PARKER, Umpire, delivered the opinion of the commission, the American and German commissioners concurring in the conclusions:

These cases grow out of the sinking of the British ocean liner *Lusitania*, which was torpedoed by a German submarine off the coast of Ireland May 7, 1915, during the period of American neutrality. Of the 197 American citizens aboard the *Lusitania* at that time, 69 were saved and 128 lost. The circumstances of the sinking are known to all the world, and as liability for losses sustained by American nationals was assumed by the Government of Germany through its note of February 4, 1916, it would serve no useful purpose to rehearse them here.

Applying the rules laid down in Administrative Decisions Nos. I and II handed down this date, the commission finds that Germany is financially obligated to pay to the United States all losses suffered by American nationals, stated in terms of dollars, where the claims therefor have continued in American ownership, which losses have resulted from death or from personal injury or from loss of, or damage to, property sustained in the sinking of the *Lusitania*.

This finding disposes of this group of claims, save that there remain to be considered (1) issues involving the nationality of each claimant affecting the commission's jurisdiction, and (2) the measure of damages to be applied to the facts of each case.

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1 Reference is made to Administrative Decision No. I for the definition of the terms used herein.

We are here dealing with a group of cases all growing out of a single catastrophe. As it is manifestly of paramount importance that the same rules of decision shall govern the disposition of each and all of them, whether disposed of by agreement between the two commissioners or in the event of their disagreement by the umpire, this opinion announcing such rules is, at the request of the two commissioners, prepared by the umpire, both commissioners concurring in the conclusions. The principles and rules here laid down will, where applicable, govern the American and German agents and their respective counsel in the preparation and presentation of all claims.
In this decision rules applicable to the measure of damages in death cases will be considered. In formulating such rules and determining the weight to be given to the decisions of courts and tribunals dealing with this subject, it is important to bear in mind the basis of recovery in death cases in the jurisdictions announcing such decisions.

At common law there existed no cause of action for damages caused by the death of a human being. The right to maintain such actions has, however, been long conferred by statutes enacted by Great Britain and by all of the American States. The German code expressly recognizes liability for the taking of life. These legislative enactments vary in their terms to such an extent that there can not be evolved from them and the decisions of the courts construing them any composite uniform rules governing this branch of the law. Such statutes and decisions as well as the other governing principles set out in this commission's Administrative Decision No. II will, however, be considered in determining the applicable rules governing the measuring of damages in death cases.

The statutes enacted in common-law jurisdictions conferring a cause of action in death cases where none before existed have frequently limited by restrictive terms the rules for measuring damages in such cases. The tendency, however, of both statutes and decisions is to give such elasticity to these restrictive rules as to enable courts and juries in applying them to the facts of each particular case to award full and fair compensation for the injury suffered and the loss sustained. The statutes of several States of the American Union authorize juries to award such damages as are "fair and just" or "proportionate to the injury." Under such statutes the decisions of the courts give to the juries much broader latitude in assessing damages than those of other States.

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where the statutes expressly limit them to so-called "pecuniary injuries," which is a term much misunderstood.

In most of the jurisdictions where the civil law is administered and where the right of action for injuries resulting in death has long existed independent of any code or statute containing restrictions on rules for measuring damages, the courts have not been hampered in so formulating such rules and adapting them to the facts of each case as to give complete compensation for the loss sustained.

It is a general rule of both the civil and common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as "compensation," "reparation," "indemnity," "recompense," and is measured by pecuniary standards, because, says Grotius, "money is the common measure of valuable things."

In death cases the right of action is for the loss sustained by the claimants, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The inquiry then is: What amount will compensate claimants for such losses?

Bearing in mind that we are not concerned with any problems involving the punishment of a wrongdoer but only with the naked question of fixing the amount which

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will compensate for the wrong done, our formula expressed in general terms for reaching that end is: Estimate the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates, reduced to its present cash value, will generally represent the loss sustained by claimant.

In making such estimates there will be considered, among other factors, the following:

(a) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him:

(b) The probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered;

(c) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;

(d) The age, sex, health, condition and station in life, and probable life expectancy of each of the claimants;

(e) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;

(f) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5 per cent interest rate and standard present-value tables will be used;

(g) Neither the physical pain nor the mental anguish which the deceased may have suffered will be considered as elements of damage;

(h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;

(i) No exemplary, punitive, or vindictive damages can be assessed.
The foregoing statement of the rules for measuring damages in death cases will be applied by the American agent and the German agent and their respective counsel in the preparation and submission of all such cases. The enumeration of factors to be taken into account in assessing damages will not be considered as exclusive of all others. When either party conceives that other factors should be considered, having a tendency either to increase or decrease the quantum of damages, such factors will be called to the attention of the commission in the presentation of the particular case.

Most of the elements entering into the rules here expressed for measuring damages, and the factors to be taken into account in applying them, are so obviously sound and firmly established by both the civil and common law authorities as to make further elaboration wholly unnecessary. As counsel for Germany, however, very earnestly contends that the mental suffering of a claimant does not constitute a recoverable element of damage in death cases, and also contends that life insurance paid claimants on the happening of the death of deceased should be deducted in estimating the claimant's loss, we will state the reasons why we are unable to adopt either of these contentions. The American counsel, with equal earnestness, contends that exemplary, punitive, and vindictive damages should be assessed against Germany for the use and benefit of each private claimant. For the reasons hereinafter set forth at length this contention is rejected.

Mental suffering.—The legal concept of damages is judicially ascertained compensation for wrong. The compensation must be adequate and balance as near as may be the injury suffered. In many tort cases, including those for personal injury and for death, it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained, involving such inquiries as how long the deceased would probably have lived but for the fatal injury; the amount he would have earned, and of such earnings the amount he would have contributed to each member of his family; the pecuniary value of his supervision over the education and training of his children; the amount which will reasonably compensate an injured man for suffering

Mental suffer-
excruciating and prolonged physical pain; and many other inquiries concerning elements universally recognized as constituting recoverable damages. This, however, furnishes no reason why the wrongdoer should escape repairing his wrong or why he who suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise. To deny such reparation would be to deny the fundamental principle that there exists remedy for the direct invasion of every right.

Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. The interdependency of the mind and the body, now universally recognized, may result in a mental shock producing physical disorders. But quite apart from any such result, there can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body, and of its detrimental and injurious effect on the individual and on his capacity to produce. Why, then, should he be remediless for this injury? The courts of France under the provisions of the Code Napoleon have always held that mental suffering or "prejudice morale" is a proper element to be considered in actions brought for injuries resulting in death. A like rule obtains in several American States, including Louisiana, South Carolina, and Florida. The difficulty of measuring mental suffering or loss of mental capacity is conceded, but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree.

On careful analysis it will be found that decisions announcing a contrary rule by some of the American courts are measurably influenced by the restrictions imposed by the language of the statutes creating the right of action for injuries resulting in death. As herein-after pointed out, these very restrictions have in some instances driven the courts to permit the juries to award as exemplary damages what were in truth compensatory damages for mental suffering, rather than leave the plaintiff without a remedy for a real injury sustained.

Mental suffering to form a basis of recovery must be real and actual, rather than purely sentimental and vague.\(^7\)

**Insurance.**—Counsel for Germany insist that in arriving at claimants’ net loss there should be deducted from the present value of the contributions which the deceased would probably have made to claimants had he lived all payments made to claimants under policies of insurance on the life of deceased. The contention is opposed to all American decisions and the more recent decisions of the English courts. The various reasons given for these decisions are, however, for the most part inconclusive and unsatisfactory. But it is believed that the contention here made by the counsel for Germany is based upon a misconception of the essential nature of life insurance and the relations of the beneficiaries thereto.

Unlike marine and fire insurance, a life insurance contract is not one of indemnity, but a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The consideration for the claimants’ contract rights is the premium paid. These premiums are based upon the risk taken and are proportioned to the amount of the policy. The contract is in the nature of an investment made either by, or in behalf of, the beneficiaries. The claimants’ rights under the insurance contracts existed prior to the commission of the act complained of, and prior to the death of deceased. Under the terms of the contract these rights were to be exercised by claimants upon the happening of a certain event. The mere fact that the act complained of hastened that event can not inure to Germany’s benefit, as there was no uncertainty as to the happening of the event, but only as to the *time* of its happening. Sooner or later payment must be made under the insurance contract. Such payment of insurance, far from springing from Germany’s act, is entirely foreign to it. If it be said that the acceleration of death secures to the claimants *now* what might otherwise have been paid to others had deceased survived claimants, and that therefore claimants may *possibly* have benefited through Germany’s act, the answer is that the law will not for the benefit of the wrongdoer enter the domain of speculation and consider the probability or probabilities

\(^7\) Sedgwick, sec. 46a.
in order to offset an absolute and certain contract right against the uncertain damages flowing from a wrong.

*Use of life-expectancy and present-value tables.*—Ordinarily the facts to which must be applied the rules of law in measuring damages in death cases lie largely in the future. It results that, absolute knowledge being impossible, the law of probabilities and of averages must be resorted to in estimating damages, and these preclude the possibility of making any precise computations or mathematical calculations. As an aid—but solely as an aid—in estimating damages in this class of cases, the commission will consider the standard life-expectancy and present-value tables. These will be used not as absolute guides but in connection with other evidence, such as the condition of the health of deceased, the risks incident to his vocation, and any other circumstances tending to throw light on the probable length of his life but for the act of Germany complained of. To the extent that happenings subsequent to the death of deceased make certain what was before uncertain, to such extent the rules of probabilities will be discarded.

Neither will we lose sight of the fact that life tables are based on statistics of the length of life of individuals, not upon the duration of their physical or mental capacity or of their earning powers. In using such tables it will be borne in mind that the present value of the probable earnings of deceased depends on many more unknowable contingencies than does the present value of a life annuity or dower. Included among these contingencies are possible and probable periods of illness, periods of unemployment even when well, and various degrees of disability arising from gradually increasing age. The weight to be given to such tables will, therefore, be determined by the commission in the light of the facts developed in each particular case.

*Exemplary damages.*—American counsel with great earnestness insists that exemplary, or, as they are frequently designated, punitive and vindictive, damages should be assessed by this commission against Germany in behalf of private claimants. Because of the importance of the question presented the nature of exemplary damages will be examined and the commission's reasons for declining to assess such damages will be fully stated.

Undoubtedly the rule permitting the recovery of exemplary damages as such is firmly intrenched in the
EXEMPLARY DAMAGES

jurisprudence of most of the States of the American Union, although it has been repudiated by the courts of several of them and its soundness on principle is challenged by some of the leading American text writers.\(^8\)

The reason for the rule authorizing the imposition of exemplary in addition to full reparation or compensatory damages is that they are justified "by way of punishing the guilty, and as an example to deter others from offending in like manner."\(^9\) The source of the rule is frequently traced to a remark alleged to have been made by Lord Chief Justice Pratt (afterwards Lord Camden) in instructing a jury (italics ours) that:\(^10\)

"Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

That such a charge was ever in fact given has been questioned.\(^11\) However this may be, this alleged instruction has been quoted and requoted by the courts of England and of America as authority for the awarding of exemplary damages where the tort complained of has been wilfully or wantonly or maliciously inflicted.

In some of the earlier cases the awards of exemplary damages were sustained "for example's sake" and "to prevent such offense in the future," and again "to inflict damages for example's sake and by way of punishing the defendant." In one early New York case\(^12\) it was said:

"We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime."

In our opinion the words exemplary, vindictive, or punitive as applied to damages are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong.\(^13\) The remedy should be commensurate with the loss, so that the injured party may

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\(^10\) Wilkes vs. Wood, 1763, 19 Howell's State Trials (1816) 1153, 1167, Loft's Reports (1790), pages 1 and 19 of first case.

\(^11\) Sedgwick, sec. 350.

\(^12\) Cook vs. Ellis, 1844, 6 Hill's (New York) Reports 466, 467.

\(^13\) Sedgwick, sec. 571a.
be made whole. 14 The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. Many of the American authorities lay down the rule that where no actual damage has been suffered no exemplary damages can be allowed, giving as a reason that the latter are awarded, not because the plaintiff has any right to recover them, but because the defendant deserves punishment for his wrongful acts; and that, as the plaintiff can not maintain an action merely to inflict punishment upon a supposed wrongdoer, if he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all. 15 It is apparent that the theory of the rule is not based upon any right of the plaintiff to receive the award assessed against the defendant, but that the defendant should be punished. The more enlightened principles of government and of law clothe the state with the sole power to punish but insure to the individual full, adequate, and complete compensation for a wrong inflicted to his detriment. 16

An examination of the American authorities leads to the conclusion that the exemplary damage rule owes its origin and growth, to some extent at least, to the difficulties experienced by judges in tort cases of clearly defining in their instructions to juries the different factors which may be taken into account and readily applied by them in assessing the quantum of damages which a plaintiff may recover. It is difficult to lay down any rule for measuring injury to the feelings, or humiliation or shame, or mental suffering, and yet it frequently happens that such injuries are very real and call for compensation as actual damages as much as

14 Grotius, Book II Chap. XVII, Sec. X: Blackstone's Commentaries, Book II, chap. 29, Sec. VII, par. 2 (*p. 438); Sedgwick; sec. 29.
16 Vattel's Law of Nations, Chitty edition with notes by Ingraham, 1852 (1857), (hereinafter cited as "Vattel") Book I, sec. 169, where it is said: "Now, when men unite in society—as the society is thenceforward charged with the duty of providing for the safety of its members, the individuals all resign to it their private right of punishing. To the whole body, therefore, it belongs to avenge private injuries, while it protects the citizen at large. And as it is a moral person, capable also of being injured, it has a right to provide for its own safety, by punishing those who trespass against it—that is to say, it has a right to punish public delinquents. Hence arises the right of the sword, which belongs to a nation, or to its conductor. When the society use it against another nation, they make war; when they exert it in punishing an individual, they exercise vindictive justice."
COMPENSATORY DAMAGES

physical pain and suffering and many other elements which, though difficult to measure by pecuniary standards, are, nevertheless, universally considered in awarding compensatory damages. The trial judges, following the lead of Lord Camden, 17 have found it easier to permit the juries to award plaintiffs in the way of damages a penalty assessed against defendants guilty of willful, malicious, or outrageous conduct toward the plaintiffs, rather than undertake to formulate rules to enable the juries to measure in pecuniary terms the extent of the actual injuries. 18 In cases cited and numerous others, the damages dealt with and designated by the court as "exemplary" were in their nature purely compensatory and awarded as reparation for actual injury sustained.

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. The tendency of the decisions and statutes of the several American States seems to be to broaden the scope of the elements to be considered in assessing actual and compensatory damages, with the corresponding result of narrowing the application of the exemplary damages rule. 19

The industry of counsel has failed to point us to any money award by an international arbitral tribunal where

17 Wilkes v. Wood, note 10 supra.
18 Boydan v. Haberstumpf, 1901, 129 Michigan Reports 137, where it was held (p. 140; italics ours) that the term "exemplary damages," as employed in Michigan, "has generally been understood to mean an increased award of damages in view of the supposed aggravation of the injury to the feelings by the wanton or reckless act of the defendant," and that "It has never been the policy of the court to permit juries to award capiously any sum which may appear just to them, by way of punishment to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a just measure of compensation for injury to feelings, in view of the circumstances of such particular case." Pagrum v. Sturtz, 1888, 31 West Virginia Reports 220, 229, 242-243; Gillingham v. Ohio River Railroad Co., 1891, 35 West Virginia Reports 588, 590-593; Levy v. Fleischner, Mayer & Co., 1895, 12 Washington Reports 15, 17-18.
19 See the cases cited in note 6 above. In the case cited from 128 Louisiana Reports the court said, at page 592, "the idea that damages allowed for mental suffering are exemplary, punitive, or vindictive in their character has been very generally abandoned, and they are now recognized by this court and other courts as actual and compensatory."
exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals. Great stress is laid by counsel on the Moses Moke case which arose under the convention between the United States and Mexico of July 4, 1868. Moke, an American citizen, was subjected to a day's imprisonment to "force" him to "loan" $1,000. He sought to recover the amount of the "loan" and damages. The American Commissioner Wadsworth, speaking for the commission, said:

"We wish to condemn the practice of forcing loans by the military, and think an award of $500 for 24 hours' imprisonment will be sufficient *. * *. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them."

This language is the nearest approach to a recognition of the doctrine of exemplary damages that we have found in any reported decision of a mixed arbitral tribunal, but we do not regard the decision in this case as a recognition of this doctrine. On the contrary, an award of $500 for the humiliation and inconvenience suffered by this American citizen for the outrageous treatment accorded

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20 "International Arbitral Law and Procedure," by Jackson H. Ralston, 1910, sec. 369, where he says:

"While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it possessed the power to grant anything save compensation. * * *"

Borchard's "The Diplomatic Protection of Citizens Abroad," 1915 (1922), sec. 174, makes substantially the same statement in these words: "Arbitral commissions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages."

Doctor Lieber, umpire of the commission under the convention of July 4, 1868, between the United States and Mexico, in awarding the sum of $4,000 on an $85,000 claim, said (p. 4311, Vol. IV, of Moore's "History and Digest of the International Arbitrations to which the United States Has Been a Party," 1893, hereinafter cited as "Moore's Arbitrations"): "Nor can these high damages be explained as exemplary damages. Our commission has no punitive mission, nor is there any offense to be punished."

See also opinion of Umpire Bertinatti in the case of Ogden, administrator of the estate of Isaac Harrington, in which an award of $1,000 was made on an original demand of $160,000 where the claim was made that an American citizen was treated oppressively and with great indignity by Costa Rica. II Moore's Arbitrations, p. 1566.

21 IV Moore's Arbitrations, 3411.

Counsel also lays much stress on the language used by Umpire Duffield of the German-Venezuelan Mixed Claims Commission in the Metzer case (pp. 578-580, "Venezuelan Arbitrations of 1903," report by Jackson H. Ralston, 1904, hereinafter cited as "Venezuelan Arbitrations 1903"), where it is said (p. 580; italics ours): "Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, because it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment." Clearly this is dictum. The case was apparently correctly decided and there was no reason for giving any careful consideration to the right of the commission to go further than award compensatory damages.
him by the Mexican authorities can hardly be said to be adequate compensation. Certainly the award has in it none of the elements of punishment, nor can it be evoked as an example to deter other nations from according similar treatment to American citizens.

But it is not necessary for this commission to go to the length of holding that exemplary damages can not be awarded in any case by any international arbitral tribunal. A sufficient reason why such damages can not be awarded by this commission is that it is without the power to make such awards under the terms of its charter—the treaty of Berlin. It will be borne in mind that this is a "treaty between the United States and Germany restoring friendly relations"—a treaty of peace. Its terms negative the concept of the imposition of a penalty by the United States against Germany, save that the undertaking by Germany to make reparation to the United States and its nationals as stipulated in the treaty may partake of the nature of a penalty.22

Part VII of the treaty of Versailles (arts. 227 to 230, inclusive) deals with "penalties." It is significant that these provisions were not incorporated in the treaty of Berlin.

In negotiating the treaty of peace, the United States and Germany were of course dealing directly with each other. Had there been any intention on the part of the United States to exact a penalty either as a punishment or as an example and a deterrent, such intention would have been clearly expressed in the treaty itself; and, had it taken the form of a money payment, would have been claimed by the Government of the United States on its own behalf and not on behalf of its nationals. As to such nationals, care was taken to provide for full and adequate "indemnities," "reparations," and "satisfaction" of their claims for losses, damages, or injuries suffered by them. While under that portion of the treaty of Versailles which has by reference been incorporated in the treaty of Berlin, Germany "accepts" responsibility for all loss and damage to which the United States and its nationals have been subjected as a consequence of the war, nevertheless the United States frankly recognizes

22 Oppenheim on International Law, 3d (1920) edition (hereinafter cited as "Oppenheim"). Vol. II, sec. 299a, p. 333, where it is said (italics ours): "There is no doubt that if a belligerent can be made to pay compensation for all damage done by him in violating the laws of war, this will be an indirect means of securing legitimate warfare."
the fact "that the resources of Germany are not ade­quate * * * to make complete reparation for all such loss and damage", but requires that Germany make "compensation" for specified damages suffered by Ameri­can nationals.\textsuperscript{23} For the enormous cost to the Govern­ment of the United States in prosecuting the war no claim is made against Germany. No claims against Germany are being asserted by the Government of the United States on account of pensions paid, and compensation in the nature of pensions paid, to naval and military victims of the war and to their families and dependents.\textsuperscript{24} In view of this frank recognition by the Government of the United States of Germany's inability to make to it full and complete reparation for all of the consequences of the war, how can it be contended that there should be read into the treaty an obligation on the part of Germany to pay penalties to the Government of the United States for the use and benefit of a small group of American nationals for whose full and complete compensation for losses sus­tained adequate provision has been made?

The United States is in effect making one demand against Germany on some 12,500 counts. That demand is for compensation and reparation for certain losses sus­tained by the United States and its nationals. While in determining the amount which Germany is to pay, each claim must be considered separately, no one of them can be disposed of as an isolated claim or suit, but must be considered in relation to all others presented in this one demand. In all of the claims the parties are the same. They must all be determined and disposed of under the same treaty and by the same tribunal. If it were pos­sible to read into the treaty a provision authorizing this commission to assess a penalty against Germany as a punishment or as an example or deterrent, what warrant is there for allocating such penalty or any part of it to any particular claim and how should it be distributed? Why should one American national who has sustained a loss receive in addition to full compensation "smart money" rather than another? Should the full amount of the penalty be imposed in connection with a particular claim or in connection with a particular incident out of which a number of claims arose or in connection with all acts of a particular class?  Why impose a penalty for the

\textsuperscript{23} Arts. 231 and 232 and Annex I to Sec. I of Pt. VIII of the treaty of Versailles.

\textsuperscript{24} See note 11 to this commission's Administrative Decision No. II handed down this day.
use and benefit of a small group of American nationals who are awarded full compensation and at the same time waive reimbursement for the cost of the war which falls on all American taxpayers alike?

If it were competent for this commission to impose such a penalty, what penalty stated in terms of dollars would suffice as a deterrent? And if this commission should arrogate to itself the authority to impose in the form of damages a penalty which would effectively serve as a deterrent, where lie the boundaries of its powers? It is not hampered with any constitutional limitations save those found in the treaty; and if the power to impose a penalty exists under the treaty may not the commission exercise that power in a way to affect the future political relations of the two Governments? The mere statement of the question is its answer. Putting the inquiry only serves to illustrate how repugnant to the fundamental principles of international law is the idea that this commission should treat as justiciable the question as to what penalty should be assessed against Germany as a punishment for its alleged wrongdoing. It is our opinion that as between sovereign nations the question of the right and power to impose penalties unlimited in amount is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this commission.

The treaty is our charter. We can not look beyond its express provisions or its clear implications in assessing damages in any particular claim. We hold that its clear and unambiguous language does not authorize the imposition of penalties. Hence the fundamental maxim "It is not allowable to interpret that which has no need of interpretation" applies. But all of the rules governing the interpretation of treaties would lead to the same result were it competent for us to look to them. Some of these are: The treaty is based upon the resolution of the Congress of the United States, accepted and adopted by Germany. The language, being that of the United States and framed for its benefit, will be strictly construed against it. Hence the fundamental maxim "It is not allowable to interpret that which has no need of interpretation" applies. 

The treaty provisions must be so construed as

\[\text{Treaty interpretation.}\]

\[\text{Treaty construction.}\]

\[\text{Vattel, Book II, Chap. XVIII, sec. 329.}\]
\[\text{Vattel, Book II, Chap. XVII, sec. 263.}\]
to best conform to accepted principles of international law rather than in derogation of them.\textsuperscript{28} Penal clauses in treaties are odious and must be construed most strongly against those asserting them.\textsuperscript{29}

The treaty is one between two sovereign nations—a treaty of peace. There is no place in it for any vindictive or punitive provisions. Germany must make compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate, and complete. To this extent Germany will be held accountable. But this commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none.

This decision in so far as applicable shall be determinative of all cases growing out of the sinking of the steamship \textit{Lusitania}. All awards in such cases shall be made as of this date and shall bear interest from this date at the rate of 5 per cent per annum.

Done at Washington November 1, 1923.

\textbf{ Edwin B. Parker, \hfill Umpire.}

Concurring in the conclusions:

\textbf{ Chandler P. Anderson, \hfill American Commissioner.}

\textbf{ W. KiesSELbach, \hfill German Commissioner.}


\textsuperscript{29} Vattel, Book II, Chap. XVII, secs. 301-303; Crotius, Book II, Chap. XVI, Sec. X and par. 3 of Sec. XII.
OPINION CONSTRUING THE PHRASE "NAVAL AND MILITARY WORKS OR MATERIALS" AS APPLIED TO HULL LOSSES AND ALSO DEALING WITH REQUISITIONED DUTCH SHIPS

March 25, 1924.

(Mixed Claims Commission, United States and Germany, p. 75)

The United States of America on its own behalf, acting through the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Corporation, and on behalf of certain of its nationals suffering losses at sea, v. Germany. Docket Nos. 29, 127, and 546-556 inclusive.

PARKER, Umpire, delivered the opinion of the commission, the German Commissioner concurring in the conclusions, and the American commissioner concurring save as his dissent is indicated:

There is here presented a group of 13 typical cases in which the United States, in some instances on its own behalf and in others on behalf of certain of its nationals, is seeking compensation for losses suffered through the destruction of ships by Germany or her allies during the period of belligerency. These claims do not embrace damages resulting from loss of life, injuries to persons, or destruction of cargoes but are limited to losses of the ships themselves, sometimes hereinafter designated "hull losses."

With the exception of the construction and the application to requisitioned Dutch ships of the phrase "property * * * belonging to" as found in paragraph 9 of Annex I to Section I of Part VIII of the treaty of Versailles as carried by reference into the treaty of Berlin, the sole question considered and decided in this opinion is: Were any or all of the 13 hulls in question when destroyed "naval and military works or materials" within the meaning of that phrase as used in that paragraph?

The cases in which an affirmative answer to this question is given must, on final submission, be dismissed on the ground that Germany is not obligated to pay such losses under the treaty of Berlin. The cases in which a negative answer is given will be reserved by the commission for further consideration of the other issues raised.

The commission is not here concerned with the quality of the act causing the damage. The terms of the treaty

10 Reference is made to definition of terms contained in Administrative Decision No. I.
fix and limit Germany’s obligations to pay, and the com-
mission is not concerned with inquiring whether the act
for which she has accepted responsibility was legal or
illegal as measured by rules of international law. It is
probable that a large percentage of the financial obli-
gations imposed by said paragraph 9 would not arise under
the rules of international law but are terms imposed by
the victor as one of the conditions of peace.

The phrase “naval and military works or materials”
has no technical signification. It is not found in previous
treaties. It has never been construed judicially or by any
administrative authority save the reparation commission.
The construction by that body is not binding on this
commission nor is it binding on Germany under the
treaty of Berlin. It will, however, be considered by this
commission as an early ex parte construction of this
language of the treaty by the victorious European allies,
who participated in drafting it and are the principal
beneficiaries thereunder.

The construction of this phrase is of first impression,
and the commission must, in construing and applying it,
look to its context. It is found in the principal reparation
provisions of the treaty of Versailles as embraced in
article 232 and the Annex I expressly referred to therein.
That article, after reciting that the “allied and associated
governments recognize that the resources of Germany are
not adequate * * * to make complete reparation
for all” losses and damages to which they and their
nationals had been subjected as a consequence of the war,
provides that:

“The allied and associated Governments, however,
require, and Germany undertakes, that she will make
compensation for all damage done to the civilian popula-
tion of the allied and associated powers and to their
property during the period of the belligerency of each
as an allied or associated power against Germany by
such aggression by land, by sea, and from the air, and in
general all damage as defined in Annex I hereto.”

It is apparent that the controlling consideration in the
minds of the draftsmen of this article was that Germany
should be required to make compensation for all damages
suffered by the civilian population of each of the allied
and associated powers during the period of its belligerency.
It was the reparation of the private losses sustained by the
civilian population that was uppermost in the minds of
the makers of the treaty rather than the public losses of the governments of the allied and associated powers which represented the cost to them of prosecuting the war. 32

Article 232 makes express reference to "Annex I hereto" as more particularly defining the damages for which Germany is obligated to make compensation. Annex I provides that "compensation may be claimed from Germany under article 232 above in respect of the total damage under the following categories." Then follows an enumeration of 10 categories, of which Nos. 1, 2, 3, 4, 8, and 10 deal solely with damages suffered by the civilian populations of the allied and associated powers. Categories 5, 6, and 7 deal with reimbursement to the governments of the allied and associated powers as such of the cost to them of pension and separation allowances, rather than damages suffered by the "civilian population." The Government of the United States has expressly committed itself against presenting claims arising under these three categories. 33 There remains of the 10 categories enumerated in Annex I only category 9, which reads:

"(9) Damage in respect of all property wherever situated belonging to any of the allied or associated states or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea, or from the air, or damage directly in consequence of hostilities or of any operations of war."

Under the terms of this paragraph arise Germany's financial obligations, if any, to pay the claims now before this commission for the hulls destroyed during the period of belligerency.

It can not be doubted that the language of this paragraph 9 so expands that used in article 232 as to include certain property losses sustained by the governments of the allied and associated powers as well as the losses sustained by their "civilian populations." It was found that

32 The reparations provided for in the exchange of notes between the United States and Germany culminating in the armistice of November 11, 1918, executed by the military representatives of the belligerent powers, were limited to reparations for losses to the civilian population. The Lansing note of November 5, 1918, provides that the allied powers "understand that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air."

33 Italics appearing throughout this opinion are, as a rule, added by the commission.
property belonging to the victorious powers not designed or used for military purposes had been destroyed or damaged, so in addition to requiring that Germany compensate the civilian population for their property losses this paragraph requires that Germany shall also compensate those governments for government losses suffered through destruction or damage with respect to property of a non-military character. Much property belonging to the governments of the victorious powers, especially to the governments of the European allies, and not impressed by reason of its inherent nature or of its use with a military character, had been destroyed or damaged. Under this provision it is clear that Germany is obligated to compensate the governments suffering such losses. But, reading the reparation provisions as a whole, it is equally clear that the allied and associated powers did not intend to require that Germany should compensate them, and that Germany is not obligated to compensate them for losses suffered by them resulting from the destruction or damage of property impressed with a military character either by reason of its inherent nature or by the use to which it was devoted at the time of the loss. Property so impressed with a military character is embraced within the phrase "naval and military works or materials" as used in paragraph 9, which class described by this phrase will sometimes hereinafter be referred to as "excepted class."

This phrase, in so far as it applies to hulls for the loss of which claims are presented to this commission, relates solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies. A ship privately operated for private profit can not be impressed with a military character, for only the government can lawfully engage in direct warlike activities.

By the terms of the treaty of Versailles, the French and English texts are both authentic. The French word "matériel," in the singular, is used in the French text, against which the English word "materials," in the plural, is used in the English text. Littré, whose dictionary is accepted as an authority on the French language, defines "matériel" thus: "The articles of all kinds taken as a whole which are used for some public service in contradistinction to personnel," and he gives as an example
matériel of an army, the baggage, ammunition, etc., as distinguished from the men.

The Century Dictionary defines this French word thus: "The assemblage or totality of things used or needed in carrying on any complex business or operation, in distinction from the personnel, or body of persons, employed in the same: applied more especially to military supplies and equipments, as arms, ammunition, baggage, provisions, horses, wagons, etc."

The English word "materials" means the constituent or component parts of a product or "that of or with which any corporeal thing is or may be constituted, made, or done" (Century Dictionary).

Reading the French and English texts together, it is apparent that the word "materials" is here used in a broad and all inclusive sense, with respect to all physical properties not attached to the soil, pertaining to either the naval or land forces and impressed with a military character; while the word "works" connotes physical properties attached to the soil, sometimes designated in military parlance as "installations," such as forts, naval coast defenses, arsenals, dry docks, barracks, cantonments, and similar structures. The term "materials" as here used includes raw products, semifinished products, and finished products, implements, instruments, appliances, and equipment, embracing all movable property of a physical nature from the raw material to the completed implement, apparatus, equipment, or unit, whether it were an ordinary hand grenade or a completed and fully equipped warship, provided that it was used by either the naval or land forces of the United States in direct furtherance of a military operation against Germany or her allies.

While it is difficult if not impossible to so clearly define the phrase "naval and military works or materials" that the definition can be readily applied to the facts of every claim for the loss of a hull pending before this commission, the true test stated in general terms is: Was the ship when destroyed being operated by the United States for purposes directly in furtherance of a military operation against Germany or her allies? If it was so operated, then it is embraced within the excepted class and Germany is not obligated to pay the loss. If it was not so operated, it is not embraced within the excepted class and Germany is obligated to pay the loss.
The United States Shipping Board (sometimes hereinafter referred to as "Shipping Board") exerted such a far-reaching influence over American shipping both prior to and during the period of American belligerency that the scope and effect of its activities and powers must be clearly understood in order to reach sound conclusions with respect to the cases here under consideration.

The Shipping Board was established in pursuance of the act of the Congress of the United States of September 7, 1916 (39 Statutes at Large, 728), entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." The act as amended provided that the members of the board should be appointed by the President subject to confirmation by the Senate; that they should be selected with due regard for the efficient discharge of the duties imposed on them by the act; that two should be appointed from States touching the Pacific Ocean, two from States touching the Atlantic Ocean, one from States touching the Gulf of Mexico, one from States touching the Great Lakes, and one from the interior, but that not more than one should be appointed from the same State and not more than four from the same political party. All employees of the board were selected from lists supplied by the Civil Service Commission and in accordance with the civil-service law. The board was authorized to have constructed and equipped, as well as "to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes."

The President was authorized to transfer "either permanently or for limited periods to the board such vessels belonging to the War or Navy Department as are suitable for commercial uses and not required for military or naval use in time of peace."

 Provision was made for the American registry and enrollment of vessels purchased, chartered, or leased from the board and it was provided that "Such vessels while
employed solely as merchant vessels shall be subject to all
laws, regulations, and liabilities governing merchant
vessels, whether the United States be interested therein as
owner, in whole or in part, or hold any mortgage, lien, or
other interest therein."

The board was authorized to create a corporation with
a capital stock of not to exceed $50,000,000 "for the
purchase, construction, equipment, lease, charter, main-
tenance, and operation of merchant vessels in the commerce
of the United States." In pursuance of this latter pro-
vision the United States Shipping Board Emergency
Fleet Corporation (sometimes hereinafter referred to as
"Fleet Corporation") was organized under the laws of
the District of Columbia with a capital stock of $50,000,-
000, all fully paid and all held and owned by the United
States save the qualifying shares of the trustees. Under
the terms of the act, this corporation could not engage
in the operation of vessels owned or controlled by it
unless the board should be unable to contract with citizens
of the United States for the purchase or operation thereof.

Then followed in the act numerous provisions clothing
the board with broad powers with respect to transpor-
tation by water of passengers or property in interstate
and foreign commerce, provisions for investigations and
hearings, for the fixing of maximum rates, and for
penalties for failure to observe the terms of the statutes
and the orders of the board.

The act as amended provided that it "may be cited as
'shipping act, 1916.'" The board created by virtue of
its terms possessed none of the indicia of a military
tribunal. Its members, all civilians, were drawn from
remote sections, that the board might represent the
commercial and shipping interests of the entire Nation. The
act taken in its entirety indicates that the controlling
purpose of the Congress was to promote the development
of an American merchant marine and also "as far as the
commercial requirements of the marine trade of the United
States may permit" provide vessels susceptible of "use
as naval auxiliaries or Army transports, or for other
nava l or military purposes". This act was approved
September 7, 1916, during the period of American
neutrality. The World War had found American
nationals engaged in an extensive foreign commerce but
without an adequate merchant marine to keep it afloat.
The channels of American foreign commerce would have
been choked but for the use of belligerent bottoms with the resultant risks. This situation, coupled with the possibility of the developments of the war forcing American participation therein, prompted the enactment of this statute for the creation of a merchant marine and setting up the machinery for the mobilization and control of all American shipping.

Following America's entrance into the war on April 6, 1917, Congress through the enactment of several statutes clothed the President of the United States with broad powers including the taking over of title or possession by purchase or requisition of constructed vessels or parts thereof or charters therein and the operation, management and disposition of such vessels and all other vessels theretofore or thereafter acquired by the United States. From time to time through Executive orders the President being thereunto duly authorized, delegated these powers with respect to shipping to the Shipping Board, to be exercised directly by it or, in its discretion, by it through the Fleet Corporation.

Under these powers the Shipping Board and the Fleet Corporation proceeded to requisition the use of all power-driven steel cargo vessels of American registry of 2,500 tons dead weight or over and all passenger vessels of American registry of 2,500 tons gross registry or over adapted to ocean service. Immediately upon the execution of these requisition orders a "requisition charter" was entered into between the Shipping Board and the owner, fixing the compensation to be paid by the United States to the owner for the use of the vessel and providing for the operation of the vessel on what was known as the "time-form" basis, the board reserving the right to change the charter to a "bare-boat" basis on giving five days' notice. The time-form basis provided for the operation of the vessel by the owner as agent of the United States and fixed the terms and conditions of such operation, stipulating, among other things, that the owner should pay all expenses of operation, including the wages and fees of the master, officers, and crew, and should assume all marine risks, including collision liabilities, but that the United States should assume all war risks. The Shipping Board directed the owner as its agent to operate the vessel in its regular trade. The bare-boat basis provided that all the expenses of manning, victualling, and supplying the vessel and all other costs of operation should be borne by
the United States. This latter form was used in requisitioning ships for service in the War Department, and also in some other instances where requisitioned ships were delivered by the Shipping Board to third parties to operate as agents of the United States. When a ship was delivered by the Shipping Board to the War Department no formal agreement was entered into between these two Government agencies, but the War Department recognized the agreement between the Shipping Board and the owner of the vessel and duly accounted to the Shipping Board under the terms and conditions of the requisition charter.

When the requisitioned vessel was redelivered to the owner for operation by him under a time-form requisition charter, an "operating agreement" was also entered into between the Fleet Corporation, acting for the United States, and the owner, whereby the owner as agent of the Fleet Corporation undertook the operation of the vessel, including the procurement of cargoes and the physical control of the ship. For these services the owner as agent received stipulated fees and commissions in addition to the compensation which he received as owner for the use of the vessel as provided in the requisition charter.

When the vessel was requisitioned under a bare-boat form charter and delivered to a third party other than an established government agency to operate, a "managing agreement" was entered into between the Fleet Corporation and such third party whereby the latter as agent for the Fleet Corporation assumed physical control of the ship, receiving fees and commissions for such services.

It was not the practice of the Shipping Board or the Fleet Corporation to issue detailed and minute instructions to agents operating requisitioned vessels with respect to the conduct of the particular voyage or the particular cargoes which such vessels should carry. These operating or managing agents were selected because of their experience and ability in handling commercial shipping. While the United States reserved to itself full power and authority to exercise complete control over vessels requisitioned by it, such control was in practice delegated to the operating or managing agent, who exercised his sound discretion in the management of ships operated by him as agent, with a view to preventing any
unnecessary dislocation of trade or disturbance in the established channels of commerce.

Thus the United States through the agencies of the Shipping Board and the Fleet Corporation effectively and speedily mobilized all American shipping, exercising such control over it that, as emergency required, it could be immediately utilized by the United States in the prosecution of its military operations against its enemies; but pending such emergency the requisitioned vessels were commercially operated, by their owners or by third parties, as agents of the United States, and these agents were given the greatest latitude and freedom of action in the management and control of vessels operated by them in order to prevent any unnecessary disturbance in the free movement of commerce. Under the requisition charter it was expressly stipulated that the vessel “shall not have the status of a public ship, and shall be subject to all laws and regulations governing merchant vessels **. When, however, the requisitioned vessel is engaged in the service of the War or Navy Department, the vessel shall have the status of a public ship, and ** the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States.” At another point in the requisition charter it was stipulated that the master “shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, except when the vessel becomes a public ship.”

The German agent contends that presumptively the control by the Shipping Board thus exercised over vessels, whether owned by the United States or held by the United States under requisition, was in furtherance of the conduct of the military effort of the United States against Germany, and hence—in the absence of satisfactory proof to the contrary, the burden being on the United States—all such vessels must be classed as “naval and military works or materials.” The commission has no hesitation in rejecting this contention. After America entered the war, its entire commerce and industry were in a broad sense mobilized for war. Because of the urgent war requirements, steel and numerous other products became government-controlled commodities,
their uses being rigidly restricted to war purposes. Yet it can not be contended that the fact that an American steel plant was operated 100 per cent on war work raised a *prima facie* presumption of its conversion into "military works." The railroads of the United States were taken over and operated by the Government as a war measure, but this did not presumptively convert them into "military works or materials" within the meaning of that term as used in the treaty of Versailles. Nor can the mobilization for war of American shipping through the agency of the Shipping Board create even a rebuttable presumption that the vessels so mobilized, whether owned or requisitioned by the United States, had a military character. Nothing short of their operation by the United States directly in furtherance of a military operation against Germany can have such an effect. So long as such vessels were performing the functions of merchant vessels, even though engaged in a service incident to the existence of a state of war, they will not fall within the excepted class.

Construing the shipping act, the Executive orders of the President, and the provisions of an operating agreement similar to that hereinbefore described, the Supreme Court of the United States held a vessel owned by the Fleet Corporation but operated by an American national as an agent of the Shipping Board was a merchant vessel and subject to libel in admiralty for the consequences of a collision. It is apparent that a vessel either owned or requisitioned by the Shipping Board or Fleet Corporation and operated by an agent of the United States under such an operating or managing agreement as hereinbefore described was a merchantman and in no sense impressed with a military character.

When, however, the Shipping Board delivered such vessels to either the War Department or the Navy Department of the United States their status at once changed and they became public ships; their masters, officers, and crews at once became employees and agents of the United States with all of the resultant rights and duties; and it will be presumed that such delivery was made to the military arms of the Government to enable them to be used (in the language of section 5 of the shipping act) "as naval auxiliaries or army transports, or for other naval or military purposes." Such assignment of vessels to and their operation by the War Department

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or the Navy Department will be treated by the commission as *prima facie* but not conclusive evidence of their military or naval character. The facts in each case will be carefully examined and weighed by the commission in order to determine whether or not the particular ship, at the time of her destruction was operated by the United States directly in furtherance of a military operation against Germany or her allies. If she was so operated, she will fall within the excepted class; otherwise she will not.

The application of this general rule to the facts as disclosed by the records in the 13 typical cases preliminarily submitted will illustrate its scope and its limitations.

Case No. 127, steamship *Rockingham*

The steamship *Rockingham*, owned and operated by the Garland Steamship Corporation, an American national, sailed on April 16, 1917, from Baltimore, Md., via Norfolk, Va., which she left April 19, bound for Liverpool, England, with a general cargo for numerous consignees. She was armed for defensive purposes with two 4-inch guns, one fore and one aft, manned by a civilian crew of 36, and in addition had a naval gun crew of 13 enlisted men. She was sunk by a German submarine on May 1, 1917, before reaching Liverpool. In the early part of the afternoon of May 1, the weather being hazy, two small objects were sighted by the *Rockingham* at a distance of approximately 5 miles, one on the starboard bow, the other on the port quarter, and assuming that they were German submarines the master steered a zig-zag course in accordance with instructions issued by the United States Navy Department designed to elude the operations of hostile submarines. The two objects were seen to submerge and thereafter were not sighted until after the sinking. The gun crew of the *Rockingham* had, therefore, no target to fire upon, and no effort was made at resistance. The attack was upon the starboard side, was made without warning the torpedo entering the engine room, tearing a great hole in the ship and causing her to sink in 25 minutes.

The German agent contends that the *Rockingham* at the time of her destruction had lost her status as a private peaceful trading ship and had become "naval and military * * * materials" as that term is used
in the treaty because: (1) she was armed, (2) her guns were manned by a naval gun crew, (3) she was operated in accordance with instructions given by the Navy Department of the United States although by a civilian master with a civilian crew. The contention is that, notwithstanding such arming and manning and operation may have been entirely legal and justified, they nevertheless stripped the Rockingham of her character of a peaceful merchantman and impressed her with a military character.

This contention must be rejected. It is clear that the Rockingham was being privately operated by an American national for private profit. She was armed in pursuance of the policy adopted by the Government of the United States, of which all foreign missions in Washington were given formal notice on March 12, 1917, during the period of American neutrality, in the following language:

“In view of the announcement of the Imperial German Government on January 31, 1917, that all ships, those of neutrals included, met within certain zones of the high seas would be sunk without any precautions being taken for the safety of the persons on board, and without the exercise of visit and search, the Government of the United States has determined to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board.”

The instructions given by the Navy Department of the United States to the masters of these merchant vessels and to the commanders of the naval gun crews clearly indicate that the purpose of so arming and operating such vessels was to protect against the offensive operations of German submarines and to elude or escape from them if possible, and not to initiate offensive operations against such submarines. The control in the nature of routing instructions which the civilian masters received from the Navy Department and followed was designed to avoid and to escape from the submarine, not to seek them out and destroy them.

The arming for defensive purposes of a merchantman and the manning of such armament by a naval gun crew, coupled with the routing of such ship by the Navy Department of the United States for the purpose of
avoiding the danger of submarines and the following by the civilian master of the ship of instructions given by the Navy Department for the defense of the ship when in danger of attack by submarines, certainly do not change the juridical status of the ship or convert it from a merchant ship to a war ship or make of it naval material.

Decision. The commission holds that the Rockingham at the time of her destruction was being operated as a merchant vessel and that she does not fall within the excepted class.

The Molano. Case No. 551, steamship Molano—oil tanker

The steamship Molano, owned and operated by the Standard Oil Co. of New Jersey, an American national, sailed from New York on July 6, 1917, with a cargo of fuel oil for account of the British ship control for use of the British Admiralty. She left Plymouth with other vessels convoyed by three British destroyers for Portsmouth, England, as her final discharge port. She was armed for defensive purposes with two 3-inch guns, one fore and one aft, and had a civilian master and crew of 33 men and a gun crew of 13 enlisted men of the United States Navy. She was sunk on July 31, 1917, on her voyage between Plymouth and Portsmouth by a torpedo fired by a German submarine. The air was hazy, the sea choppy, the submarine had not been sighted, and no resistance was made by the naval gun crew. The Molano was insured with the British Government for $616,000, which sum has been paid to the claimant, and this claim is made for the difference between that amount and the true value of the vessel, which difference is placed at the sum of $594,000, plus interest and expenses.

The German agent contends that the Molano at the time of her destruction constituted "naval * * * works or materials" because (1) she carried armament susceptible of use for hostile purposes and was manned by a naval gun crew, (2) she was convoyed by regular fighting forces of a belligerent power, and (3) she was controlled by the belligerent British Government and used for warlike purposes. The commission rejects this contention because it is apparent that the Molano was privately owned and privately operated for private profit, was not employed or designed to be employed directly in furtherance of a military operation of the United States
or its associated powers against Germany or her allies, and was not impressed with a military character.

We have heretofore examined the test of armament manned by a naval gun crew on a privately operated commercial ship and held that it did not have the effect of converting such ship into naval material.

The German agent with great earnestness and ability insists that a ship associating itself with a belligerent convoy assumes the character of its associates and that when it becomes a part of the convoy flotilla, which is a military unit and subject to naval instructions and naval control, it participates in hostilities and must be classed as naval material. We have no quarrel with the contention that a vessel, whether neutral or belligerent, forming part of a convoy under belligerent escort may, through the methods prescribed by international law, be lawfully condemned and destroyed as a belligerent. But that is not the question before this commission. If we assume that the Motano—a belligerent merchantman—was lawfully destroyed, this does not affect the result. The fact that the Motano, because of its helpless and nonmilitary character, sought the protection of a convoy and voluntarily subjected itself to naval instructions as to routing and operation, for the purpose of avoiding the German submarines rather than seeking them out to engage them in combat, certainly can not, by some mysterious and alchemic process, have the effect of transforming the ship from a merchantman into naval material. The control exercised by the British Government over the Motano was not such as to affect its status. Such control was limited to directions looking to the protection of the vessel and the furtherance of its commercial activities, and not directly in furtherance of any military operation against Germany for her allies.

The commission therefore concludes that the Motano at the time of her destruction maintained her character as a peaceful commercial vessel and that she does not fall within the excepted class.

**Case No. 29, steamship Pinar del Río**

The steamship Pinar del Río, owned by the American & Cuban Steamship Line (Inc.), an American national, was requisitioned by the United States through the
Shipping Board, and a time-form requisition charter was entered into February 4, 1918. By the terms of this charter the owner became the agent of the Shipping Board and as such continued to operate the ship. She was unarmed and manned by a civilian crew. While en route from Cuba to Boston with a cargo of sugar she was sunk, on June 8, 1918, through gunfire by a German submarine.

It is apparent that at the time of her destruction she was being operated as a merchant vessel and in no sense impressed with a military character. She does not, therefore, fall within the excepted class.

Case No. 550, steamship Rochester

The steamship Rochester, owned and operated by the Rochester Navigation Corporation, an American national, after having discharged a general cargo at Manchester, England, sailed from that port in ballast October 26, 1917. She was armed for defensive purposes with two 3-inch guns, mounted one fore and one aft, and had a civilian crew of 36 men and a naval gun crew of 13 men. After leaving Manchester she with nine other merchantmen was convoyed for several days by five destroyers and one armed cruiser, and, after the convoying ships returned to their base, the Rochester was sunk on November 2, 1917, by a torpedo and shells fired from a German submarine.

It is apparent that the Rochester at the time of her destruction was being operated as a merchant vessel and was not in any sense impressed with a military character. The commission, therefore, finds that the Rochester does not fall within the excepted class.

Case No. 555, steamship Moreni—oil tanker

The steamship Moreni, owned and operated by the Standard Oil Co. of New Jersey, an American national, sailed from Baton Rouge, La., May 19, 1917, with a cargo of gasoline consigned to the Italian-American Oil Co., at Savona, Italy, to call at Gibraltar for orders. She was armed for defensive purposes with two 4-inch guns, one fore and one aft, and manned with a civilian crew of 35 and a naval gun crew of 12. After calling at Gibraltar for orders she sailed from that port June 10, 1917, and on the morning of June 12 was fired
upon and finally sunk by a German submarine after a running fight in which the *Moreni* endeavored to escape and in which 200 to 250 shots were fired by the submarine and about 150 shots by the *Moreni*.

It is apparent that the *Moreni* was at the time of her destruction being privately operated for private profit as a merchant vessel, and for the reasons heretofore given the commission holds that she does not fall within the excepted class.

**Case No. 549, steamship Alamance**

The steamship *Alamance*, owned by the Garland Steamship Corporation, an American national, was requisitioned by the Shipping Board October 20, 1917, and at once redelivered to the Garland Steamship Corporation under a time-form requisition charter, executed December 28, 1917, by the terms of which the owner operated the vessel as agent of the Shipping Board. She was manned with a civilian crew of 38 men, armed for defensive purposes with two 4-inch guns, one fore and one aft, which were manned by a naval gun crew of 19 men. On February 5, 1918, while en route from Hampton Roads, Va., to Liverpool, England, with a cargo consisting principally of tobacco, cotton, zinc, and lumber, and while in a convoy of 15 ships escorted by naval vessels, she was torpedoed and sunk by a German submarine.

For the reasons heretofore given the commission holds that at the time of her destruction the *Alamance* was a merchant vessel and that she does not fall within the excepted class.

**Case No. 553, steamship Tyler**

The steamship *Tyler*, owned by the Old Dominion Steamship Co., of New York, an American national, was requisitioned by the Shipping Board November 29, 1917, and a time-form requisition charter executed on January 4, 1918. On March 2, 1918, the Shipping Board entered into an operating agreement with Chase Leaveth & Co. by the terms of which they operated the *Tyler* as agent of the Shipping Board, and she was being so operated at the time of her destruction. She was manned by a civilian crew, armed for defensive purposes with two 3-inch guns, one fore and one aft, which were manned by a naval gun crew of 19 men. On April 30, 1918, the
Tyler left Genoa, Italy, in convoy, bound for New York in ballast. On May 2, 1918, she was sunk by torpedoes fired by a German submarine.

For the reasons hereinabove given the commission holds that at the time of her destruction the Tyler was a merchantman in no sense impressed with a military character, and hence is not within the excepted class.

Case No. 554, steamship Santa Maria—oil tanker

The steamship Santa Maria, owned by the Sun Co., an American national, was requisitioned by the Shipping Board October 12, 1917, delivered on January 14, 1918, and on the same day redelivered to the owner, which operated her as agent of the Shipping Board under a requisition agreement constituting a part of the requisition charter. She sailed from Chester, Pa., the latter part of January, 1918, via Norfolk, Va., bound for Great Britain in convoy with a cargo of fuel oil. She was manned by a civilian crew of 39 men, armed with two 4-inch guns, one fore and one aft, and had a naval gun crew of 22 men. On February 25, while under convoy of British trawlers, she was sunk by a torpedo fired by a German submarine.

The commission holds that at the time of her destruction the Santa Maria was a merchant vessel and that she does not fall within the excepted class.

Case No. 552, steamship Merak

By virtue of a proclamation of the President of the United States of March 20, 1918, 87 vessels of Holland registry and belonging to her nationals, lying in American ports, were, in accordance with international law and practice, requisitioned by the United States, the President in his proclamation directing that the Shipping Board "make to the owners thereof full compensation, in accordance with the principles of international law." Of these vessels 46, including the steamships Merak and Texel, were delivered to the Shipping Board.

The Merak was operated as a merchantman by Wessel Du Val & Co., American nationals, as agents of the Shipping Board. She sailed under the American flag, was unarmed, and was manned by a civilian crew. While en route from Norfolk, Va., to Chile with a cargo of 4,000 tons of coal she was, on August 6, 1918, captured by a German submarine and sunk by bombs.
DUTCH SHIPS REQUISITIONED

Case No. 556, steamship Texel

As appears from the statement made in connection with the Merak case supra, the steamship Texel was one of the Dutch ships requisitioned by the United States and assigned to the Shipping Board, after which she was operated by the New York & Porto Rico Steamship Co. as agent for the Shipping Board. She was unarmed and manned by a civilian crew. She sailed under the American flag from Ponce, P. R., on May 27, 1918, for New York with a cargo of sugar. On June 2, she was attacked by a German submarine, overhauled, and sunk by bombs.

It is apparent that the steamships Merak and Texel were at the time of their destruction being operated as merchant vessels and in no sense impressed with a military character. For the reasons heretofore given the commission holds that neither the steamship Merak nor the steamship Texel falls within the excepted class, and that neither can in any sense be held to have constituted "naval and military works or materials" as that phrase is used in the treaty.

But notwithstanding this holding the German agent "Belonging to." contends that these claims do not fall within the terms of the treaty of Berlin because these Dutch ships were not vessels "belonging to" the United States or its nationals as that term is used in the paragraph 9 here under consideration. That these ships were lawfully requisitioned, reduced to possession, and operated by the United States is conceded by Germany. It results that at the time of their destruction the right of the United States to possess and use them against all the world was absolute and superior to any possible contingent rights or interests of those Dutch nationals who owned them at the time they were requisitioned. That the United States had at least a special or qualified property in these ships there can be no doubt. They were lawfully in its possession, sailing under its flag, used as it saw fit without regard to the wishes of the former owners and during an emergency the duration of which the United States alone could determine. There never was a time when the Dutch nationals who owned the ships at the time they were requisitioned could, as a matter of right, demand their return or impose any limitation whatsoever upon their operation or control. As the United States had the absolute right against the whole world to possess these ships and use them as it
saw fit, conditioned only upon the duty to make adequate compensation for their use and to return them, at a time to be determined by it or in the alternative to make adequate compensation, to the Dutch nationals who owned them at the time they were requisitioned, certain it is that this amounted to a special or qualified property in the ships tantamount to absolute ownership thereof for the time being. The possession of the United States was analogous to that of a grantee having an estate defeasible upon the happening of some event completely within his control.

Where under the terms of a trip or time charter the holder of the legal title delivers to the charterer the whole possession and control of the ship, the charterer becomes the "owner" thereof during the term of the charter and is designated as such. The British merchant shipping (salvage) act, 1916, provides that: "Where salvage services are rendered by any ship belonging to His Majesty * * * the Admiralty shall * * * be entitled to claim salvage * * * and shall have the same rights and remedies as if the ship * * * did not belong to His Majesty." The English courts have held that a ship requisitioned and operated by the government under requisition charter "belonged to" His Majesty within the terms of this act and hence was entitled to salvage. These decisions while helpful are not controlling in construing the phrase "Damage in respect of all property wherever situated belonging to" the United States or its nationals. "Belonging to" as here used is not a term of art or a technical legal term. It must be construed in the popular sense in which the word is ordinarily used, as synonymous with appertaining to, connected with, having special relation to. That it was used in this sense is evidenced by reference to this clause of the French text of the treaty of Versailles, which reads: "Dommages relatifs à toutes propriétés, en quelque lieu qu’elles soient situées, appartenant à." The use of the word "appartenant" is significant. The expression "belonging to" does not necessarily convey the idea that


36 Admiralty Commissioners v. Page and others (1918), 2 K. B. 447, affirmed in (1919) 1 K. B. 299. See also The Sarpen, Court of Appeal (1916), Probate Division, 305, 313; Master of Trinity House v. Clark (1815), 4 M. & S. 288.
the indefeasible legal title to the property "in respect of" which the damage occurred must have vested in the United States or its nationals. It is sufficient that the United States or its nationals had such control over and interest, general or special, in such property as that injury or damage to it directly resulted in loss to them. Had the draftsmen of the treaty intended to restrict Germany's obligations to pay for damages to property in which the unconditional legal title was vested in the allied or associated States or their nationals, they would have used apt and well-recognized terms to express such limitation. On the contrary, it is evident from reading the reparation provisions as a whole that their purpose and intention was to require Germany to pay all losses sustained by the allied or associated States or their nationals resulting from "damage in respect of all property wherever situated" of a nonmilitary character.

While not controlling, it is interesting to note that the Reparation Commission has placed a similar construction on the language in question, and gone a step farther than here indicated in holding that "Time chartered neutral vessels, in respect of which compensation was paid by the claiming power might also be included [in computing the amount of Germany's reparation payments under paragraph 9 of Annex I], though not sailing under the flag of the power in question."

It follows that the claims for losses resulting from the destruction of the steamships *Merak* and *Texel* fall within the terms of the treaty of Berlin and that Germany is obligated to compensate for their loss.

Case No. 546, steamship *John G. McCullough*

The steamship *John G. McCullough*, owned by the United States Steamship Co., an American national, was requisitioned by the United States through the Shipping Board November 6, 1917, under a bare-boat requisition charter. On the same day she was delivered she was turned over to the War Department of the United States and operated with a British civilian crew, 32 in number, employed and paid by and in all things subject to the orders of the United States War Department. Under the requisition charter she thereupon became a public ship.

She was armed with one *French* 90 mm. gun, which was manned by a *British* naval crew of two gunners.
While en route, May 18, 1918, from London, England, in naval convoy to Rochefort, France, with a general cargo for the Army of the United States, she was destroyed, either by a torpedo from a German submarine, as claimed by the American agent, or by a mine, which may or may not have been of German origin. The German agent denies that she was torpedoed by a German submarine. The German Admiralty is without information with respect to her destruction. There is, however, evidence supporting the allegation that she was torpedoed; but in view of the disposition which the commission will make of this case the cause of her destruction is not material.

At the time the McCullough was destroyed she was a public ship in the possession of and operated by the United States through its War Department, one of the military arms of the Government whose every effort was concentrated on mobilizing and hurling men and munitions against Germany. She had been requisitioned in European waters. America's associates in the war had assisted in manning and equipping her. France had supplied armament and Great Britain had supplied a naval gun crew. She was transporting from England to France supplies for the active fighting forces of the Army of the United States. She possessed every indicia of a military character save that she was not licensed to engage in offensive warfare against enemy ships. Offensive operation on the seas was not her function. The fact that the legal title to her had not vested in the United States is wholly immaterial. She was in the possession of the United States. It had the right against all the world to hold, use, and operate her and was in fact operating her through its War Department by a master and crew employed by and subject in every respect to the orders of the War Department. She was actively performing a service for the Army on the fighting front. She possessed none of the indicia of a merchant vessel. The very requisition charter under which she was operating took pains to declare her a "public ship" and not a merchant vessel subject to the laws, regulations, and liabilities as such as was the Lake Monroe. She was at the time of her destruction being utilized for "other military purposes" within the meaning of that phrase as used in section 5 of the shipping act. She was impressed with a military character.

The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the military governor of Paris and used to transport French reserves to meet and repel the oncoming German Army they became military materials, and so remained until redelivered to their owners. The automobile belonging to the United States assigned to its President and constitutional commander in chief of its Army for use in Washington is in no sense military materials. But had that same automobile been transported to the battle front in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character. The steel rails used in the yards of a steel plant in Pittsburgh for shifting war materials from one part of the plant to another are not impressed with a military character, for they are privately operated for private profit. But if these same rails had been taken up and shipped to the American Army in France and laid by it as a part of its transportation system, used and operated by it for transporting munitions and supplies to the fighting front, they would then have become military materials.

So here the *McCullough*, by the terms of her requisition charter stamped a "public ship," actively engaged in transporting Army supplies to the battle front, operated by the War Department of the United States through a crew employed and paid by it and subject in all things to its orders, was at the time of her destruction "military materials" and not property for which Germany is obligated to pay under the provisions of the treaty of Berlin.

Case No. 547, steamship *Joseph Cudahy*—oil tanker

The steamship *Joseph Cudahy*, an oil tanker, owned by the American Italian Commercial Corporation, of New York, an American national, was requisitioned by the United States through the Shipping Board on October 3, 1917, and on the same day delivered to the War Department and operated by the United States Army Transport Service under a bare-boat charter by a civilian crew employed and paid by and in all things subject to the orders of the Army authorities. She was armed with two 3-inch guns. Her armament was manned by a United States naval crew of 21 men. She had carried
a cargo of gasoline and naphtha for the United States Army from Bayonne, N. J., calling first at La Pollice, France, and then to Le Verdon, and discharged her cargo at Furt, Gironde River. She sailed from Le Verdon in ballast on her return trip to New York on August 14, 1918, in convoy with 28 other vessels. The convoy broke up during the night of August 15. She was torpedoed by a German submarine and sunk on the morning of August 17.

The fact that she was in ballast at the time of her destruction is immaterial. Being a tank ship operated by and for the exclusive use of the Army Transport Service of the United States, her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations.

For the reasons set out in connection with the destruction of the John G. McCullough the commission holds that the Joseph Cudahy at the time of her destruction was impressed with the character of "military materials" and that the loss suffered by the United States resulting from her destruction is not one for which Germany is obligated to pay under the terms of the treaty of Berlin.

Case No. 548, steamship A. A. Raven

The steamship A. A. Raven, owned by the American Transportation Co. (Inc.), an American national, was requisitioned by the United States through the Shipping Board, and a bare-boat requisition charter was executed on February 19, 1918. She was delivered to and operated by the War Department with a civilian crew employed and paid by and in all respects subject to the orders of the War Department. She was armed with two 3-inch guns but had no armed guard at the time of her loss. While en route in convoy on March 14, 1918, from Barry, England, to Brest, and thence to Bordeaux, France, she was sunk. The German Admiralty has no record of her having been torpedoed by a German submarine as claimed by the American agent. As pointed out by the German agent, she may possibly have struck a mine adrift from fields planted by the Netherlands Government along the Dutch coast not far from the point where the A. A. Raven was sunk. The evidence that she was torpedoed, while far from satisfactory, is sufficient to support the allegation.
However, in view of the disposition which the commission will make of this case the cause of her destruction is immaterial.

At the time of her destruction she had a cargo of food, clothing, surgical instruments, hospital supplies, piping, and rails and 400 tons of explosives, all belonging to the United States and all designed for the use of the American Army in France.

For the reasons set forth in connection with the case involving the loss of the John G. McCullough the commission holds that the steamship A. A. Raven was at the time of her destruction impressed with a military character and that the resultant loss to the United States is not one for which Germany is obligated to pay under the terms of the treaty of Berlin.

From the foregoing the commission deduces the following general rules with respect to the tests to be applied in determining when hull losses fall within the excepted class of "naval and military works or materials" as that phrase is found in paragraph 9 of Annex I to Section I of Part VIII of the treaty of Versailles as carried by reference into the treaty of Berlin:

I. In order to bring a ship within the excepted class she must have been operated by the United States at the time of her destruction for purposes directly in furtherance of a military operation against Germany or her allies.

II. It is immaterial whether the ship was or was not owned by the United States; her possession, either actual or constructive, and her use by the United States in direct furtherance of a military operation against its then enemies constitute the controlling test.

III. So long as a ship is privately operated for private profit she can not be impressed with a military character, for only the government can lawfully engage in direct warlike activities.

IV. The fact that a ship was either owned or requisitioned by the Shipping Board or the Fleet Corporation and operated by one of them, either directly or through an agent, does not create even a rebuttable presumption that she was impressed with a military character.

V. When, however, a ship, either owned by or requisitioned by the United States during the period of belligerency, passed into the possession and under the operation of either the War Department or the Navy
Department of the United States, thereby becoming a public ship, her master, officers, and crew all being employed and paid by and subject to the orders of the United States, it is to be presumed that such possession, control, and operation by a military arm of a government focusing all of its powers and energies on actively waging war, were directly in furtherance of a military operation. Such control and operation of a ship will be treated by the commission as *prima facie*, but not conclusive, evidence of her military character.

VI. Neither (a) the arming for defensive purposes of a merchantman, nor (b) the manning of such armament by a naval gun crew, nor (c) her routing by the Navy Department of the United States for the purpose of avoiding the enemy, nor (d) the following by the civilian master of such merchantman of instructions given by the Navy Department for the defense of the ship when attacked by or when in danger of attack by the enemy, nor (e) her seeking the protection of a convoy and submitting herself to naval instructions as to route and operation for the purpose of avoiding the enemy, nor all of these combined, will suffice to impress such merchantman with a military character.

VII. The facts in each case will be carefully examined and weighed and the commission will determine whether or not the particular ship at the time of her destruction was operated by the United States directly in furtherance of a military operation against Germany or her allies. If she was so operated she will fall within the excepted class, otherwise she will not.

The preliminary submissions of the 13 cases specifically dealt with in this opinion will not be held a waiver of the right of either the American agent or the German agent to file in any of them additional proofs bearing on the points decided. Such additional proofs if filed will be considered by the commission on the final submission, when the principles and rules herein announced will be applied and final decisions rendered. In the absence of further evidence, the interlocutory decisions herein rendered in each of these 13 cases will become final.

Done at Washington, March 25, 1924.

**Edwin B. Parker,**

*Umpire.*

Concurring in the conclusions:

**W. Kiesselbach,**

*German Commissioner.*
I concur in the conclusions generally, but not in the conclusions that on the facts stated with reference to the Joseph Cudahy she was impressed with the character of "military and naval works or materials" within the meaning of that phrase as used in the provisions of the treaty of Versailles under consideration.

One of the conclusions concurred in is that the control and operation of a vessel by the War Department of the United States for Army service, as was the case with the Joseph Cudahy, constitutes *prima facie* but not conclusive evidence of her military character.

Another conclusion concurred in is that in order to bring a vessel within the excepted class she must have been operated by the United States at the time of her destruction "for purposes directly in furtherance of a military operation against Germany or her allies."

On the facts stated, the Joseph Cudahy was returning home from France to the United States in ballast at the time of her destruction, so that she was not being operated at that time "for purposes directly in furtherance of a military operation against Germany or her allies." Accordingly the presumption arising from her control and operation by the War Department is completely rebutted by her actual use and situation at the time of her destruction.

**Chandler P. Anderson,**

*American Commissioner.*