
GENERAL
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as applied by
International Courts
and Tribunals

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GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

BIN CHENG, PH.D., LICENCIÉ EN DROIT
Lecturer in International Law
University College, London

WITH A FOREWORD BY

GEORG SCHWARZENBERGER, PH.D., DR.JUR.

Reader in International Law in the University of London;
Vice-Dean of the Faculty of Laws, University College, London

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**SALES &
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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

case" (p. 782). We cannot agree, however, that the obligation to abstain from acts of bad faith is purely moral and non-legal (pp. 781 *et seq.*). The draft to a certain extent betrays the usual confusion between the coming into force of the substantive provisions of the treaty and the abstention from acts of bad faith pending ratification. This can be seen from the examples which the *Comment* gives of "hypothetical cases wherein the obligation of good faith referred to in Art. 9 might be regarded as being ignored." The first example is as follows: "A treaty contains an undertaking on the part of the signatory that it will not fortify a particular place on its frontier or that it will demilitarise a designated zone in that region. Shortly thereafter, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armament within the zone referred to" (p. 781). The act is plainly in violation of the terms of the treaty if the substantive provisions have come in force. But before that date, however, it cannot be said that the act was designed to prejudice the eventual execution of the treaty, nor to injure the inchoate rights of the other party, in case the treaty becomes ratified. In fact, the only party which would suffer, if the treaty is ratified, would be the State erecting these fortifications, because it would have to demolish them. The situation would be totally different if the treaty had provided not for demilitarisation, but for the maintenance of the military *status quo* in a given area. In such a case, the act of increasing the fortification in the area concerned during the interval between signature and ratification would indeed be an act of bad faith, and such an act, if it is submitted, cannot be sanctioned, either by morality or by law.

29 Fran.-Ven. M.C.C. (1902): *Maninat Case* (1905), *Ralston's Report*, p. 44, at p. 73.

30 *Metzger & Co. Case* (1900), U.S.F.R. (1901), p. 262, at p. 276.

31 *Metzger & Co. Case* (1900), *ibid.*, at p. 271.

32 PCIJ: *Austria-German Customs Union* (1931), *Adv.Op.*, A/B. 41, p. 47.

33 *Van Bokkelen Case* (1888), 2 *Int.Arb.*, p. 1807, at pp. 1849-50, quoting *Kent's Commentaries*

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

34 See *Harvard Research* (1935 Part III), Supplement to 29 A.J.I.L. (1935), pp. 671-85; Kunz, "The Meaning and the Range of the Norm Pacta sunt Servanda" 39 A.J.I.L. (1945), pp. 180-97; and literature cited in both.

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

36 Ven.-U.S. M.C.C. (1903): *Rudloff Case* (Interlocutory Decision), *Ven.Arb.* 1903, p. 182, at p. 194. Cf. *Id.*: *Turnbull/Manoa Co., Ltd./Orinoco Co., Ltd. Cases*, *ibid.*, p. 200, at p. 244.

37 The Protocol of London of 1871. See PCIJ: *Oscar Chinn Case* (1934), S.O. by van Eysinga, A/B. 63, p. 134. The Protocol of London of 1871 is found in *Martens*, 18 N.R.G., p. 278. See also *Chilean-Peruvian Accounts Case* (1875) 2 *Int.Arb.*, p. 2085, at pp. 2095, 2102.

38 PCIJ: *Meuse Case* (1937), S.O. by Altimira, A/B. 70, p. 43. Cf. *contra*, ICJ: *Anglo-Iranian Oil Co. Case* (Jd.) (1952), U.K./Iran, D.O. by Alvarez, *ICJ Reports*, 1952, p. 93, at p. 126. Judge Alvarez' "New International law" is, however, still largely *de lege ferenda*.

39 See *infra*, pp. 118-119.

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

41 *Ibid.*

may be in duration⁴² 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 Nations⁴⁴ "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 international 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

⁴² PCIJ: *Oscar Chinn Case* (1934), D. O. by Sir Cecil Hurst, A/B. 63, p. 119: "If a State is subject to engagement to do or not to do a certain thing, there cannot be read into it a provision that for short periods there shall be liberty to violate the engagement."

⁴³ Peruv.-U.S. Cl.Com. (1863): *Sartori Case*, 3 *Int.Arb.*, p. 3120, at p. 3123: "On the principle that reparation ought to be made in cases where responsibility is incurred, however small it may be, for non compliance with the treaty, in order that each Government may place entire confidence in the good faith of the other, it seems to me that an equitable and reasonable indemnity ought to be granted to Mr. Sartori."

⁴⁴ U.N. Charter, Art. 2 (2).

⁴⁵ Cf UNCTC: 6 *Documents*, p. 79.

⁴⁶ 1 H.C.R., p. 143, at p. 167.

⁴⁷ PCA: *Timor Case* (1914) 1 H.C.R., p. 354, at p. 365.

Cf. UNCTC: 6 *Documents*, pp. 74-75. With regard to the term good faith, Dean Gildersleeve explained in Commission I of the UNCTC: "This is a customary phrase, which to our friends of the Latin countries, especially, conveys the meaning that we are all to observe these obligations, not merely the letter of them, but the spirit of them, and that these words do convey an assurance without which the principle would seem unsatisfactory to these friends of ours."

See also Planiol et Ripert, 6 *Traité pratique de droit civil français*, 1930, § 379: ". . . all our contracts are contracts *bonæ fidei*, which imply the obligation to behave like an honest and conscientious man not only in the formation, but also in the performance of the contract, and not to cling to its literal meaning. . . . To determine what is due [under the contract], we must ascertain what honesty allows us to demand as well as what it obliges us to do" (Transl.).

Harvard Research (1935, Part III): Draft Convention on the Law of Treaties, Comment *ad* Art. 20: "The obligation to fulfil in good faith a treaty engagement requires that its stipulations be observed in their spirit as

and the United States in support of the Malietoans against the Mataafans in March, 1899. Beside finding that the three treaty Powers should always act in common accord, the Arbitrator held:—

“ Furthermore, by proclamation issued on the 4th of January, 1899, the Consular representatives of the treaty powers in Samoa, owing to the then disturbed state of affairs and to the urgent necessity to establish a strong provisional government, recognised the Mataafa party, represented by the High Chief Mataafa and 13 of his chiefs, to be the provisional government of Samoa pending instruction from the three treaty powers, and thus *those powers were bound upon principles of international good faith to maintain the situation* thereby created until by common accord they had otherwise decided . . .

“ . . . That being so, the military action in question undertaken by the British and American military authorities before the arrival of the instructions mentioned in the proclamation, and tending to overthrow the provisional government thereby established, was contrary to the sforesaid obligation.”¹²

The military measures were, therefore, considered unlawful, and the United Kingdom and the United States were held liable for their consequences.

It would appear from the cases just considered that whenever the parties have agreed to await a final decision concerning a certain matter, or are under an obligation to do so—a decision depending either upon the parties themselves or upon an independent third party—the principle of good faith obliges them to maintain the existing situation as far as possible so that the final decision, if taken on the basis of the *status quo*, would not be prejudiced in its effects by a unilateral act of one of the parties during the inevitable lapse of time.

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

¹² U.S.F.R. (1902), p. 444, at p. 446. Italics added.

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

¹³ England, Court of Exchequer: *Cave v. Mills* (1862) 7 Hurlstone & Norman, p. 918, at p. 927.

¹⁴ 3 UNRIIA, p. 1767, at p. 1779.

¹⁵ *Ibid.*, at p. 1790.

¹⁶ Ecua.-U.S. Cl.Com. (1862): *Atlantic and Hope Insurance Companies (The Mechanic) Case*, 3 *Int. Arb.*, p. 3221, at p. 3226.

¹⁷ PCIJ: A/B. 70, p. 25. Cf. also the apparently contradictory attitude of the Netherlands in the same case as to whether the possibility of an infraction constitutes an infraction (pp. 5 and 8) and the Dutch explanation (Ser. C. 81, pp. 137 *et seq.*).

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

¹⁸ PCIJ: *Macrommatis Palestine Concessions Case* (1924), A. 2, p. 33. *Id.*: *Chorzów Factory Case* (Jd.) (1927), A. 9, p. 31.

¹⁹ *Dec. & Op.*, p. 103, at p. 139. *Id.*: *Hickson Case* (1924), *ibid.*, p. 499, at p. 443.

²⁰ See *Case of the U.S.*, Part II, Point II (*Shufeldt Claim*, USGPO, 1932, pp. 57 *et seq.*).

²¹ *Ibid.*, at pp. 869-70; or 2 UNRIAA, p. 1079, at p. 1094.

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

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

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

²² PCIJ: *Serbian Loans Case* (1929), A. 20/21, pp. 88-89. *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923), 1 UNRIAA, p. 869, at pp. 883-4. See also *Shufeldt Case* (1930), *Case of the U.S.*, Part II, Point II (*loc. cit.*) and the definition of estoppel by conduct of Lord Denman C.J. in *Pickard v. Sears* (1837) (6 Ad. & E., p. 469, at p. 474) therein cited.

See further Halsbury, *Laws of England, sub voce Estoppel*, §§ 538, 541, 547; Phipson, *The Law of Evidence*, 1952, pp. 704-710; Broom's *Legal Maxims*, 1939; M. Cababe, *Principles of Estoppel*, 1888; L. F. Everest and E. Strode, *Law of Estoppel*, 1928.

²³ *European Danube Commission* (1927), B. 14, p. 23.

See also *Costa Rica-Nicaragua Boundary Case* (1888), 2 *Int. Arb.*, p. 1945, at p. 1961.

²⁴ Brit.-U.S. Cl.Arb. (1910): *The Eastry* (1914), Nielson's *Report*, p. 499. See also *Id.*: *The Kate* (1921), *ibid.*, p. 472, *The Lindisfarne* (1913), *ibid.*, 489. Cf. Art. 2 of the Terms of Submission, *ibid.*, p. 9. Mex.-U.S. Cl.Com. (1868): *Hammeken Case*, 4 *Int. Arb.*, p. 8470, at p. 8471.

Cf. decisions of the Granadine-U.S. Cl.Com. (1857): "*Panama Riots Cases*" (2 *Int. Arb.*, p. 1361) with *U.S. and Paraguay Navigation Co. Case* (1860) (*ibid.*, 1485) as to whether the agreement to submit claims to arbitration is an admission of liability.

²⁵ Brit.-U.S. Cl.Arb. (1910): *Union Bridge Co. Case* (1924), Nielsen's *Report*, p. 371, at p. 378.

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 right of ownership of Hassar [the deceased] has passed to Rzini [the claimant]." ²⁶ Where 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

²⁶ Spanish Zone of Morocco Claims (1923): *Claims Nos. 18-20* (1924), 2 UNRIAA, p. 685, at p. 686. (Transl.) The recognition was considered as sufficient evidence to establish ownership over the whole property, for the purpose of the particular case, but it was not regarded as irrefutable. The question of ownership being merely incidental, the *Rapporteur* made a reservation with regard to the case where the claimant should be evicted from the property by a competent tribunal (see *infra*, p. 354, note 63).

²⁷ U.S.-Ven. Cl. Com. (1885): *Gowen and Copeland Case*, 4 *Int. Arb.*, p. 3354, at p. 3357.

²⁸ *Dutch and French Boundary Dispute concerning Guiana* (1891), 5 *Int. Arb.*, p. 4869, at p. 4870.

²⁹ P.C.A.: *North Atlantic Coast Fisheries Case* (1910), 1 H.C.R., p. 141, at p. 186.

³⁰ A/B. 53, pp. 68-9. The various acts constituting admissions and their reaffirmations were, in this case:—

1. The formal withdrawal of a claim over the contested territory and the statement that it was lost to Norway (Holst Declaration) (pp. 64-6).

2. During a previous mediation in the matter between the Kingdom of Sweden and Norway on the one hand, and Denmark on the other, the Foreign Minister of the former mentioned in two different communications to the mediator that his sovereign on behalf of Norway renounced all claims to Greenland in favour of the Crown of Denmark (p. 66).

3. The Convention of Sept. 1, 1819, signed by the King of Sweden and Norway in his capacity as King of Norway, and the King of Denmark expressly stated that "everything in connection with the Treaty of Kiel" of 1814, which *inter alia* reserved Greenland to Denmark, was to be regarded as completely settled (pp. 66-8).

4. Norway reaffirmed her previous admissions by affixing her signature to, and accepting as binding upon herself, bipartite agreements between Norway and Denmark, and various other multipartite agreements to which both Denmark and Norway were parties, in which Greenland was described as a Danish colony or as forming part of Denmark, or Denmark was allowed to exclude Greenland from the operation of the agreements (pp. 68-9).

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

³¹ *ICJ Reports 1951*, p. 116, at p. 139.

³² *Ibid.*, at p. 138. See also *ICJ: United States Nationals in Morocco Case* (1952), *ICJ Reports, 1952*, p. 176, at p. 200: "There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court cannot ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither party intended to concede its legal position."

³³ A/B. 53, p. 62 (English text authoritative). See also pp. 54 *et seq.* Cf. D.O. by Anzilotti (pp. 82, 94). Cf. *ICJ: Asylum Case* (1950), *infra*, p. 300, note 5.

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 régime, 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 régime.³⁶ This appears to be the reason

³⁴ U.S.F.R. (1902), p. 838, at p. 866.

³⁵ *Op. of Com.* 1931, p. 36, at p. 47.

³⁶ *Cf. Aguilar-Amory and Royal Bank of Canada (Tinoco) Case*, 2 UNRIAA, p. 369, at p. 381; Mex.-U.S. G.C.C. (1923): *Hopkins Case* (1926, 1927), *Op. of Com.* 1927, pp. 42 and 329, at p. 50. Fran.-Mex. M.C.C. (1924): *Pinson Case* (1928), *Jurisprudence*, p. 1, at p. 106.

why the non-recognition of a Government has been held not to estop a foreign State from subsequently asserting that a régime 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

³⁷ *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1928), *loc. cit.*, p. 384; *Hopkins Case* (1926, 1927), *loc. cit.*, p. 50. Cf. also *Pinson Case* (1928), *loc. cit.*, pp. 106-7. In the last mentioned case, the Umpire did not in reality commit himself. See also *infra*, p. 189, note 91.

³⁸ Cf. Brit.-U.S. Cl.Arb. (1916): *The Newchwang* (1921), Nielsen's Report, p. 411. A private recommendation by the U.S. Secretary of the Navy to the Chairman of the House of Representatives Committee on Claims expressing views favourable to the claim held not to constitute an admission of liability on the part of the U.S. See *infra*, pp. 200 *et seq.*, 208 *et seq.*

³⁹ One of the reasons why the Senate of Hamburg, in the *Croft Case* (1856) (2 *Arb.Int.*, pp. 1-37), refused, after much deliberation and hesitation (pp. 21-2), to regard as admissions statements in a Portuguese Government memorial, filed with the Portuguese Council of State, was that the Portuguese Government was only adopting the arguments of the claimants and acting as if it were their counsel (pp. 24-25).

⁴⁰ Mex.-U.S. Cl.Com (1868): *Cuculla Case*, 3 *Int.Arb.*, p. 2878. Counsel for the U.S. contended that Mexico should be held responsible to the U.S. for acts of the Zuloaga Government, since she had previously admitted liability to France and England. The U.S. Commissioner held: "These concessions, extorted by a duress as actual and relentless as ever pressed upon an embarrassed and exhausted Government, were made to buy its peace and, rejected by its powerful adversaries, cannot now furnish any assistance to this commission in determining the interesting question presented in this case" (p. 2879).

In the *Croft Case* (1856), the Portuguese pleaded compulsion with regard to certain statements that they had made and the tribunal admitted that these statements were made at the "pressing instances" of the British Government in an attempt to "appease" the latter (*loc. cit.*, p. 24).

⁴¹ PCIJ: *Mavrommatis Jerusalem Concessions Case* (1925), A. 5, p. 31. The PCIJ inquired into the question "Whether the fact that M. Mavrommatis is described in the concession as an Ottoman subject, though not invalidating the concession itself, might deprive him of the right to benefit by the terms of Art. 9 of the Protocol"; for Mavrommatis now claimed to be a Greek subject, entitled to the intervention of the Greek Government. But it answered the question in the negative; for it held that the description Ottoman national "was in error set down in the concessionary contracts."

Closure of Buenos-Aires Case (1870), Argentina/G.B., 2 *Arb.Int.*, p. 637. It was considered an excusable error not constituting an admission, the fact that the Argentine Government confirmed the decisions of a mixed commission which wrongly interpreted certain conventions, apparently because the State archives, in which the texts of these conventions were kept, were at that time in the hands of revolutionaries "and it is not surprising that the Commission and the Government did not know the terms of the conventions" (p. 654).

⁴² *Salvador Commercial Co. Case* (1902), *loc. cit.*, at p. 866. See *supra*, p. 147.

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^a 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

⁴³ A. 20/21, p. 39.

⁴⁴ PCIJ: *Chorzów Factory Case* (Jd.) (1927), A. 9, p. 19; (Merits) (1928), A. 17, pp. 51, 62. Rum.-Hung. M.A.T.: *Emeric Kulin Case* (Jd.) (1927), 7 T.A.M., p. 138, at p. 149.

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

⁴⁶ Jay Treaty (Art. VII) Arb. (1794): 4 *Int. Adj.*, M.S., p. 179, at p. 277.

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

⁴⁸ A. 9, p. 81.

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 dis-possession 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 Mixed 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 Mixed 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 Tatiler 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 Mixed 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

⁴⁹ Martens, III (16) N.R.G., p. 645.

⁵⁰ *Loc. cit.*, p. 81.

⁵¹ Brit.-U.S. Cl.Arb. (1910): Nielsen's Report, p. 489, at p. 493.

⁵² Ven.Arb. 1903, p. 142, at p. 144. See also Mex.-U.S. G.C.C. (1923): *G. W. Cook Case* (Dock. 668) (1927), *Op. of Com. 1927*, p. 318, at p. 319.

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 sua 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 1947⁵⁷:—

" . . . 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

⁵³ *Shufeldt Case* (1930) 2 UNRIAA, p. 1079. Guatemala cancelled a concession to extract chicle. One of the contentions put forward when the case was submitted to arbitration was that the claimants used machetes instead of a scratcher to bleed the chicle, in violation of Guatemalan law and fiscal regulations. Held: "The Government never having taken any steps to put a stop to this practice which they must have known existed either under the law or by arbitration under the contract, and never having declared the contract cancelled therefor, and having recognised the contract all through, and thus making themselves *particeps criminis* in such breach (if any) of the law, cannot now in my opinion avail themselves of this contention" (p. 1097).

See also *Brit.-U.S. Cl.Arb.* (1910): *Yukon Lumber Co. Case* (1913) *Nielsen's Report*, p. 438, at p. 442. Cf. also *The Montijo* (1875) 2 *Int.Arb.* p. 1421.

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

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

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

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

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

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

⁵⁹ *Loc. cit.*, p. 227.

⁶⁰ *Loc. cit.*, p. 227.

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 umpire. 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

⁶¹ *Loc. cit.*, p. 237. See also the French (authoritative) text of the Adv.Op.

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

⁶³ See *supra*, pp. 105 *et seq.*

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,

⁶⁴ Cf. Schwarzenberger, "Trends in the Practice of the World Court," 4 C.L.P. (1951), p. 1, at pp. 11 *et seq.*

⁶⁵ *Loc. cit.*, p. 228.

⁶⁶ *Interpretation of Peace Treaties* (1950), ICJ Pleadings, pp. 235, 294, 360.

⁶⁷ See *ibid.*, p. 294.

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 tribunals⁷⁰ 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

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

⁶⁹ PCIJ: *Eastern Greenland Case* (1933), D.O. by Anzilotti, A/B. 53, p. 95.

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

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 up between 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

⁷¹ 3 *Int.Arb.*, p. 2730.

⁷² *Ibid.*, p. 2731, at pp. 2738-9.

⁷³ *Ibid.*, p. 2743.

⁷⁴ *Ibid.*, p. 2743, at p. 2749. Hassaurek's opinion was cited and the same principle was applied in U.S.-Ven.M.C.C. (1903): *Jarvis Case*, *Ven.Arb.1903*, p. 145. See also Span.-U.S. Cl.Com. (1871): *The Mary Lowell* (1879) 3 *Int.Arb.*, p. 2772. Claimants who aided insurgents by supplying arms were estopped from claiming damages for capture of these arms on the high seas by the Spanish Government (pp. 2774, 2775, 2776). “On those principles of equity which the Umpire does not feel at liberty to disregard he is bound to decide that the owners of the ship and cargo are, as such, estopped in their present claim to indemnity for the consequences of their unlawful venture” (p. 2776). Cf. also Mex.-U.S. Cl.Com. (1868): *Cucullu [i.e., Cuculla] Case*, 4 *Int.Arb.*, p. 3477, at p. 3479.

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 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

⁷⁵ U.S. Domestic Commission for Claims against Mexico (1849): *Meade Claim*, 4 *Int.Arb.*, p. 3430, at p. 3432. The waiver referred to was deduced from decisions of the Mex.-U.S. Cl. Com. (1830) which dealt with a number of claims arising out of supplies furnished to the Mexican revolutionaries in their struggle for independence against Spain. In these cases, no question was raised by either the Mexican or the U. S. Commissioners as to the admissibility of the claims. The Mexican Commissioners concurred in allowing the claims without discussion, except where questions of evidence gave rise to differences of opinion. In each case, the Commissioners referred to the supplies as having been furnished for "the promotion of the great object aforesaid," viz., the independence and self-government of Mexico. The *Meade Claim* arose out of similar circumstances. See *ibid.*, pp. 3426-8.

⁷⁶ U.S.F.R. (1887), pp. 606-7.

⁷⁷ See *Pelletier Case* (1885) 2 *Int.Arb.*, pp. 1749-1805.

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

E. *Fraus Omnia Corruptit*

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

⁷⁸ Cf. Mex.-U.S. G.C.C. (1923): *Mussey Case* (1927) *Op. of Com.* 1927, p. 228, at pp. 229-30; *Id.*: *Chattin Case* (1927), *ibid.*, p. 422, at p. 423.

⁷⁹ *Supra*, p. 77.

⁸⁰ *Supra*, p. 148.

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

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,

⁸² *The Alabama Arbitration* (1872) 1 *Int.Arb.*, p. 495, at p. 655.

⁸³ See *Salem Case* (1932) U.S.A./Egypt, 2 *UNRIAA*, p. 1161, at pp. 1184 *et seq.*. See also U.S.-Ven. M.C.C. (1903): *Flutie Case*, *Ven.Arb.* 1903, p. 38, and precedents therein cited.

⁸⁴ Germ.-U.S. M.C.C. (1922): *Friedman Case* (1925) *Dec. & Op.*, p. 605, at p. 613.

⁸⁵ Mex.-U.S. G.C.C. (1922): *Mallén Case* (1927) *Op. of Com.* 1927, p. 254, at pp. 255 *et seq.*, pp. 273 *et seq.*

⁸⁶ Germ.-U.S. M.C.C. (1922): *Lehigh Valley Railroad Co. Case* (1933) *Dec. & Op.*, p. 1084, at p. 1127. See *infra*, pp. 358 *et seq.*

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 its 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

⁸⁷ See *infra*, p. 320, note 82, and p. 359.

⁸⁸ Fraud was alleged against the American Commissioner on the U.S.-Ven. Cl.Com. (1866) at Caracas both in the choice of the Umpire and in the proceedings. Venezuela protested. The U.S. Administration at first was adamant. But Congress intervened at the instance of the claimants concerned. In its Report of 1883, the Committee for Foreign Affairs of the House of Representatives declared: "The alleged commission was a conspiracy; its proceedings were tainted with fraud. That fraud affects its entire proceedings. It was diseased throughout, and there is no method known to the Committee by which to separate the fraudulent part from the honest part and establish any portion in soundness and integrity. . . . Justice to Venezuela demands these proceedings should be set aside speedily" (2 *Int.Arb.*, p. 1663). Accordingly, a new convention was signed in 1885 creating the Claims Commission of Washington to re-examine all the claims.

Cf. also *infra*, p. 261, where the P.C.A. in saying that the nullity of an award in case of essential error may be partial expressly emphasised that the case was not one where allegations of bad faith had been made against the tribunal.

⁸⁹ As to how the claims of alleged bona fide possessors of certificates of award issued by the Caracas Commission were dropped, see U.S.-Ven. Convention of March 15, 1888 (5 *Int.Arb.*, p. 4815), and the interpretation given to it by the Order of the Washington Commission on August 25, 1890 (2 *Int.Arb.*, p. 1675, note 2). *Cf.* also Mr. Rice's Report, 1885, *ibid.*, p. 1672.

can be more easily satisfied than in cases where no such endeavour seems to have been made." 90

The general principle requiring the best available evidence is thus tempered by considerations of possibility.⁹¹

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 (*présomptions 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 [*présomptions de fait*], provided that they leave no room for reasonable doubt." 93

⁹⁰ *Ibid.*, p. 61, at p. 63.

⁹¹ Cf. also ICJ: *Corfu Channel Case* (Merits) (1949); *ICJ Reports, 1949*, p. 4, at p. 18. In case one State is the victim of an unlawful act committed within the exclusive territorial jurisdiction of another State, "the fact of this exclusive territorial control exercised by one State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence."

⁹² *ICJ Reports, 1949*, p. 4, at pp. 90-91.

⁹³ *Ibid.*, at p. 18. Italics of the Court. From the established fact that Albania kept a strict watch over the Corfu Channel during the whole period when the mines could have been laid there, and the established fact that any laying of mines in the Channel during that period would have been detected from the observation posts set up in Albania, the "Court draws the conclusion that the

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.

laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government" (p. 22). In other words, knowledge by the Albanian Government was considered proved. Judge Badawi Pasha and also the *ad hoc* judge in their dissenting opinions, concurred in the use of circumstantial evidence, although both emphasised that the conclusion adopted must be the only rational one to be drawn from the established circumstances (pp. 60, 120). Judge Krylov alone doubted if State responsibility could be proved by indirect evidence (p. 69).

In cases before the Brit.-Mex.Cl.Com. (1926), knowledge of the Mexican authorities of certain acts was inferred from their public notoriety in the locality. See *McNeill Case* (1931), *Further Dec. & Op. of Com.*, p. 96, at p. 100; *The Sonora (Mexico) Land and Timber Co. Case* (1931), *ibid.*, p. 292, at p. 296; *Taylor Case* (1931), *ibid.*, p. 297, at p. 298.

See other examples of the use of circumstantial evidence: Hague Commission of Inquiry: *The Tubantia* (1922) 2 H.C.R., p. 135. Germ.-U.S. M.C.C. (1922); *Toft Case* (1926), *Dec. & Op.*, p. 801. In the latter case, the desired inference from the facts was rebutted by conclusive counter-evidence. Portuguese-German Arbitration (1919): *The Cygne Case* (1930), 2 UNRIAA, p. 1611, at p. 1056; *supra*, p. 303, note 11.

Spanish Zone of Morocco Claims (1923): Claim I: *Rzini (Tetuan Orchards) Case* (1924), 2 UNRIAA, p. 615, at p. 654.

⁹⁴ *Lynch Case* (1929), *Dec. & Op. of Com.*, p. 20, at p. 21. The Commissioners were of the opinion that where a fact can be more easily and conclusively established, *e.g.*, birth, death, etc., a stricter degree of proof would be required (*ibid.*).

See, also, Hungaro-Serb-Croat-Slovene M.A.T.: *Cie pour la Construction du Chemin de Fer d'Ogulin à la Frontière, S.A., Case* (1926), 6 T.A.M., p. 505. Restitution of articles under Art. 250, Treaty of Trianon. Claimants having produced sufficient proof to establish at least a presumption in favour of their ownership, the Tribunal could not admit "that the Serb-Croat-Slovene State is legally entitled to exact the absolute proof of ownership, this *probatio diabolica* being generally impossible" (p. 509. Transl.).

"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

⁹⁵ Mex.-U.S. G.C.C. (1923): *Kling Case* (1930) *Op. of Com. 1931*, p. 36, at p. 49, quoting 23 *Corpus Juris*, p. 9.

⁹⁶ E.g., Brit.-Mex. Cl.Com. (1926): *Lynch Case* (1929), *Dec. & Op. of Com.*, p. 20, at p. 22. In the absence of evidence impugning the accuracy of a consular certificate, this, although it "cannot be considered as absolute proof of nationality," was "accepted as prima facie evidence." Compare this case with the *Cameron Case* (Demurrer) (1929), decided by the same Commission, *ibid.*, p. 33, at p. 36: "The certificate of consular registration put in by the British Agent does raise a presumption of British nationality, though that presumption is rebutted by another document put in by the Mexican Government." Though the latter was not conclusive, the former was considered weakened to such an extent that British nationality was considered not to have been established.

⁹⁷ Cf. Fran.-Ven. M.C.C. (1902): *Brun Case*, *Ralston's Report*, p. 5 at p. 25: "The Umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent Government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question."

⁹⁸ Mex.-U.S. Special Cl.Com. (1923): *Naomi Russell Case* (1931), *Op. of Com. 1926-1931*, p. 44, at p. 88.

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. 130)]."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

⁹⁹ *Op. of Com. 1931*, p. 36, at pp. 44-5. See other cases therein cited. See also *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923) 1 UNRIIAA, p. 369, at p. 393.

¹ Germ.-U.S. M.C.C. (1922), *Dec. & Op.*, p. 1175, at p. 1176. See also *supra*, pp. 309-10.

² Mex.-U.S. G.C.C. (1923): *Melczer Mining Co. Case* (1929), *Op. of Com. 1929*, p. 228, at p. 233.

³ *Neth.-Ven. M.C.C. (1903): Evertsz Case, Ven. Arb. 1903*, p. 904, at p. 905.

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

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 impression⁷ that, contrary to the view generally accepted by

⁴ Mex.-U.S. G.C.C. (1923): *Op. of Com.*, 1929, p. 61, at p. 65.

⁵ Brit.-Mex. Cl.Com. (1926): D.O. by British Commissioner, *Doc. & Op. of Com.* p. 100, at p. 100.

⁶ Span.-U.S. Cl.Com. (1871): *Zaldívar Case* (1882), 3 *Int.Arb.*, p. 2982. U.S.-Ven. M.C.C. (1908): *Gago Case*, *Ven.Arb.* 1903, p. 164, at p. 167. ICJ: *Corfu Channel Case* (Merits) (1949), D.O. by E.Ser. ICJ Reports 1949, p. 4, at pp. 120, 124, 129.

⁷ See Fran.-Mex. Cl.Com. (1924): *Pinson Case* (1928), *Jurisprudence*, p. 1, at pp. 94-5.

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

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

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

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

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

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

⁸ *Op. of Com.*, 1927, p. 35, at pp. 39-40.

⁹ *Ibid.*, at p. 39.

¹⁰ See *supra*, p. 306.

¹¹ 2 *Arb.Int.*, p. 706, at p. 708. (Transl.)

See Lord Phillimore in the Advisory Committee of Jurists for the Establishment of the PCIJ, *Procès-verbaux*, p. 316. Speaking of the "principes du droit commun qui sont applicables aux rapports internationaux," he said: "Another principle of the same kind is that by which the plaintiff must prove his contention under penalty of having his case refused."

Fran.-Germ. M.A.T.: *Firme Ruinat Père et Fils Case* (1927), 7 T.A.M.,