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Fubini Case—Decision No. 201

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FUBINI CASE—DECISION No. 201 OF 12 DECEMBER 1959 [1]

Exemption from special progression tax on property—Active right to claim—Applicability of second part of paragraph 9 (*a*) of Article 78 of Peace Treaty—Whether time-limit of 3 September 1943 implied therein—Interpretation of treaties—Rules of—Natural and ordinary meaning of terms employed—Literal interpretation—Interpretation by reference to Preamble of Treaty—Meaning and scope of the expression "laws in force in Italy during the war"—Whether the expression includes acts and measures enacted or taken by the Italian Social Republic—Co-existence in a State of legal Government and insurrectional Government—Effects on Peace Treaty provisions—Principle of effectiveness—Wartime occupation—Effects on sovereignty of occupied State—Conditions required in order to be considered as having been "treated as enemy".

Exemption d'un impôt extraordinaire progressif sur le patrimoine — Droit d'action — Applicabilité de la seconde partie du paragraphe 9 *a*) de l'article 78 du Traité de Paix — Question de savoir si la date du 3 septembre 1943 est tacitement prévue par cette partie — Interprétation des traités — Règles d'interprétation — Sens naturel et ordinaire des termes employés — Interprétation littérale — Recours au préambule du Traité — Signification et portée de l'expression « législation en vigueur en Italie pendant la guerre» — Question de savoir si cette expression comprend les actes du Gouvernement de la République sociale italienne — Coexistence, dans un Etat, d'un gouvernement légal et d'un gouvernement insurrectionnel — Effets sur les dispositions du Traité de Paix — Principe de l'effectivité — Occupation de guerre — Effets sur la souveraineté de l'Etat occupé — Conditions requises pour être considéré comme ayant été « traité comme ennemi».

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy, pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of Italy, and Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member, chosen by mutual agreement between the United States and Italian Governments;

Having considered the Petition dated December 20, 1956 of the Agent of the Government of the United States of America, filed on the same date with the Joint Secretariat of the Commission *versus* the Government of the Italian Republic in behalf of Eugenio Fubini, Gino Fubini and Mrs. Anna Fubini Ghiron, claimants;

Having considered the Answer of the Agent of the Italian Government dated April 27, 1957;

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[1] *Collection of decisons*, vol. VI. case No. 272.

Having considered the *Procès-verbal* of Non-Agreement dated May 17, 1957, signed by the Representatives of the two Parties to the dispute, wherein it is decided to resort to a Third Member, as provided for in Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, in order to resolve the disputed issues raised by the case under review;

Having considered the Memorandum filed on June 6, 1958 with the Joint Secretariat of the Commission by the Agent of the United States of America, unopposed by the Agent of the Italian Government;

Having heard the Agents of both Parties during the oral hearings held in Rome, at the seat of the Commission, on April 2, 1959;

Having noted that the Agent of the United States has submitted the following requests, in his Petition, that the Commission:

(*a*) Decide that the claimants are to be considered United Nations nationals within the meaning of paragraph 9 (*a*) of Article 78 of the Treaty of Peace;

(*b*) Decide that the claimants are entitled to the exemption from the Extraordinary Progressive Patrimonial Tax imposed on their property by the Italian Government;

(*c*) Order that any sums heretofore or hereafter paid by the claimants to the Italian Government under the tax assessment dated August 24 and October 5, 1953 be refunded to the claimants within 60 days of the date of the decision;

(*d*) Decide that the claimants are entitled to receive from the Italian Government the sum of 115,000 lire, representing the reasonable expenses incurred in Italy in establishing their claim.

Having noted that the Agent of the Italian Government concludes his Answer by requesting that the Petition be declared to be inadmissible, or that it be, in any event, rejected;

A. CONSIDERATIONS OF FACT:

1. The claimants, Eugenio Fubini, Gino Fubini and Mrs. Anna Fubini Ghiron, originally Italian nationals, domiciled at New York, are respectively the sons and the widow of Professor Guido Fubini, a well-known mathematician and Professor Emeritus of the Polytechnical School of Turin.

As a result of the racial laws enacted by the then Fascist Government of Italy (Law No. 1779 of November 15, 1938 and Law No. 1024 of July 13, 1939), Professor Fubini was deprived of his professorial chair at the aforementioned school and his two sons were expelled from the University of Turin and deprived of the possibility of following the engineering profession, to which they intended to devote themselves. Because he was a renowned scientist, Professor Fubini was sent for by the Institute of Advanced Studies of the University of Princeton, New Jersey, in the United States, where he died in 1952.

His sons, Eugenio Fubini and Gino Fubini, continued to study in the United States and became naturalized citizens of that country. The former acquired naturalization on May 2, 1945 and the latter on March 25, 1946. Their mother, Mrs. Anna Fubini Ghiron, was naturalized in the United States on December 13, 1944. The three claimants thus acquired American nationality on the aforementioned dates, a fact that is not denied by the defendant Party; nor is it denied that they have all preserved their American nationality, uninterrupt edly, to date. Certificates of American nationality, issued in their names, are included in the records of the case. The jurisdiction of this Commission to adjudicate this case is undeniable.

2. The claimants were compelled to abandon all the property they owned in Italy, just like other Jews who were forced to leave Italy as a result of the racial persecution.

The Italian Government, by decree of the Chief of the Province of Turin, No. 23519/44, of March 2, 1944, sequestered and took possession of all the real and personal property located in the municipality of Turin owned by the brothers Eugenio and Gino Fubini.

By another decree of the Chief of the Province of Turin, No. 23519/30, of February 29, 1944, Mrs. Anna Fubini Ghiron's property was also placed under sequestration because she belonged to the Jewish race.

All this property was transferred to Ente di Gestione e Liquidazione Immobiliare, known as E.G.E.L.I., a special agency established by the Italian Government for the administrative management and liquidation of property belonging to Jews and foreign enemy nationals; the latter entrusted the Istituto di San Paolo of Turin with the care and management of the property owned by the claimants.

Following the Armistice of September 3, 1943 and the conclusion of the Treaty of Peace, signed on February 10, 1947 between the Allied and Associated Powers, on the one hand, and Italy, on the other, and which came into force on September 15, 1947, all the sequestered property under the care of the aforementioned Istituto di San Paolo of Turin, acting as E.G.E.L.I.'s delegate, was returned to the claimants, who were the owners thereof.

3. A special progressive tax on property was established in Italy under Legislative Decree of the Provisional Head of the State, No. 143, dated March 29, 1947.

On September 1, 1947, the Provisional Head of the State approved and enacted a law, dated September 1, 1947, No. 828, of "ratification with amendments to and complements of the legislative decree of the Provisional Head of the State No. 143 of March 29, 1947, concerning the establishment of a special progressive tax on property".

4. On August 25, 1953 and on October 5, 1953, the Office of the 3rd District of Direct Taxes of Turin served on each of the two Fubini brothers and on Mrs. Fubini Ghiron a notice of assessment of the Special Progressive Tax on Property on the property owned by them in Italy, and requested them to pay the following sums:

	Lire
Eugenio Fubini	329,810
Gino Fubini	345,150
Mrs. Anna Fubini Ghiron	764,720
	1,439,680

The claimants submitted their claim to the Agent of the United States of America before this Commission. They did not fail, at the same time, to exercise their right of recourse before the Italian authorities, in accordance with Italian fiscal laws; their claims were rejected by the Municipal Commission and by the Provincial Tax Commission of Turin; they are still pending before the Central Tax Commission, as the Italian Government has refused to take action on a request for suspension of payment submitted by the Agent of the Government of the United States during the proceedings before this Commission. The claimants deemed it advisable to make these claims within the time limit provided for by Italian fiscal legislation in order not to be exposed to the

objection of having acquiesced to these impositions, at a time when they were forced to take such action for the sole purpose of avoiding a distraint on their property.

B. CONSIDERATIONS OF LAW:

5. Following the decision of the French-Italian Conciliation Commission of August 29, 1949 (No. 32 [1], *Recueil*, fascicule I, pp. 99 *et seq.*) it is no longer disputed between the signatory Parties to the Treaty of Peace that the special taxes established in Italy by Legislative Decree No. 143 of March 29, 1947 and Law No. 828 of September 1, 1947, fall under the provisions of Article 78, paragraph 6 of the Treaty of Peace. Within the framework of this provision, the exemption from the special progressive tax on property in Italy was acknowledged in Italian-American intercourse, by a note dated June 13, 1950, addressed by the Ministry of Foreign Affairs of the Italian Republic to the Embassy of the United States of America in Rome (see Decision of the Commission dated September 24, 1956 in the Levi case, No. 96, typewritten text, p. 4).[2]

By letter dated August 6, 1955 the Italian Ministry of the Treasury advised the Embassy of the United States that it could not proceed with the request for exemption submitted by the Fubini brothers and by Mrs. Fubini Ghiron, on the basis of certain arguments which were repeated before this Commission by the Agent of the Italian Government. In his Answer dated April 27, 1957, the Italian Agent submitted a defence which textually incorporated and espoused the dissenting opinion written by the Representative of the Italian Republic on the Commission, in connexion with the decisions rendered on September 24, 1956 in the Treves (No. 95) [3], Levi (No. 96) [2] and Wollemborg (No. 109) [4] cases. He invoked the following grounds of law:

(i) The claimants do not fulfil the conditions required by Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace in order to claim the benefit of the exemption from levies, taxes or other charges of an exceptional nature that is afforded to United Nations nationals under Article 78, paragraph 6 of the aforesaid Treaty, because, even assuming that they were treated as enemies, such treatment is said to have occurred subsequent to the Armistice of September 3, 1943.

(ii) The conception of "laws in force in Italy during the war" would not include the acts and measures enacted or taken by the Italian Social Republic, also known as Republic of Salò.

(iii) The treatment as enemy which allowed, by virtue of Article 78, paragraph 9 (*a*) sub-paragraph 2 of the Treaty of Peace, the inclusion of persons who were the victims of said treatment within the meaning of "United Nations nationals", cannot be extended to persons who were subjected to measures of racial discrimination, in view of the fact that these measures were based exclusively on their membership in the Hebrew race and irrespective of the nationality of the persons injured.

6. Article 78, paragraphs 6 and 9 (*a*) of the aforesaid Treaty, read as follows:

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[1] Volume XIII of these *Reports*.
[2] *Supra*, decision No. 145, p. 272.
[3] *Supra*, decision No. 144, p. 262.
[4] *Supra*, decision No. 146, p. 283.

Paragraph 6: United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

Paragraph 9 (*a*): "United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

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

7. Before proceeding with a careful analysis of these various grounds of law, the Commission notes that it is not denied that the Fubini claimants do not fulfil the conditions of Article 78, paragraph 9 (*a*), sub-paragraph 1 of the Treaty of Peace in order that the American nationality with which they are now vested may authorize them to benefit, as nationals of the United States of America, from the exemption from the Special Progressive Tax on Property. Naturalized in 1944, 1945 and 1946 respectively, none of the claimants fulfils the condition of Article 78, paragraph 9 (*a*), sub-paragraph 1, that is, none of them was vested with this nationality on September 3, 1943, date of the Armistice with Italy, although they were United States nationals on September 15, 1947, the date on which the Treaty of Peace came into force.

8. *On the first ground of law.*

Since it is a question of interpreting Article 78, paragraph 9 (*a*), sub-paragraph 2, which declares that the expression "United Nations nationals" also includes persons who, under the laws in force in Italy during the war, "were treated as enemies", the Agent of the Italian Government contends, in the first place, that the treatment as enemy cannot be assimilated to the nationality of one of the United Nations unless it occurred prior to the date of the Armistice, on September 3, 1943. In other words, this date, referred to in sub-paragraph 1 of Article 78, paragraph 9 (*a*) of the Treaty of Peace, should, in his opinion, be implied in sub-paragraph 2 which is said to be a special case of the preceding paragraph.

He maintains that the aforesaid Article 78, paragraph 9 (*a*), sub-paragraph 2, is only apparently clear and that its veritable meaning cannot be discovered by a mere literal interpretation of the terms used but should be inferred from logical elements which modify its content. In his opinion, a restrictive interpretation should be forcibly resorted to if one bears in mind what practical possibilities there were to treat effectively a person as enemy in Italy after the political and military events that occurred at the beginning of September 1943, and he believes that the victorious Powers must have taken them into consideration when they drafted the Treaty of Peace. He points out that after September 3, 1943, the Italian Government, that is, the only legitimate Government, could only sequester German owned property and that a literal interpretation of the subject provision would lead to this absurd consequence, namely, that the application of Article 78 could be claimed in favour of a German, who was treated as enemy in Italy subsequent to September 3, 1943, but who at a later date further became, in some manner or other, a United

Nations national. He infers therefrom that the rule must necessarily have a more restrictive meaning than that which is conferred on it, *prima facie*, by the words used and that there are, therefore, grounds for giving a restrictive interpretation to Article 78, paragraph 9 (*a*), sub-paragraph 2, in that only persons treated as enemy in Italy before September 3, 1943 are entitled to benefit by Article 78, paragraph 6.

The Commission does not deem this argument to be conclusive.

The rules on the art of interpreting international treaties require that the interpreter rely, first of all, on the text that must be applied, in giving the terms employed by the contracting States their natural meaning. In that direction is the Resolution of the Institut de droit international of April 19, 1956, Grenade session (*Annuaire*, vol. 46, p. 365):

> The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the Treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.

In its jurisprudence, the Permanent Court of International Justice rendered the same opinion and refused to give any consideration to the provisions that were not to be found in the text.

The Advisory Opinion of September 15, 1923 on the interpretation of Article 4 of the Treaty regarding Polish minorities of June 28, 1919 (matter of the acquisition of Polish nationality) contains the following passage:

> The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the matter of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might, with advantage, have been added or substituted for it. (*Recueil C.P.J.I.*, serie B, No. 7, p. 20.)

Advisory Opinion of May 16, 1925 relating to the Polish postal service at Danzig:

> It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd. (*Recueil C.P.J.I.*, serie B, No. 11, p. 39).

The jurisprudence of the present International Court of Justice is in no way different.

> Advisory Opinion of May 28, 1948 concerning the conditions of admission of a State as a member of the United Nations (*C.I.J. Recueil* 1947–1948, p. 62); Decision of November 20, 1950 in the matter of the right of asylum (*C.I.J. Recueil* 1950, p. 279).

Nevertheless, these rules of interpretation hold good insofar as they do not lead to unreasonable or inconsistent results.

The Commission is of the opinion that the Agent of the Italian Government has not established that such was the case. The reasoning, by which he contends that a literal interpretation of Article 78, paragraph 9 (*a*) leads to an inconsistent conclusion, is the result of a *petitio principii*, because it originates from an assumption given as certain, whereas it would need proof to support it. He asserts that, subsequent to the Armistice of September 3, 1943, only the legitimate Italian Government could sequester enemy property and this property could only be German owned; he forgets that the Allied and Associated Powers, in conditioning the quality of "nationals of the United Nations", of persons who were not vested with this nationality, on the fact that they were treated as enemy during the war, evidently also foresaw the cases which oc-

curred after the Armistice and which arose from the measures adopted by Italian authorities other than those of the legitimate Government; these Powers were not unacquainted with the provisions of the Italian War Law of July 8, 1938 (law-decree No. 1415) which conferred the quality of enemy nationals to persons who did not have the nationality of an enemy State, but are stateless persons formerly vested with enemy nationalities or whose parents possessed or had possessed enemy nationality, or lastly that reside in enemy territory, nor the measures of racial persecution directed against the Jews by the insurrectional Government of the Italian Social Republic. It is these victims of the treatment as enemy that Article 78, paragraph 9 (*a*), sub-paragraph 2 intends to protect in assuring them the same restoration of their rights and interests and the same restitution of their property as that provided for United Nations nationals, in conformity with Article 78, paragraph 1, which governs the whole question of restoring the injured persons in their property, rights and interests.

A literal interpretation of Article 78, paragraph 9 (*a*), sub-paragraph 2, which was criticized by the Agent of the Italian Government, hence does not necessarily lead to the inconsistent conclusion pointed out by him. It is undoubted that, after Italy entered the war on the side of the Allied and Associated Powers on October 13, 1943, Germans treated as enemy at that time in this country were so treated in conformity with the rules of the law of nations and even if one were to assume that any one of them might have subsequently succeeded in acquiring the nationality of one of the United Nations, it is clear that such individual could not claim the benefits of Article 78 of the Treaty of Peace with Italy, because there would not be here involved non-enemy persons treated as enemies, but actually enemy persons treated as such. Nevertheless, the Commission is not aware that such an eventuality actually occurred in practice, after the Armistice, so that the observations of the Hon. Agent of the Italian Government would appear to be of a rather academic character.

In conformity with the jurisprudence already adopted in the Treves,[1] Levi[2] and Wollemborg[3] precedents, this Commission finds it can much the less restrict the protection accorded by Article 78 of the Treaty of Peace, in only taking into consideration the treatment as enemy inflicted, prior to September 3, 1943, on a person who was not a United Nations national, in that the introduction of that date in Article 78, paragraph 9 (*a*), sub-paragraph 1 does not have the meaning conferred on it by the Agent of the Italian Government, as United Nations nationals are entitled to benefit by the protecting provisions of Article 78 of the Treaty of Peace, even if the measures adopted against them or their property were taken after September 3, 1943, but during the war.

In point of fact there is no ground for interpreting Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace in the sense that the date appearing in sub-paragraph 1 of this Article is implied in sub-paragraph 2 in order to limit, in time, the treatment as enemy that accords to the injured person the benefits of the protective provisions of the Treaty of Peace.

As has already been pointed out by the Commission in its decisions in the Treves, Levi and Feldman[4] cases (No. 23, December 1954), the two sub-paragraphs of this Article have very different aims. The former sub-paragraph rules, in principle, that the national of the United Nations must have this quality at the date of the coming into force of the Treaty of Peace, September 15, 1947;

[1] *Supra*, p. 262.
[2] *Supra*, p. 272.
[3] *Supra*, p. 283.
[4] *Supra*, p. 212.

but in order to avoid that, for the purpose of benefiting by the provisions regarding property, rights and interests, certain persons should take the initiative of fraudulently changing their nationality between the conclusion of the Armistice and the coming into force of the Treaty of Peace, the Treaty requires that claimants were already vested with the nationality of one of the United Nations on September 3, 1943, the date of the Armistice. There is therefore here involved a measure of defence in Italy's favour enabling her to discard all claimants that acquired the nationality of one of the United Nations only after the Armistice. This provision is not based on the idea of mitigating Italy's responsibility but on the necessity of fighting against any *fraus legis*.

The second sub-paragraph assimilates to United Nations nationals all such persons who never were United Nations nationals, but who were treated as enemies under the laws in force in Italy during the war; as this treatment does not originate from their initiative, the signatory Powers did not have to concern themselves with fixing a term after which this treatment would no longer have any effect, because said term was necessarily automatically established by the end of the war with Italy, because treatment as enemy had to occur under the laws in force in Italy during the war.

All the foregoing consequences of a literal interpretation of the text of Article 78, paragraph 9 (*a*), sub-paragraph 2 are highly reasonable and do not lead to any inconsistent result. This Commission finds it has no authority to introduce in this conventional provision the addition recommended by the Agent of the Italian Government, nor to decide that all treatment as enemy which occurred subsequent to the Armistice should not be taken into consideration for the purpose of placing the victims thereof on the same level as United Nations nationals.

9. *On the second ground of law.*

The Agent of the Italian Government contends that it is impossible to admit that the claimants were treated as enemies under the legislation "in force in Italy during the war", for the reason that the rules which were applied to them, enacted by the Italian Social Republic, do not involve the responsibility of the Italian State recognized by the Associated and Allied Powers who have signed the Treaty of Peace with it, and could not be qualified as "Italian legislation" within the meaning of this Treaty.

It makes a rather subtle distinction between, on the one hand, the damages suffered by the property, rights and interests of the United Nations and their nationals in Italy during the war (*causa damni*), which would be an objective condition of restoration or restitution, and, on the other hand, the treatment as enemy of a person who is not vested with enemy nationality, which would be a subjective condition, and which must be fulfilled by an injured person in order to be entitled to benefit by Article 78 of the Treaty, and which can only be the result of a short-coming engaging the responsibility of the Government which committed it.

He contends that it is sufficient to read the Preamble of the Treaty of Peace in order to note the limits of the responsibility which the Allied and Associated Powers intended to impose on Italy, became it [the Preamble], reads:

> Whereas Italy under the Fascist régime became a party to the Tripartite Pact with Germany and Japan, undertook a war of agression . . . and bears her share of responsibility for the war; and whereas . . . the Fascist régime in Italy was overthrown on July 25, 1943, . . . and whereas after the said Armistice Italian armed forces . . . took an active part in the war against Germany, and Italy declared war on Germany as from October 13, 1943, and thereby became a co-belligerent against Germany . . .

The Agent of the Italian Government infers from this text that the victorious Powers agreed to differentiate between sequestrations made before and those made after the Armistice so as not to hold Italy responsible for the acts performed by the Government of the Italian Social Republic against whom Italy was at war side by side with the Allied and Associated Powers.

He adds that the sentence "legislation in force in Italy during the war" could not include the acts and decisions of the Salò Government as the concept of "Law" requires a power of legality which that Government lacked entirely.

All the foregoing arguments could be supported by certain moral motives, but these the Commission fails to find pertinent at the legal level.

In the law of nations it is certain that the Preamble of Treaties may serve as an interpretation thereof, in that they often supply an indication in connexion with the aims the Parties intended to achieve. But, in the instant case, the Commission fails to find in the Preamble of the Treaty of Peace with Italy any elements in support of the interpretation suggested by the Agent of the Italian Government. From the reference made to Italy's share of responsibility in the war, to the overthrow of the Fascists, to Italy's participation in the war against Germany after the Armistice, it is possible to draw certain inferences with regard to the general tendency of this Treaty, but not, unless one seeks support in the texts, an explanation as to whether or not Article 78, paragraph 9 (*a*), sub-paragraph 2 is applicable to persons who, although not vested with the nationality of one of the United Nations, are, by a fiction, considered to be so vested because they suffered injury under the laws or by the acts or decisions of the agents of the Italian Social Republic.

With regard to the position of the latter subsequent to September 28, 1943, the date on which Mussolini was reinstated into power, up to his demise and capitulation of the German forces in Italy (April 28 and April 29—May 2, 1945), with regard to its actual existence, its extension, its organization, the powers it exercised, at first over the greater part of the peninsula and then over territories which grew smaller and smaller as the Forces of the Allied and sociated Powers gradually advanced, decisions No. 144 (Treves case) [1] and No. 145 (Levi case) [2] rendered by the Conciliation Commission contained exhaustive accounts, and this Commission can confine itself to refer thereto, because the considerations therein contained have not given rise, with regard to the facts, to any exception on the part of the Agent of the Italian Government.

The condition which thus materialized in Italy is not unknown in international law; it is one of the co-existence of a legal Government and an insurrectional Government fighting one another over the possession of power in a State. It is by an application of the general principles of international law that this condition must be judged and that its effects on the provisions of the Treaty of Peace must be determined.

The rules of the law of nations in this field are controlled by the principle of effectiveness which plays a fundamental part in establishing the legal order of the insurgents. In view of the fact that there did exist, during a period of nineteen months, two Governments in Italy, each of which denied the power of the other, the question arises whether the laws enacted by the insurrectional Government must be considered as part of the laws in force in Italy during the war, within the meaning of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace.

This question must undoubtedly be solved in the affirmative on the following grounds:

[1] *Supra*, p. 262.
[2] *Supra*, p. 272.

First of all, the Italian Social Republic cannot, as was contended by the Agent of the Italian Government during the proceedings of the Levi case (decision No. 145), be considered as an agency of the German Reich whose armed forces occupied, at that time, a part of the Italian territory.

Wartime occupation is a well defined institution in international law. It does not entail the disappearance of the sovereignty of the occupied State and must be distinguished from a trustee occupation, such as that established in Germany after the surrender of its armies in 1945, by the Allied and Associated Powers. The sovereignty of the occupied State is only held in suspense during the time when enemy military forces are actually present in parts of its territory. Wartime occupation confers only certain powers on the occupying power, that are in keeping with the nature of war; adoption of necessary measures for the safety of its troops and the maintenance of public order, enactment of martial laws, suspension of certain particular points of the laws of the occupied State when unavoidable war requirements so demand, etc. (see Articles 42 to 56 of the Rules of The Hague of 1907 on the laws and customs of war on land). But it does not have the right to substitute its own sovereignty for that of the Government, or of one of the Governments, of the occupied State. It is therefore irrelevant, in the law of nations, that the Italian Social Republic was established by Germany and that its Government, when making decisions, had to reckon with, up to a certain point, the intent of its ally because it never acted in the name of the latter (this is the opinion contained in the decision of January 17, 1953, Mossé case, No. 144 of the French-Italian Conciliation Commission, *Recueil*, IVe fascicule, p. 125).[1]

It has occurred several times in history, that a rival Government was established in an occupied State, either with the recognition of the occupying authorities, or against them and the national Government that had accepted defeat; in that case there exist three simultaneous powers in one and the same State; the power of the legal Government, the power of the rival Government, which is a *de facto* Government, and the limited power of the military occupant which is not to be identified with that of the *de facto* Government. This condition occurred in France, in Norway and in Yugoslavia; it also occurred in Italy. It has not the effect of changing a rival Government into an agency of the occupying State when it had allied itself to the latter, nor the occupant into a *de facto* Government. The powers of a *de facto* Government and the powers of a war occupant are entirely different in international public law (see Sauser-Hall "L'occupation de guerre et les droits privés", *Annuaire Suisse de droit international*, 1944, vol. I, p. 70–73).

Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace does not say by whom measures equivalent to treatment as enemy were to be adopted, which were to confer on an individual, who did not possess it at the time these measures were applied against himself or his property, the status of United Nations national. The Commission holds, in conformity with the letter and the spirit of the aforesaid Treaty as well as the teachings of general international law, that these measures emanated from the Government which, in fact, exercised the political power over that part of the Italian territory where the parties in interest (if personal measures were involved) or the sequestered or confiscated property (if measures against property were involved) were located.

The Italian Social Republic, established on September 28, 1943, had its own Government, which was a local Government, but aimed at becoming a general Government; it exercised its powers in a positive manner through

[1] Volume XIII of these *Reports*.

its own administrative and judicial organs; the rules it decreed were obligatory for all those who were in actual fact subjected to that legal order and liable to penalties, bearing in mind the conditions resulting from an international and civil war, both of which raged in Italy.

The principle of effectiveness plays a part of primary importance in the law of nations in establishing the status of an insurrectional Government. Professor Guggenheim expresses the same opinion, to wit:

> The seizure of power by belligerents and insurgents in a part of the territory of the State conflicts with State positive law, entails the creation of a new provisional legal order. It is what one often describes as "a local *de facto* Government". The latter may establish international law intercourse with the Central Government, as well as with third States, on the condition that its legal order be an effective one. (*Traité de droit international public*, I, p. 203.)

This opinion is confirmed by Prof. Balladore Pallieri, in the citation set out hereunder, which appears in the decision rendered in the Mossé case (No. 144 of January 17, 1953) by the French-Italian Conciliation Commission (*Recueil*, IVe fascicule, p. 126), and which would not be unavailing to reproduce here:

> The international organization to which the international system refers is that which, *de facto*, really exists within the State. International law does not consider as a system, in this respect, that system which should exist according to domestic rules, but those which effectively and positively do exist. An international revolutionary movement can, in a violent manner and without legal continuity, substitute new systems for those which formerly existed, but as far as the international order is concerned it is not important that these agencies have no basis in the former regime and that they assert themselves to be Government agencies only *de facto*, by the success of the revolution that has brought them to power. It is this fact which is important, and without any limitation whatever, with regard to both international law and the international order . . . The imputation concerns whoever is in possession of real public authority in the interior of the State and, consequently, . . . those who, whatever the reason, come to be in a similar position, become agencies of the State. (*Diritto internazionale pubblico*, p. 92).

It flows from this principle of the law of nations, which must be resorted to when interpreting an international treaty, that the measures constituting "treatment as enemy" can have been adopted by the Government which, in fact, exercised political power over that part of Italian territory where the property owned by the Fubini brothers and Mrs. Fubini Ghiron was located. The sequestration which was ordered appears as a measure adopted by authorities which, from an international standpoint, effectively exercised political power over Turin, namely, the organs of the Italian Social Republic who enacted the rules permitting such a procedure and gave them execution. Hence, under the principle of effectiveness, these rules were part of the legislation in force in Italy during the war (this is the meaning of decision dated January 31, 1959 rendered by the Commission in the Turin district for taxation of direct and indirect imposts in the Tedeschi case).

There is proof that the drafters of the Treaty adopted this viewpoint in the fact that the obligation to make restitution of the property sequestered by the Italian Social Republic is incumbent on the legitimate Government, whof ulfilled it, thus making it clear that it is not possible to allow the distinction which the Agent of the Italian Government has tried to establish, on the basis of the Preamble of the Treaty of Peace, between the objective responsibility of

the Italian Government for the losses and injuries suffered by the property, rights and interests of nationals of the United Nations and the subjective responsibility of this same Government which arises in cases where there has been "treatment as enemy" of an injured person not vested with the nationality of one of the United Nations. The very purpose of the provision of Article 78, paragraph 9 (*a*), sub-paragraph 2 permits one to establish that the existence of the legislation of the Italian Social Republic was considered by them as a fact conditioning the right, accorded by the Treaty of Peace to persons who were the victims of discriminatory measures, of invoking against Italy the same protection accorded to nationals of the United Nations.

10. *On the third ground of law.*

Finally, the Agent of the Italian Government denies that Jews in Italy could have been treated as enemy, because the racial discriminatory measures concerning them were completely independent from the contingencies of war and differed from the measures which were applicable to nationals of enemy Powers, under the Italian War Law of July 8, 1938 (Law-Decree No. 1415). He does not admit that treatment as enemy could originate from measures other than those based on assimilation with a national of a country at war with Italy.

In support of his contention he cites the decision of the Italian-United States Conciliation Commission, No. 22, rendered on February 19, 1954 in the Bacharach case,[1] with which the three decisions in the Treves,[2] Levi[3] and Wollemborg[4] cases appear to him to be in conflict. He asserts that the Treaty of Peace does not contain any clause which would permit one to believe that the Allied and Associated Powers, over and above protecting the property, rights and interests of their nationals, also intended protecting persons subjected to racial persecutions. In this connexion, he refers to Article 78, paragraph 1 of the aforesaid Treaty which only concerns restoration of property, rights and interests to the United Nations and their nationals; this fundamental provision of the Treaty contains no reference to the victims of racial persecution.

These criticisms do not appear, to this Commission, to be better founded than those previously analysed.

If it is correct that the Treaty of Peace contains no provision referring specifically to the property, rights and interests of the victims of racial persecution, it is certain that, by its very definition of United Nations nationals, it embraces them in the broad protection it intends to extend to all those who have suffered as a result of discriminatory measures adopted by Italy during the war.

Article 78, paragraph 1 of the Treaty is, in fact, the fundamental provision assuring this protection to the United Nations and their nationals. But paragraph 9 (*a*), sub-paragraph 2 of this Article specifically includes in the concept of "United Nations nationals", individuals, corporations or associations who, under the laws in force in Italy during the war, were treated as enemy. This provision is directed at individuals who fulfilled the conditions of the Italian War Law of July 8, 1938 to be considered as enemies, or the conditions of the other laws which resulted in subjecting persons of non-enemy nationality to a treatment similar to that meted out to enemy nationals. This was not only the case of stateless persons (Article 3 of the War Law), but also of the victims

[1] *Supra*, p. 187.
[2] *Supra*, decision No. 144, p. 262.
[3] *Supra*, decision No. 145, p. 272.
[4] *Supra*, decision No. 146, p. 283.

of racial persecution, Jews whether Italian or neutral nationals. These cases were known to the Allied and Associated Powers at the time the Treaty of Peace was drafted and it is for the very purpose of covering them, as it is held in the three decisions in the Treves, Levi and Wollemborg cases, that the definition of national of the United Nations was expanded. It must be acknowledged, without any reticence, that this expansion cannot be made to cover all cases. But the numerical consequences of a provision contained in a Treaty are irrelevant in determining the legal scope on the basis of a search for the intent of the contracting Parties.

In this connexion, the well established case-law of the Conciliation Commission requires that the fulfilment of two conditions be obtained in order that a person "had been treated as enemy" within the meaning of the Treaty of Peace, with the effect of falling within the concept of "United Nations nationals". It is necessary:

(i) that there have been a positive and concrete course of action on the part of the Italian authorities actually subjecting a person who, legally, was not vested with the nationality of one of the Allied and Associated Powers, to measures which were applicable to enemy nationals, and that it does not suffice that such individual fulfil, in an abstract manner, the conditions of Italian legislation in force during the war, in order to be considered as enemy; this case-law was clearly defined in decisions No. 167,[1] Società Generale dei Metalli Preziosi case (French-Italian Conciliation Commission, *Recueil*, fascicule V, p. 12), No. 20, Flegenheimer case,[2] and, above all, in the Bacharach case[3] wherein the Italian-United States Conciliation Commission ruled as follows:

> . . . To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not the abstract possibility of adopting one) . . . (Archives of the Commission)

(ii) that such treatment as enemy occurred on the basis of the legislation in force in Italy during the war, which term must not be considered to include only the Italian War Law of July 8, 1938, and the legislative acts that either amended or completed it, but also all such other legal provisions as were intended to subject a person thereby affected to measures which were substantially equivalent to those concerning enemy nationals, as the drafters of the Treaty intended to exclude measures which were, for instance, the outcome of the arbitrary conduct of an official; this case-law was already outlined in the Bacharach case, in the following terms:

> . . . To be treated as enemy necessarily implies . . . on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals . . . (Archives of the Commission).

It was subsequently further developed in the three decisions concerning the Treves, Levi and, above all, the Wollemborg cases wherein the Commission affirmed that for the purposes of the application of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace, it is not required that the law specifically declared as enemies, and subjected, as such, to the Italian War Law, certain Italian nationals; it suffices that it (the law) provided the adoption of measures, in their respect, which, substantially, entail a treatment as enemy.

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[1] Volume XIII of these *Reports*.
[2] *Supra*, decision No. 182, p. 327.
[3] *Supra*, decision No. 24, p. 187.

As this Commission has no grounds for doubting the correctness of the foregoing, it is bound to confirm it.

It is certain that in the Fubini brothers and Mrs. Fubini Ghiron cases, these two conditions are fulfilled.

As regards the former condition, it is established that the real and personal property located in Italy, owned by the claimants, was sequestered under Decrees of the Head of the Province of Turin No. 23519/30 of February 29, 1944 and No. 23519/44 of March 2, 1944, and that it was turned over to E.G.E.L.I. for management thereof, which organization, in turn, handed this property over to the Istituto di San Paolo at Turin for custody and management thereof. The claimants were thus deprived of the free management and disposition of their property in Italy, exposed to measures of confiscation and placed on the same level as enemy nationals; they were manifestly treated as enemies, the Italian War Law of 1938 providing for a preservation attachment of enemy property (Article 295).

Regarding the latter condition, the measures adopted against the property of the claimants are based on legal provisions in force in Italy during the war, namely, the Legislative Decree of the Head of the Government of the Republic of Salò No. 2, dated January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944, which finds support in the legislation previously enacted by the preceding legitimate Government, reading as follows:

> The Duce of the Italian Social Republic, Head of the Government;
>
> Having considered the absolute necessity of urgently taking action;
>
> Having seen Law Decree No. 1728 of November 17, 1939 containing provisions for the protection of the Italian race;
>
> Having seen Law Decree No. 739 of February 9, regarding the rules implementing and completing the provisions contained in Article 10 of Law Decree No. 1728 of November 17, 1938, concerning the limitations on real property owned and on industrial and business activity performed by Italian nationals of the Jewish race;
>
> Having heard the Council of Ministers:
>
> *Hereby decrees:*
>
> Article 1. Nationals belonging to the Jewish race . . . cannot, in the territory of the State:
>
> (*a*) . . .
>
> (*b*) be the owners either of plots of land or of buildings and incidentals thereto.
>
> (*c*) own securities, valuables, credits and title to ownership interests, whatever the nature thereof, nor can they be owners of other real property whatever the nature thereof;
>
> . . .
>
> Article 7. Real property and incidentals thereto, personal property, industrial and commercial enterprises and any other source of profit or revenue existing in the territory of the State, owned by Italian nationals of the Jewish race . . . shall be confiscated by the State and turned over to E.G.E.L.I. for management thereof.
>
> Article 8. The confiscation decree shall be issued by the Chief of the Province having jurisdiction over the territory wherein the individual property is located. . . .
>
> Article 13. The sale of the property confiscated under Article 7 shall be effected by E.G.E.L.I. . . .
>
> Article 15. Any sums collected under Article 14 above shall be paid into the State as partial reimbursement of the expenses incurred for assisting and paying out subsidies and war damage compensation to persons injured by enemy air attacks.

These legal provisions served as a legal basis for the anti-semitic measures which had already been contemplated, as a policy to be followed, in Point 7 of the programme of action of the First Assembly of Republican Fascism, which was the legislative authority of the Italian Social Republic; it was in fact stated therein:

> Those who belong to the Jewish race are aliens. During the war they are enemy nationals.

This Commission cannot escape the evidence and must note that the claimants were actually treated as enemies in Italy, under the legislation in force in that country at the time when severe measures were adopted against their property and that they fulfil, consequently, the conditions of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace for the purpose of being considered as "United Nations nationals" within the meaning of the Treaty.

11. The Plaintiff Party concludes by requesting that the Italian Government reimburse any reasonable expenses incurred by the claimants in establishing their claim.

This request is based on Article 78, paragraph 5 of the Treaty of Peace which charges the Italian Government with expenses of this nature; the claimants have fixed them at 115,000 lire, which is considered to be fair by the Commission.

DECIDES,

with a majority vote, the Italian Representative dissenting, that:

1. The claimants, Eugenio Fubini and Gino Fubini, as well as Mrs. Anna Fubini Ghiron, are entitled to avail themselves of the quality of "United Nations nationals", within the meaning of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace with Italy of February 10, 1947.

2. The three claimants named in the foregoing paragraph are therefore exempted from payment of the Special Progressive Tax on Property, established by the Italian Republic under Law No. 828 of September 1, 1947.

3. Within a time limit of sixty days, beginning from the date on which this Decision is filed, the Italian Government shall refund any and all such sums as the claimants may have already paid as a result of their having been subjected to this tax, notice of assessment of which was served on the claimants on August 24, 1953 and October 5, 1953, as well as the sum of 115,000 lire settled as reimbursement of expenses incurred in establishing this claim.

4. This Decision is final and binding.

5. The Agents of the two Governments concerned shall be notified of this Decision.

DONE in Rome; at the seat of the Conciliation Commission, on this 12th day of the month of December, nineteen hundred and fifty-nine.

The Third Member

G. SAUSER-HALL

The Representative of the United States of America	*The Representative of the Italian Republic*
Alexander J. MATTURRI	Antonio SORRENTINO