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PART TWO - THE PRINCIPLE OF GOOD FAITH

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

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

CHAPTER 3 - GOOD FAITH IN TREATY RELATIONS

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

A. Formation of Treaties

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

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

> "No construction shall be admitted which renders a treaty null and illusive, nor which leaves it in the discretion of the party f promising to fulfil or not his promise."[4]

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

"'In case of doubt, treaties ought to be interpreted conformably with the real mutual intention, and conformably to what can be presumed, between parties acting loyally and with reason, was promised by one to the other according to the words used.'"[8]

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

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

Thus, in 1903, after three of Venezuela's many creditors had staged a blockade of her ports, Venezuela sent a representative to Washington with full powers to negotiate with the creditor Powers. In the course of the negotiations, the Venezuelan representative proposed to the representatives of the blockading Powers that " all claims against Venezuela " should be offered special guarantees.[12] A controversy arose as to whether the

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words "all claims" referred to all the claims of the allied and blockading Powers, or to all the claims of every country; creditor of Venezuela. The Permanent Court of Arbitration decided:-

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

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

How far are States bound in good faith, pending the negotiation for a Special Agreement, to abstain from any surprise action capable of modifying the existing situation at law, or from resort to any tactical measures? The question arose to a limited extent in the *Eastern Greenland Case* (1933), but

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unfortunately the Permanent Court of International Justice had no occasion to consider it.[16] In the present state of international law, however, it does not seem that such an obligation exists, except perhaps in very special circumstances.

[...]

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C. Pacta sunt servanda

"A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent."[29]

"It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here."[30]

"It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements."[31]

"From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes."[32]

"'Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith.'"[33]

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Pacta sunt servanda, now an indisputable rule of international law,[34] is but an expression of the principle of good faith which above all signifies the keeping of faith,[35] the pledged faith of nations as well as that of individuals. Without this rule, "International law as well as civil law would be a mere mockery."[36]

A party may not unilaterally "free itself: from the engagements of a treaty, or modify the stipulations thereof, except by the consent of the contracting parties, through a friendly understanding."[37] "As long as the Treaty remains in force, it must be observed as it stands. It is not for the Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument."[38] The doctrine of clausula rebus sic stantibus has, therefore, no application in international law in the sense that what has been mutually agreed to by the parties can cease to be binding merely on account of changed circumstances. On the other hand, the doctrine, is applicable in the sense that a treaty or contract cannot be invoked to cover cases which could not have been reasonably contemplated at the time of its conclusion.[39]

"Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."[40] It is, indeed, "a general conception of law, that any breach of an engagement involves an obligation to make reparation,"[41] however short the breach

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may be in duration[42] and however relative it may be in importance, so that each party may " place entire confidence in the good faith of the other."[43]

D. Performance of Treaty Obligations

The principle that treaty obligations should be fulfilled in good faith and not merely in accordance with the letter of the treaty has long been recognised by international tribunals and is reaffirmed by the United Nations"[44] as an act of faith."[45]

In the *North Atlantic Coast Fisheries Case* (1910) the Permanent Court of Arbitration expressly affirmed that:-

"Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of inter-national law in regard to observance of treaty obligations."[46]

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

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

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

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

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

> "Above all, the common intention of the parties must be established: id quod actum est . . . . Good faith prevailing throughout this subject, treaties ought not to be interpreted exclusively according to their letter, but according to their spirit . . . . Principles of treaty interpretation are, by and large, and Ynutati8 mutandis, those of the interpretation of agreements between individuals, principles of common sense and experience, already formulated by the Prudents of Rome."[49]

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

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

Again, if parties agree that disputes shall be submitted to judicial settlement only if they "cannot be settled by negotiation," "the condition in question does not mean . . . that resort to the Court is precluded so long as the alleged wrongdoer may profess a willingness to negotiate."[58] A party which is bound by a *pactum de contrahendo* to negotiate a certain treaty is responsible for the consequences of its acts of bad

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faith[59] It may be said that in such cases good faith consists in a sincere and honest desire, as evidenced by a genuine effort, to fulfil the substance of the mutual agreement. It is essentially a moral quality or perhaps what Judge Moore has described as the " ordinary conceptions of fair dealing as between man and man"[60] The enforcement of the principle of good faith may be considered as the enforcement of that degree of morality which is necessary for the functioning of the legal system.

Also, since it is the common intention of the parties and the spirit, rather than the letter, of the treaty which have to be observed, a party may not be allowed to make capital out of inexact expressions or mistaken descriptions in a treaty, when the real and common intention can be ascertained and the error established. *Falsa demonstratio non nocet.*[61]

While the principle of good faith prohibits the evasion of an obligation as established by the common intention of the parties, it also prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty, as, for example, by invoking the treaty to cover cases which could not reasonably have been in the contemplation of the parties at the time of its conclusion[62] In this limited sense, the doctrine of

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clausula rebus sic stantibus is founded on the principle of good faith and is recognised by international law.[63]

Finally, the principle of good faith requires a party to refrain from abusing such rights as are conferred upon it by the treaty.[64]

[...]

CHAPTER 5 - OTHER APPLICATIONS OF THE PRINCIPLE

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C. Allegans Contraria Non Est Audiendus

It is a principle of good faith that "a man shall not be allowed to blow hot and cold -to affirm at one time and deny at another . . . . Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by

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any other name, it is one which courts of law have in modern times most usefully adopted."[13]

In the international sphere, this principle has been applied in a variety of cases. In the case of *The Lisman* (1937), concerning an American vessel which was seized in London in June, 1915, the claimant's original contention before the British prize court "was not that ,there was not reasonable cause for seizure, or for requiring the goods to be discharged, but that there was undue delay on the part of the Crown in taking the steps they were entitled to take as belligerents."[14] In a subsequent arbitration in 1937, which took the place of diplomatic claims by the United States against Great Britain, the sole Arbitrator held that:

> "By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, *claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on*, that these acts were unlawful, and constitute the basis of his claim."[15]

This principle has also been applied, to admissions relating to the existence of rules of international law. Thus in the case of *The Mechanic* (C. 1862), it was held that:-

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

In the *Meuse Case* (1937), it was held that, where two States were bound by the same treaty obligations, State A could not complain of an act by State B of which it itself had set an example in the past[17] Nor indeed may a State, while denying

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that a certain treaty is applicable to the case, contend at the same time that the other party in regard to the matter in dispute has not complied with certain provisions of that treaty.[18]

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

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

This case is a clear application in the international sphere of the principle known in Anglo-Saxon jurisprudence as estoppel in pais or equitable estoppel, the application of which was also considered in the *Serbian Loans Case* (1929) and in the *Aguilar-Amory and Royal Bank of Canada* (Tinoco) Case (1923). It appears, from the discussion of this principle in the last two mentioned cases, that it precludes person A from averring a particular state of things against person B if A had previously, by words or conduct, unambiguously represented to B the existence of a different state of things, and if, on the faith of that representation, B had so altered his position that the

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establishment of the truth would injure him[22] An intent to deceive or defraud is, however, not necessary. The principle is yet another instance of the protection which law accords. to the faith and confidence that a party may reasonably place in another, which, as mentioned before, constitutes one of the most important aspects of the principle of good faith.

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

The principle applies equally, though perhaps not with the same force, to other admissions of a State which do not give rise to an equitable estoppel. Thus :it has been held that a State cannot be heard to repudiate liability for a collision after j its authorities on the spot had at the time admitted liability and sought throughout to make the most advantageous arrangements for the Government under the circumstances.[24] Again if a State,having been fully informed of the circumstances, has accepted a person's claim to the ownership of certain property and entered into negotiation with him for its purchase, it becomes "very difficult, if not impossible" for that State subsequently to allege that he had no title at the time.[25] If a State, which is

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the lessee of a property owned by two joint owners, has, after the death of one of them, paid the entire rent to the other, who claims to have become the sole owner, "this act can not be interpreted otherwise than as a recognition by the authorities of the fact that the righ of ownership of Hassar [the deceased] has passed to Rzini [the claimant]."[26] There a party negotiates for the sublease of a concession granted by a State, it thereby recognises the, validity of the concession and the right of the State to grant it.[27] Again, if a State in the past had dealings with the inhabitants of a certain territory only through, and in the presence of, the representative of another State[28] or if it has applied to that other State for protection against the molestations of its interests or those of its nationals in that territory by the acts of a third State,[29] it should not dispute a claim to jurisdiction over the territory in question advanced by the other State. In the *Eastern Greenland Case* (1933), the Permanent Court of International Justice held that:-

> "Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland."[30]

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In the *Anglo-Norwegian Fisheries Case*: (1951), the International Court of Justice went further and considered that the "prolonged abstention" of the United Kingdom from protesting against the Norwegian system of straight base lines in delimiting territorial waters was one of the factors which, together with "the notoriety of the facts, the general toleration of the international community, Great Britain's, position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."[31]

In the same case, however, the International Court of Justice considered that:

> "Too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court."[32]

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

> "In these circumstances, there can be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonised part of Greenland, nor for holding that it is estopped [empêché] from claiming, as it claims in the present case, that Denmark possesses an old established sovereignty over all Greenland."[33]

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The application of this principle to such cases of admission, sometimes also called "estoppel," or described. under the maxim "*non concedit venire contra factum proprium*," does not, however, have the same effect as an equitable estoppel mentioned earlier in this section. Unlike the latter, an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an *argumentum ad hominem*, which is directed at a person's sense of consistency, or what in logic is paradoxically called the "principle of contradiction." An admission is not necessarily conclusive as regards the facts admitted. Its force may vary according to the circumstances.

Thus, in the *Salvador Commercial Co. Case*(1902), the Arbitral Tribunal, in dealing with the Salvadorian contention that the Company did not comply with the terms of the concession, held that:

> "It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were

procured by fraud or undue influence. No evidence of this kind is introduced."[34]

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

In this connection, it may be noted that there is a growing tendency among international tribunals not always to regard the recognition of Governments as an admission of the effective status of a regime, but often as a political act grounded on political considerations. In such a case, the recognition or non-recognition carries little evidential weight in regard to the actual status of the regime.[36]. This appears to be the reason

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why the non-recognition of a Government has been held not to estop a foreign State from subsequently asserting that a regime not recognised by it was the effective Government of a country[37].

As regards admissions in general, it may be said that they must have been made by responsible agents of the State acting in their official capacity,[38] on behalf of the State.[39] Admissions may be vitiated by duress,[40] excusable error,[41] fraud or undue influence.[42] In the *Serbian Loans Case* (1929), the Permanent Court of International Justice was faced with the plea of admission on the ground that for many years the creditors had accepted payment in paper francs. The Court rejected the

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plea on the ground that: "It does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them."[43] Conduct, in order to constitute an admission, must not, therefore, be due to an impossibility of acting otherwise.

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

D. Nullus Commodum Capere De Sua Injuria Propria

"No one can be allowed to take advantage of his own wrong," declared the Umpire in *The Montijo Case* (1875).[45]

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

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

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

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

Another instance where the same principle was applied is *The Tattler Case* (1920), where the Tribunal held that:

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

The refusal was wrongful.

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

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

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

The situation is slightly different where a State's acquiescence in a breach of its own law amounts to connivance. In such a

case the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defence.[53]

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

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

The International Court of Justice, in that case, was concerned with the interpretation of the following provision of the Peace Treaties of 1947[57]:

> ". . . any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article

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

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

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

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

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

"that the term 'third member' is used here simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member can be appointed only when the two national Commissioners have already been appointed, and that therefore the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General."[59]

But the Court also conceded that "the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners."[60] This interpretation could indeed

have been upheld as being more in accordance with both the letter and the spirit of the provision. Contrary to the opinion of the Court,[61] the literal interpretation of the text does not disclose any contemplated "sequence" in the appointment of the three members. Nor, it is submitted, can such a "sequence" be regarded as "natural and ordinary "in view of the "normal practice of arbitration"; for it has possibly been overlooked that the Treaty Commission is by no means a "normal" arbitral commission, where the national Commissioners are appointed as independent arbitrators and not as national representatives[62] In the case of the Treaty Commission, they are expressly stated to be "representatives" of their respective Governments. Consequently, their position, even though they have the right to vote, is more akin to that of agents than judges, while the neutral member fulfils the function of a sole arbitrator rather than an empire. Although it may be the normal practice to appoint first the arbitrators and then the umpire, it is equally normal first to select the sole arbitrator before appointing the agents. Moreover, as contemplated by the Peace Treaties, the Treaty Commission is the last resort to break any deadlock which might arise between the parties in case of a dispute and it represents a machinery to be set in motion essentially by unilateral action "at the request of either party." This is so with regard to the reference of the dispute to the Commission, and also to the eventual appointment of the third member by the Secretary-General. The intention is that this ultimate means of settlement should not fail on account of either the indifference or the recalcitrance of one of the parties.

It is submitted, therefore, that the interpretation: "the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter, by the Secretary-General," besides being in strict conformity with the terms, of the provision, would be more in accordance with the intention of the parties, and with the principles of good faith,[63] and more in the interest of the rule of law in international

relations.[64] If this interpretation were accepted, the failure of one of the parties to appoint its representative to the Commission would not affect the power of the Secretary-General to make the appointment. That the defaulting party may or may not have thereby violated a treaty obligation thus becomes immaterial and there is, therefore, no occasion for applying the principle *nullus commodum capere de sua injuria propria*.

The problem of the application of this principle might have arisen, however, if the condition required by the Peace Treaties for the appointment of the neutral member by the Secretary-General is not the failure of the *parties* to agree upon the appointment, but the failure of the two *national Commissioners*. In such a case, if one of the parties refuses to appoint its national Commissioner, albeit unlawfully, i.e., in violation of its treaty obligations, it would be necessary to agree with the Court, though perhaps for different reasons, that "nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment."[65]

The Court was not altogether explicit as to the reasons for this statement. It is submitted that the reason is not that the principle that no one can benefit from his own wrong cannot be applied, but that the Secretary-General cannot, on the basis of his power of appointment, assume the right to pass judgment upon the violation *vel non* by States of their international obligations. It was pointed out by the United States before the Court that in the municipal law of the great majority of nations, " provision is made for the appointment of an arbitrator (*often by the court*) if one of the parties to a dispute refuses or fails to appoint its arbitrator under an arbitration agreement."[66] It is submitted that this is possible principally because, generally speaking, a municipal court has jurisdiction over the parties. It can determine their responsibility for any violation of their contractual obligations and has also the power to order relief *in natura*.[67] Similarly, an international tribunal would also have the power, if it has jurisdiction over the issue,

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

EX DELICTO NON ORITUR ACTIO

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

> "an unlawful act cannot serve as the basis of an action in law."[69]

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

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

When claims commissions were constituted between the United States on the one hand and New Granada, Ecuador and

Venezuela on the other hand, the claims of Capt. Clark were successively and separately put forward before these commissions.

These claims were allowed by Umpire Upham before the Granadine-United States Claims Commission (1857).[71]

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

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

Subsequently a new Claims Commission (1864) was set upbetween the United States and New Granada (which had by then changed its name to Columbia). Sir Frederick Bruce, the Umpire of this Commission, adopted the views of Commissioner Hassaurek and reversed the decision of Umpire Upham[73].

Finally, on the same principle, the case was dismissed by Umpire Findlay before the United States-Venezuelan Claims Commission (1885).[74]

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The principle does not, however, appear to be jus cogens. For although a Government

> "could not be justified, under the law of nations, in interposing its authority to enforce a claim of one of its citizens growing out of services rendered in violation of its own laws, and its duties as a neutral nation, yet if the nation against whom such claim exists sees proper to waive the objection, and agrees to recognise the claim as valid and binding against it, the tribunal to which it is referred for settlement cannot assume for it a defence which it has expressly waived."[75]

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

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

The award was never enforced.[77]

The principle, however, only applies in so far as the claim itself is based upon an unlawful act. It does not apply to cases

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where, though the claimant may be guilty of an unlawful act, such act is juridicially extraneous to the cause of the action.[78]

E. Fraus Omnia Corrumpit

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

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

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

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

> "The offence of which this vessel was guilty . . . does not disappear as a result of an indecent ruse . . . *Dolus nemini patrocinari debet*."[81]

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

> "The effects of a violation of neutrality, committed by means of the construction, equipment, and armament. of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which

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> the offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence."[82]

What normally constitutes a right will, therefore, not be upheld if it is either begotten by fraud or is used to dissemble the effects of another fraudulent act.

Similarly, while a State is in general sovereign in deciding who shall be its subjects and in granting naturalisation to individuals, in relation to another State a naturalisation is not conclusive as to the nationality of an individual, if it can be established that such naturalisation had been obtained by fraud[83].

A judgment, which in principle calls for the greatest respect, will not be upheld if it is the result of fraud. A State, first of all, has a right to expect from another that "no claim will be put forward that does not bear the impress of good faith and fair dealing on the part of the claimant."[84] A certain amount of exaggeration and even misrepresentation of facts on the part of the individuals whose claim their State espouses is not infrequent and does not of itself invalidate the claim.[85] But when it is alleged that an international tribunal has been "misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them," "no tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has an inherent power to reopen and to revise a decision induced by fraud," as long as it still has jurisdiction over the case.[86] Even where the judgment has passed out of the hands of the tribunal, a State, on discovering that an award made in its favour has been induced by fraud practised upon the tribunal by the claimants, would refuse to enforce it and would restore any money received in execution of the award, as for instance,

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in the *La Abra Silver Mining Co. Case* (C. 1868) and the *Benjamin Weil Case* (C. 1868).[87]

And where fraud is proven either with regard to the formation of an international tribunal or with regard to the conduct of it members, the entire proceedings will be regarded as null and void[88] Even innocent third parties cannot claim a right derived from its decisions.[89]

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

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CHAPTER 8 - THE PRINCIPLE OF FAULT

[...]

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Negligence, or culpable negligence, is, therefore, the failure to perform a legal duty, i.e., a pre-existing obligation prescribing the observance of a given degree of diligence. Being a default in carrying out an obligation, culpable negligence constitutes fault in the sense described above. In such cases, fault does consist in culpable negligence. But culpable negligence constitutes only one category of fault, namely, default in those obligations which prescribe the observance of a given degree of diligence for the protection of another person from injury. Fault as such, however, covers a much wider field. It embraces any breach of an obligation. There are certain obligations which merely stipulate that a party should do or abstain from doing certain acts. This is so as regards most treaty obligations as well as most contractual obligations in the municipal sphere. The mere failure to comply with such obligations, unless it is the result of *vis major*, constitutes a failure to perform an obligation, and a fault entailing responsibility. In such instances, there is no need to consider whether the failure is accompanied by malice or is due to negligence.[24] A State may often be held responsible for the errors of judgment of its organs, even if such errors be bona fide.[25] In cases of this kind, the unlawful act, the fault, is free from the element of malice or culpable negligence. Thus, whether or not malice or culpable negligence is necessary to constitute an unlawful act depends not upon a general principle covering all unlawful acts but upon the particular pre-existing obligation. Malice and negligence can neither be identified with, nor are they inherent in, the notion of fault. Fault is dependent upon the

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existence of the will,[26] but not upon that of malice or negligence. Good faith and due diligence are not the limits of all obligations. Impossibility is. It is only where *vis major* has deprived a person of his free will that there is no obligation, no fault.[27]

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

> "The exception of *vis major*, invoked as the first line of defence, may be pleaded in public international law as well as in private law."[28]

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

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

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

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

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

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

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

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

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

Within the limit of possibility, therefore, the obligation subsists.[37] Consequently, there must be an effective connection between the *vis major* and the consequences of the failure to fulfil the obligation. This is a point of fact, which must be proved in case of dispute.

Evidence of the second qualification that *vis major* must not be imputable to the obligated party himself may be found in the *Norwegian Claims Case* (1922), where the Permanent Court of Arbitration held that while the exercise of the power of eminent domain by the United States might be used as a defence in

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disputes between private citizens as a "restraint of princes," the United States could not itself invoke it as against the Kingdom of Norway in defence of a claim by Norway.[38]

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

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

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

"Neither was the Government of Great Britain bound to ask for, nor the Parliament to grant to it, powers inconsistent with the established principles of British law and government and with the general institutions of the country."[39]

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

"The government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."[40]

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

"Indeed, this principle implies that the nonfulfilment of an obligation of the obligated party must, in order that he may be exonerated, proceed from an extraneous cause which cannot, therefore, be imputed to him."[41]

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Turkey having entered the war before any openly hostile acts on the part of other belligerent Powers took place, the Tribunal held that she could not invoke the war as a *vis major* exonerating her from contractual obligations towards the claimant.

It follows from the above survey of international decisions that the principle of fault and its corollary, the concept of *vis major*, are general principles of law governing the notion of responsibility in the "very nature of law." Their application in the international legal order is abundantly confirmed by international judicial practice.

As has already been shown in the section on imputability,[42] the theory of responsibility without fault or of objective responsibility, in favour of which the Presiding Commissioner declared himself in the *Caire Case* (1929), was not necessary to the decision in that case and was, moreover, founded on a misconception of the problem of imputability in international law. It is not denied that there may be genuine cases of "objective responsibility," where there exists an obligation to make reparation which is conditional on the happening of certain events independent of any fault or unlawful act imputable to the obligated party. But, as explained in the Chapter on the Principle of Individual Responsibility,[43] this so-called responsibility, like "assumed responsibility," is simply a legal obligation modelled on the notion of responsibility. Such a legal obligation based on an express provision does not form part of the concept of responsibility and should be kept entirely separate from it in any discussion of the subject. Responsibility based on fault, founded on the existence of an unlawful act imputable to the actor, forms an independent juridical concept and is one of the most important institutions in any legal order.[44]

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CHAPTER 10 - THE PRINCIPLE OF PROXIMATE CAUSALITY

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

"What was the damage caused by Rochín's telegram? Linked up with subsequent occurrences, his telegram may have been the cause of all the mishap of the claimant relative to the three engines which on September 3, 1921 [date of the telegram], were in good condition, and of part of the

mishap with the fourth engine which had been wrecked in August . . . It is clear, however, that only those damages can be considered as losses or damages caused by Rochín which are immediate and direct results of his telegram."[2]

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

"The problem of responsibility for indirect damage has often been considered by international tribunals and writers on international law. In the well-known *Alabama* Case, the arbitrators

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declared that they would not take into consideration this kind of loss. This decision has been criticised, and in subsequent cases, arbitrators have quite often allowed compensation for damages that are not direct. And, indeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links. But, on the other hand, every one agrees that, even if the strict principle that direct losses alone give rise to a right to reparation is abandoned, it is none the less necessary to exclude losses unconnected with the initial act, save by an unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and which he could in no way have foreseen. Otherwise, there would be an inadmissible extension of responsibility. Thus, notwithstanding the provisions of the treaty of August 25, 1921, between the United States of America and Germany, which requires Germany to compensate losses caused to American citizens 'directly or indirectly,' the arbitrators, charged with the application of this treaty, have not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by Germany, also resulted from other and more proximate causes."[3]

The proper criterion, according to the Portugo-German Arbitral Tribunal is, therefore, not the directness of the consequences, but their foreseeability or proximate causality in relation to the wrongful act. The decisions of the German-United States Mixed Claims Commission (1922) to which this Tribunal referred are *Administrative Decision No. II* (1923) and the Opinion in *War Risk Insurance Premium Claims* (1923), in which the same view is brought out with much greater force. In the latter decision, the Umpire held that the arguments of counsel for the claimants were partly based on "a confusion of the legal concept of the proximate cause of a loss with that of the consequential and I indirect damages flowing therefrom."[4]

In *Administrative Decision No. II* (1923), the Umpire declared:-

"The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate result or

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

order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."[5]

"The use of the term [indirect damages] to describe a particular class of claims is inapt, inaccurate and ambiguous. The distinction sought to be made between *damages* which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote.' The distinction is important."[6]

It is only true to say that in the majority of cases, in which the epithets "direct" and "indirect" are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with "proximate" and "remote".[7]

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The decisions of the Portugo-German Arbitral Tribunal (1919) and the German-United States Mixed Claims Commission (1922) categorically show, however, that "indirect damage" -in the strict sense of the term-cannot as a group be excluded from reparation.[8] Moreover, they show that it is "a rule of general application both in private and public law," equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation. In order that a loss may be regarded as the consequence of an act for purposes of reparation, either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss.

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Hence the maxim : *In jure causa proxima non remota inspicitur*. Even in cases of "assumed responsibility," with which the German-United States Mixed Claims Commission (1922) was concerned, derogation from this principle is not to be presumed.[9]

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

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

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

"Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents and the members of their families, flowed from Germany's act as a *normal consequence* thereof, and *hence attributable to Germany's act as a proximate cause*. The usages, customs, and laws of civilised

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

"But the claims for losses here asserted on behalf of life insurance companies rest on an entirely different basis. Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* [italics of the Commission] so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in *legal contemplation remote -not in time- but in natural and normal sequence* . . . In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was *not a natural and normal consequence* o f Germany's act in taking the lives, and *hence not attributable to that act as a proximate cause*."[10]

The contrast in which the German-United States Mixed Claims Commission (1922) placed these two types of consequence t brings out with great clarity what the Commission meant by proximate cause in legal contemplation. If a loss is a normal consequence of an act, it is attributable to the act as a proximate cause. If a loss is not the normal and natural consequence of an act, it is not attributable to the act as a proximate cause.[11] As to what constitutes a normal and natural consequence of an act,

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

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

"When it comes to the actual trial of actions for personal injuries, there are two difficult questions, to the solution of which the testimony of the medical expert may be directed. One of these is how far the defendant's negligence is responsible for some subsequently developed infirmity or disease or, in other words, how far a given injury may be said to be the natural and proximate cause of a subsequently developed condition and therefore render the defendant liable for that condition."[12]

Quoting medico-legal authority , the Umpire said:-

"'The general rule is easily stated, to wit: if the subsequent disease or infirmity is one which would occur as the natural result of the. injury, and it is not shown that any other independent cause existed of which it might have been the result, then the author of the original injury is liable for the subsequent disease or infirmity.'"[13]

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

"Since his death resulted through a line of natural sequences from a wound inflicted under the circumstances named, the responsibility of the respondent government is the same as though death had been the immediate result of the machete stroke."[14]

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

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"The general principle of civil law, according to which damages ought not only to include compensation for injuries suffered, but also for loss of profit, is equally applicable in international disputes . . . . In order that it may be applied, it is not necessary for the amount of the *lucrum cessans* to be calculable with certainty. It is sufficient to show that the act complained of has prevented the making of a profit which would have been possible *in the ordinary course o f events (dans l'ordre naturel des chores)*."[15]

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

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

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

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

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

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

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

"The effect of these rules, stated briefly, is that the damages for which a wrongdoer is liable are the damages which are both, in fact,

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

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

foreseeable and, *a fortiori*, all intended consequences of any of his voluntary acts which are unlawful. That this subjective element of foreseeability and intention is the ratio of the principle seemed to be the view of the Portugo-German Arbitral Tribunal in the *Angola Case* (1928, 1930). It may be recalled that this Tribunal made the following statement in its first award:-

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

While the foreseeability of its consequence by the doer of an act may be regarded as one of the *rationalia* of responsibility, the standard which the law in fact applies is perforce much more objective. The proximate consequences of an act are not necessarily those which its author actually foresaw, but need

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only be those which the judges consider he could and should have foreseen. In practice, therefore, it is still the standard of the reasonable man. In the *Angola Case*, speaking of the causal connection between the unjustified German incursions into Angola and the subsequent native uprising, the Tribunal, after mentioning the responsibility of Portugal for its extension, said:-

> "It is certain, however, that the German aggression was, in itself, capable of causing trouble among the native population, that it was in the natural order of things that the blacks, subdued only so few years previously, would avail themselves of the opportunity to revolt. No doubt, the Germans could not have foreseen the spreading of this revolt by reason of the special circumstances which have just been mentioned, but they should have reckoned with the serious effects which their military action, in a country only recently pacified, would have had on the authority of Portugal."[20]

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

> "This uprising, considered as a harmful act., thus constitutes . . . an injury which the author of the initial act, namely, the German command, should have foreseen as a necessary consequence of its military operations."[21]

For these consequences which should have been foreseen,[22] Germany was held responsible.

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

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

In the *Frances Irene Roberts Case* (C. 1903), which concerned an unjustifiable and inexcusable attack upon an American

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citizen and his family, the United States-Venezuelan Mixed Claims Commission (1903) decided that:-

> "The act was committed by duly constituted military authorities of the Government. It was never, so far as the evidence shows, disavowed or the guilty parties punished. Under these circumstances well established rules of international law fix a liability beyond that of compensation for the direct

losses sustained. *Other consequences are presumed to have been in the contemplation of the parties committing the wrongful acts* and in that of the Government whose agents they were. The derangement of Mr. Quirk's plans, the interference with his favourable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained. To the amount hereintofore designated is added, in view of the considerations above mentioned, the sum of $5,000."[23]

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

"Governments, like individuals, are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."[24]

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In conclusion, it may be said that the principle of integral reparation in responsibility has to be understood in conjunction with that of proximate or effective[25] causality which is valid both in municipal and international law. By virtue of the latter principle, the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all intended damages.

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CIRCUMSTANTIAL EVIDENCE

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

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

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

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

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

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PRIMA FACIE EVIDENCE

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

"It would be impossible for any international commission to obtain evidence of nationality amounting to certitude unless a man's life outside the State to which he belongs is to be traced from day to day. Such conclusive proof is impossible and would be nothing less than *probatio*

diabolica. All that an international commission can reasonably require in the way of proof of nationality is prima facie evidence sufficient to satisfy the Commissioners and to raise the presumption of nationality, leaving it open to the respondent State to rebut the presumption by producing evidence to show that the claimant has lost his nationality through his own act or some other cause."[94]

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

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

It does not create a moral certainty as to the truth of the allegation, but provides sufficient ground for a reasonable belief in its truth, rebuttable by evidence to the contrary.[96] The absence of evidence in rebuttal is an essential consideration in the admission of prima facie evidence. Where the opposite party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence before the Commission.[97] As the American Commissioner said in the *Naomi Russell Case* (1931), when referring to those common-sense principles underlying " the rules of evidence in domestic law:-

"It [the Commission] can analyse evidence in the light of what one party has the power to produce and the other party has the power to explain or contravert. And in appropriate cases it can draw reasonable inferences from the non-production of evidence."[98]

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

"A claimant's case should not necessarily suffer by the non-production of evidence by the respondent. It was observed by the Commission in the *Hatton Case, Op. of Com., Wash., 1929*, pp. 6, 10, that, while it was not the function of a respondent government to make a case for the claimant government, certain inferences could

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be drawn from the non-production of available evidence in the possession of the former. See also the *Melczer Mining Co. Case*, ibid., pp. 228, 233. The Commission has discussed the conditions under which, when a claimant government has made a prima facie case, account may be taken of the non-production of evidence by the respondent government, or of unsatisfactory explanation of the non-production of evidence. Case of L. *J. Kalklosch*, ibid., p. 126. [In this case, the Commission said: 'In the absence of official records the non-production of which has not been satisfactorily explained, records contradicting evidence accompanying the Memorial respecting wrongful treatment of the claimant, the Commission can not properly reject that evidence' (p. 1-30)]."[99]

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

"Mere suspicions never can be a basic element of juridical findings,"[1]

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

"it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto."[2]

The inference in every case must, however, be one which can reasonably be drawn.[3] The situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation. This was regarded as a general principle of law by the American Commissioner who said in his concurring opinion in the *Daniel Dillon Case* (1928):-

"Evidence produced by one party in a litigation may be supported by legal presumptions which arise from the non-production

of information exclusively in the possession of another party, and this well-known principle of domestic law is one which it seems to me an international tribunal is justified in giving application in a proper case."[4]

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

"If, after giving due weight to all these considerations, it [the Commission] feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established."[5]

In dubio pro reo.[6]

BURDEN OF PROOF

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

In this connection, the *Parker Case* (1926), decided by the Mexican-United States General Claims Commission (1923), needs to be carefully examined; for the language used by the Commission in that case has sometimes given rise to the impression[7] that, contrary to the view generally accepted by

international tribunals, it gave a negative answer to the question.[8]

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

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

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

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

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

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

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

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

To illustrate the distinction between these two meanings of the term, the *Taft Case* (1926), decided by the German-United States Mixed Claims Commission (1922) may be mentioned. In this case, the claimants alleged that their ship the *Avon* had been sunk by a German submarine. On behalf of the claimants, "all available evidence tending however remotely to establish the loss of the *Avon* through an act of war has been diligently assembled and presented by able counsel,"while on behalf of

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the defendant, "a full disclosure has been made to the Commission by the German Agent" of the activities of German submarines operating at the material time in the vicinity of the *Avon's* projected course. In his conclusion the Umpire held, however, that:-

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

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

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

"The Commission denies the 'right' of the respondent merely to wait in silence in cases where it is reasonable that it should speak. . . . On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a prima facie case and the respondent has afforded no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is encumbent [sic] upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from

its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be . . . . In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent government, the

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

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

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

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

he disallowed the claim because:-

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

Indeed, the Commission on several occasions held that:-

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

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

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

Another point raised by the Parker Case (1926) may also be mentioned. The Commission said:-

"The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between governments in their own right, as in those cases the distinction between a plaintiff and. a respondent often is unknown, and both parties often have to file their pleadings at the same time."[19]

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

"The Arbitrator, before examining these various grievances, deems it his duty to make some observation concerning the burden of proof. While the British Government asserts that the burden is upon the French Government as the plaintiff, the latter maintains that in the present case there is neither plaintiff nor defendant. In this connection, it calls attention to an Order issued on August 15, 1929, by the Permanent Court of International Justice, where it was said that, the case in issue

having been submitted by a *compromis*, there was neither plaintiff nor defendant. But on that point, in the opinion of the Arbitrator, there is a misunderstanding. The Order only refers to a question of procedure and decides nothing in regard to questions relating to the burden of proof. The matter is complicated, and if Article 3 of the *compromis* imposes upon both Parties the duty of 'determining to the satisfaction of the Arbitrator the authenticity of all points of fact offered to establish. or disapprove responsibility,' that provision, in the Arbitrator's opinion, is not intended to exclude the application of the ordinary rules of evidence.

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It only shows that there can also be a duty to prove the existence of facts alleged in order to deny responsibility."[20]

Thus, despite the fact that there was no procedural distinction between the plaintiff and defendant, the burden of proof was laid upon France, who was the claimant in fact.[21]

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

"There is in fact a claimant, the United Kingdom, and a defendant, Albania."[22]

The Corfu Channel Case was first brought before the Court by a unilateral application of the United Kingdom (May 22, 1947). When the Albanian Preliminary Objection to the Court's jurisdiction was rejected by the Court on March 25, 1948, the two parties notified the Court on the same day of the conclusion of a Special Agreement. That Special Agreement formed the basis of subsequent proceedings before the Court in that case.[23] But the respective positions of the parties as regards burden of proof was not thereby altered. As far as the British claim was concerned, the burden of proof was undoubtedly laid upon the United Kingdom.[24] The Court expressly held that the mere fact that an act contrary to international law had occurred in Albanian territory did not shift the burden of proof to Albania.[25]

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

It may in fact happen that the claimant is procedurally the defendant, as in the *United States Nationals in Morocco Case*

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(1952), between France and the United States.[26] In that case, the United States was in fact in the position of a claimant, in that it claimed special rights and privileges inn the French Zone of Morocco and alleged that certain acts of the Moroccan authorities were contrary to such rights and privileges. France, in denying the existence of these rights and privileges and maintaining the legality of the acts of the Moroccan authorities, was in fact. in the position of a defendant; for she could rely on the principle that neither restridtions on sovereignty nor international responsibility are to be presumed.[27]

For political reasons, however, the French Government, in order to bring the dispute before the Court, took the initiative and applied to the International Court of Justice under the Optional Clause, thus abandoning, as it said in its Memorial,[28] its logical position as defendant and placing itself, from the procedural standpoint, in the position of a plaintiff. Thereupon, the United States claimed that the burden of proof lay upon France because the latter had assumed the position of plaintiff, and because of "the nature of the legal issues involved."[29]

This, however, was not the view taken by the Court. What the Court in fact did in its judgment was to examine each of the United States claims, and rejected them to the extent to which they were not supported by treaties which the United States . was entitled to invoke against Morocco.[30] The United

States also adduced "custom and usage" as a basis for some of its alleged special rights and privileges. The Court here specifically laid the burden of proof upon the United States and rejected the allegation for want of sufficient evidence of such a custom binding upon Morocco.[31] In the operative part of the judgment, the Court referred to only one of the Submissions of the French Government. But, even in this case, its rejection of the French Submission that the Decree of December 30, 1948, issued by the French Resident General in Morocco, was lawful, was in fact only a favourable decision on the United States Submission that the Decree violated the treaty rights of the

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

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

> "Each party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute."[32]

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

Taking into consideration that the *actor*, whether termed claimant or plaintiff, is to be determined according to the issues involved rather than the incidents of procedure, what has been said above shows that there is in substance no disagreement among international tribunals on the general legal principle that the burden of proof falls upon the claimant, i.e., "the plaintiff must prove his contention under penalty of having his case refused."[33] *Actore non probante reus absolvitur.*

The burden of proof so far discussed relates to the proof of the factual basis of the claim as a whole, although in a single action,there may be several claims, as well as counter-claims. This may be called the ultimate burden of proof.[34] The term burden of proof may, however, also he used in a more restricted sense as referring to the proof of individual allegations advanced by the parties in the course of proceedings. This burden of proof may be called procedural. As has been seen at the beginning of the present Chapter, in this sense of the term, the burden of proof rests upon the party alleging the fact, unless the truth of the fact is within judicial knowledge or is presumed by the

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Tribunal. In the absence of convincing evidence, the Tribunal will disregard the allegation.[35]

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

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CHAPTER 17 - THE PRINCIPLES OF RES JUDICATA

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

> "It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principle of law recognised by civilised nations,' mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was

the binding effect of *res judicata* expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the above-mentioned article (Minutes, p. 335)."[1]

There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings. Thus the Trial Smelter Arbitral Tribunal (1935) stated in its *Final Award* (1941):-

"That the sanetity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.
"If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end."[2]

A. Meaning

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

"Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitve and obligatory."[3]

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

"'The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed, etc.,'"[4] "the essence of the final judgment being, as it has been expressed 'to close the mouth on the one side and the ear on the other.'"

This negative effect of *res judicata* has long been expressed in the maxim: *Non bis in idem* or *Bis de eadem re non sit actio*.[6] [7]
It only attaches, however, to a final judgment of a competent tribunal. Where a tribunal has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the

Referring Principles

Trans-Lex Principle: I.1.1 - Good faith and fair dealing in international trade
(/901000/_/good-faith-and-fair-dealing-in-international-trade/)

Trans-Lex Principle: I.1.5 - No advantage in case of own unlawful acts
(/904000/_/no-advantage-in-case-of-own-unlawful-acts/)

Trans-Lex Principle: I.1.2 - Prohibition of inconsistent behavior

(/907000/_/prohibition-of-inconsistent-behavior/)

> Trans-Lex Principle: IV.1.2 - Sanctity of contracts
(/919000/_/sanctity-of-contracts/)

> Trans-Lex Principle: IV.5.4 - Interpretation against the party that supplied the term
(/926000/_/interpretation-against-the-party-that-supplied-the-term/)

> Trans-Lex Principle: IV.7.1 - Invalidity of contract that violates good morals ("*boni mores*")
(/937000/_/invalidity-of-contract-that-violates-good-morals-/)

> Trans-Lex Principle: IV.9.1 - Limitation periods
(/940000/_/limitation-periods/)

> Trans-Lex Principle: VI.3 - Force majeure
(/944000/_/force-majeure/)

> Trans-Lex Principle: VII.2 - Principle of foreseeability of loss
(/947000/_/principle-of-foreseeability-of-loss/)

> Trans-Lex Principle: XIII.1 - Distribution of burden of proof
(/966000/_/distribution-of-burden-of-proof/)

> Trans-Lex Principle: XIII.3 - Circumstantial evidence
(/968000/_/circumstantial-evidence/)

> Trans-Lex Principle: XIV.4.5 - Conclusive and preclusive effects of awards; res judicata
(/970070/_/conclusive-and-preclusive-effects-of-awards-res-judicata/)