by whom committed, would constitute injuries in the eyes of the Commission. To indulge in such supposition is to imagine that the representative of Venezuela had abandoned reason when the protocol was signed, and an interpre-

tation according common sense to both parties signing a contract should always be sought.

Let us for a moment analyze the language of the protocol in view of the facts. Venezuela had for a long time by her constitution and laws denied her liability for certain classes of acts, and denied that she was responsible anywhere save in her own courts.

By the protocol she admitted liability for injury to persons and property and wrongful seizure of the latter, and remitted to a mixed commission the questions (*a*) whether the injury took place, and (*b*), if so, what amount of compensation is due. In aid of the sense we may presume that the word " injury," when last used, includes injury to person and property and wrongful seizures.

It has already been pointed out that " injury " imports a damage inflicted against law. It involves a wrong inflicted on the sufferer and of necessity wrongdoing by the party to be charged, as otherwise it could not be called " wrongful " as against him. Applying this doctrine, which the umpire believes to be unassailable, by what process of ratiocination can he imply to Venezuela the wrongful intent lodged in the bosoms of those who were at enmity with her and seeking to destroy her established Government? And if he may not do so, how can he charge Venezuela with the commission of acts of which she is innocent? And how, under such circumstances, can he find that an injury has been committed with which, by the law of nations, she should be so charged?

If it be argued that she has admitted liability for the acts of another, and therefore she should pay, is it not to be remarked that a promise to pay for the acts of one's enemy engaged in an attempt upon one's own life is so far contrary to the usual practice of mankind that it is only to be believed upon the most direct and express evidence, and beyond all dispute this evidence is lacking.

But even if the case were not clear, as it seems to be, applying the usual rules of law, and bearing in mind the tendencies of human nature, what are we taught as the canons of interpretation in such cases?

Woolsey's International Law, section 113, gives as one of the most important rules of interpretation:

> 2. If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted. For in securing a benefit he ought to express himself clearly. The sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer.

Wharton's Digest, section 133, expresses a like idea in these terms:

> If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by party accepting it.

In the same sense says Pradier-Fodéré (section 1188):

> Les auteurs modernes reconnaissent que * * * les stipulations douteuses doivent être interpretées dans le sens le moins onéreux pour la partie obligée.

Vattel expresses himself (sec. 264, Tome II) as follows:

> Si celui qui pouvait et devait s'expliquer nettement et pleinement ne l'a pas fait, tant pis pour lui; il ne peut être reçu à apporter subséquemment des restrictions qu'il n'a pas exprimées.

Summing up the foregoing, the umpire thinks that if it had been the contract between Italy and Venezuela, understood and consented to by both, that the latter should be held for the acts of revolutionists — something in derogation of the general principles of international law — this agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.

As above indicated, it is strongly urged, in connection with Article VIII of the protocol, that because of the presence of the " most-favored-nation " clause the umpire should give to Italy all the advantages which might be claimed by Germany and France by virtue of the protocols made with those powers.

At first glance the suggestion would appear to be well founded; but a careful study of the article will, in the umpire's opinion, prove the argument erroneous.

At the time the protocol was signed relations between Italy and Venezuela were so far broken that, as shown by the language of the article, it was necessary to " renew and confirm " the old treaty.[1]

Italy then asked and obtained a special interpretation of the treaty of 1861 with her. If this interpretation is to be given a retroactive effect, and if it is to be considered as applying in favor of Italy, all the provisions of other protocols recently signed, then a resort to such instruments is necessary in every case to learn the furthest bounds of the powers of this Commission. Unless both elements concur we need not refer to them.

Has, therefore, this new interpretation of articles 4 and 26 of the old treaty any retroactive effect? If it has not, the rights of Italian subjects and the duties of the Venezuelan Government are fixed by treaty or international laws as of the date of the occurrence complained of, but modified by such provisions of the protocol as do not form part of the treaty of 1861 as now interpreted.

Treaties are to be interpreted, generally, mutatis mutandis, as are statutes (Wharton's Digest, sec. 133), and on many occasions the Supreme Court of the United States has held that in the absence of express language statutes will not be held to be retroactive. In one of the most recent cases brought before that tribunal it was held that —

> a statute should not be construed to act retroactively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. (City R. Co. *v.* Citizens' Street R. Co., 166 U.S., 557.)

The case now before us, as above indicated, is substantially that of a treaty " renewed and confirmed," with a new interpretation as to claims, but not in terms relating back to past conditions or justifying the umpire in believing that new obligations as to past events had been called into existence by its signing.

This belief is borne out by the fact that the signers of the protocol did not think that this renewed treaty related back, for if they had done so they would not have concluded the article with the words:

> It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present protocol.

If the treaty, as newly interpreted, had, in the signers' opinion, related back, these words would have been unnecessary, for, giving full force to the interpretation as relating to an earlier date, there would have been nothing for Italy to fear. If the treaty uninterpreted could have been invoked, save for the presence of the words in the protocol, there was reason to believe that its Article IV, above cited, would have defeated many Italian claims.

Article VIII, though found within a temporary protocol, is in fact part of a renewed treaty and relates necessarily to the treatment to be accorded citizens

[1] It will be noted that the permanent court of arbitration at The Hague, sitting in the Venezuelan case, found that the blockade resulted in war between Great Britain, Germany, and Italy on the one hand and Venezuela on the other. (Vol. IX, of these Reports, p. 105.)

and subjects by general and permanent rules between nations, and not to momentary rules of decision controlling the disposition of claims arising out of past events. Rules for the settlement of prior disputes, which die with the Commission acting under them, accord nothing partaking of "favored-nation" treatment; for, to illustrate, suppose Venezuela had said in a protocol with Switzerland ten years ago that to settle by arbitration a dispute affecting a single individual she had admitted her liability for the acts of robbers, could that admission now be invoked by Italy as against Venezuela? Is the case stronger or the rule different because France, for instance, has now a a hundred or more claimants? Must the umpire examine the records of every past commission to be sure that Italy is receiving "favored-nation" treatment before him?

If the idea presented by the honorable Commissioner for Italy were to prevail, would not inextricable confusion result? Must the umpire of the Italian-Venezuelan Commission withhold his decision on a particular case until another commission decide it, and follow the views then expressed? If he decide a certain proposition against Italy, and any other commission thereafter give a more favorable decision, must he, in subsequent cases, abandon his opinions despite his solemn declaration at the formation of this Commission, or must he insist upon them, notwithstanding that the Commission primarily charged with the interpretation of the other protocol be of a different opinion?

The umpire concludes that the interpretation of the old treaty in Article VIII of the protocol has no retroactive effect and no reference to the pending arbitrations.

The umpire has discussed the foregoing as if the French and German protocols might give superior rights to those granted to Italy, but expresses no opinion on this point.

It is strongly insisted on behalf of the claimant that whatever may be the general rule of international law with respect to the nonliability of governments for the acts of revolutionists, this rule does not find a proper field of operation in Venezuela, the country being subject to frequent revolutions.

It is true that an exception such as is indicated has on various occasions been maintained by the United States and several European nations in their dealings with certain Central and South American states. But the exception can not be said to have become a settled feature of international law, not having been accepted by the nations against which it was enforced, and being repudiated by some international writers (Calvo, sec. 1278) and perhaps squarely accepted by none.

Attorney-General Cushing, a lawyer of deserved eminence in international affairs, remarked nearly fifty years ago (2 Moore, p. 1631):

> Great Britain, France, and the United States had each occasionally assumed in behalf of their subjects or citizens in those countries (South American) rights of interference which neither of them would tolerate at home — in some cases from necessity, in others with questionable discretion or justification. In some cases such interference had greatly aggravated the evils of misgovernment. Considerations of expediency concurred with all sound ideas of public law to indicate the propriety of a return to more reserve in this matter as between the Spanish-American republics and the United States, and of abstaining from applying to them any rule of public law which the United States would not admit in respect of itself.

To take the position, as is asked, that Venezuela is in the regard under discussion an exception to the general rule we must have the right to decide, and must actually decide, that Venezuela does not occupy the same position among nations as is occupied by nations contracting with her. Is this justifiable?

For about seventy years Venezuela has been a regular member of the family

of nations. Treaties have been signed with her on a basis of absolute equality. Her envoys have been received by all the nations of the earth with the respect due their rank.

The umpire entered upon the exercise of his functions with the equal consent of Italy and Venezuela and by virtue of protocols signed by them in the same sovereign capacity. To one as to the other he owes respect and consideration.

Can he therefore find as a judicial fact, even inferentially (the protocol not authorizing it in express terms), that one is civilized, orderly, and subject only to the rules of international law, while the other is revolutionary, nerveless, and of ill report among nations, and moving on a lower international plane?

It is his deliberate opinion that as between two nations through whose joint action he exercises his functions he can indulge in no presumption which could be regarded as lowering to either. He is bound to assume equality of position and equality of right.

The umpire is the more confirmed in this opinion because of the fact that at the time of the happening of many of the offenses committed by revolutionists upon which claims against Mexico before the several commissions were founded, Mexico was experiencing internal disorders and revolutions certainly not less marked than those from which Venezuela had suffered within the past five years. Nevertheless Mexico was not charged with responsibility.

While the umpire considers the rule of action above indicated as that which must control him, he does not ignore the fact that the existence of the protocol implies that Venezuela may have failed in her duties in the light of international law in certain instances, and that as to such cases his powers as an umpire may be called into play. But in his mind there is a broad difference between indulgence in a general presumption of inferior status and the acceptance of proof of wrongdoing in particular instances.

The umpire therefore accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible. In the present instance no such want of diligence is alleged and proved.

It is suggested that a decision holding Venezuela not responsible for the acts of revolutionists would tend to encourage them to seize the property of foreigners. This appeal is of a political character and does not address itself to the umpire.

It is further urged that absolute equity should control the decisions of the Commission and that equitably sufferers from the acts of revolutionists should be recompensed. But this subject may be viewed from two standpoints. It is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for a technical reason.

In the view of the umpire, the true interpretation of the protocol requires the present tribunal, disregarding technicalities, to apply equitably to the various cases submitted the well-established principles of justice, not permitting sympathy for suffering to bring about a disregard for law.

The umpire will close the discussion by quoting upon this point from Mérignhac's Traité d'Arbitrage, section 305:

> Cet usage est assez fréquent entre particuliers (permitting to the arbitrator absolute liberty of decision). Grotius en parlait déjà et ne voyait aucune bonne raison de le prohiber au regard des parties ayant une confiance absolue en l'arbitre (conf. art. 1019 du code de procédure civile français). Dans ce cas aucune règle ne s'impose, en principe, à l'arbitre international, et il est libre de statuer" suivant sa conscience personnelle." Nous estimons, cependant, qu'on ne saurait trop lui recommander de se conformer, toutes les fois qu'il le pourra, aux solutions du droit

international, mitigé, le cas échéant, par l'équité, comme nous l'avons dit. En agissant autrement il risquerait souvent de faire fausse route, car, si grandes que soient son autorité et son expérience personnelles, elles ne peuvent évidemment aboutir à des déductions aussi sûres que celles qui ont été approuvées par une longue pratique internationale et l'usage constant des peuples civilisés. Il faut ranger dans la classe des compromis, laissant toute liberté à l'arbitre, ceux qui lui permettent de juger suivant la justice et l'équité; cette formule vague aboutit en effet à lui laisser une liberté absolue.

Governed by what he regards as the clear teachings of international law, the umpire will sign a judgment dismissing the case.

In conclusion, the umpire desires to express his appreciation of the industry and learning displayed on behalf of Italy and Venezuela in the preparation of the case.

[1] *Supra*, p. 499.