

The Treatment of Italians Abroad in the Legal Opinions of the *Consiglio del Contenzioso Diplomatico* of the Italian Ministry of Foreign Affairs (1861-1907)*

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1. *Sovereignty and the Treatment of Aliens in XIX Century International Law*

The paper seeks to reconstruct the development of international law rules concerning the protection of individuals through the discussion of several cases in which the Kingdom of Italy was requested to intervene in diplomatic protection on behalf of its nationals residing abroad between 1861 and 1907.

From the point of view of international law theory, the paper thus covers the subjects of the treatment of aliens, state responsibility and diplomatic protection.

At the time, none of these subjects had been thoroughly analysed by international law scholarship, which was still an «amateur science»¹.

In contrast, cases related to the treatment of foreign nationals were ever so common in practice, as yet another consequence of «the creation of a single global economy» which was one of the «major

facts» of the XIX century, and in particular of its second half, and of the unprecedented movement of people and capital which followed².

It is no surprise, then, that the topic received increasing attention by writers throughout the second half of the Century.

In outline, lacking any mechanism to provide rights and place for individuals at the international stage, international lawyers of the time thought that individual rights could be vindicated through the intervention of their state of nationality, drawing upon the Vattelien fiction that «quiconque traite mal un citoyen porte indirectement préjudice à l'Etat qui doit protéger ce citoyen»³.

There are, of course, differences and exceptions. But one could nonetheless say that, by the beginning of the XX Century, the general view among mainstream international lawyers was that there existed rules of international law concerning the treatment of individuals, sanctioned in treaties of friendship, commerce and navi-

gation, and (albeit very limited) in custom. Only, these rules did not address individuals, but states alone: their violation from the part of a state (the state of residence of the individual) triggered international responsibility toward another state (the state of nationality) and could be vindicated by «the instrument [of enforcement] *par excellence*» of diplomatic protection⁴.

This position was shared by most of the international lawyers of the time, their dogmatic differences notwithstanding, as, for instance, Robert Phillimore, Johann Kaspar Bluntschli, Paul Pradier-Fodéré, Augusto Pierantoni, William Edward Hall, Jean Thomas, Iouda Tchernoff, John Westlake, Pasquale Fiore, and was perfected by Dionisio Anzilotti at the turn of the Century⁵.

This is also the doctrine behind the discussions and resolutions of the *Institut de droit international* on the treatment of aliens, such as those relating to the damages suffered by aliens during civil wars and those on the right to expulsion⁶.

Having said that, and however interesting the analysis of these writings and resolutions, the paper takes a more concrete approach and focuses on actual cases of diplomatic protection from the perspective of the legal opinions delivered to the Italian Government by the *Consiglio del contenzioso diplomatico*. It seems, indeed, that such an approach would render more understandable the mix of legal and political arguments that lie behind the subject. At the same time, such an approach does not aim, primarily, at establishing whether, or to what extent, this advice was taken into consideration, or whether, or to what extent, the legal opinions bent to political needs. It, rather, seeks to follow the development of

the distinct set of rules concerning state responsibility for damages suffered by private aliens, pondering the importance of international law scholarship against political needs in a set of actual disputes⁷.

2. The “*Consiglio del Contenzioso Diplomatico*”

In accordance with the above, the paper uses, as primary sources, the legal opinions delivered by the *Consiglio del contenzioso diplomatico*, an advisory body established at the ministry of foreign affairs of the then kingdom of Sardinia on November 29, 1857⁸.

According to the decree that established it, the *Consiglio* is a special committee of diplomats, high bureaucrats and lawyers who are appointed by the King, at the proposal of the minister of foreign affairs, and entrusted with the task of giving advisory, non-binding opinions on questions of international law at the request of the ministry of foreign affairs⁹.

According to the *Consiglio*’s rules of procedure, adopted on December 13, 1857, the opinions are drafted by a rapporteur (chosen by the president among the members), whose conclusions are then approved either unanimously, or by a majority¹⁰. Albeit not provided for by the rules of procedure, dissenting members may attach their individual opinion.

Even though it underwent several reforms during the period that spans from its foundation to its suppression in the wake of WWI (the major of which is the Mancini reform of 1883), the *Consiglio* preserves the same composition and task¹¹. As to the former, albeit increased from 7 to 15, mem-

bers of the *Consiglio* will always be chosen among the above-mentioned categories, the most important of which seems to be the one composed by «the most renowned lawyers and law professors of the kingdom» (as stated in Article 4 of the 1857 decree). This is very important for the present paper, which relies upon a set of legal opinions drafted by prominent members of the Italian school of international law (including Esperson, Pierantoni and Fusinato). As to the latter, a survey of the over 200 opinions given by the *Consiglio* between 1857 and 1915 reveals subject matters covering almost any international law issue. Among them, some opinions concerning the treatment of Italian nationals residing abroad have been selected.

Eight of these opinions are dealt with in the paper.

Two of them (dating back to 1861 and 1893) relate to questions of nationality, and are to be addressed at the outset, since nationality constitutes the primary requirement to diplomatic protection.

A third opinion of 1899 relates to the *protégés* system, and, by the example of the different solutions adopted by two renowned international lawyers sitting in the *Consiglio*, highlights the uncertainties of the doctrine of the international responsibility of states for damages caused to private persons during the period under review.

The last four opinions (adopted between 1898 and 1907) relate to diplomatic protection claims in the narrow sense and refer to disputes occurred with South-American republics. As such, the last four opinions offer the opportunity to examine the different (and opposing) arguments developed by European international lawyers, on the one hand, and their South-American coun-

terparts, on the other hand, in relation to the treatment of foreigners and diplomatic protection¹².

3. *Italian Nationality Before the Italian Kingdom*

Nationality constituted, at the time, the essential requirement for the individual to receive legal protection at the international stage¹³. It is only natural, then, that many claims were tackled on point of nationality¹⁴.

For the new Italian kingdom, questions of nationality arose as a consequence of the interweaving of the process of unification with the historical, and yet on-going, emigration from the peninsula.

Generally speaking, the principle of *jus sanguinis* (sanctioned in Article 4 of the Italian civil code of 1865, and already applied in the majority of the Italian pre-unitarian states) secured a tight bond between the community of the Italians abroad (the «colonies») and the motherland¹⁵. Indeed, no one doubted that, under Italian law, the simple fact of emigration did not entail the loss of Italian citizenship. There is, admittedly, much rhetoric on the point. For instance, Esperson argues that he who leaves the «beautiful Italian sky» will not as such forfeit the nationality he acquired by blood. But there is also a political side to it. In fact, according to this doctrine, the King of Italy inherited the right to protect all the individuals of Italian descent residing abroad, albeit raised and possibly born overseas, as made clear, for example, by Article 23 of the consular instructions issued on April 8, 1859, by the then King of Sardinia, which

ordered the consuls to afford protection to all those individuals of Genoan descent established in the Levant¹⁶.

But, however clear that might seem in general terms, a survey of the opinions given on the subject by the *Consiglio* discloses some difficulties, especially when it comes to the question of establishing the nationality of individuals emigrated (long) before the Italian unification¹⁷.

The *Consiglio* is referred a question to this effect as early as December 1860, in relation to some Jewish families (so-called Grana), who emigrated from Spain to Tuscany after the *Reconquista*, acquired the citizenship of the grand duchy of Tuscany and then moved to Tunis during the XVII century¹⁸.

In its opinion, adopted on January 18, 1861, the *Consiglio* considers that all those who were subjects of the grand duchy of Tuscany at the time of the incorporation to the Sardinian states ought to be recognised as «subjects of the new sovereignty». Accordingly, the *Consiglio* advises the ministry to reclaim those individuals to the king's sovereignty, to guarantee that all «the Italians» residing in Tunis enjoy their «sacred rights of nationality»¹⁹.

In sum, the *Consiglio* makes use of the "incorporation paradigm" to justify the automatic acquisition of Sardinian nationality for the ancient subjects of pre-unitarian Italian states. This is not surprising, considering the consistent stance taken by Italian legal scholarship²⁰. Less predictably, though, the opinion under review applies this position irrespective of the residence within the peninsula of the individuals concerned. In other words, according to the *Consiglio*, after the unification all the individuals of Italian descent acquire

Italian citizenship even though they resided outside the peninsula, provided that they retained their original citizenship up to the time of the incorporation. Still less predictably, the *Consiglio* recognises the Granas as Italians prior to the proclamation of the Italian kingdom (which famously took place on March 17, 1861)²¹.

It is interesting to note how this conclusion merges the notion of nationality as a consequence of cultural and ethnical factors (such as language) with the voluntarist approach to nationality, stressing the individual's will to be part of the (Italian) community²².

The Grana offer the perfect case for such a comprehensive approach. It has, indeed, been noted that they spoke Italian as their main language, and contributed in making it the *lingua franca* for commerce in Tunisia²³. Moreover, they perceived themselves as an important part of the Italian bourgeoisie, sent their kids to Italian schools, fit important roles in the liberal professions both in Italy and in Tunisia.

At the same time, there is a clear economic interest both for the Grana to be recognised as Italian citizens and for the newly established Kingdom to be able to intervene in their protection. The former needed a citizenship to rely upon in their activity as cosmopolitan traders. The latter seeks to deploy the strategic position of the Grana in the Mediterranean trade for foreign policy purposes²⁴.

Admittedly, all this remains in the background of the 1861 opinion, which is still very concise and somewhat assertive. As will be seen below, however, these considerations will soon become part of the *Consiglio*'s opinions on nationality.

4. *The Connection Between Nationality and the Capitulations Regime in the Ottoman Empire*

The *Consiglio* addresses the same questions some 30 years later, in an opinion adopted in 1894 concerning the conformity to international law of two Turkish statutes: the regulation on consular service of 1863 and the law on nationality of 1869.

Both statutes were passed by the Sublime Porte to counter the abuses inherent in the capitulation regime, and in particular in the institution of protection, which allowed the European powers to extend the benefits stemming from the capitulations to Ottoman subjects employed by embassies, consulates, or merchants²⁵. While not acquiring foreign nationality, these individuals (referred to as *protégés* upon granting of a certificate of protection by European ambassadors or consuls) enjoyed all the privileges recognised to foreigners and, in substance, were treated as such²⁶.

Over time, the institution could not but convey abuses. Certificates of protections were openly sold by western ambassadors and consuls to take these individuals away from Ottoman sovereignty²⁷.

To curb these misapplications of the institution, the regulation on consular service of August 10, 1863, provides that, from that moment onward, only interpreters (*dragomans*) and guards would have been recognised and accepted by the Sublime Porte as European *protégés*²⁸.

Tellingly, though, as soon as Turkey tackled the abuses of protection, the European powers started to abuse of nationality. Not being able to issue new certificates of protection, they would simply consider the former *protégés* as their nationals, some-

times issuing a certificate of naturalisation²⁹. As a reaction, the law on nationality of January 18, 1869, provides that no certificate of naturalisation would have been deemed valid, unless it bore an authorisation by the Sultan (Article 5), and requires foreigners to provide clear evidence of their foreign nationality, if they were to be treated as such (Article 9)³⁰.

With a circular letter to the European representatives in Constantinople of March 26, 1869, the Sublime Porte clarified: (i) that these provisions did not aim to undermine the rights of foreigners, as established by the capitulations; (ii) that it only applied to cases where the local authorities had good reasons to believe that one individual were falsely claiming a foreign nationality, in order to avoid the consequences of domestic jurisdiction; and (iii) that it did not have retroactive effect³¹.

These assurances notwithstanding, the Italian consul in Beirut, in a report to the ministry of foreign affairs of 1892 (then transmitted to the *Consiglio* and attached to its opinion) point out that Article 9 might prove detrimental to the individuals of Italian origin, whose ancestors established in the Levant under the Maritime republics, as they might not be able to produce clear evidence of their lineage to the ancestor who emigrated to Turkey, or of his birth within Italian territory, after such a long time from the original settlement. Yet, notices the consul, to require such a proof would be unfair, since these communities have historically claimed and enjoyed extraterritorial privileges in the Levant³².

The committee appoints as rapporteur Pietro Esperson, whose draft is approved unanimously.

On the *protégés* issue, the opinion is very concise. It merely acknowledges the misapplication of the institution and shares the rationale behind the rule confining protection individually to guards and interpreters³³.

By contrast, the opinion elaborates on the law on nationality.

At the outset, it takes note of the positive assessment of that law that was expressed by the French *Comité du contentieux diplomatique* and by French scholarship³⁴. It, then, provides an analysis of the two provisions at hand, having made it clear that it is each state's sovereign attribution to establish the conditions for the acquisition and loss of nationality, and that the principle applies to nationality at birth as well as naturalisation.

As far as Article 5 of the Turkish statute is concerned, it then follows that each state is free to make naturalisation conditional upon the requirements that it considers more apt. In other words, for Esperson (and for the *Consiglio*), the status of the person naturalised abroad is to be determined with sole regard to the domestic legislation of his country of origin. Granting of certificates notwithstanding, naturalisation is not perfected if the individual did not comply with his country of origin's regulation concerning loss of nationality; in the case at hand, the need to obtain the Sultan's authorisation. According to the opinion, such a sovereign prerogative could not be denied to the Ottoman empire which, though far from being relieved from the capitulations, had nonetheless been admitted to the concert of civilised nations with the treaty of Paris of 1856 and was, thus, entitled to control the «denationalisation» of its subjects and avoid them being taken away from its jurisdiction³⁵.

Article 9 is considered in light of the same principle that it is a state's sovereign and «unilateral» attribution to establish who are its nationals. Having said that, and having taken note of the *Mémoire* of March 26, 1869, in which the Sublime Porte guaranteed that it did not aim at imposing ottoman nationality on foreign subjects, Esperson and the *Consiglio* conclude that those who Italy deems as Italians are to be recognized as such, unless Turkey is able to prove that these individuals had lost their original nationality (for instance, since they accepted Ottoman nationality by naturalisation).

Therefore, the opinion accepts that Article 9 of the Turkish law on nationality complies with international law, and with the capitulation regime, only to the extent that it is interpreted as establishing a mere "presumption" of ottoman nationality upon the individuals there resident who are not able to prove their status of foreigner. Conversely, had it established a conclusive, non-rebuttable (*juris et de jure*) presumption of ottoman nationality, said provision would have breached international law and run afoul with the capitulation regime³⁶.

But, as always with the law, the devil is in the details. The nature of the conclusive evidence of foreign nationality envisaged by Article 9 becomes the matter for contention.

The answer is not univocal. The opinion draws a distinction between the evidence required to those individuals of Italian origin whose ancestors emigrated to Turkey at the beginning of the XIX Century and those whose ancestors established there at the time of the Italian Maritime republics. Only the former will have to prove their Italian nationality by title (birth certificate of the

ancestor who emigrated from Italy and evidence of lineage to that ancestor). The latter will be relieved from the *probatio diabolica* of the exact time of their ancestors' emigration and their lineage. For them, the *Consiglio* asserts, Italian nationality is to be presumed on the basis of the registration within the Italian consular registry³⁷.

It was, in fact, common ground at the time that, for an «uninterrupted and never disputed custom [...] in all the foreign communities in the Ottoman empire the descendants of the foreign subjects have always been regarded [...] in the lineage of the sovereign of the country from which the ancestor came»³⁸. It is, therefore, only natural that the new Italian kingdom succeeded in the protection of the descendants of the communities of the Maritime republics that, first, quartered in the Levant and enjoyed extraterritorial privileges.

It seems, however, that in Esperson's views, and in those of other Italian scholars, the principle is not limited to the case of the Levant, but is of a general nature (as Esperson himself and other members of the Italian school of international law point out in their academic works)³⁹. This is, perhaps, the reason why the opinion under review does not take into account the specific features of Ottoman nationality (which was originally tied to Islamic religion, in accordance with the confessional character of the Empire⁴⁰) but addresses the question as though it related to the nationality of any other (Western) Country. Indeed, the principle of the continuity of Italian nationality is key to the new Kingdom's political and ideological foundations. As such, the *Consiglio* (that is tasked with the mission to bring consistency in Italy's foreign relations)

strives to craft its conclusions in terms as general as possible.

This is, also, the reason why the opinion under review clearly identifies the different priorities of Italian foreign policy. The most pressing issue is doubtless the one relating to the nationality of members of the historical Italian colonies. The nationality of the "new" immigrants ranks second, naturalisation third, whereas the safeguards of the *protégés* is clearly of minor concern, as will be further proven by the analysis of another opinion given by the *Consiglio* on the issue.

5. *The Constitutive Elements of International Responsibility: Fusinato v. Pierantoni*

Five years later, in 1899, the abuses of protection return before the *Consiglio*. This time, the question asked by the ministry relates to a claim of an Italian company, operating in Morocco, that complains of the unlawful arrest of one of his *protégé* by the part of the Moroccan government, and demands compensation for the economic loss suffered in his absence⁴¹.

It must be noted, at the outset, that the *Consiglio* advises the government not to press the claim in diplomatic protection. But the discussion to reach this conclusion discloses a conflict of opinions between two prominent international lawyers sitting in the *Consiglio*. For Fusinato (who drafts the report adopted by the majority), the claim discloses a violation, but does not deserve to be pressed in diplomatic protection since the damage alleged by the company would not be a direct and immediate consequence of that violation, whereas for Pierantoni

(dissenting from the opinion of the majority) the whole complaint is ill-founded, since there is no wrongful act from the part of the Moroccan government.

On the one hand, Fusinato takes the violation for granted, asserting that the arrest of the *protégé* infringed Italy's right to protection. However, he points out that, for a generally recognised principle of international law, reparation is confined to damages that are the direct and immediate consequence of the wrongdoing and recalls, in support of this statement, the findings of the Geneva arbitral tribunal in the *Alabama* case, which famously excluded reparation for the US indirect claims⁴². It, then, follows, in Fusinato's opinion, that the claim is not to be pressed in diplomatic protection lacking conclusive evidence of the direct causal link between the wrongful act complained of (*i.e.* the arrest of the *protégé*) and the damage allegedly suffered by the company (*i.e.* loss of commercial gain due to the absence of an agent). In substance, Fusinato argues that the company could have avoided damages by simply appointing another *protégé*⁴³.

On the other hand, while sharing the conclusion that the company is not entitled to claim damages, Pierantoni bases his separate opinion on completely different grounds⁴⁴. To begin with, the author who wrote two monographs on the *Alabama* (and prides himself of having been quoted in the US case before the Geneva tribunal) considers that the principle of indirect claims does not apply to the case at hand, which is, instead, to be addressed from the point of view of the «foundation of international responsibility» (that is to say, the alleged violation of the right to protection)⁴⁵.

Pierantoni, then, notes that, in Morocco, protection was regulated by the treaty of July 3, 1880, concluded between Morocco and the great powers (including Italy, which ratified it on April 24, 1881). The first test is, thus, whether that treaty had been violated⁴⁶.

Before looking into the matter, however, Pierantoni calls for a restrictive interpretation of the treaty, in light of the «special character» of the institution of protection of natives, as opposed to the general character of every state's right to protect its nationals⁴⁷.

Having said that, he focuses on Articles 7 and 8 of the treaty, which prescribe a number of formalities in order to grant protection to a subject of the Sultan of Morocco, including the need to register him on a list, sealed by the consular authority, and transmitted to the local authorities⁴⁸. He, then, points out that these formalities have not been complied with by the Italian Consulate in Morocco in the specific case. Therefore, he concludes that the agent of the company was not entitled to Italian protection in the first place and that, consequently, the arrest did not breach any international law provision⁴⁹.

In retrospect, Pierantoni's thesis seems more convincing. But in any event, while the agreement as to the substantive conclusions underlines the restrictive approach adopted by these international lawyers on the *protégés* issue, the discussion as to the merits of the case discloses the uncertainties which, still, dominate the doctrine of international responsibility for damages caused to private aliens at the end of the century.

6. *The search for general principles of international law on the treatment of aliens*

The uncertainties underlined in connection with the last-mentioned opinion grow exponentially when the *Consiglio* is requested to advise on claims relating to a subject matter which is not covered by treaty stipulations.

As pointed out by the *Consiglio* in an opinion given in 1898 on a complaint raised by some Italian nationals residing in Bahia who suffered damages to their properties at the hands of bandits, these cases are governed by the principles of international law on the treatment of aliens universally accepted by civilized nations⁵⁰. It is not easy, however, to define the scope and content of such principles. All that the analysis suggests is that customary international law principles governing state responsibility for damages suffered by private individuals developed, in the period under review, «in pairs of opposites, reflecting contrasting ways to think about a problem»⁵¹. Notably, while «the classical antinomy underlying the subject», that between the principle of equal treatment and that of the international minimum standard of treatment, is fairly obvious, the survey of the opinions delivered in a number of actual disputes shows a more nuanced attitude on both sides⁵².

For instance, the above-mentioned opinion concerning the damages suffered by the Italian community in the Brazilian state of Bahia accepts that international law does not bind states to afford a higher degree of protection to foreigners, than that granted to its nationals (thus, seemingly, acknowledging the principle of equal treatment), but points out that this conclusion applies only to the extent that the state

concerned does everything in its power to protect the life and properties of both its subjects and the foreigners (thus echoing the doctrine of the international minimum standard of treatment)⁵³.

Against this background, in that case the *Consiglio* advises against diplomatic protection attaching importance to the following facts: (i) that the wrongful acts complained of were performed by bandits (rather than state agents); (ii) that they damaged Brazilians and Italians alike; and (iii) that federal and local authorities had made any effort to prevent them and punish the responsible⁵⁴.

Rather than from general principles, the conclusion thus ensues from the careful consideration of the facts of the complaint. Moreover, the conclusion of the *Consiglio* in that case is only provisional. Indeed, the opinion under review notes that criminal proceedings against the alleged perpetrators were pending before domestic courts and calls the government to watch over the proceedings to verify whether some sort of responsibility would be established upon the government: in that case, indeed, the claim would deserve to be pressed in diplomatic protection⁵⁵.

7. *The Problem of International Responsibility for Private Acts*

As a matter of fact, the issue of the then so-called indirect responsibility (*i.e.* international responsibility for wrongful acts performed by private persons) was a major source of controversies between European states and South American republics: the former arguing that, in some instances, even private acts trigger the international

responsibility of the territorial state; the latter, denying such possibility in absolute terms.

In practice, these disputes arose in cases of damages caused to aliens in the wake of rebellions, popular uprisings, or civil wars⁵⁶. The *Consiglio* confronts with the issue in an opinion delivered in 1899 in relation to the responsibility of Peru for damages suffered by Italian nationals during the civil war of 1894-1895.

After the war, the South American republic established a special commission to adjudicate foreigners' claims for damages. On October 26, 1897, the Peruvian ministry of foreign affairs communicates to the states of nationality of the claimants the results of the commission's decisions. Italy had filed 82 claims with the commission on behalf of its nationals, only 32 among them had been granted compensation. Together with the results, the Peruvian ministry transmits a diplomatic note highlighting the criteria followed in the adjudication of the different claims⁵⁷.

The note is modelled on the monograph *Le droit international appliqué aux guerres civiles*, published in 1898 by Carlos Wiese (former undersecretary to the Peruvian ministry). Just like the monograph, the note acknowledges the theoretical foundation of every state's right to protect its nationals abroad, but decries the practice of abusive claims⁵⁸. Along the lines of one of the most traditional Latin American contentions, the Peruvian note emphasises that, once a foreigner decides to settle in a country different than his own, he must bear the defects in the organisation and in the welfare of that country, since foreigners are to be placed on equal footing with nationals and cannot claim any greater protection⁵⁹.

It follows, in the argument crafted in the Peruvian note, that foreigners are not entitled to diplomatic protection for damages suffered during popular uprisings, revolutions or civil wars. In the Peruvian ministry's reasoning, that would be tantamount to allow diplomatic intervention to recover damages suffered for an earthquake or other natural disasters, «como si fuesen los gobiernos sociedades de seguros contra riesgos y danos que de ellos no dependen ni pueden, en la generalidad de los casos, impedir»⁶⁰.

At the most, the government of Peru accepts international responsibility when domestic authorities were proven to have been negligent in preventing such damages and/or in punishing those responsible for them. However, it argues that, even in these cases, the domestic government escapes responsibility by disavowing the conduct of its agents and bringing them to prosecution⁶¹.

It is on that note (namely, on its compliance to international law) that the Italian government seeks the advice of the *Consiglio*⁶².

The *Consiglio* begins dealing with the task by questioning the actual equality between foreigners and nationals with an argument that ultimately relies upon the (in) famous doctrine of the standard of civilisation. Notably, the opinion argues that a state which fails in protecting the life and property of both citizens and foreigners would cease to be considered a civilised one. In that event, however, citizens may react through the exercise of their political rights, and ultimately through revolution, whereas foreigners, who do not enjoy political rights and are bound to neutrality, need some other safeguard against injus-

tice. That safeguard, for the *Consiglio*, is the diplomatic protection of their state of nationality⁶³.

The *Consiglio* shows more restraint on the subject of international responsibility for damages suffered by aliens during civil wars. It grants that the territorial State escapes responsibility, unless local authorities have been negligent in preventing them and/or careless in punishing the guilty parties, but, at the same time, it introduces a set of exceptions for cases in which the popular uprisings are specifically directed against foreigners of a certain nationality⁶⁴.

One has to keep in mind that mobs against Italian immigrants were not infrequent at the time. And it is noteworthy that, to counter the objection that European states apply different international law principles to their mutual relations than to those with South American states, the *Consiglio* supports his statement by recalling the precedent of Aigues Mort, when France paid an indemnity to the families of the Italians killed or wounded in a mob of 1893 (although that indemnity was actually paid out of humanity, not to fulfil an international legal obligation⁶⁵).

On the same line of argument, when it comes to reject as «frankly unacceptable» the principle, predicated by Peru, that the territorial state evades responsibility, even were the wrongful act committed by its agents, by simply disavowing their conduct or bringing them to prosecution, the *Consiglio* prays in aid the arbitral award given by the Baltic international lawyer Friedrich Martens in 1897 in the *Costa Rica Packet* case, between the Netherlands and Great Britain⁶⁶. The case is direct authority for the principle that a State cannot avail itself of the institutional independence of its or-

gans to evade international responsibility. As such, the *Consiglio* uses it to reinforce the argument that the territorial State is always responsible for the acts and omissions of its agents, irrespective of the subsequent disavowal of their conduct and/or persecution.

Once again, in the understanding of the *Consiglio*, the fact that the *Costa Rica packet* case opposed two European states would disprove the South American contention that these States apply a double standard, thus reaffirming the universal character of international law principles governing state responsibility for damages suffered by aliens.

These efforts notwithstanding, the comparison between the arguments contained in the opinion under review (and in other opinions given on the subject matter by European legal advisers, such as that of the British and Spanish governments) and those affirmed in the Peruvian diplomatic note (and outlined in major international law works by South American scholars) highlights a conflict which seems hardly reducible to the sphere of legal reasoning, calling into question (opposing) ideological views⁶⁷.

8. Denial of Justice as a «Workable Compromise»

Starting from such different premises, it is only natural that disputes of the kind develop on technicalities to reach what has been portrayed as a «workable compromise». Eventually, that was to be found in the longstanding public international law principle of denial of justice⁶⁸.

Indeed, the idea that every state is under an international duty to afford aliens the right to access domestic courts and seek justice could be accepted on both sides of the Atlantic⁶⁹. Moreover, such legal construction seeks to avoid uncertainties concerning attribution of the wrongful act in cases of indirect responsibility: the territorial State is held accountable (not for the wrongdoing itself, but) for having failed in providing redress (or, at the very least, a reasonable prospect thereof)⁷⁰. In addition, a claim for denial of justice implies an attempt to exhaust domestic remedies, thus securing some extent of respect for the sovereignty of the territorial state⁷¹.

For these reasons, the provision that a state incur international responsibility for denial of justice was incorporated in virtually all treaties and came to be recognized as a customary norm of international law as well as «the fundamental basis of an international claim»⁷².

As noted, though, «[this] compromise in words [...] amounts to a postponement of the decision»⁷³. In other words, while the parties agree that denial of justice triggers international responsibility, they disagree on what exactly constitutes a denial of justice.

The committee is asked this question in 1898, in relation to a dispute between an Italian national and the government of Guatemala concerning the acquisition of some coffee plantation. In short, an Italian businesswoman based in Guatemala complains of the fact that, contrary to domestic law, local authorities overlooked her offer for purchasing some fallow fields and accepted the one advanced by a local businessman⁷⁴.

It is a crucial point in the dispute, that the constitution of Guatemala of 1879 provides, at Article 23, that foreigners shall not avail themselves of diplomatic protection, save for cases of denial of justice, adding that the mere fact that the final decision opposes the foreigner is, by no means, to be deemed as a denial of justice⁷⁵.

The *Consiglio* accepts the first provision contained in Article 23 of the Constitution of Guatemala only to the extent that it reflects a general and universally accepted principle of international law, being understood that foreign legislation does not bind a state in the exercise of its sovereign rights, including the right to diplomatic protection⁷⁶.

On the merits, the *Consiglio* advises against diplomatic intervention, noting that the Italian claimant had already instituted legal proceedings before domestic courts and was yet to obtain a decision⁷⁷. Thus, the *Consiglio* applies the local remedy rule and shows its willingness to let the matter at the hands of the authorities of Guatemala prior to engage the Italian government in an international claim.

However commendable it may be, though, this conclusion allows the *Consiglio* not to confront with the second provision contained in Article 23 of the Constitution of Guatemala, the one that excluded once and for all that a Court decision against a foreigner constituted denial of justice.

9. *From Denial of Justice to Manifest Injustice*

In fact, the analysis of other opinions delivered by the *Consiglio* concerning the existence of a denial of justice suggests that such

a blunt proposition, as the one embodied in the second provision contained in Article 23 of the Constitution of Guatemala, could not be entertained.

In similar cases, the discussion rather focused on the conditions and the principles upon which a decision on the merits of a foreign court amounts to a denial of justice⁷⁸.

Unsurprisingly, the opinions of the *Consiglio* on the subject do not take a consistent stance.

Some cases disclose a very strict approach, with the *Consiglio* ruling out the possibility to raise a claim for denial of justice once a final decision had, rightly or wrongly, been delivered by domestic jurisdictions. This is the case of an opinion delivered in 1907 on the complaint of an Italian national ordered, by the Brazilian Supreme Court, to cover the debts contracted by his sons' company. There, the *Consiglio* states that a judgment's flawed reasoning does not open the door to diplomatic protection, as long as the domestic legal system in question provides judicial remedies which have been exhausted, albeit unsuccessfully⁷⁹.

In other, more elaborated opinions the conclusion is reversed. This is the case of an opinion delivered in the same year, 1907, in connection with a dispute between an Italian company and the government of Venezuela.

In short, the dispute concerned a big concession contract, concluded in 1898, between the government of Venezuela and the Italian company Martini. The former granted use of some coal mines, a railroad and the docks of the port of Guanta. The latter agreed to pay an annual rent and fulfil a complex set of obligations (e.g. guarantee

tariffs for the transport of passengers and mail on the railroad, hire local workers, keep the railroad and the docks in order). The dispute peaked in 1905, when the Supreme Court of Venezuela found the company to have breached the contract and ordered it to pay damages to the government⁸⁰.

Between the concession agreement of 1898 and the Supreme Court's decision of 1905, Venezuela underwent popular uprisings and suffered the blockade of its ports, that was imposed by Great Britain and Germany, along with Italy, as a reprisal for the refusal to restore aliens who had been damaged during the revolution and for Venezuela's default on external debt. In 1903, the international crisis was resolved by setting up mixed commissions to adjudicate foreign claims, while the question relating to the bondholders' rights was referred to the Permanent Court of Arbitration, set in The Hague⁸¹.

The same Martini company had filed a claim for the damages suffered at the hands of revolutionaries before the mixed commission, and had received compensation by an award of July 8, 1904⁸².

Once the matter seemed settled, however, the Venezuelan government initiated legal proceedings against the company for breach of contract, alleging that the company did not fulfil its obligations (among other things, did not repair the railroad). In the counter-case, the Martini company argued that the railroad had, in fact, been destroyed by the revolts and that the government breached the concession agreement in the first place, by granting a monopoly for the carrying of goods to and from the port of Guanta to a rival company.

On December 4, 1905, the Supreme Court eventually found in favour of the government, declared the contract resolved for non-compliance on the part of the company and ordered it to pay damages⁸³.

It is in the aftermath of this decision that the ministry of foreign affairs refers to the *Consiglio* three questions to enquiry whether the Supreme Court judgment amounted to a denial of justice⁸⁴.

At the outset, the opinion delivered by the *Consiglio* notes that Article XVI of the Martini concession provided for a waiver of diplomatic protection. It was one of the yet many examples of so-called "Calvo clause", commonly agreed in South-American business practice of the time (for contracts between governments and private aliens) in order to rule out diplomatic intervention and secure respect for the sovereignty of the newly independent countries⁸⁵. Ironically, it is precisely with an argument about sovereignty that Western international lawyers countered the validity of such clauses. Since diplomatic protection was an attribution of one state's sovereignty, they argued, it was not for a private individual to waive it.

The *Consiglio* takes this stance. Not only diplomatic protection is a right of the state (as such, non-disposable by private individuals), it is also an «essential» and «inalienable» one (and, thus, non-waivable):

una delle due: o si tratta di uno di quei casi che l'intervento diplomatico non comportano, e allora la disposizione è inutile; o si tratta invece di uno di quei casi che, pel comune diritto delle genti, possono dar luogo a tale intervento, e in tal caso la disposizione manca di qualunque valore, non solo perché le parti contraenti mancavano di competenza a contrattare sui diritti di un terzo estraneo alla convenzione, quale si era lo stato straniero cui una di esse apparteneva; sia perché, tanto il diritto del cittadino di invocare,

nei congrui casi, la protezione del proprio governo, quanto il diritto di quest'ultimo di esercitarla quando ne sia il caso, sono di quei diritti essenziali che si reputano inalienabili; e perciò non potrebbero essere in modo generale rinunziati, neppure in virtù di qualsiasi più solenne trattato internazionale⁸⁶.

Therefore, the clause does not bar the *Consiglio* from looking into the Supreme Court judgment to assess whether it falls within one of the «exceptional cases» in which a state's court decision entails the international responsibility of that state, and, consequently, entitle the intervention of the claimant's state of nationality in diplomatic protection⁸⁷.

Prior to undertake such an assessment, however, the *Consiglio* rephrase the question posed by the ministry. Technically, the case does not disclose an instance of denial of justice, meant as refusal to adjudicate, since a decision had indeed been delivered by the Supreme Court after having heard and evaluated (rightly or wrongly) arguments and evidence by both parties. Rather, the question is whether such a decision is so manifestly unjust as to amount, in substance, to a denial of justice⁸⁸.

Having said that (and recalling its previous jurisprudence), the *Consiglio* discards the presumption that favours the legal and factual reliability of foreign courts' decisions on two grounds.

First, because the Venezuelan judiciary is not trustworthy in adjudicating matters which, like the Martini case, oppose foreigners to the federal government (arguing, *a contrario*, that the 1903 mixed commissions would not have been otherwise established). Second, because that presumption rests on the assumption that, being more proximate to the disputed facts, local courts

are in a better position to evaluate them. Conversely, the presumption does not apply to cases, like the one at hand, which do not focus on facts, but on the application of «well established legal principles» to an uncontroverted set of facts⁸⁹.

Indeed, according to the *Consiglio*, «the Supreme Court based the solution of the knot of the dispute on two serious errors of law»⁹⁰. On the one hand, it overlooked the general principle of contract law that, in mutual covenants, the parties cannot modify the object of the contract without agreement, as the Venezuelan government had done by granting a second concession to a rival company. On the other hand, it failed in administering the burden of proof, in violation of the general principle of law according to which «actori incumbit onus probatio, reus in excipiendo fit actor». In practice, the *Consiglio* argues that, since the government was plaintiff, it would have been for it to prove that the company did not fulfil its contractual obligations (e.g. did not repair the railroads), with the doubt benefiting the defendant, not vice versa.

These arguments lead the *Consiglio* to conclude that the Venezuelan Supreme Court decision amounted to manifest injustice, and that the Italian government was, therefore, entitled to vindicate the company's rights in diplomatic protection⁹¹.

Eventually, the dispute will be settled in 1930, by another arbitration which finds in favour of the Martini company⁹².

It is fair to say that, along with the argument on the manifest injustice of the Supreme Court's decision, the arbitral award ponders the question of whether and to what extent the Supreme Court's decision entailed a violation of the international obligations stemming from the 1904 award of

the Italian mixed commission and from the treaty between Italy and Venezuela of 1861.

These questions were, also, referred to the *Consiglio* by the ministry. One might, thus, doubt whether the solution given to the question of the manifest injustice of the Supreme Court decision had been influenced by that of the other two questions (the *Consiglio* advising diplomatic protection on all three grounds), and even speculate on whether the same conclusion would have been reached, had it not been referred that question together with the other two.

Still, it is striking to see how the *Consiglio* looks at the merits of a final decision of a foreign country's Supreme Court in order to establish international responsibility on that state, and, in substance, offer legal justification to the diplomatic action of the government, aimed at vindicating the rights of an Italian company doing business abroad.

10. Conclusions

At first sight, these opinions of the *Consiglio*, as well as the cases to which they refer to, show such a degree of interference with the sovereignty of the territorial State as to justify the views of South-American international lawyers that, as held by the Brazilian legal adviser in an opinion given to his foreign ministry, equal diplomatic protection to a special instance of appeal for foreigners alone, not provided for by law and against its spirit: in sum, a privilege⁹³.

In retrospect, this position is understandable. After all, it is the Italian ministry of foreign affairs itself that, in 1894, decrying that individual claims of diplomatic

protection often bear unreasonable requests of indemnities, when they are not at once fictitious, instructs the Italian consuls in Brazil to apply a strict approach and dismiss every private claim to diplomatic protection, unless based on denial of justice or treaty violation⁹⁴.

From a different perspective, however, it seems interesting to register the rapid technical development of the opinions of the *Consiglio* on the treatment of Italian nationals residing abroad.

On the one hand, this development is due to (and at the same time reflects) the renovated attention of international law scholarship for the subject at the turn of the Century.

On the other hand, it is only natural that the growing emigration of Italian nationals to the Americas makes these disputes more common, and, in turn, the opinions more precise and more cautious. Indeed, it is the *Consiglio* that points out, almost invariably in its opinions on the subject, that it is precisely the mass Italian emigration which calls for a restrictive approach in establishing the cases in which to advise for diplomatic protection⁹⁵.

In light of the above, the provisional conclusion on the interference with the sovereign prerogatives of other (usually less developed) states can be amended.

Notably, while the fact that some agency of a state (such as the Italian *Consiglio del contenzioso diplomatico*) dares to look at the merits of another state's judicial decision surely seems to run counter the principle of the sovereign equality among States, the development in the solutions of these disputes, in the last decades of the XIX century and the beginning of the XX, shows a trend toward a more technical, and thus neutral

(or professional), approach. In this regard, the progressive consolidation of the local remedy rule, and the related focus on the international wrongful act of denial of justice, provide a clear example. Indeed, looking at the merits of a sovereign state's court final decision, though invasive it may appear, is certainly an important progress against the practice of military intervention and reprisals, that were the common solutions to these disputes in earlier times.

Beyond this, it might prove useful to provide some final remarks on the different arguments underlying the disputes under review, as the analysis suggests a difference between the arguments that underline the disputes concerning nationality and those applied in diplomatic protection cases in the narrow sense.

When nationality is at stake, the core legal argument of both states of emigration, like Italy, and immigration, like the Ottoman empire (but similar arguments are raised by the South-American republics and even by the United States), is the same. Of course, it is based on sovereignty and, as said, predicates that every state enjoys an unfettered right to establish the modes of acquisition and loss of its nationality; in other words, to decide unilaterally who are to be regarded as its nationals.

Conflicting solutions, then, are due to the fact that states of immigration apply this doctrine to naturalisation, thus claiming to have a right to issue certificates of naturalisations as they please, whereas European states, and Italy in the first place, claim that nationality «expresses a free, voluntary and permanent bond», and even that «nationality is inalienable, because it is nature which ties an individual with the land of his birth». Hence, they claim that

the state of origin keeps the right to investigate the legitimacy of the naturalisation of one of its subjects in a foreign country (just like the *Consiglio* concluded in the opinion concerning Article 5 of the Turkish law on nationality)⁹⁶.

Differently, in cases where the nationality of the claimant is undisputed, arguments advance in a specular way: the doctrine of equal treatment opposes that of the minimum standard; the doctrine of irresponsibility of the states for private acts tackles that of the then so-called "indirect responsibility"; the local remedy rule finds both its reason, and its limit, in the elaboration of the traditional concept of denial of justice.

To be sure, all these doctrines are based on the disputing states' (personal, or territorial) sovereignty, which confirms to be the «ultimate source of international obli-

gation» in the domain of state's responsibility (and, arguably, in public international law)⁹⁷.

It is, indeed, through the conceptualization of the subject as an instance of opposing or conflicting sovereignties that the international law rules on the treatment of foreigners have been developed and applied during the period under review, thus allowing to establish a certain set of exceptions to the principle of the unfettered power of the state over its territory and, in the last analysis, to «what was beginning to be called, significantly, the internal or reserved domain [of states]»⁹⁸.

* The present article is based upon my Ph.D. thesis in legal history defended at the University of Milan on March 17, 2017 titled *I sacri diritti di nazionalità. La giurisprudenza del Consiglio del contenzioso diplomatico del Regno d'Italia sui reclami degli Italiani all'estero* (available at <https://air.unimi.it/handle/2434/486439>). I have addressed the two cases concerning nationality in a talk of September 8, 2014, at the Fourth session of the *Centre de recherche franco-italien en droit international* of the University of Nice. The talk has been published in A. Arcari, L. Balmond, A.S. Millet-Devalle (eds.), *La gestion des espaces en droit international et européen*, Napoli, Ed. Scientifica, 2016, pp. 20-49.

¹ See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2001, pp. 28-35. Following the last-mentioned author, the current trend in the history of international law acknowledges «the radical character of the break that took place in the field between the first half of the nineteenth century and the emergence of a new professional self-awareness and enthusiasm between 1869 and 1885» (*ibidem*, p. 3); see, for example, L. Nuzzo, *La storia del diritto internazionale e le sfide del presente. A proposito di Martti Koskenniemi, Il mite civilizzatore delle nazioni. Ascesa e caduta del diritto internazionale 1870-1960*, in «Quaderni fiorentini per la storia del pensiero

giuridico moderno», 42, 2013, pp. 681-701; Id., *Origini di una Scienza. Diritto internazionale e colonialismo nel XIX secolo*, Frankfurt am Main, Klosterman, 2012, p. 4; M. Vec, *From the Congress of Vienna to the Paris Peace Treaty of 1919*, in B. Fassbender, A. Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford, Oxford University Press, 2012, pp. 654-678, pp. 656-657; L. Nuzzo, M. Vec, *The Birth of International Law as a Legal Discipline in the 19th Century*, in L. Nuzzo, M. Vec, (eds.), *Constructing International Law. The Birth of a Discipline*, Frankfurt am Main, Klosterman, 2012, pp. IX-XVI, p. IX; M. Vec, *Universalization, Particularization, and Discrimination. European Perspectives on a Cultural History of 19th Century International*

al Law, in «InterDisciplines», 2, 2012, pp. 79-102, pp. 83-93; E. Jouannet, *Le droit international liberal-providence. Une histoire du droit international* (2011), eng. tr. *The Liberal-Welfarist Law of Nations. A History of International Law*, Cambridge, Cambridge University Press, 2012, p. 113; M. Koskenniemi, *The Legacy of the 19th Century*, in D. Armstrong (ed.), *Routledge Handbook of International Law*, New York, Routledge, 2009, pp. 141-153, pp. 142-144; I. Hueck, *The Discipline of History of International Law*, in «Journal of the History of the International Law», 3, 2001, pp. 194-217, p. 200. Critical dates to underline the break may be that of the foundation of the *Revue de droit international et de législation comparée* (1869) and that of the *Institut de droit international* (1873). For references, see, for example, L. Nuzzo, *Ordine giuridico e disordine politico. Iniziative ed utopie nel diritto internazionale di fine Ottocento*, in «Materiali per una storia della cultura giuridica», XLI, 2, 2011, pp. 319-337; M. Koskenniemi, *Gustave Rolin-Jaequemyns and the establishment of the Institut de Droit International* (1873), in «Revue Belge de Droit International», 37, 2004, pp. 5-11; G.G. Fitzmaurice, *The Contribution of the Institute of International Law to the Development of International Law*, in *Recueil des cours de l'Académie de Droit International de la Haye* (hereafter *Recueil des cours*), 138, 1, 1973, pp. 203-260. For the contribution of an Italian international lawyer of the time, see A. Pierantoni, *La riforma del diritto delle genti e l'istituto di diritto internazionale di Gand*, Napoli, Jovene, 1874. As for the state of art on the specific subject of state responsibility for damages caused to foreign nationals, it is worth remembering that it is commonplace in international law literature to state that «the subject is one in which

guidance from previous writers is almost wholly wanting; it has never yet been treated as a whole» (E.W. Hall, *A Treatise on the Foreign Powers of the British Crown*, Oxford, Clarendon Press, 1894, p. vii). The same is reiterated by Anzilotti at the turn of the Century (A. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Firenze, Lumachi, 1902, reissued in Id., *Scritti di diritto internazionale pubblico*, Padova, Cedam, 1956, pp. 1-149, p. 7, footnote 1; see also Id., *La responsabilità internazionale degli Stati a raison des dommages soufferts par des étrangers*, in «Revue Générale de Droit International Public», 13, 1906, pp. 5-285) and by Borchard in the inter-war period (E. Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claim*, New York, Banks, 1925, p. 177. In fact, the subject was included in international law treatises and addressed in articles and monographs (see next footnote). It may, however, be conceded that it lacked a comprehensive analysis up to the works of the authors cited above. For the anglo-saxon tradition, Edward William Hall is «the first writer on State responsibility in a modern sense» (H. Spiegel, *Origin and Development of Denial of justice*, in «The American journal of international law», 32, 1, 1938, pp. 63-81, p. 79). It is undisputable, though, that «[i]t [was] Anzilotti's enduring achievement to have provided a theoretical framework for the law of state responsibility which reconciled the contemporaneous emphasis on sovereignty and the need to establish a clear system for this area of the law» (G. Nolte, *From Dioniso Anzilotti to Roberto Ago: the Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, in «European journal of international law», 13, 5, 2002, pp. 1083-1098, in particular p. 1088). The same au-

thor acknowledges that «the most important practical issue of state responsibility at the time was the responsibility for injuries to aliens» (*ibidem*). The first issue of the third volume of the *European Journal of International Law* contains several contributions on the work of Anzilotti by such authors as Roberto Ago, José Maria Ruda, Giorgio Gaja, Pierre-Marie Dupuy, Antonio Cassese, Antonio Tanca (see «European journal of international law», 3, 1, 1992, pp. 92-162). More recently, the works of Anzilotti have been analysed by L. Passero, *Dioniso Anzilotti e la dottrina internazionalistica tra Otto e Novecento*, Milano, Giuffrè, 2010.

² See E. Hobsbawm, *The Age of Empire: 1875-1914*, London, Weidenfeld, 1987, p. 62. For an assessment of the relationship between economic progress, migration and the development of international law rules relating to the treatment of aliens, see, among many, Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 44-45; S. Laghmani, *Histoire de droit de gens. Du jus gentium au jus publicum europaeum*, Paris, Pedone, 2003, p. 175; V. Chetail, *Migration, droits de l'homme et souveraineté*, in Id. (ed.), *Mondialisation, migration et droits de l'homme: le droit international en question*, Bruxelles, Bruylant, 2007, v. 2, pp. 14-133 (in particular, pp. 23 and pp. 35-37); E. Augusti, *Protezione, sicurezza, assistenza, solidarietà. Politiche internazionali di controllo dello straniero in Europa tra Otto e Novecento*, in E. Augusti, A.M. Morone, M. Pifferi (eds.), *Il controllo dello straniero. I "campi" dall'Ottocento a oggi*, Roma, Viella, 2017, pp. 53-80 (in particular p. 56). For the development of a global market economy in the Italian Kingdom see H. James, K.H. O'Rourke, *Italy and the first Age of Globalization, 1861-1940*, in «University of Oxford, Discussion Papers in Economic and Social History», n. 94, 2012, avail-

able at <<http://www.economics.ox.ac.uk/>>, novembre 2017.

³ For a recent contribution on XIX Century international law doctrines concerning the protection of individuals, see R. Kolb, *The Protection of the Individual in Times of War and Peace*, in Fassbender, Peters (eds.), *The Oxford Handbook of the History of International Law* cit., pp. 317–337, as well as A. Vermer-Kunzli, *As If: The Legal Fiction in Diplomatic Protection*, in «European Journal of International Law», 18, 1, 2007, pp. 36–68. The quote in the text comes from E. de Vattel, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, v. III, London, 1758, p. 136.

⁴ See A.A. Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law*, in «Philippine Law Journal», v. 53, 1978, pp. 404–421 (in particular, p. 407); in the same sense, see J. Dugard, *Diplomatic Protection*, in *Max Planck Encyclopedia of Public International Law* (hereinafter MPEPIL), available at <www.mpepil.com>, novembre 2017 (as all entries of the Encyclopedia), par. 8; C. Walter, *Subjects of International Law*, in MPEPIL par. 15 and, more recently, K. Parlett, *The Individual in International Law*, Cambridge, Cambridge University Press, 2010, pp. 13–16. The classic authority on the matter is G. Manner, *The Object Theory of the Individual in International Law*, in «The American Journal of International Law», 46, 1952, pp. 428–449. For one of the earliest reception of the theory in Italian international legal scholarship, besides the works of Anzilotti quoted above, see G. Diena, *L'individuo davanti l'autorità giudiziale et le droit international*, in «Revue generale de droit international public», 16, 1906, pp. 57–76.

⁵ See the positions of the different authors: R. Phillimore, *Commentaries Upon International Law*,

Philadelphia, T. & J.W. Johnson, 1854, pp. 23–25 and pp. 49–50; J.K. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt* (1868), tr. fr. *Le droit international codifié. Traduit de l'allemand par M. C. Lardy et précédé d'une préface par M. Edouard Laboulaye*, deuxième édition revue et corrigée, Paris, Guillaumin, 1870, pp. 223–224; P. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaine*, 8 vv., Paris, Pédone-Lauriel, 1885–1906, v. 1, pp. 329–351; A. Pierantoni, *I fatti di Nuova Orleans e il diritto internazionale*, Roma, Pallotta, 1891; J. Thomas, *La condition des étrangers et le droit international*, in «Revue générale de droit international public», 4 (1897), pp. 620–645; J. Tchernoff, *Protection de nationaux resident à l'étranger, avec introduction sur la souveraineté des Etats en droit international*, Paris, Pedone, 1899; J. Westlake, *International Law, Part I, Peace*, Cambridge, Cambridge University Press, 1904, pp. 314–315, in addition to the works of Hall and Anzilotti cited above. 'Theoretical differences notwithstanding' means that, even those authors who professed the existence of individual (human) rights, such as Bluntschli, Fiore and (to a lesser extent) Thomas and Pradier-Fodéré recognised that the intervention of the state of nationality was the only mean to ensure those rights, thus bowing, in practice, to the more realistic approach epitomised by Anzilotti (see, for instance, the position of Fiore at P. Fiore, *Trattato di diritto internazionale pubblico, seconda edizione interamente rifatta e considerevolmente ampliata*, Torino, Unione tipografico-editrice, 3 vv., 1879–1884, v. 1, p. 493). This is not surprising, in perspective, since these authors had to confront the position that denied at once that international responsibility existed (see, for

instance, Th. Funck-Brentano, Sorel A., *Précis de droit des gens*, Paris, Plon, 1877, p. 224). For an appraisal of the positions of some of these authors on the subject, see T.C. Wingfield, J.E. Meyen (eds.), *Lillich on the forcible protection of nationals abroad: in memory of professor Richard B. Lillich*, International Law Studies, v. 77, Newport (RI), Naval War College, 2002.

⁶ As regards the issue of state responsibility for damages suffered by aliens during civil wars, see the report of Emilio Brusa and the other members of the special committee established by the Institut de droit international, including Enrico Catellani and Carlo Francesco Gabba, *Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile*, published in *Annuaire de l'Institut de droit international*, XVII, 1899, pp. 96–137; the report prepared by Ludwig Von Bar, *De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile*, published in «Revue de droit international et de législation comparée», XXXI, 1899, pp. 464–481 and, finally, the resolution adopted by the Institut on September, 10, 1900, at the session of Neuchâtel, *Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile*, published in *Annuaire de l'Institut de droit international*, XVIII, 1900, pp. 254–256 e pp. 312–315. As regards expulsion, see the report drafted by Gustave Rolin-Jaequemyns and presented at the Institut in 1888, at the session of Lausanne, *Droit d'expulsion des étrangers, Rapport à l'Institut du droit international* (session de Lausanne, 1888), published in «Revue de droit international et de législation comparée», 20, 1888, pp. 498–504 and in *Annuaire de l'Institut de droit international*, X, 1888–

1889, pp. 229-238; the report of the special committee composed, *inter alia*, by Albert Rivier, Ludwig Von Bar, Emilio Brusa e Paul Pradier-Fodéré (published Ivi, pp. 238-244); the discussion of the subject that took place at the subsequent session of Hamburg (in 1891) after the submission of additional observations by Louis-Joseph-Delphin Féraud-Giraud (*Projet de réglementation de l'expulsion des étrangers présenté par M. Féraud-Giraud*), Ludwig Von Bar (*Projet de règlement international et rapport de M. L. de Bar*), and John Westlake (*Observations de M. Westlake sur le projet de M. de Bar (extrait d'une lettre de M. Westlake à M. de Bar en date du 28 août 1891)*), all published in *Annuaire de l'Institut du droit international*, XI, 1889-1891, pp. 316-329, pp. 284-329, as well as the final discussion at the session of Geneva (1892) when the Institut adopted the resolution concerning *Règles internationales sur l'admission et l'expulsion des étrangers* (published in *Annuaire de l'Institut de droit international*, XII, 1892-1894, pp. 185-226).

⁷ The model is C. Storti, *Empirismo e scienza: il crocevia del diritto internazionale nella prima metà dell'Ottocento*, in Nuzzo, Vec (eds.), *Constructing International Law. The Birth of a Discipline* cit., pp. 51-145 (in particular, p. 55).

⁸ The establishment of the *Consiglio* was foreseen in the *Regolamento del servizio interno della segreteria di Stato* of December 22, 1856 (published in R. Moscati, *Il ministero degli affari esteri (1861-1870)*, Milano, Giuffrè, 1961, pp. 52-82, see, in particular Articles 195-199). However, the *Consiglio* was in fact established by royal decree n. 2560 of November 29, 1857 (for references, see Ivi, pp. 18-19). Sources report that the establishment of the *Consiglio* was proposed by Cavour, who, having attended the Paris conferences of 1856, had been impressed by the advice given to his French coun-

terpart by the *Comité du contentieux*, established at the French ministry of foreign affairs by order of April 21, 1835 (see, for instance, L. Piloti (ed.), *Il fondo archivistico serie Z - contenzioso (1861-1959)*, Roma, Istituto poligrafico e zecca dello Stato, 1987, p. 53, footnote 1). The work of the *Consiglio* is generally overlooked in the literature on the history of international law (for exceptions, see C. Storti, *L'indipendenza dell'Italia nel diritto internazionale della prima metà dell'Ottocento*, in M.P. Viviani Schlein (ed.), *Problemi giuridici dell'unità italiana*, Milano, Giuffrè, 2013, pp. 58-59 and Ead., *Ricerche sulla condizione giuridica dello straniero in Italia, dal tardo diritto comune all'età preunitaria, aspetti civilistici*, Milano, Giuffrè, 1989, pp. 209-210 and p. 314). That is striking, considering the importance that international lawyers of the time attached to the opinions delivered by such advisory bodies, and by the *Consiglio del contenzioso diplomatico* in particular (see, for instance, A. Pierantoni, *Trattato di diritto internazionale. Volume I. Prolegomeni - Storia dall'antichità al 1400*, Roma, Forzani e c. Tipografi del Senato, 1881, pp. 40-48). The opinions are part of the collection of the *Archivio Storico Diplomatico del Ministero degli Affari Esteri* (hereinafter, ASDMAE) in Rome. They will be cited with reference to their number in the *Indici del fondo 'Consiglio del contenzioso diplomatico 1857-1937'*, Roma, Istituto poligrafico e zecca dello Stato, 1980, together with the indication of the collection (*Archivio del contenzioso diplomatico. Periodo dal 1857 al 1937. Parte prima: periodo dal 1857 al 1923* hereinafter cons. cont.), package (*pacco*, hereinafter «p.») and file (*fascicolo*, hereinafter «f.») where they are located.

⁹ Royal decree n. 2560/1857 is published in Ministero degli affari esteri (hereinafter Mae), *Il Consiglio del contenzioso diplomatico*

(1857-1897). *Cenni storici e statistici*, Roma, Tipografia del ministero degli affari esteri, 1898, pp. 6-7 (see, in particular, Articles 2, 3 and 6). See also the report drafted by Cavour to introduce the decree to the king (*Relazione a S.M. che precede il r. decreto del 29 novembre 1857*, published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 4-5). On that same November 29, 1857, count Sclopis of Salerano (who famously presided the Geneva arbitral tribunal in the *Alabama* case) was elected president of the committee.

¹⁰ The *Regolamento interno* of December 13, 1857 is published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 9-11 (see, in particular, Articles 1, 3 and 6).

¹¹ In the years immediately following the establishment of the *Consiglio*, several decrees provided minor amendments (see, for example, royal decree of December 4, 1863, of December 23, 1866, of January 27, 1867, of March 9, 1873 and of May 9, 1973, all published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 15, 18, 22, 25, 29). Mancini plans an overall reform shortly after having been appointed minister of foreign affairs in 1881. The reform is enacted by royal decree n. 1236 of February 17, 1883 (published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 28-30, see in particular Articles 2, 4, 10). The reform's main feature are: (i) the establishment of a smaller committee for routine legal questions; (ii) the provision of a staggered term of appointment for the members of the *Consiglio* (each member will serve for a five year term, but three of the members will be replaced each year, counting from the fifth year after the reform takes effect). According to the report drafted by Mancini to introduce the decree to the King, this set of amendments proved necessary to allow the *Consiglio* to keep its high

- office of main international legal adviser to the government, while establishing a quicker mechanism for routine legal questions (*Relazione a S.M. il re che precede il r. decreto del 17 febbraio 1883*, published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 30-35). Moreover, Mancini insists that the *Consiglio* should preserve its independence from government, thus the staggered term of appointment of its members (*ibidem*). After the reform, some further amendments are provided by royal decree n. 5548 of July 1, 1888 (published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., p. 48), royal decree n. 550 of December 15, 1901, royal decree of December 14, 1905 and royal decree n. 1090 of August 6, 1911 (all located at ASDMAE, cons. cont., p. 1). Finally, the *Consiglio* is abolished by royal decree of December 30, 1915.
- ¹² As noted, in general terms, by A. Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, in «Harvard International Law Journal», 51, 2, 2010, pp. 475-552.
- ¹³ See Kolb, *The Protection of the Individual in Times of War and Peace* cit., p. 331; Parlett, *The Individual in International Law* cit., pp. 13-16; C. Walters, *Subjects of International Law*, in MPEPIL, par. 15; Weis P., *Nationality and Statelessness in International Law*², Alphen aan den Rijn-Germantown, Sijthooff & Noordhoff, 1979, pp. 32-33. In international law works of the time, that condition is underlined, for instance, by J.K. Bluntschli, *De la qualité de citoyen d'un Etat au point de vue des relations internationales*, in «Revue générale de droit international public», 2, 1870, pp. 107-120, p. 108; P. Esperson, *Condizione giuridica dello straniero secondo le legislazioni e la giurisprudenza italiana ed estera, i trattati fra l'Italia e le altre nazioni, parte seconda*, Torino, Bocca, 1883, p. 3; F.P. Contuzzi, *Cittadinanza. Diritto internazionale*, in «Digesto italiano», Torino, Unione tipografico-editrice, 1896-1899, v. VII-2, pp. 305-334, p. 307.
- ¹⁴ These disputes, concerning the nationality of individuals (normally the claimant or his ancestors), are themselves disputes over sovereignty, being understood that «[e]n principe, la détermination de la nationalité est un acte de la souveraineté interne, en vertu de laquelle chaque législateur concède ou refuse comme il l'entend la qualité de national de son pays» (F. Despagne, *Cours de droit international public, deuxième édition complètement revue et mise au courant*, Paris, Sirey, 1899, p. 338).
- ¹⁵ According to Article 4 of the 1865 civil code: «è cittadino il figlio del padre cittadino». Authors of the time note that the principle of *jus sanguinis* is a natural consequence of the French revolution, and of the principle of nationality developed by the Italian school of international law; and that the same principle was adopted in the majority of the civil codes of Italian preunitarian states (see, for example, O. Sechi, *Cittadinanza. Diritto italiano*, in «Digesto italiano», t. VII, parte II, Torino, Unione tipografico-editrice, 1896-1899, pp. 221-305, in particular pp. 230-231). The assertion that it was one of Italy's main foreign policy goal to establish a close link between Italians abroad and the motherland is commonground in Italian historiography (see, for instance, G. Tintori, *Cittadinanza e politiche di emigrazione nell'Italia liberale e fascista*, in D. Zincone (ed.), *Familismo legale. Come non diventare italiani*, Roma-Bari, Laterza, 2006, pp. 52-106; Id., *Italy: the Continuing History of Emigrant Relations*, in M. Collyer (ed.), *Emigration Nations. Policies and Ideologies of Emigrant Engagement*, Houndmills Basingstoke, Palgrave Macmillan, 2013, pp. 126-152).
- ¹⁶ Article 23 of the *Instructions aux consuls de S.M. le Roi de Sardaigne du 8 avril 1859* (published in Moscati, *Il ministero degli affari esteri (1861-1870)* cit., p. 101) instructed Sardinian (and then Italian) consuls to protect all those individuals «qui sont originaires des Etats et qui quoique nés et domiciliés en pays étrangers ont toujours été considérés et traités comme sujet du Roi; tels sont dans le pays de Levant e dans l'île de Scio beaucoup des familles d'origine génoises».
- ¹⁷ As correctly pointed out, «gli italiani [...] hanno cominciato a spostarsi molto prima che l'Italia diventasse uno Stato nazionale» (M. Vitiello, *Le politiche di emigrazione e la costruzione dello Stato unitario italiano*, in «Percorsi Storici - Rivista di storia contemporanea», 1, 2013, available at <www.percorsistorici.it/docs/articolipdf/numero1/PS1-Vitiello.pdf>, p. 5, november 2017).
- ¹⁸ The request for an opinion is transmitted to the *Consiglio* on December 5, 1860 (*Memoria del ministero degli affari esteri del 5 dicembre 1860, Posizione degli ebrei livornesi nella Tunisia. Convenzioni toscano-tunisine in proposito (1822-1847)*, in ASDMAE, cons. cont., p. 4, f. 13). References to the history of the *Grana families* can be found in F. Petrucci, *Una comunità nella comunità: gli ebrei italiani a Tunisi*, in «Altreltalia, Rivista internazionale di studi sulle migrazioni italiane nel mondo», n. 36-37, 2008, pp. 173-188; J.-P. Filippini, *La nazione ebraica di Livorno*, in C. Viviani (ed.), *Storia d'Italia, Annali*, n. XI, *Gli ebrei in Italia*, vol. II, Torino, Einaudi, 1997, pp. 1047-1066; S. Milella, *Gli italiani all'estero: breve storia della comunità italiana in Tunisia*, in «The Lab's Quarterly/Il Trimestrale del Laboratorio», n. 3 (2006), available at <<http://dsslab.sp.unipi.it/trimestrale/Archivio%20-%20Articoli/Milella%20S.%20-%20Gli%20italiani%20all%27estero.pdf>>, november 2017; H. De

Montety, *Les Italiens en Tunisie*, in «Politique étrangère», 2, 5, 1937, pp. 409-425.

¹⁹ The *Consiglio* states that: «coloro che erano o potevano essere considerati come sudditi del granducato di Toscana al momento della seguita annessione agli Stati sardi debbono godere di tutti i vantaggi accordati ai sudditi di Sua Maestà»; accordingly, it is for the ministry to «rivendicare quei sudditi che furono ingiustamente rapiti alla sovranità toscana, alla quale subentrò il governo di S.M.» for the purpose of the «riconoscimento agli italiani residenti [in Tunisia] dei loro sacri diritti di nazionalità» (Parere del Consiglio del contenzioso diplomatico del 18 gennaio 1861, Posizione degli ebrei livornesi nella Tunisia. Convenzioni toscano-tunisine in proposito (1822-1847), n. 13, Alfieri, in ASDMAE, cons. cont., p. 4, f. 13, pp. 1-2). On a practical note, the *Consiglio* presses the Sardinian consuls to «provvedere alla pronta iscrizione d'ufficio di tutti gli antichi sudditi riconosciuti dalla Toscana» (*ibidem*).

²⁰ At the time and up to the unorthodox opinion expressed by Anzilotti (D. Anzilotti, *La formazione del Regno d'Italia nei riguardi del diritto internazionale. Prolusione tenuta nell'università di Roma il 4 dicembre 1911*, Roma: Athenaeum, 1912), the process of Italian unification was described as one of subsequent incorporations to the Sardinian states by virtually all international and constitutional lawyers (see, for instance, Gabba G., *Successione di Stato a Stato*, in *Questioni di diritto civile*, Torino, 1882, p. 327, footnote 1; G. Fusinato, *Annessione*, in *Enciclopedia giuridica italiana*, v. I-II, pp. 2055-2143). Recently, it has been argued that, even after the turn of the century, those authors who (like Anzilotti) stressed the «discontinuità» between the Italian kingdom and the ancient kingdom of Sardinia were a minority

(L. Lacchè, *L'opinione pubblica nazionale e l'appello al popolo: figure e campi di tensione*, in M. Torres Aguilar, M. Pino Abad (eds.), *Burocracia, poder político y justicia. Libro-homenaje de amigos del profesor José María García Marín*, Madrid, Dykinson, 2015, pp. 455-473, p. 472, footnote 77, with reference to F. Colao, *L'idea di nazione nei giuristi italiani tra Ottocento e Novecento*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 30, 2001, pp. 255-360; Ead., *Due momenti della storia costituzionale italiana nella cultura giuridica tra Ottocento e Novecento: la "formazione del regno d'Italia" e la "trasformazione dello Stato" dall'età liberale al fascismo*, in A. De Benedictis (ed.), *Costruire lo Stato, costruire la storia. Politica e moderno fra '800 e '900*, Bologna, Clueb, 2003, pp. 183-247). In any event, be it for incorporation to the Sardinian state, be it for the creation of a new state, all nationals of the different states of the peninsula acquired Italian nationality by virtue of a longstanding principle of international law (see, for instance, A. Zimmerman, *State succession*, in MPEIL, par. 26), which is well established in Italian case-law of the time (see, among may, *Parere del consiglio di Stato a sezioni unite del 20 dicembre 1870*; *parere del consiglio di Stato, sezione di grazia e giustizia dell'8 febbraio 1879*; *parere del consiglio di Stato, sezione di grazia e giustizia del 21 febbraio 1879*; *parere del consiglio di Stato, sezione dell'interno del 27 giugno 1884*).

²¹ This is noted, for instance, by P. Audenino, *Rotta verso sud: dall'Italia al Mediterraneo*, in M. Antonoli, A. Moiola (eds.), *Saggi storici. In onore di Romani H. Rainero*, Milano, Franco Angeli, 2005, pp. 239-267, in particular p. 265.

²² The tension among the two conceptions of Italian nationality can be traced throughout all the works of the Italian school of international law from P.S. Mancini, *Del-*

la nazionalità come fondamento del diritto delle genti. Prelezione al corso di diritto internazionale e marittimo pronunciata nella R. università di Torino nel 22 gennaio 1851, in P.S. Mancini, A. Pierantoni (eds.), *Diritto internazionale. Prelezioni con un saggio sul Machiavelli*, Napoli, G. Marghieri, 1873, pp. 1-64, to P. Esperson, *Il principio di nazionalità applicato alle relazioni civili internazionali e riscontro di esso colle norme di diritto internazionale privato sancite dalla legislazione del regno d'Italia*, Pavia, Tip dei f.lli Fusi, 1868 (in particular p. 63, where the author stresses the voluntaristic side of the acquisition of Italian nationality, arguing from the right to option that was reserved by Article 12 of the treaty of Zurich of 1859 and Article 14 of the treaty of Vienna of 1866) and G. Fusinato, *Le mutazioni territoriali, il loro fondamento giuridico e le loro conseguenze. Parte prima. Fondamento giuridico*, Lanciano, Carabba, 1885 (in particular p. 99, where the author underlines the importance of the plebiscites by means of which the people of the peninsula «voted» the incorporation to the Italian kingdom).

²³ It has been noted that «[I Grana] contribuirono a mantenen[re] l'italiano come idioma ufficiale degli europei presenti [in Tunisia] e come lingua franca del paese» (A. Cortese, *L'emigrazione italiana nell'Africa mediterranea*, Dipartimento di Economia Università degli Studi Roma Tre, Working Paper n. 149, 2012, available at <[http://dipeco.uniroma3.it/public/WP%20149%20Cortese%202012\(1\).pdf](http://dipeco.uniroma3.it/public/WP%20149%20Cortese%202012(1).pdf)>, pp. 4-5, november 2017).

²⁴ It has been noted that the Grana were «[u]n des éléments essentiels [de la bourgeoisie italienne]» and that they «ont occupé, jusqu'à une époque récente, la première place sans conteste au sein de la colonie italienne» (A. Sayous, *Les Italiens en Tunisie*, Bruxelles, Goemaere, 1927, p. 84). Moreover, it is com-

monground that the Grana played «[un] ruolo di spicco nel commercio mediterraneo» (Petrucchi, *Una comunità nella comunità* cit., p. 175).

²⁵ For Italy, the capitulation regime was regulated by the treaty of July 10, 1861 and by that of March 11, 1873. On the content of these treaties, in comparison with that of those previously in force between the Ottoman empire and some preunitarian Italian States (such as Venice, Genoa and the kingdom of the two Sicilies) see S. Pomodoro, *Le capitazioni e la giurisdizione consolare negli scali di Levante*, Roma, stab. G. Civelli, 1889, pp. 12-14 and, more recently, E. Augusti, *Storie e storiografie dei Consolati in Oriente tra Otto e Novecento*, in «Historia et ius», 11/2017, available at <http://www.historiaetius.eu/uploads/5/9/4/8/5948821/augusti_11.pdf>, p. 14, november 2017.

²⁶ Authors of the time define protection as «un lien juridique qui rattache une personne à un Etat et le fait jouir de certains de droits et avantages dérivés de la qualité de national de cet Etat sans cependant lui conférer cette qualité de national ni le statut personnel qui en dépend» (P. Arminjon, *Etrangers et protégés dans l'empire ottoman*, Paris, A. Chevalier-Maresq & Cie, p. 261).

²⁷ On the abuses in the protégés system starting in the XVII century and reaching its apex in the second half of the XIX century see, among many, Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., p. 61; Ferrero Gola, *Corso di diritto internazionale pubblico, privato e marittimo* cit., p. 180 and, in more recent times, Laghmani, *Histoire de droit de gens* cit., pp. 206-207; Becker Lorca, *Universal International Law: 19th century histories of imposition and appropriation* cit., pp. 506-509. On the diplomatic correspondence between the Sublime Porte and the Italian government concern-

ing the abuses of the capitulation regime in the last decade of the XIX Century, see Augusti, *Storie e storiografie dei Consolati in Oriente tra Otto e Novecento* cit., p. 8.

²⁸ The regulation on foreign consular service of 1863 is published (in French translation) in Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., pp. 325-330. Its content is illustrated in a *Mémoire* transmitted by the Sublime Porte to foreign ambassadors in Constantinople on May 21, 1869 (published in «Archive Diplomatiques», 1870, pp. 249-254). For references, see Nuzzo, *Origini di una Scienza. Diritto internazionale e colonialismo nel XIX secolo* cit., pp. 169-170, footnote 1, and Id., *Un mondo senza nemici. La costruzione del diritto internazionale e la negazione delle differenze*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 39, 2009, pp. 1311-1382 (in particular p. 1365 and footnote 130).

²⁹ The abuses in the granting of certificates of naturalisation once the regulation of 1863 inhibited that of new certificates of protection are confirmed by Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., pp. 61-62 and p. 68, where the author concludes: «tous les sujets du Sultan auxquels [le règlement du 1863] avait barré la route à la protection s'étaient tournés vers la naturalisation».

³⁰ The Turkish law on nationality is published (in French) in «Journal de droit international privé», 16, 1889, p. 896. Article 5 provides that: «le sujet ottoman qui a acquis une nationalité étrangère avec l'autorisation du gouvernement impérial est considéré et traité comme sujet étranger; si, au contraire, il s'est naturalisé étranger sans l'autorisation préalable du gouvernement impérial, sa naturalisation sera considérée comme nulle et non avenue, et il continuera à être considéré et traité en tous points comme sujet ottoman. Aucun sujet ottoman

ne pourra obtenir un acte d'autorisation délivré en vertu d'un irade impérial». Article 9 provides that: «tout individu habitant le territoire ottoman est réputé sujet ottoman et traité comme tel jusqu'à ce que sa qualité d'étranger ait été régulièrement constatée».

³¹ The *Circulaire* is published in G. Cogordan, *La nationalité au point de vue des rapports internationaux*², Paris, Larose et Forcel, 1890, pp. 465-466. The relevant passage reads: «la dernière disposition de la loi se rapporte exclusivement aux cas d'individus que l'on aurait des raisons de croire sujets ottomans et qui revendiqueraient une nationalité étrangère sans être en mesure de justifier leur dire. Il est clair que [...] la preuve de la nationalité étrangère incombe à celui qui la revendique, et jusqu'à ce qu'il fournisse cette preuve, les autorités impériales doivent, en tant qu'il se trouve sur le territoire ottoman, le considérer et le traiter comme sujet ottoman [...] l'article ne porte aucune atteinte aux droits acquis aux étrangers par les traités, et n'autorise point les Autorités impériales à se départir des règles découlant de ces traités dans leurs rapports avec les étrangers [...] cette loi, comme toute loi d'ailleurs, n'a pas d'effet rétroactif». Concerning Article 5 it clarifies that «l'article 5 exige du sujet ottoman qui veut acquérir une nationalité étrangère de se munir préalablement d'un acte d'autorisation qui lui sera délivré en vertu d'un irade impérial, sans quoi sa naturalisation sera toujours considérée comme nulle et non avenue». With a subsequent note of April 21, 1869, (published in «Archive Diplomatiques», 1870, pp. 50-53), the Sublime Porte reiterated that the statute's only aim was to tackle «les abus qui devaient, par la force des choses, découler des capitulations et qui augmentaient de jour en jour».

³² According to the Italian consul

in Beirut, Article 9 of the Turkish law on nationality poses a threat for all the «individui che vantano antenati italiani [che] si stabilirono in Turchia sotto il governo delle italiane repubbliche, e passarono poi sotto la dominazione turca [poiché] non sono in grado di produrre i titoli [...] della loro discendenza dall'antenato che emigrò in Turchia e la fede di nascita in Italia di quell'antenato [...] a tanta distanza dall'antenato a cui rimontano» (Questione di nazionalità in Turchia, Rapporto del cavaliere De Gubernatis nobile Enrico, regio console a Beirut, settembre 1892, in ASDMAE, cons. cont., p. 4, f. 12, p. 6). However, the consul stresses that «essi vantarono per secoli la qualità di stranieri [e] ne hanno goduto i benefici» (Ivi, p. 10). The fact that Venetians and Genoans were among the first communities to enjoy extraterritorial privileges in the territories of the then Byzantine empire is confirmed, among others, by M. Soosa Nasim, *Historical Interpretation of the Origin of the Capitulations in the Ottoman Empire*, in «Temple Law Quarterly», 4, 1929-1930, pp. 358-371 (in particular p. 362).

³³ According to the opinion adopted by the *Consiglio* at Esperson's proposal: «non possiamo fare alcun rimprovero alla Turchia per aver emanato la legge del 1863 [...] la quale limitò la protezione agli indigeni che sono impiegati come guardie o come dragomanni [...] la Turchia aveva il diritto di emanarla, per far cessare le protezioni abusive, che erano molto numerose [...] è ben giusto che tale protezione sia estesa agli indigeni che sono impiegati come guardie o come dragomanni al servizio dei consolati; ma non vi ha ragione alcuna di estenderla ad altre persone» (Parere del Consiglio del contenzioso diplomatico del 27 maggio 1894, Protetti e cittadini italiani in Turchia, n. 117, Esperson, in ASDMAE, cons. cont., p. 5, f. 1, p. 4).

³⁴ In the opinion it is stated that: «il comitato del contenzioso presso il ministero degli esteri della Francia, corrispondente al nostro Consiglio del contenzioso diplomatico, fu riunito per esaminare la legge e riconoscere se essa non contenesse nulla di contrario alle regole poste dalle capitolazioni. Il risultato di questo esame fu che: la legge del 1869 nulla ha di contrario al diritto internazionale in generale, e che essa non porta alcuna offesa ai diritti ed ai privilegi riconosciuti dalle capitolazioni e consacrati negli usi» (Parere del 27 maggio 1894 cit., pp. 12-13). Below, Esperson's draft takes note of the opinion expressed by Cogordan, *La nationalité au point de vue des rapports internationaux* cit., p. 150. For an account of the (overall positive) French diplomatic reaction to the approval of the statute, see E.R. Salem, *Des effets en Turquie de la naturalisation obtenue par un sujet ottoman sans autorisation du gouvernement turc. De la compétence des tribunaux ottomans pour juger les étrangers qui commettent en Turquie un acte délictueux envers un sujet ottoman*, in «Journal de droit international privé», 33, 1906, pp. 65-93 (in particular p. 69 and footnote 2) and Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., p. 70.

³⁵ In dealing with nationality, the opinion states, at the outset, that «ogni Stato [è] libero, in forza del potere legislativo inerente alla sovranità, di regolare, come meglio crede, le condizioni dalle quali dipende la qualità di nazionale» (Parere del Consiglio del contenzioso diplomatico del 27 maggio 1894 cit., p. 13). Applying this principle to the provision contained in Article 5 of the Turkish law, Esperson holds that from the above principle follows that «ciascuno Stato, in virtù della sua sovranità, è libero di regolare la naturalizzazione come meglio crede, subordinandola alle condizioni che giudica più convenienti [...] quando si vuol sapere

trattandosi di naturalizzato, quale sarà la sua situazione rispetto al suo paese d'origine, se, cioè, il governo da cui egli dipende al momento della naturalizzazione lo considererà snazionalizzato, oppure se continuerà, non ostante la naturalizzazione, ad esercitare a di lui riguardo la sua sovranità, la decisione di siffatta questione non può appartenere che al diritto pubblico interno dello Stato dal quale il naturalizzato vuole staccarsi» and concludes: «Non poteva negarsi alla Turchia, ammessa nel concerto delle nazioni civili, il diritto di regolare la snazionalizzazione dei suoi sudditi e di impedire che questa segua coll'unico intendimento di sottrarli alla sua autorità legislativa» (Ivi, pp. 13-14, emphasis in the original). It is interesting to note that Esperson attaches importance to the Sublime Porte's admission «à participer aux avantages du droit public et du concert européens», provided for by Article 7 of the treaty of Paris of March 30, 1856, albeit recognising that «siamo lontanissimi ancora dal caso di rinunciare alle capitolazioni, perché certamente molto rimane da fare alla Turchia per porsi al livello delle nazioni civili» (Ivi, p. 4). On the treaty of Paris of 1856 and its consequences on the status of Turkey under international law see (in addition to the works cited above) H. McKinnon Wood, *The Treaty of Paris and Turkey's Status in International Law*, in «The American Journal of International Law», 37, 2, 1943, pp. 262-274; A. Tryol y Serra, *L'expansion de la société internationale aux XIXe et XXe siècles*, in «Recueil des Cours», 116, (1965), pp. 89-169 (in particular pp. 129-132); Y. Onuma, *When Was the Law of International Society Born – An Inquiry of the History of International Law from an Intercivilizational Perspective*, in «Journal of the History of International Law», 2, 1, 2000, pp. 1-66 (in particular pp. 33-36); E. Agustí, *La Sublime*

Porta e il Trattato di Parigi del 1856. Le ragioni di una partecipazione, in «Le Carte e la Storia», n. 1, 2008, pp. 151-159; Ead., *From Capitulations to Unequal Treaties. The matter of an Extraterritorial Jurisdiction in the Ottoman Empire*, in «Journal of Civil Law Studies», v. 4, 2011, pp. 285-307; Ead., *L'intervento europeo in Oriente nel XIX secolo: storia contesa di un istituto controverso*, in *Constructing International Law. The Birth of a Discipline* cit., pp. 277-330. Capitulations will eventually be abolished in 1923 with the treaty of Lausanne.

³⁶ The opinion reads, in relevant part: «E parimenti unilaterale la questione tendente a conoscere la nazionalità in generale di un individuo [...] essendo ogni stato libero di regolare come meglio crede la condizione dalla quale dipende la qualità di nazionale [...] in massima generale chi da noi è considerato italiano dev'esserlo anche dalla Sublime Porta, salvo che questa non dimostrasse, a sua volta, che l'italiano divenne ottomano» (Parere del 27 maggio 1894 cit., pp. 13-14). It follows that: «La disposizione dell'art. 9 [...] non impone ad alcuno la nazionalità ottomana, ma fa solo sorgere una presunzione di siffatta nazionalità riguardo a chi, residente nell'impero, non è in grado di constatare la sua qualità di straniero. Se egli è effettivamente straniero, non gli mancherà certamente la prova per dimostrarlo; ma fino a tanto che non abbia fornito siffatta prova, vale a dire, sino a prova contraria, non essendo stata stabilita che una presunzione soltanto *juris*, è ben giusto che si presuma suddito ottomano, e, come tale, venga reputato e trattato. La disposizione dell'art. 9 sarebbe stata ingiusta unicamente nel caso nel caso in cui avesse stabilito una presunzione *juris et de jure*, la quale non ammette prova contraria» (Ivi, p. 14).

³⁷ According to the opinion under review: «è ben giusto che per le famiglie di origine italiana [...] i

cui antenati si stabilirono in Turchia sotto il governo delle italiane repubbliche [...] debba bastare la loro iscrizione nei registri consolari ed il possesso della nazionalità, senza che occorra precisare l'epoca in cui i loro antenati vennero a stabilirsi in Turchia. La iscrizione, infatti, ed il possesso della nazionalità italiana sono più che sufficienti ad attribuire la cittadinanza, poco importando se lo stabilimento in Turchia dati più o meno tempo, non essendo tale fatto valevole a distruggere la presunzione di cittadinanza» (Parere del 27 maggio 1894 cit., pp. 14-15). The definition of the proof of nationality *iure sanguinis* as *probatio diabolica* is taken from A.-N. Makarov, *Règles générales du droit de la nationalité*, in «Recueil des Cours», 74, 1949, pp. 269-378 (in particular p. 364).

³⁸ See E. Pears, *Turkish capitulations and the status of British subjects and other foreign subjects residing in Turkey*, in «Law quarterly review», 21, 1905, pp. 408-425 (in particular p. 413) and Phillimore, *Commentaries upon International Law*, cit., I, p. 341 (quoted in Augusti, *Storie e storiografie dei consolati in oriente tra Otto e Novecento* cit., p. 6 and footnote 25).

³⁹ See, for instance, Esperson, *Il principio di nazionalità* cit., pp. 62-63, where the author affirms that «se alcuno [...] pretendesse di essere considerato come cittadino italiano, la controversia dovrebbe essere risolta consultando le disposizioni del codice civile del regno d'Italia concernenti l'acquisto e la perdita della cittadinanza» and, in the same vein, Contuzzi, *Cittadinanza. Diritto internazionale* cit., pp. 319-324.

⁴⁰ With regard to the Ottoman conception of nationality, it has been pointed out that: «I non-musulmani, gli infedeli, erano divisi in tre categorie: i dhimma, i musta'min e gli harbi, a seconda che si trattasse di cristiani sudditi ottomani, individuati singolarmente o a comporre piccole comunità

minoritarie, definite millet; di stranieri cristiani che si fossero trattenuti temporaneamente sul territorio ottomano e di nemici dei musulmani tout-court, cioè di tutti quei soggetti che non avessero riconosciuto l'Islam» in accordance with the principle «ignoto all'occidente della personalità del diritto in base alla confessione religiosa» (E. Augusti, *Storie e storiografie dei consolati in Oriente tra Otto e Novecento* cit., p. 13). Below (making reference to C.A. Nallino, *Diritto Musulmano, Diritti Orientali Cristiani*, in M. Nallino (ed.), *Raccolta e scritti editi e inediti*, Roma, Ipocan, 1942, v. 4), the author explains that «Il diritto [...] è unico per tutti i musulmani, ovunque risiedano, da qualsiasi sovrano dipendano, a qualsiasi "razza" appartengano» since «il diritto musulmano non ha alcuna relazione con il concetto di territorialità» and, consequently, «quel tipo di rapporto dell'individuo verso lo Stato che si qualifica "cittadinanza" o "nazionalità", è cosa ignota al sistema musulmano» (Consiglio, see also Ead., *Protezione, sicurezza, assistenza, solidarietà* cit., pp. 59-60).

⁴¹ The native Moroccan had been registered as a *protégé* by the Italian consulate in Tangier for the service of the Italian firm Lombroso & Co. on June 2, 1897. He was, then, arrested on July 5, 1898 and released on January 20, 1899 (see Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico del 14 marzo 1889, oggetto: domanda di indennità della ditta V.A. Lumbruso verso il governo marocchino in ASDMAE, cons. cont., p. 5, f. 6, with the attached diplomatic correspondence). The ministry of foreign affairs asks the opinion of the Consiglio on March 14, 1899, i.e. after the release of the protégés. The question is, thus, confined to the matter of damages. For general reference, see H.C.M. Wendel, *The Protégé System in Morocco*, in «Journal of modern

history», 2, 1, 1930, pp. 48-60.

- ⁴² According to the opinion adopted by the *Consiglio* on Fusinato's draft: «è un principio generalmente accolto nella teoria e nella pratica del diritto delle genti che, come regola, la riparazione non debba oltrepassare i limiti del danno direttamente e immediatamente accertato» whereas «i danni indiretti, per i precetti del diritto internazionale (che ebbero la più solenne consacrazione nella sentenza del tribunale arbitrale di Ginevra [...]), non possono costituire una base sufficiente per fondare un giudizio per calcolo di indennità nei rapporti fra le nazioni» (Parere del Consiglio del contenzioso diplomatico del 25 marzo 1899, domanda di indennità della ditta V.A. Lumbroso di Livorno verso il governo marocchino, Fusinato, n. 131, ASDMAE, cons. cont., p. 5, f. 13, pp. 1-2). On the indirect claims doctrine contained in the arbitral award see, among many, Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 413-417.

- ⁴³ In Fusinato's words, «mancherebbe, in ogni caso, la indispensabile dimostrazione del vincolo di necessaria e inevitabile causalità fra il fatto e il danno. Invero, dopo l'arresto del Ben Giumla ben poteva la ditta nominare un altro suo rappresentante [...] e nol fece» (Parere del 25 marzo 1899 cit., p. 2). As a consequence, «le domande della ditta non potrebbero venire accolte se non ammettendo di poter entrare nel terreno degli apprezzamenti delle utilità che l'individuo illegalmente privato della sua libertà personale, avrebbe potuto trarre, in determinate circostanze, dalla propria attività personale, o dal proprio patrimonio» (Ivi, pp. 2-3).

- ⁴⁴ In his separate opinion, Pierantoni agrees «che non vi sia ragione di reclamare danni nel caso, e che la Ditta in nessun modo possa reclamarli» but reaches this conclusion «per ragioni pienamente

diverse da quelle della relazione» (Voto separato del consigliere Pierantoni, attached to the Parere del 25 marzo 1899 cit., pp. 7-8).

- ⁴⁵ Pierantoni «non crede che calzi qui l'esempio dei danni indiretti nel caso Alabama» (Voto separato cit., p. 8). He, then, distinguishes the two cases on account of the different facts underlying the two of them: «Innanzitutto il tribunale arbitrale di Ginevra, l'America presentò la domanda dei danni diretti e indiretti, imputandoli al governo inglese. I primi erano composti del valore della distruzione delle navi e dei loro carichi per opera delle navi degli insorti; gli altri erano formati dalle spese fatte per l'inseguimento delle navi corsare, per le perdite sofferte in seguito al trasferimento sotto bandiera inglese di navi della marina mercantile degli Stati Uniti, per l'elevazione dei prezzi di assicurazione, e per le perdite sofferte per il prolungamento della guerra [...] Qui la dedotta mancanza dell'acquisto delle pelli dipepe dalla impossibilità in cui si trovò il [protetto] di fare il sensale» (*ibidem*). On the Alabama case, Pierantoni published A. Pierantoni, *La questione anglo-americana dell'Alabama: studio di diritto internazionale pubblico e marittimo*, Firenze, Stabilimento Civelli, 1870 and Id., *Gli arbitrati internazionali e il trattato di Washington*, Napoli, De Angelis, 1872, where the author recalls that a passage from his previous monograph had been quoted in the US case (Ivi, p. 8 and footnote 1).

- ⁴⁶ According to Pierantoni, the case at hand calls for the identification of the «fondamento dell'azione di responsabilità [...] in diritto internazionale»; that is to say, «come nel diritto interno, così nello internazionale, la legge, il patto, il delitto e il quasi-delitto», with the precision that «[i] trattati [...] equivalgono alla legge tra le parti stipulanti» (Voto separato cit., p. 4). With reference to the case at hand, he, then,

points out that the question is «se sia esistita la violazione del diritto di protezione», i.e. «se il governo del Marocco [abbia] violato la fede dovuta ai trattati», and in particular to the treaty of Madrid of July 3, 1880 (*ibidem*, emphasis in the original). Pierantoni's elaboration on the foundation of the international responsibility naturally echoes that expressed in Pierantoni, *I fatti di nuova Orleans e il diritto internazionale* cit.

- ⁴⁷ In his separate opinion, the author stresses the «carattere speciale, che il diritto di protezione assume ne' paesi retti a capitolazioni [ove] per diritto comune i consoli debbono proteggere i loro cittadini [mentre] per diritto speciale inerente al sistema delle giurisdizioni consolari la protezione [...] si estende benanche ad una categoria di individui che, sudditi del paese nel quale si svolgono i privilegi e le immunità consolari, si pongono al servizio degli ambasciatori, de' consoli stranieri e di un determinato commercio straniero» (Voto separato cit., pp. 4-5).

- ⁴⁸ Article 7 of the treaty of July 3, 1880 provides as follows: «foreign representatives shall inform the Sultan's minister of foreign affairs, in writing, of any selections of an employee made by them. — 2. They shall furnish annually to the said minister a list of the names of the persons protected by them or by their agents throughout the states of the Sultan of Morocco. — 3. This list shall be transmitted to the local authorities, who shall consider as persons enjoying protection only those whose names are contained therein». Article 8, in turn, reads: «consular officers shall transmit each year to the authorities of the district in which they reside a list, bearing their seal, of the persons protected by them. These authorities shall transmit it to the minister of foreign affairs, to the end that, if it be not conformable to the reg-

ulations, the Representatives at Tangier may be informed of the fact. — 2. A consular officer shall be required to give immediate information of any changes that may have taken place among the persons protected by his consulate». An English version of the treaty is available at <<https://www.loc.gov/law/help/us-treaties/bevans/m-ustoo0001-0071.pdf>>. In its separate opinion Pierantoni reports (in Italian translation) the treaty's main provisions (see Voto separato cit., p. 7). For references on the treaty, see Wendel, *The Protégé System in Morocco* cit., pp. 54-55 and 56-60, and Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 469-470.

⁴⁹ In Pierantoni's own words, «la lista doveva essere trasmessa alle autorità locali e al ministero, e il governo marocchino non era obbligato a riconoscere [il] protetto. I servizi che l'anizdetto marocchino doveva rendere alla ditta, dovevano essere indicati nel certificato. Mancando l'osservanza delle condizioni e delle solennità della nomina manca la violazione del trattato; e quindi cade certamente l'azione di danno nascente dalla supposta inosservanza» (Voto separato cit., pp. 7-8). Hence, the separate opinion concludes that: «Ogni altra argomentazione [è] superflua, se non vi fu manifesta violazione del diritto di protezione, l'arresto del sensale fa mancare la ragione a chiedere per lui la indennità [...] ed esclude assolutamente l'azione dei Lumbroso» (*ibidem*).

⁵⁰ See Parere del Consiglio del contenzioso diplomatico del 19 giugno 1898, n. 127, Cappelli, Reclamo di italiani danneggiati nello Stato di Bahia (Brasile) nel 1896, in ASDMAE, cons. cont., p. 5, f. 5, p. 8, where the *Consiglio* makes reference to the norms of «il diritto internazionale universalmente riconosciuto fra popoli civili» as the only applicable law.

⁵¹ See M. Koskenniemi, *International Law in the World of Ideas*, in M.

Koskenniemi, J. Crawford (eds.), *The Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2012 pp. 57-60 (in particular p. 59).

⁵² See Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law* cit., p. 415, and, in the same sense, Chetail, *Migration, droits de l'homme et souveraineté* cit., pp. 40-47, E. Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 105-106. On the principle of equal treatment (so-called Calvo doctrine) see C. Calvo, *Dictionnaire de droit international public et privé*, 2 vv., Berlin-Paris, Puttkammer et Mühlbrecht-Pedone Lauriel, 1885, v. 2, pp. 170-173 (entry "responsabilité internationale"); A.A. Alvarez, *Latin America and International Law*, in «The American Journal of International Law», 3, 1909, pp. 269-353; J.M. Yepes, *Les problèmes fondamentaux du droit des gens en Amérique*, in «Recueil des Cours», 47, 1934, pp. 1-144 and, for an appraisal, J. Rizzarray y Puente, *The concept of "denial of justice" in Latin America*, in «Michigan Law Review», n. 43, 1944-1945, pp. 383-406 (in particular pp. 388-389). The Calvo doctrine is summarized in P. Bordwell, *Calvo and the 'Calvo doctrine'*, in «The Green Bag», 28, 7, 1906, pp. 377-382. On the opposite principle of the international minimum standard, see M. Paparinski, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford, Oxford University Press, 2013, pp. 20-44; H. Dickerson, *Minimum Standards*, in MPEPIL; A. Roth, *The Minimum Standard of International Law Applied to Aliens*, The Hague, Sijthoff, 1949. See also the speech given by the US secretary of State in 1910, published as E. Root, *The Basis of Protection to Citizens Residing Abroad*, in «The American Journal of International Law», 4, 1910, pp. 517-528.

⁵³ In this regard, the *Consiglio* states

that «nessuno stato può essere obbligato ad accordare ai cittadini di altro stato maggiori guarentigie di quelle che concede ai propri cittadini, pur essendo strettamente tenuto a fare tutto ciò che gli è possibile per tutelare la sicurezza della vita e delle sostanze dei primi come dei secondi» (Parere del 19 giugno 1898 cit., p. 8).

⁵⁴ The *Consiglio* attaches importance to the fact that «i fatti dolorosi che si lamentano non avvennero e non avvengono solamente a danno degli italiani, ma hanno luogo abitualmente anche a danno dei brasiliani e sono cagionati dal deplorevole stato delle cose in alcune regioni di quella repubblica» and that «il governo federale ed il governo locale nell'ottobre 1896 hanno fatto ogni sforzo per impedire gli atti di brigantaggio contro gli italiani e per punirli» (Parere del 19 giugno 1898 cit., p. 8).

⁵⁵ In the words of the *Consiglio*: «conviene che il regio governo vigili per accertare se dal processo stesso non siano per risultare, a carico del predetto individuo [...] responsabilità di tale natura da impegnare anche la responsabilità delle autorità governative, così da giustificare, in questa parte, una domanda di rifacimento a vantaggio dei nostri connazionali danneggiati» (Parere del 19 giugno 1898 cit., p. 9). Interestingly, the *Consiglio* shares the conclusion reached by the legal adviser of the Brazilian ministry of foreign affairs, see Parecer: Indenização reclamada pela legação da Itália pelo saque que sofreram vários súditos italianos estabelecidos no sertão da Bahia, em local onde a ação preventiva da autoridade não se podia exercer eficazmente, e onde os mesmos se haviam fixado espontaneamente, Carlos de Carvalho, 22 de julho de 1905, in A.P. Cachapuz de Medeiros (ed.), *Pareceres dos Consultores Jurídicos do Itamaraty*, v. I, 1903-1912, Brasília, FUNAG, 2000, pp. 11-16. The role of *Consultor Jurídico* of the Brazilian ministry

of foreign affairs was established by decree n. 2358 of February, 19, 1859, see, for references, F.M. de O. Castro, *1808-2008: dois séculos de história da organização do Itamaraty*, Brasília, FUNAG, 2009 (in particular p. 111). The role was covered by renown professors of international law, such as Antônio Pimenta Bueno (1803-1878), José Maria da Silva Paranhos (1819-1880), Carlos Augusto de Carvalho (1851-1905), Amaro Cavalcanti (1849-1922), Clovis Bevilacqua (1859-1944). In an opinion of 1911, Bevilacqua provides a useful insight on the work carried out by the office, see Parecer: sobre o apoio a conceder-se as reclamações enquanto não se esgotarem os recursos da via judiciária, Clovis Bevilacqua, 23 de janeiro 1911 in *Pareceres dos Consultores Jurídicos do Itamaraty* cit., pp. 114-120.

- ⁵⁶ The issue is widely treated in international law works of the time; see, for the South American position, C. Calvo, *De la non-responsabilité des Etats à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerre civile*, in «Revue de droit international et de législation comparée», 1, 1869, pp. 417-427. Calvo's views are accepted, in principle, by European authors, see, for instance, J.K. Bluntschli, *Le droit international codifié* cit., p. 224 (art. 380 bis); Pradiere-Fodéré, *Traité de droit international public européen et américain* cit., v. 1, pp. 346-348; F. Despagnet, *Cours de droit international public*, II ed. complètement revue et mise au courant, Paris, Sirey, 1899, pp. 469-471; Hall, *A Treatise on International Law* cit., pp. 218-219 and, among monographs, V. Pennetti, *Responsabilità internazionale in caso di rivolte o di guerre civili. Lettura fatta al circolo giuridico di Napoli*, Napoli, stab. tip. G. Cozzolino e c., 1899; A. Rougier, *Les guerres civiles et le droit des gens*, Paris, Larose, 1903. In 1899-1900, the issue was discussed at

the Institut de droit international, see supra footnote 7.

- ⁵⁷ According to the Peruvian ministry of foreign affairs, the note was conceived «no solamente para justificar la manera como se ha resuelto las demandas [...] sino por [exponer] de modo sucinto los principios que acerca de [las reclamaciones diplomáticas] admite [el] gobierno y que son los que ha aplicado en la presente oportunidad» (Il ministro delle relazioni esteriori del Perù al r. ministro in Lima, Lima, 26 ottobre 1897, attached to Relazione del ministero degli affari esteri del 29 gennaio 1899, oggetto: recente dottrina del Perù in ordine ai danni sofferti da regi sudditi in quello Stato durante la guerra civile, Roma, 29 gennaio 1899, in ASDMAE, cons. cont., p. 5, f. 2, pp. 6-7). The note had been transmitted to the Italian, British, French, German and Spanish representatives. For references, see P. Pradier-Fodéré, *Traité de droit international public européen et américain* cit., v. 1, pp. 234-239, and, in more recent times, Irizarry y Puente, *The concept of "denial of justice" in Latin America* cit., p. 390, footnote 30.

- ⁵⁸ According to the Peruvian ministry of foreign affairs, «indiscutibile es ciertamente el que sirve de fundamento a las reclamaciones diplomáticas: el Estado debe protección a sus miembros, no sólo dentro de su territorio, sino donde quiera que se hallen, siendo ésta una de las principales ventajas de la asociación política a cuya satisfacción tiende la moderna institución de las legaciones permanentes. Objeto de esa protección es reparar las injurias que el extranjero recibiese en el país de su residencia, y que, en ciertos casos, trascienden al Estado a que pertenece, y indemnizarle de los daños que en el mismo pudieran irrogársele [...] pero, si es cierto el principio, no es siempre admisible la extensión que se pretenden darle al aplicarlo, por lo que,

en esta materia, encuentra-se la dificultad en reconocer, para no exagerarlo, hasta dónde se extiende aquel deber de protección y cuando, por consiguiente, pueden los gobiernos entablar legítimamente reclamaciones, en defensa de sus nacionales» (Il ministro delle relazioni esteriori del Perù cit., pp. 6-7). The note appears to be widely based upon C. Wiese, *Le droit international appliqué aux guerres civiles, édition française revue et mis à jour par A. De Blonay*, Lausanne, B. Benda libraires-éditeurs, 1898.

- ⁵⁹ On the issue, the Peruvian note reads as follows: «el ingreso de un individuo al territorio de un Estado a que no pertenece, origina entre ambos reciprocas derechos y obligaciones: aquel contrae la de respetar las leyes del país, obedecer a sus autoridades, someterse a su jurisdicción, y tácitamente se compromete también a sufrir resignado los vicios de su organización o de su estado social; el Estado, por su parte, se impone respecto de extranjero la obligación de hacerle justicia, de velar por su existencia, de defenderle sus bienes y de no hacer distinción entre el y los nacionales en lo relativo a la garantía de sus derechos; pero [...] no se deduce, por cierto, de esta reciprocidad de derechos y obligaciones que los extranjeros hayan de encontrarse en mejor condición que los nacionales, lo que no se puede pretender sin alterar el orden natural de su situación respectiva [...] si se la llevase mas allá de sus naturales y justos limites, pretendiéndose colocar a los nacionales en una situación de inferioridad tanto mas irritante cuanto menos fundada [...] el elemento extranjero, lejos de ser agente poderoso de bienestar, se convertiría, para los países, en carga pesada y peligrosa, de la que, sobre todo los débiles, procurarían verse libres en previsión de desagradables desavenencias, si no, desdolorosas humillaciones» (Il ministro delle

relazioni esteriori del Perù cit., p. 7). It has been noted that «no doctrine is more strongly emphasized by Latin-American publicists than the general principle that aliens coming and settling in a country must normally share its fortunes, and have no claim to better treatment than nationals» (Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 236-237). The same argument is crafted by Wiesse, *Le droit international appliqué aux guerres civiles* cit., 1898, pp. 44-46.

⁶⁰ The Peruvian note goes on in stating that «no afectan la responsabilidad de la nación, ni pueden, por consiguiente, ser materia de reclamación diplomática, los danos y perjuicios que sufran los extranjeros como consecuencias inevitables del estado de rebelión o de guerra civil, ni los que en tal estado les causen las facciones rebeldes [...] derivar responsabilidad des estado de insurrección, pretender ponerse a cubierto de sus danos inevitables, importa, pues, tanto como querellarse de un terremoto o otro semejante siniestro: la insurrección es una calamita general, extensiva à todos los habitantes del pais en que ocurre, y de la cual, por consiguiente, nadie tiene el derecho de pretender sustraerse con absurdas exigencias de responsabilidad, como si fuesen los gobiernos sociedades de seguros contra riesgos y danos que de ellos no dependen ni pueden, en la generalidad de los casos, impedir» (Il ministro delle relazioni esteriori del Perù cit., pp. 7-8). The appeal from the contrary by which the Peruvian note equals government with insurance companies appears, identical, in Von Bar, *De la responsabilité des États à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile* cit., pp. 468-469 (published two years later).

⁶¹ The Peruvian note admits international responsibility in cases where there has been «culpable

y notoria negligencia» from state agents; however, it maintains that responsibility is not triggered «si el gobierno desaprueba y condena [la] conducta y somete al funcionario culpable al juicio correspondiente para hacer efectiva, conforme à ley, la responsabilidad civil y criminal en que hubiese incurrido» (Il ministro delle relazioni esteriori del Perù cit., pp. 8-9).

⁶² Actually, the ministry asks the *Consiglio*: «Se e fino a qual punto ritenga l'alto consesso doversi dal governo del Re far luogo all'azione diplomatica a pro dei reclami italiani in confronto della dottrina alla quale il governo peruviano afferma di voler informare la propria condotta» (Relazione del ministero degli affari esteri al Consiglio del contenzioso diplomatico, oggetto: recente dottrina del Perù in ordine ai danni sofferti da regi sudditi in quello Stato durante la guerra civile, Roma, 29 gennaio 1899, in ASDMAE, cons. cont., p. 5, f. 2, p. 1).

⁶³ According to the *Consiglio*, «uno Stato il quale o si sottraesse [...] o fosse impotente ad adempiere [il suo dovere di difesa della vita e dei beni] tanto verso i nazionali quanto verso gli stranieri [...] perderebbe la sua ragione d'essere di Stato civile. I nazionali hanno con l'esercizio dei diritti politici o, quando altro manchi, con la rivoluzione [...] modo di difendersi da un governo incivile. Lo straniero, che non gode dei diritti politici ed è tenuto alla neutralità, deve trovare altra guarentigia che sia capace di salvaguardare in lui i diritti della civiltà umana [...] Questa guarentigia sta nella protezione dello Stato al quale egli appartiene» (Parere del Consiglio del contenzioso diplomatico del 19 febbraio 1899, n. 130, Cappelletti, Reclami di italiani verso il Perù per danni sofferti durante la guerra civile 1894-1895, in ASDMAE, cons. cont., p. 5, f. 5, p. 3).

⁶⁴ Notably, the *Consiglio* considers that an exception to the rule that

excludes international responsibility for damages occurred to foreigners during civil commotions had to be provided «quando si trattasse [...] di moti popolari diretti specialmente contro gli stranieri» (Parere del 19 febbraio 1899 cit., p. 4).

⁶⁵ The opinion makes it clear that the reference to the facts of Aigues Mortes is intended to «escludere l'ingiusta accusa [che] una interpretazione simile del diritto le potenze europee non la applicano fra loro, ma solo quando trattasi delle repubbliche sudamericane» (Parere del 19 febbraio 1899 cit., p. 4). It is true that, after the killing of 7 Italian workers at the salterns of Aigues Mort (and the wounding of 26) by a mob led by French workers, the French government operated swiftly in opening an enquiry and providing redress to the families. At the same time, sources witness that economic redress was provided «dans une pensée d'humanité» (see *Chronique de faits internationaux*, in «Revue générale de droit international public», 1, 1894, pp. 171-181 and Borchard, *The Diplomatic Protection of Citizens Abroad* cit., p. 221).

⁶⁶ The *Consiglio* labels as «veramente inammissibile la pretesa del governo peruviano, il quale vuole negare [un'indennità] a stranieri non d'altro colpevoli che di essere incorsi nelle persecuzioni delle autorità locali» (Parere del 19 febbraio 1899, p. 5). The arbitral award issued on February 13/25, 1897 is published in G. Regelsperger, *L'affaire du Costa Rica Packet et la sentence arbitrale de M. de Martens*, in «Revue générale de droit international public», t. IV, 1897, pp. 735-745. See, for references, J. Valéry, *Sur la sentence arbitrale rendue dans l'affaire du Costa Rica Packet*, in «Revue générale de droit international public», 5, 1898, pp. 57-66 and J. Dietzmann, *Costa Rica Packet Arbitration*, in MPEPIL.

⁶⁷ Together with the other docu-

ments relating to the case, the *Consiglio* is transmitted the legal opinion given by the British Law Officer of the Crown and by the Spanish government legal adviser, in Italian translation (see Il R. ambasciatore in Londra al ministro degli affari esteri, Londra, 1 marzo 1898, and Nota verbale [traduzione] Madrid 4 luglio 1898, attached to Relazione del ministero degli affari esteri del 29 gennaio 1899 cit., pp. 17 and 19-20). Not surprisingly, these opinions resemble that given by the *Consiglio* in all the relevant passages. Few months after the *Consiglio* gave its opinion, Italy and Peru conclude an agreement to submit the claims originally rejected to the arbitration of the Spanish ambassador in Lima (see Acuerdo diplomático para el arreglo de las reclamaciones italianas, firmado, en Lima, a los 25 días del mes de noviembre 1899, published in H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux* (1794-1900), Berne, Imprimerie Stampelli & CIE, 1902, pp. 614-615).

- ⁶⁸ J. Paulsson, *Denial of justice in international law*, New York, Cambridge University Press, 2005, p. 22. The author argues that «the duty to provide decent justice to foreigners arises from customary international law. Indeed, it is one of its oldest principles» and recalls the definition of denial of justice elaborated by Grotius and Vattel. The former, «conceived two types of denial of justice: (i) where a judgement cannot be obtained against a criminal or a debtor within a reasonable time and (ii) where in a very clear case judgement has been rendered in a way manifestly contrary to law»; the latter «the true intellectual father of denial of justice [...] proposed a systemic approach to the illegitimate refusal of justice under three heads: (i) not admitting foreigners to establish their rights before the ordinary courts; (ii)

delays which are ruinous or otherwise equivalent to refusal; (iii) judgements manifestly unjust and onesided» (Ivi, pp. 1, 62 and 65).

- ⁶⁹ See, for the South American position, C. Calvo, *Dictionnaire de droit international public et privé* cit., v. 1, p. 237 (entry «déné de justice») and, for an appraisal, Irizarry y Puente, *The concept of "denial of justice" in Latin America* cit., pp. 383-406.

- ⁷⁰ On attribution, see J.R. Crawford, T.D. Grant, *Local Remedies, Exhaustion of*, in MPEPIL, par. 7; C. De Visscher, *Le déni de justice en droit international*, in «Recueil des Cours», 52, 1935, pp. 369-441 (in particular pp. 373-374); Borchard, *The Diplomatic Protection of Citizens Abroad* cit., p. 219.

- ⁷¹ On the relationship between denial of justice and the local remedy rule see Paulsson, *Denial of justice in international law* cit., p. 8; Borchard, *The diplomatic protection of citizens abroad* cit., p. 179; Freeman, *The international responsibility of States for denial of justice* cit., p. 56; Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law* cit., p. 404 and Id., *Origins and Historical Development of the Local Remedy Rule in International Law*, in «Revue Belge de droit international», 12, 1976, pp. 499-527 (in particular p. 526).

- ⁷² See Borchard, *The Diplomatic Protection of Citizens Abroad* cit., p. 180. On the same line, it has been noted that «[le déni de justice] a son fondement dans le droit international commun ou coutumier; les traités, d'ailleurs nombreux, qui contiennent la clause de libre et facile accès aux tribunaux se bornent à confirmer un principe dont l'autorité est indépendante de toute convention» De Visscher, *Le déni de justice en droit international* cit., p. 374. In the same sense, see also Cançado Trindade, *Origins and Historical Development of the Local Remedy Rule in International Law* cit., p. 526.

- ⁷³ See Spiegel, *Origin and Development of Denial of Justice* cit., p. 79. On the same line, see A.A. Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law*, in «Philippine Law Journal», 53, 1978, pp. 404-416 (in particular p. 404); O.J. Lissitzyn, *The Meaning of the Term Denial of Justice*, in «The American Journal of International Law», 30, 1936, pp. 632-646 (in particular p. 645); Freeman, *The International Responsibility of States for Denial of Justice* cit., pp. 182-183. In its resolution on denial of justice, adopted at the 1927 Lausanne session, on report by Leo Strisower, the Institut de droit international defined denial of justice as the international wrongful act which occur, on the one hand (so-called formal denial of justice), «lorsque les tribunaux nécessaires pour assurer la protection des étrangers n'existent ou ne fonctionnent pas – lorsque les tribunaux ne sont pas accessibles aux étrangers – lorsque les tribunaux n'offrent pas les garanties indispensables pour assurer une bonne justice»; on the other hand (so-called substantive denial of justice), «[lorsque] la procédure ou le jugement constituent un manquement manifeste à la justice, notamment s'ils ont été inspirés par la malveillance à l'égard des étrangers, comme tels, ou comme ressortissants d'un Etat déterminé» (see Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers, available at <http://www.justitiaetpace.org/idiF/resolutionsF/1927_lau_05_fr.pdf>, Articles 5 and 6).

- ⁷⁴ The facts are resumed in Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico del 25 febbraio 1898, Reclamo di Ermoli Antonietta vedova Felice, in ASDMAE, cons. cont., p. 5, f. 5.

- ⁷⁵ Article 23 of the Ley constitutiva

de la Republica de Guatemala decretada por la asamblea nacional constituyente en 11 de diciembre de 1879 (available at <<https://archivos.juridicas.unam.mx/www/bjv/libros/5/2210/14.pdf>>, november 2017) reads as follows: «1. Los habitantes de la Republica tienen asimismo libre acceso, ante los tribunales del País, para ejercitar sus acciones en la forma que prescriben las leyes. – 2. Los extranjeros no podrán ocurrir a la vía diplomática sino en los casos de denegación de justicia. – 3. Para este efecto, no se entiende por denegación de justicia, el que un fallo ejecutoriado no sea favorable al reclamante». It has been noted that that was yet another example of the «established practice of [...] Latin American countries to enact legislation strengthening the principle of exhaustion of local remedies [...] by the mid-nineteenth century» (Cançado Trindade, *Origins and Historical Development of the Local Remedy Rule in International Law* cit., p. 521). However, as correctly pointed out, «[i]t is hardly to be supposed that any foreign State [...] would consider itself bound by a municipal legislative interpretation of the term denial of justice» (Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 334–335).

⁷⁶ Notably, the *Consiglio* considers that «[è] universalmente riconosciuto il principio di diritto internazionale, che la ingerenza in via diplomatica di uno Stato verso l'altro, per la protezione che è doverosa a tutela dei diritti personali e patrimoniali dei propri cittadini, non è permessa nelle controversie private, se non quando [...] pur chiesta giustizia, la sia stata negata, o in odio della nazionalità del reclamante, o per qualsiasi altro motivo. Usata fuori de' detti casi l'azione diplomatica [...] sarebbe trasmodante ed inopportuna, perché lesiva dell'uguaglianza degli Stati e dell'indipendenza dei tribunali e comprometterebbe

altresi gli interessi legittimi degli stessi cittadini, che esplicando la propria attività, abbiano liberamente preso stanza durevole in estero Stato» (Parere del Consiglio del contenzioso diplomatico del 26 marzo 1898, Reclamo di Ermoli Antonietta vedova Felice verso il governo del Guatemala, Pagano-Guarnaschelli, n. 126, in ASDMAE, cons. cont., p. 5, f. 5, pp. 9–10).

⁷⁷ According to the *Consiglio*, which blames the obscurity of the complaint transmitted by the claimant: «siano non tre, ma due, e se vuolsi sia pure uno solo il giudizio pendente, non è lecito alla reclamante, dopo avere liberamente, e secondo le leggi, adito la giustizia locale, ritirarsi indietro a mezzo il cammino, e lasciando sospeso il giudizio e facendo dormire la procedura dei gravami prodotti, venir chiedendo lo straordinario ausilio dell'azione diplomatica» (Parere del 26 marzo 1898 cit., pp. 10–11).

⁷⁸ According to a consistent body of authorities, that is «the most confused and difficult problems in the whole field of international responsibility» (see A.V. Freeman, *The International Responsibility of States for Denial of Justice* cit., p. 308; in the same sense, see also Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 340–341).

⁷⁹ The *Consiglio* holds *verbatim* that «non si può negare che in modo formale non fu negata giustizia al Verlangieri [i.e. the claimant]. Il difetto di motivazione di una sentenza non può aprire l'adito all'esercizio di un'azione diplomatica, quando le leggi di uno Stato in cui un cittadino italiano si trova porgono un sistema di rimedi giuridici che sono stati, sebbene infruttuosamente, sperimentati» (Parere del Consiglio del contenzioso diplomatico, Reclamo Verlangieri verso il governo del Brasile, 10 febbraio 1907, Inghilleri, n. 170, in ASDMAE, cons. cont., p. 7, f. 7, pp. 4–5).

⁸⁰ The concession contract of May

29, 1899, is resumed in the Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico, Vertenza fra la ditta Martini e co. e il governo venezuelano, 15 giugno 1906, in ASDMAE, cons. cont., p. 7, f. 12, p. 1. It is also published (in French) in *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-venezuelien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)*, in «Revue du droit public de la science politique en France et à l'étranger», 47, 1930, pp. 542–598 (in particular pp. 544–546).

⁸¹ On the Venezuelan revolutions and the subsequent international crisis, see A.S. Hershey, *The Venezuelan affair in the light of international law*, in «The American Law Register», 5, 1903, pp. 249–267; W.L. Penfield, *The Anglo-German Intervention in Venezuela*, in «The North American Review», DLX, 1903, pp. 86–96; J. Basdevant, *L'action coercitive anglo-germano-italienne contre le Venezuela (1902–1903)*, in «Revue générale de droit international public», 11, 1904, pp. 362–458; J.H. Ralston, *Venezuelan Arbitrations of 1903, including protocols, personnels and rules of commissions, opinions, and summary of awards, with appendix containing Venezuelan yellow book of 1903, Bowen pamphlet entitled Venezuelan protocols, and preferential question Hague decision, with history of recent venezuelan revolutions*, Washington, Government Printing Office, 1904. In 1903, mixed commission were established by bilateral protocols between Venezuela and the states of nationality of the claimants (i.e. USA, Belgium, France, Germany, Mexico, the Netherlands, and Sweden and Norway). Each commission consist of two delegates appointed, respectively, by Venezuela and the state of nationality of the claimants, and a president (umpire) named by the US president (and, for the American mixed commission, by

the queen of the Netherlands). The Italian commission was regulated by protocols of February 13 and May 7, 1903 (published Ivi, pp. 643-644 and 645-647). With separate agreement, the same countries submitted to an arbitral tribunal to be established within the framework of the Permanent Court of Arbitration, set in The Hague in 1899, the question of preferential treatment; i.e. whether subjects of the blockading powers enjoyed preference over bondholders of different nationalities (the *compromis* concluded by Italy in this regard, on May 7, 1903, is published Ivi, pp. 1050-1055).

⁸² The Award of the umpire in the Martini case, which acknowledged the wrong, but did not grant the entire sum claimed, is published in Ralston, *Venezuelan Arbitrations of 1903* cit., pp. 837-847.

⁸³ The judgment is published (in French) in *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-vénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)* cit., pp. 547-553. The arguments of the parties are resumed in Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico, Vertenza fra la ditta Martini e co. e il governo venezuelano, 15 giugno 1906 cit., pp. 3-4. The company's main argument relates to the conclusion, on November 25, 1903, of another concession contract between the Venezuelan government and another company allegedly incompatible with that in force between the parties (the second concession contract is published in *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-vénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)* cit., pp. 553-555).

⁸⁴ Namely, the ministry asks the Consiglio whether the Supreme Court's decision «contenga in sé e per sé, gli estremi di un diniego di

giustizia»; whether it violated the arbitral award of July 8, 1904, and whether the second concession agreement violated the treaty of friendship, commerce and navigation concluded between Italy and Venezuela on June 19, 1861 and renewed by the protocol of February 13, 1903 (see Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico del 15 giugno 1906 cit., p. 6).

⁸⁵ The clause provided that any doubt and any dispute that might arise in connection with the interpretation and the execution of the contract shall be decided by the courts of Venezuela, in accordance with municipal law; in no case they shall be the object of an international claim (see Parere del Consiglio del contenzioso diplomatico del 3 marzo 1907, reclamo Martini e C. verso il governo della Repubblica del Venezuela, Puccioni, n. 171, in ASDMAE, cons. cont., p. 7, f. 12, p. 11, where the text of the clause is reported in Italian, and *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-vénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)* cit., p. 546 for the French version). For first references on the Calvo clause, see P. Juillard, *Calvo Doctrine/Calvo Clause*, in MPEPIL.

⁸⁶ Parere del 3 marzo 1907 cit., pp. 12-13.

⁸⁷ In the opinion under review, the Consiglio states that: «la citata disposizione, pertanto, non fa ostacolo a che ci accingiamo ad indagare se la sentenza della Corte federale, a danno della società Martini e Co., possa essere impugnata per la via diplomatica; se, in altri termini, ci troviamo in presenza di uno di quei casi eccezionali in cui anche i responsi dell'autorità giudiziaria straniera possono dare luogo a responsabilità di ordine internazionale e quindi ad intervento diplomatico da parte dello Stato cui la persona condannata appartiene» (Parere

del 3 marzo 1907 cit., p. 13).

⁸⁸ In the Consiglio's own word: «nel [quesito] con cui si domanda se vi fu diniego di giustizia si è evidentemente inteso d'impiegare questa espressione [...] nel senso volgare di *ingiustizia*, non già nel senso tecnico, che sarebbe quella di rifiuto di giudicare, di negata amministrazione della giustizia. Ed invero, è innegabile che nel caso speciale, in cui si tratta di giudicare nel merito di una sentenza regolarmente pronunciata, dopo aver ascoltato e (bene o male) vagliato le ragioni delle due parti, non potrebbe parlarsi sul serio di *denegata giustizia* nel senso proprio [...] il quesito va così posto: potrà impugnarsi, nella via diplomatica, la sentenza della Corte suprema venezuelana pel titolo di *evidente ingiustizia*?» (Parere del 3 marzo 1907 cit., pp. 13-14, emphasis in the original).

⁸⁹ In the opinion, the argument to rebut the presumption is crafted as follows: in the first place, the Consiglio acknowledges that there exists a «presunzione di giustizia che, non solo legalmente, ma anche razionalmente, milita a favore della cosa giudicata», but finds that «nel caso speciale [...] il collegio giudiziario da cui emanò il giudicato è quella stessa Corte federale venezuelana di cui nessuna nazione volle sapere, allorché si trattava di giudicare i reclami dei rispettivi cittadini, perché non stimata capace, in affari in cui fosse interessato il governo, di giudicare con imparzialità e indipendenza» (Parere del 3 marzo 1907 cit., p. 14). In the second place, the Consiglio accepts that «non è in generale dato di recare sicuro giudizio sulla correttezza di un giudicato straniero [data] la impossibilità di sottoporre a sindacato, nelle questioni di fatto, la sufficienza delle prove su cui la sentenza è fondata», just to hold that the reasoning does not apply to the case at hand, where «come apparisce dal tenore stesso della sentenza, la contestazione, eccet-

tuato qualche punto di non decisiva importanza, non era caduta sulla realtà dei fatti [...] bensì su questioni di applicazione di principi certi di diritti ai medesimi fatti» (Ivi, p. 15).

⁹⁰ In the words of the *Consiglio*: «la Corte [...] ha basato su due gravi errori di diritto la risoluzione di ciò che era il vero nodo della causa» (Parere del 3 marzo 1907 cit., p. 21).

⁹¹ In detail, the two-fold argument elaborated in the opinion considers, on the one hand, that, for an undisputed principle of contract law, «non [è] lecito al locatore di cambiare, sia nella sostanza, sia nella forma, la cosa costituente l'oggetto della locazione senza il consenso dell'altra parte contraente» and, on the other hand, that a correct understanding of the terms of the dispute would have placed on the plaintiff the burden of proving the contractual breach (see Parere del 3 marzo 1907 cit., pp. 20-21). According to the *Consiglio*, the Supreme Court decision violated both principles, overlooking the fact that the government was the first party to breach the contract and finding against the Martini company albeit evidence was not conclusive: for these reasons, the opinion concludes that «il governo del Re [ha] indubbiamente il diritto di spiegare la sua azione diplomatica per titolo di evidente ingiustizia della pronunciata decisione» (Ivi, p. 21, emphasis in the original).

⁹² On December 21, 1920, Italy and Venezuela agree to submit the dispute to an arbitral tribunal. On May 3, 1930, the panel composed by an Italian and a Venezuelan delegate, and presided by the Swedish Östen Unden (then professor of civil law at the University of Uppsala, later also ministry of foreign affairs) found in favour of the Martini company, but did not order compensation (with the Italian delegate dissenting on that point). The arbitral award is published in «The American

Journal of International Law» v. 25, 1931), pp. 554-585. For references, see W. Weiss, *Martini case*, in MPEPIL and O. Unden, *L'Affaire Martini: une sentence arbitrale internationale*, Uppsala: Almqvist & Wiksell, 1930. The decision is commented, among others, by Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law* cit., p. 406, footnote 15; Freman, *International Responsibility for Denial of Justice* cit., pp. 322-324, 337-338, 354-357.

⁹³ According to Clovis Bevilacqua, acting as legal adviser to the Itamaraty, in an opinion given on a claim for manifest injustice pressed by Great Britain on behalf of one of its nationals diplomatic protection means to «[c]riar uma instância especial em favor dos estrangeiros, estabelecer para eles um recurso não previsto na lei e contrario a seus intuitos» (Parecer: Tendência revelada por muitas nações de recorrerem às vias diplomáticas em favor de seus súditos ates de serem tentados os médios judiciários, C. Bevilacqua, 22 de fevereiro 1907 in *Pareceres dos Consultores Jurídicos do Itamaraty* cit., pp. 44-47, (in particular p. 46). For some references on the institution of the legal adviser of the Brazilian ministry of foreign affairs, see above footnote 56.

⁹⁴ See Il ministro degli affari esteri al R. incaricato di affari in Rio de Janeiro, Roma 17 agosto 1894, istruzioni generali per la trattazione dei reclami, in ASDMAE, cons. cont., p. 5, f. 2, p. 1. It is perhaps of interest to note that these instructions address the international law doctrines on states' responsibility in such an accurate manner to be listed by Anzilotti, some ten years later, among the «documenti diplomatici di questa serie, dove la questione [della responsabilità dello Stato] è meglio posta ne' suoi reali termini» Anzilotti, *Teoria generale* cit., p. 111, n. 47.

⁹⁵ For instance, in the above-mentioned opinion concerning damages in the Brazilian state of Bahia, the *Consiglio* holds that: «[o]gni maggior pretesa è irrazionale e pericolosa, specialmente per un paese di larga emigrazione come l'Italia. Noi dobbiamo essere molto fermi nel reclamare i nostri diritti, quando esistono realmente, e molto corretti nel non affacciarne con sottili cavillazioni, quando non esistono. Il mancare alla prima di queste massime rende i nostri connazionali spregiati; il mancare alla seconda le rende odiosi, come odioso è sempre colui che pretende ciò che non ha diritto di avere; nell'uno e nell'altro caso la loro posizione è danneggiata» (Parere del 19 giugno 1898 cit., p. 8).

⁹⁶ See P. Fiore, *Diritto internazionale privato o principi per risolvere i conflitti tra le leggi civili commerciali, giudiziarie, penali di Stati diversi*, Firenze, coi tipi dei successori Le Monnier, 1869, p. 81, defining nationality as «un rapporto libero, volontario e permanente» and Esperson, *Il principio di nazionalità* cit., p. 65, stating that «la cittadinanza è inalienabile [...] è la natura stessa che lega, con un nodo indissolubile, l'uomo alla terra che l'ha visto nascere».

⁹⁷ See Nolte, *From Dionisio Anzilotti to Roberto Ago: the Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations* cit., p. 1087.

⁹⁸ See Jouannet, *Le droit international liberal-providence. Une histoire du droit international*, cit., p. 123. It is undisputed that the treatment of aliens raises a conflict between the territorial jurisdiction of the state of residence and the personal jurisdiction of the state of nationality, see, for instance, E. Kaufman, *Regles generales du droit de la paix*, in «Recueil des cours», t. 54, 1939, pp. 309-630, in particular, pp. 381-382, and, more recently, K. Hailbronner, J. Gogolon, *Aliens*, in MPEPIL, par. 3.