CLAIM MADE BY THE FINNISH GOVERNMENT WITH REGARD TO FINNISH VESSELS USED DURING THE WAR BY THE GOVERNMENT OF THE UNITED KINGDOM.

Note by the Secretary-General.

The Secretary-General of the League has the honour to communicate to the Council and the Members of the League a memorandum which has been received from the United Kingdom Delegate on the Council.

MEMORANDUM BY THE UNITED KINGDOM DELEGATE ON THE COUNCIL PRESENTED IN REPLY TO THE MEMORANDUM OF THE FINNISH GOVERNMENT OF DECEMBER 1931.

1. The present memorandum is presented in reply to the second memorandum of the Finnish Government of December 1931. It is confined to dealing with points raised in that memorandum and to certain observations made in the statement of the Finnish representative on the Council on September 14th, 1931, which were not dealt with in the memorandum of the United Kingdom delegate of September 17th, 1931, and on which the right to reply was reserved in paragraph 1 of that memorandum (C.573.M.231.1931.VII).

2. In paragraphs 1 to 3 of the Finnish memorandum of December 1931, the rule of international law with regard to the exhaustion of municipal remedies is discussed. The delegate of the United Kingdom maintains that the legal position is correctly set out in paragraph 2 of his memorandum of September 17th. The position is, in short, that, until the municipal remedies have been exhausted (and the exhaustion of municipal remedies includes the exhaustion of rights of appeal), it is impossible to establish that there has been any international delinquency upon which a foreign Government can base a claim. Reference to the authorities quoted in Appendix I of this memorandum will, it is thought, fully bear out the correctness of this statement of the position under international law.

3. At the end of paragraph 3 of the Finnish memorandum of December 1931, it appears to be contended that His Majesty's Government in the United Kingdom, even if they originally possessed the right in the present case to insist that municipal remedies should be exhausted, have now precluded themselves from putting forward this contention on the ground "that throughout a diplomatic correspondence extending over a period of several years they never raised this objection". His Majesty's Government in the United Kingdom do not contend that it is impossible for a State to waive its right to require that municipal remedies shall be exhausted before a diplomatic claim is entertained. On the contrary, a case before the Permanent Court of International Justice (the case of the Serbian bonds, Publications of the Court, Series A, Nos. 20-21) shows an instance where this has been effectually done. In order to constitute such a waiver, however, something definite and unequivocal is required—viz., a definite agreement to submit the matter to international arbitration, or to pay compensation, etc.

4. The course of events in the present case affords no evidence whatever of any such waiver on the part of His Majesty's Government. The Finnish Government originally made claims for compensation in 1920, through their Minister in London, which were rejected. The question was again raised in 1922 by the Finnish Government in connection with some commercial treaty negotiations, but His Majesty's Government refused to deal with it in these negotiations. In 1925, the Finnish shipowners did proceed to have recourse to their municipal remedies in submitting the case to the Admiralty Transport Arbitration Board, and when the Finnish Minister in London in this same year suggested international arbitration to His Majesty's Government, His Majesty's Government replied that there could be no question of international arbitration, as the case was about to be dealt with by the Admiralty Transport Arbitration Board. In 1926, after the Board had given its decision against the Finnish shipowners, the Finnish Minister in London again proposed international arbitration, and, in November 1926, a memorandum was sent to him.
explaining the reasons why His Majesty’s Government would not agree to international arbitration in which the following passage occurs: ”The findings as to values were made because the claimants had a right to appeal to the Court of Appeal, and from the Court of Appeal to the House of Lords, and it was therefore necessary for the tribunal, as would be the case with any other court of first instance, to find the facts, in case their judgment on other matters was upset on appeal. The Finnish shipowners did not appeal to the Court of Appeal and have accepted the judgment of the tribunal, and there seemed no valid reasons for referring the claim, which has been exhaustively dealt with by the Admiralty Transport Arbitration Board, to any other tribunal.”

5. It is clear, therefore, that His Majesty’s Government consistently rejected the Finnish claim, and refused to agree to its submission to any form of international arbitration. Further, so far were they from waiving any of their rights to insist that municipal remedies should be exhausted, that, in 1925, they pointed out that the existence of the remedy before the Admiralty Transport Arbitration Board precluded any consideration of international arbitration, and, in 1926, definitely stated to the Finnish Government that the failure of the Finnish shipowners to exhaust their remedies by appealing from the Board to the Court of Appeal made the judgment of the Board final.

6. In paragraph 4 of the Finnish memorandum of December 1931, it appears to be argued that, as between Members of the League, the provisions of the Covenant in some way involve the abrogation or supersession of this well-known international rule. His Majesty’s Government cannot help observing that this contention is somewhat startling, and that few Members of the League can have contemplated, when they accepted the Covenant, that the result was that the machinery of the League could be used to take the place of the municipal courts as a means by which the claims of foreigners, in respect of matters within the jurisdiction of those courts, should be adjudicated.

The Finnish argument is based upon Article 15 of the Covenant, and is to the effect that when a dispute (a) ”between Members of the League”, (b) which “is likely to lead to a rupture”, has been submitted to the Council, the Council are bound to deal with the matter, as provided by Article 15, and Article 15 contains no provision to the effect that the Council should refuse to deal with a dispute if it finds that it relates to a matter in respect of which municipal remedies have not been exhausted. In reply to this contention, it must be observed, in the first place, that this case has not been expressly referred to the Council under Article 15 of the Covenant by the Finnish Government, and it is not claimed by the Finnish Government that the essential condition upon which the application of Article 15 depends is fulfilled in this case—namely, that the dispute is one which “is likely to lead to a rupture”. 3 Article 15 of the Covenant is, of course, part of the machinery of the League for the prevention and avoidance of wars and its provisions are not relevant in respect of disputes of another character.

Finally, if a dispute were properly referred to the Council under Article 15, which arose out of a matter in respect of which municipal remedies had not been exhausted, there is nothing whatever in Article 15 to suggest that the Council should ignore this fact in dealing with the matter. Indeed, the fact that municipal remedies have not been exhausted might itself form a valid ground on which the Council might find that the case was one which came within the provisions of paragraph 8 of Article 15, and decline to make any further recommendation on this ground.

7. In paragraphs 6 to 11 of their memorandum of December 1931, the Finnish Government, in reply to the arguments in paragraph 5 (a) of the memorandum of September 1931, contend that ”it is plain that the shipowners have not now and never have had any right to take proceedings in the ordinary English courts”. This contention is based upon a summary of the effect of the Indemnity Act, 1920, which, the United Kingdom delegate is advised, does not set out the position entirely accurately or with sufficient clarity. This being so, it will, perhaps, be desirable in the first place to set out the true position, as the United Kingdom delegate conceives it to be.

8. Before the passing of the Indemnity Act, 1920, any person, whether the subject of His Majesty or of a friendly foreign Power, had the right of proceeding in the ordinary courts of justice by Petition of Right against the Crown in respect of any contract, expressed or implied, as well as in respect of the taking of property and other matters. During the war, His Majesty’s Government, although under no legal obligation to do so, granted compensation as a matter of grace to persons whose business had been interfered with through the exercise during the war of any prerogative rights of His Majesty or of any powers under any enactments relating to the defence of the realm. And, for the purposes of assessing such compensation, a tribunal, known as the Defence of the Realm (Losses) Commission, was set up. Furthermore, a special tribunal, known as the Admiralty Transport Arbitration Board, was set up to deal with claims for compensation by shipowners whose vessels had been requisitioned.

The establishment of these tribunals had resulted in the existence of considerable doubt and difficulty as to when a person was entitled to proceed with his claim in the ordinary courts of law and when he should have recourse to these special tribunals, and the opportunity was taken in the Indemnity Act, 1920, to establish these tribunals upon a statutory basis. The Act, so far from

1 The contention is no less startling in connection with the Treaty of Locarno or the General Act (see paragraph 2 of the Finnish memorandum of December 1931).

2 See the Minutes of the Council, September 1931, page 5. Statement of Baron Yrjô-Koskinen.

3 No attempt is made in the present memorandum to deal with the general question of the applicability to the present case of the Articles of the Covenant under which the Finnish Government have purported to bring it before the Council, upon which the United Kingdom delegate reserves his right to offer further observations if necessity arises, while referring to his statement before the Council on September 14th, 1931.
depriving individuals of their rights, actually conferred upon them legal rights to compensation which they did not previously possess, notably the right to compensation for interference with property or business which, as previously stated, had merely been granted during the war as an act of grace.

It was quite obvious that the conferring of these rights and the establishment by statute of the tribunals mentioned in Section 2 of the Act, with their varying jurisdictions, would cause some overlapping of remedies unless their jurisdictions were, in some way, dovetailed into the existing rights of proceeding in the ordinary courts of law. In other words, what the Indemnity Act really did was to give a legal right to claimants to compensation for interference with their property or business during the war and, at the same time, to rationalize all legal remedies in respect of claims arising out of the war, whether created by that statute or existing apart from that statute.

9. Turning now to the Indemnity Act itself, Section 1 restricts the taking of legal proceedings—that is to say, proceedings in the ordinary courts of law—in respect of any act, matter or thing done by officers of the Crown in the execution of their duty for the defence of the realm. But the proviso to Subsection (1) of that Section excepts from this restriction a number of classes of claim, including claims in respect of rights under, or alleged breaches of, contract, if the proceedings in respect thereof are brought within the limited time therein stated, unless such claims can be brought under Section 2 of the Act, in which case recourse must be had to the special tribunals therein referred to.

This Section, therefore, does not in any way restrict proceedings which could be taken by Petition of Right against the Crown on a contract, unless the rights under the contract, or the alleged breach of the contract, could be said to be an act, matter or thing done by an officer of the Crown in the execution of his duty within the meaning of Subsection (1) of Section 1.

If the rights under, or the alleged breaches of, contract cannot be said to be an act, matter or thing done by an officer of the Crown in the execution of his duty or for the defence of the realm, then the right is not affected, and it may be pursued in the ordinary courts and subject to the ordinary limitation of time. But if, on the other hand, the rights under, or the alleged breaches of, contract could be said to be such an act, matter or thing, then proceedings by Petition of Right may still be brought in the ordinary courts, but the time within which they could be brought was further limited to one year from the termination of the war or the date when the cause of action arose, whichever was the later (unless the claim came under Section 2, but it seems hardly possible that any claim based on contract or implied contract could be brought within the terms of Section 2).

It is, of course, immaterial that the periods of limitations (whichever they may be) have now expired. The question is not what remedies the Finnish shipowners have now, but what they had at the material time.

That this is the true position is clearly shown by the case of the Manchuria Steamship Company

10. Turning now to Section 2 of the Indemnity Act, that Section created two statutory tribunals:

(1) The Admiralty Transport Arbitration Board, with jurisdiction to deal with claims by owners of ships which had been requisitioned during the war in exercise of any prerogative rights of His Majesty, etc., and

(2) The War Compensation Court, which had jurisdiction to award compensations to persons (other than shipowners whose vessels had been requisitioned) who had sustained direct loss or damage by reason of interference with their property or business in the United Kingdom by reason of the exercise, during the war, of any prerogative rights of His Majesty or any powers relating to the defence of the realm.

The position of a claimant after the passing of the Indemnity Act was as follows:

(1) If his claim was a claim under a contract he still had his legal rights, enforceable by a Petition of Right, in the ordinary courts provided that:

(a) If the rights which he claimed depended upon any act, matter or thing done by an officer of the Crown in the execution of his duty for the defence of the realm, a time-limit was imposed within which that Petition of Right must be brought, and

(b) If his claim could be brought under Section 2 of the Act, he must proceed under that Section, and bring his claim before the special tribunals and not before the ordinary courts;

(2) If he claimed, as the owner of a vessel which had been requisitioned, then his claim must go to the Admiralty Transport Arbitration Board; and

(3) If his claim was not in respect of the requisitioning of a ship, his claim for direct loss by reason of interference with his property or business in the United Kingdom lay to the

War Compensation Court.

And, with regard to this latter tribunal, it is important to note that provision is made in Subsection (2) (iii) (a) of Section 2 that, where the claimant would, apart from the Act, have a legal right to compensation, the tribunal shall give effect to that right in the assessment of that compensation. In other words, in so far as Section 1 of the Act restricted the taking of legal proceedings and transferred the claim to the War Compensation Court, that court had to deal with the claim in accordance with the legal rights to compensation which the claimant had.
11. The Finnish shipowners in this case made their claim to the Admiralty Transport Arbitration Board because they based it upon a requisition of the vessels by the Government of the United Kingdom, and they failed because they were unable to prove that the vessels were so requisitioned. It therefore follows that, while they had failed before the one tribunal which they had selected, the other tribunals—namely, the Courts of Law and the War Compensation Court—were open to them if they could make good another claim. For instance, the shipowners, having a decision of the Admiralty Transport Arbitration Board to the effect that there had been no requisition, might have claimed before the War Compensation Court that there had, nevertheless, been an interference with their property in the United Kingdom. Further, if, as His Majesty's Government at first supposed, the claim was made that His Majesty's Government were bound to pay compensation for the ships under some implied contract between themselves and the shipowners arising out of their user on any other implied contract, this contractual right could, as has already been pointed out, be enforced by proceedings in the ordinary courts by Petition of Right. (It is true that it is now stated in paragraph 7 of the Finnish memorandum of December 1931 that this supposition is erroneous. The manner in which in this claim is now formulated will be discussed later in paragraph 17.) As it has been repeatedly stated, His Majesty's Government do not agree that the remedy by Petition of Right was removed by the Indemnity Act, but, even if this view is wrong, the Finnish Government seem to be under the impression that, therefore, there was no other means for enforcing any claim right to compensation. They have completely overlooked the existence of the War Compensation Court, which not only had jurisdiction to award compensation, but was also bound by statute to award it upon a legal basis where the claim was based upon a legal right.

12. In support of their view of the position created by the Indemnity Act, the Finnish Government have referred in their last memorandum to a number of English authorities, and it is now proposed to deal with these cases and to endeavour to show that these cases support the view stated above in paragraphs 8 to 11 of this memorandum.

The case of the Russian Volunteer Fleet v. The King, referred to in paragraph 9 of the Finnish Government's memorandum, is, as is supposed, the case which was referred to in paragraph 5 (a) of the United Kingdom delegate's memorandum of September 1931. The Russian Volunteer Fleet, in the first instance, based their claim to compensation upon an agreement under which the vessels were taken over. That being so, a Petition of Right was, in the view of His Majesty's Government, the proper remedy, and the case proceeded upon those lines with their assent. The Russian Volunteer Fleet, however, before the hearing of the case, amended their claim, basing it upon a requisition of the vessels. Thereupon it was obvious that the Indemnity Act applied, and this point was taken by His Majesty's Government successfully at the hearing.

The point of the reference to this case was therefore that, if a claim is based upon a contract, the remedy by Petition of Right is the proper one, whereas, if the claim is based upon the requisition of a ship, the remedy is that expressly conferred by Section 2 (1) (a) of the Indemnity Act.

13. The next case referred to in the Finnish memorandum (paragraph 10) is the Attorney-General v. The Royal Mail Steam Packet Company. In that case, there had been a requisition of the ship followed by a contract in terms as to user and payment of hire had been agreed between the parties. There was, however, no provision in the contract dealing with compensation if the ship were lost. All that that case decided was that, in those circumstances, the claim being a claim in respect of a total loss of a requisitioned ship and there being no term of the contract covering the particular claim, the proper remedy was, under the Indemnity Act, recourse to the Admiralty Transport Arbitration Board, who had express jurisdiction by statute to assess compensation in respect of damage to or loss of any requisitioned ship.

14. The next case which is mentioned is that of Brocklebank Limited v. The King (paragraph 11), and this case is cited as authority for the proposition that the Finnish owners could not have framed any claim before the ordinary courts based upon an implied contract or obligation resulting from the user of the ships by His Majesty's Government. In support of this contention, certain dicta of the judges are relied upon, but, if the facts of the case are examined, it will be seen quite clearly that those dicta do not in any way support the proposition put forward by the Finnish Government. In Brocklebank's case, an officer of the Crown had exacted money from Messrs. Brocklebank in good faith but illegally, and, in an endeavour to base their claim upon a contract, Messrs. Brocklebank resorted to a legal fiction whereby they waived the tortuous act of the officer and endeavoured to sue the Crown for money had and received. The dicta referred to by the Finnish Government make it clear that the judges referred to were careful in their choice of the language to show that they were not intending to cover a contract by implication of law as has already been pointed out which is the case here by a legal fiction. The case merely decides that the claimants could not escape the restrictions in Section 1 of the Indemnity Act by relying upon a fictitious contract. But, of course, it is important to remember that the result of that judgment is, that not the claimant gets no rights at all, but that his claim is merely transferred from the ordinary courts to the statutory tribunal set up by the statute. Similarly, with regard to the case of the Commercial Estates Company of Egypt v. The Board of Trade. There the claim was based upon requisition under the right of anger, which clearly was an exercise of a prerogative right in defence of the realm. The result was that compensation was assessable by the statutory tribunals and not by the ordinary courts of law.

15. If any authority is needed for the proposition that contractual rights, even though there has been a requisition or other interference with the claimant's property, were enforceable in the ordinary courts by a Petition of Right, it is sufficient to refer to the case of Brooke v. The King
reported in 1921 (2 K.B., page 110). The truth is that a large number of contracts made during the
war were enforced by a Petition of Right against the Crown, and the Indemnity Act only
applies to take away that right in those cases in which compensation is properly assessable under
Section 2 of that Act before the two statutory tribunals thereby established.

16. To summarise the position created by the Indemnity Act and the cases to which reference
has been made, this position is that, even if the Finnish owners accepted the judgment of the
Admiralty Transport Board that that tribunal had no jurisdiction to grant compensation because
the vessels were not requisitioned by His Majesty's Government, they were still able to bring their
case either in the ordinary courts by Petition of Right or in the War Compensation Court, based
upon interference with their property in the United Kingdom. In either of those alternatives,
if they were able to prove their claim, they were entitled to have their compensation assessed
in accordance with their legal rights.

17. The alternative ground of claim, which the Finnish Government state has given rise to
so much misunderstanding, is now formulated at the end of paragraph 7 of the memorandum
of December 1931 in the following terms:

"If there was a contract between the two Governments (i.e., the Russian Imperial
Government and His Majesty's Government) stipulating how much the British Government
was to pay for these ships, these payments, being intended for the benefit of the shipowners,
could, under the principles of international law, be regarded as accruing to them, and were
therefore recoverable by the Finnish Government on their behalf from the British Government.
(There was never any question of a contract between the British Government and the ship-
owners.)"

This formulation of the claim does, however, not appear to differ very substantially from the
statement of it in paragraph 5 (a) (second sub-paragraph, last sentence) of the United Kingdom
delegate's memorandum of September 1931. Though it is not intended to discuss the merits of
the case, it may be observed:

(1) That the statement that these payments were "intended for the benefit of the ship-
owners" is not in accordance with the facts. The Russian Government was going to pay the
shipowners at rates and on conditions which were not the same as those which governed the
payments by His Majesty's Government to the Russian Government (see paragraph 3 of His
were not intended for this purpose at all.

(2) That if the words "could, under the principles of international law, be regarded
as accruing to them" (i.e., the shipowners) mean that under international law, or under the
international agreement referred to, the shipowners acquired rights to these payments, the
proposition is certainly contrary to the generally accepted view of international law as a
law regulating the rights and duties of States inter se and creating no rights and imposing
no duties on individuals—a view which the Permanent Court of International Justice appears
to have definitely adopted. (See the case of the Danzig Railway Officials, Publications of
the Court, Series B, No. 15, page 17: "It may readily be admitted that, according to a
well-established principle of international law, the Beamtenabkommen, being an international
agreement, cannot as such create direct obligations for private individuals ").

(3) Further, if the words "recoverable by the Finnish Government on their behalf"
mean, as they appear to do, that the Finnish Government would be recovering the payments
on behalf of the shipowners in the sense that the payments so recovered would belong to the
shipowners in international law, the statement is hardly consistent with the legal position,
when a State makes an international claim in respect of injuries to its nationals as laid down
by the Permanent Court of International Justice. (See the Mavrommatis case, Publications
of the Court, Series A, No. 2, page 11, and the Chorzow Factory case, Publications of
the Court, Series A, No. 17, page 26.)

The natural construction of the passage quoted seems to give the meaning stated but, if
this is not the meaning intended, and the real meaning is that, there having been contractual
obligations between His Majesty's Government and the Imperial Russian Government under
which His Majesty's Government were liable to pay certain sums to the Russian Government
in respect of the use of certain Finnish (then Russian) ships and the shipowners having become
in the interval nationals of a new State (Finland), His Majesty's Government become bound under
international law towards the Finnish Government to make these payments to the Finnish ship-
owners (although ex hypothesi they were not bound to pay these sums to the shipowners while
the Imperial Russian Government continued internationally to represent Finland), the claim
is, it is submitted, an unprecedented one. But, supposing it to be good, it is founded on the accrual
of certain contractual rights to the shipowners as against His Majesty's Government. In spite
of the statement to the contrary at the end of the passage quoted, it is clear that the relation-
ship is contractual or quasi contractual.

The Finnish Government do not apparently contend that a claim by the shipowners on
this ground would be affected by the Indemnity Act, but they do contend that it is a claim which
would not be enforceable in the English courts. The United Kingdom delegate does not think
that such a claim could succeed in the English courts but for the reason that there is not the
slightest foundation for it in international law. If it were good in international law, then the
presumption referred to in paragraph 5 (a) of the United Kingdom delegate’s memorandum of September 17th holds (i.e., that in default of a decision to the contrary, English law is such as to enable His Majesty’s Government’s obligations under international law in respect of individuals to be recognised by the courts).

It is contended, however, that it is clear from the decisions of the English courts in Rustomjee v. The Queen, The Civilian War Claimants’ Association v. The King and Cook v. Sprigg are such decisions to the contrary.

The claims in those cases, which were rejected, were not based on the same facts, but even if those decisions were held to cover this case and, assuming for the purposes of argument that this is not a claim of a kind which could be entertained by the English courts at the suit of the Finnish shipowners, it is still impossible for the Finnish Government to establish that the shipowners exhausted all municipal remedies open to them and that, therefore, the present claim is not barred by the well-known international rule, for the reasons explained in the following paragraphs.

18. In paragraphs 12 to 14 of the Finnish memorandum of December 1931 an attempt is made to meet the argument set out in paragraph 5 (b) of the memorandum of the United Kingdom delegate of September 17th, 1931, that the points at issue between the parties in the litigation before the Admiralty Transport Arbitration Board were points which involved a question of law upon which an appeal lay to the Court of Appeal, and that, consequently, it was impossible to maintain that the right of appeal to the Court of Appeal was illusory on the ground that all the points at issue were questions of fact upon which no appeal lay.

The United Kingdom delegate (to avoid repetition) would desire to refer to what is stated in paragraph 5 (b) of his previous memorandum of September 1931, the conclusions of which he submits are in no way weakened by the arguments in paragraphs 12 to 14 of the last Finnish memorandum. The argument in this last memorandum is summed up in the passage at the end of paragraph 14 in the words:

"It is plain that the findings (1) that there were modifications of the agreement between the two Governments covering these ships, and (2) that there was no intention to requisition, are findings of fact, and it is submitted that these findings were to all intents and purposes conclusive of the questions at issue under section 2 (1) (a) of the Indemnity Act.”

The two points (1) and (2) referred to in this quotation will be taken separately.

"(1) The finding that there were modifications of the agreement between the two Governments.”

The issue here (as a reference to the proceedings before the Admiralty Transport Arbitration Board will show) was not so much as to what actually took place between the British Ministry of Shipping and the Russian Committee. The claimants were, in any case, hardly in a position to dispute the evidence given by Sir B. Kembell Cooke on this point. The claimants contended, however, through Sir Robert Aske, counsel for the owners of the s.s. Tammerfors, “that the modifications of the agreement of May 1916 between the British authorities and the Russian Committee not having been reduced to writing and approved and signed by the Ambassador of Russia were of no authority” (see the Judgment of the Board, page 17 of the memorandum of September 1st).

The same contention was made before the Council on September 14th by Baron Yrjö Koskinnen. "It is,” he said, “significant that the agreement of May 5th, 1916, was officially confirmed and signed by the British Secretary of State for Foreign Affairs and by the Russian Ambassador in London . . . If this solemn form was necessary for the validity of the agreement, why was it not equally so for the agreement to which the British Government refers . . .”

The Board held that the agreement had been modified by these informal arrangements, but this is a decision on a question of law. It is essentially a question of law whether an agreement in solemn diplomatic form can be modified by informal arrangements between subordinate officials, and on this question an appeal lay from the Board to the Court of Appeal.

“(2) The finding that there was no intention to requisition.”

It is submitted that even if the question of intention is a question of fact, a finding on it was perfectly immaterial. The material question was not whether His Majesty’s Government intended to requisition but whether what they actually did amounted in law to a requisition or not, and this question is clearly a question of law (see paragraph 5 (b) of the memorandum of September 17th). Even if the Board had itself expressed its judgment in a manner which indicated the decision was one of fact, the Court of Appeal could review that decision.

19. In paragraph 16, the Finnish Government state that, although they admit that there have been a number of appeals to the Court of Appeal from the decision of the Admiralty Transport Arbitration Board, it is noteworthy that there is not a single instance of an appeal relating to the question of “requisition” under Section 2 (1) (a), but this is not in accordance with the facts. The Bombay and Persia Steam Navigation Company v. The Shipping Controller (reported in Lloyd’s...
In conclusion, the United Kingdom delegate, in this and the immediately following paragraph, will, in the exercise of the right reserved in his memorandum of September 17th, make a few observations on certain points raised by the statement of the Finnish representative before the Council on September 14th. He desires, in the first place, to correct a mistake (to which Baron Yrjö-Koskinen called attention) in paragraph 26 of His Majesty’s Government’s memorandum of September 1st. No evidence was given by Russian lawyers before the Admiralty Transport Arbitration Board. His Majesty’s Government had obtained opinions from Russian lawyers to the effect stated in that paragraph; but the evidence was not produced in the proceedings before the Board.

22. The following observations are made with reference to the passage (too long to be quoted conveniently) in Baron Yrjö-Koskinen’s statement, which appears on page 6 of the Minutes of the meeting of September 14th, beginning: “As regards (2) it is quite impossible . . .”

It was thought that the position of the Government of the United Kingdom was made clear in the letters quoted in the Appendices to the first memorandum of His Majesty’s Government of September 1st. Indeed, that position can be summarised by reference to the concluding paragraph of the letter of September 5th, 1916, which appears in Appendix 1 (b) of that
memorandum. It is very clearly stated that the British Admiralty could not be liable in any way to the Finnish owners nor was it concerned with the terms which the Russian Government made with the owners for the hire of the vessels.

It is also apparent from the correspondence that the Finnish owners appointed their own agents in London, as did the Russian Government Committee, and it is therefore natural that communications with the Finnish owners should be made to their London agents by the Russian Government Committee through the London agents of that Committee—namely, Messrs. Gellally, Hankey and Company.

This arrangement explains why the British Ambassador in Petrograd was not acquainted in detail with the tripartite arrangement which had been made between the Finnish owners, the Russian Government as charterers, and the Government of the United Kingdom as sub-charterers. The fact that, owing to confusion and incompetence in Petrograd, the Russian Government failed to implement their obligations or to conclude formal charter parties with the Finnish shipowners is a matter which in no way concerns the Government of the United Kingdom.

23. In the interests of accuracy, it may be desirable, with reference to the statement (page 7, end of paragraph 7 of the Minutes of the Council of September 14th) that "certain credits in respect of hire were not entered in the Russian Government's account until after the revolution", to place on record that the only case in which hire was not paid or accredited until after the Russian revolution was that of the Tammerfors, the amount in that case being £4,270.

Appendix 1.

Quotations from Borchard's "Diplomatic Protection of Citizens Abroad".

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"On the other hand, it is to be noted that as a general rule the exhaustion of local remedies is considered a necessary condition precedent to recourse to diplomatic interposition. Only when these remedies have been exhausted, and a denial of justice established, does formal diplomatic espousal of a claim, as opposed to the use of good offices, become proper. Claimant Governments dispense with the requirement of exhausting local remedies when those remedies appear insufficient, illusory or ineffective in securing adequate redress. It may be noted, however, that before a denial of justice has actually been perpetrated, and while the case is still pending, foreign Governments may use their good offices to see that their citizens abroad receive the benefits of due process of law, in order that a denial of justice may be avoided."

"It has already been observed that the State is not responsible for the mistakes or errors of its courts, especially when the decision has not been appealed to the court of last resort. Nor does a judgment involving a bona fide misinterpretation by the court of its municipal law entail, on principle, the international liability of the State. Only if the court has misapplied international law, or if the municipal law in question is in derogation of the international duties of the State, or if the court has wilfully and in bad faith disregarded or misinterpreted its municipal law, does the State incur international liability."

Page 817.

"Almost daily the Department of State has occasion to reiterate the rule that a claimant against a foreign Government is not usually regarded as entitled to the diplomatic interposition of his own Government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes claim. . . . Thirdly, the home Government of the complaining citizen must give the offending Government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion . . . . It is a logical principle that where there is a judicial remedy it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper . . . . The application of the rule that local remedies must be exhausted before an international claim may properly be instituted has served to dismiss many cases brought before international tribunals."

Page 821.

"The rule that local remedies must be exhausted before diplomatic interposition is proper is in its application subject to the important condition that the local remedy sought is obtainable and is effective in securing redress. If this condition is absent, it would be futile and an empty form to require the injured individual to resort to local remedies . . . . So, where the local tribunals are of such a nature that no confidence may be placed in them and no hope may be entertained of obtaining justice from them, or where there are no duly established courts to which resort is 'open and practically available', it is unnecessary to exhaust local remedies . . . . Where recourse to or the prosecution of an appeal before the local courts appears useless or impracticable in affording a claimant relief, he has been excused from appealing to or exhausting his local remedies. This has been held in cases where the local courts were prohibited from entertaining jurisdiction of suits against the State; where the judges were menaced and controlled by a hostile mob; where the payment of a possible judgment was entirely a matter of discretion with the defendant Government; or where an appeal to the highest court from the circumstances of the case appeared
impracticable. In these cases the resort to local courts would not have resulted in an effective remedy. In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts, a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if a substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief."

EXTRACT FROM BORCHARD'S "DIPLOMATIC PROTECTION OF CITIZENS ABROAD".

Page 339.

"When feasible and where an effective remedy seems probable, all modes of appellate revision must be exhausted before diplomatic interposition becomes proper."

II.


Page 652.

"It is not necessary to affirm that a Government is not responsible in any case to a foreign Government for an alleged erroneous judicial decision rendered to the prejudice of a subject of said foreign Government. But it may be safely asserted that this responsibility can only arise in a proceeding where the foreigner, being duly notified, shall have made a full and bona fide, though unavailing, defense, and, if necessary, shall have carried his case to the tribunal of last resort. If, after having made such defense and prosecuted such appeal, he shall have been unable to obtain justice, then, and then only, can a demand be with propriety made upon the Government."

III.

LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW.

BASES OF DISCUSSION FOR THE CONFERENCE DRAWN UP BY THE PREPARATORY COMMITTEE.

(Extracts from League document C.75.M.69.1929.V.)

Basis of Discussion No. 5.

Page 48.

"A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He is refused access to the courts to defend his rights.
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State.
3. There has been unconscionable delay on the part of the courts.
4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State."

Basis of Discussion No. 27.

Page 139.

"Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in Bases of Discussion Nos. 5 and 9."

Reply of the German Government.

Page 171.

"Our opinion on this subject has already been given in connection with Nos. IV and V. We have said that, generally speaking, the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the internal laws of the State in question. In principle, therefore, a claim can only be made in respect of a decision of the highest tribunal having jurisdiction under the municipal law. Special circumstances may, however, justify exceptions to this rule. The exhaustion of all remedies could not be insisted upon when, for special reasons, it would be impossible to insist that the State concerned should await the final judgment: when, for instance, further damage is likely to occur or when, the clauses of a contract having been violated on a point of principle, there is some danger of the offence being repeated. In these circumstances, the State which has been injured in the person of its national should be permitted to urge its claims immediately."

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Reply of the British Government.

Page 206.

"In general, the answer to point XII is in the affirmative. As was said by His Majesty's Government in Great Britain in the memorandum enclosed in a note to the United States Government, dated April 24th, 1916:

"'His Majesty's Government attach the utmost importance to the maintenance of the rule that, when an effective mode of redress is open to individuals in the courts of a civilised country by which they can obtain adequate satisfaction for any invasion of their rights, recourse must be had to the mode of redress so provided, before there is any scope for diplomatic action.'—(American Journal of International Law, 1916. Special Supplement, page 139.)

"and the note goes on to point out that this is the only principle which is correct in theory and which operates with justice and impartiality between the more powerful and the weaker nations.

"If a State complies with the obligations incumbent upon it as a State to provide tribunals capable of administering justice effectively, it is entitled to insist that before any claim is put forward through the diplomatic channel in respect of a matter which is within the jurisdiction of those tribunals and in which they can afford an effective remedy, the individual claimant (whether a private person or a Government) should resort to the tribunals so provided and obtain redress in this manner.

"The application of the rule is thus conditional upon the existence of adequate and effective local means of redress. Furthermore, in matters falling within the classes of cases which are within the domestic jurisdiction of the State, the decisions of the national courts in cases which are within their competence are final unless it can be established that there has been a denial of justice."

IV.

Extracts from Eagleton: "The Responsibility of States in International Law".

Page 95.

"It will be seen that in cases in which an alien, and in many of those in which the State itself, is injured, no international delict is established, and therefore no responsibility, until the State's own machinery of justice has failed to function properly, or a denial of justice is apparent."

Page 95.

"Procedurally, the rule that local remedial measures must be fully tested before diplomatic interposition is permissible is the most important rule in the application of the doctrine of State responsibility."

Page 96.

"This protective system the State is obliged by international law to have; and, before it, the alien is required to seek relief for an injury done to him. Until he has done so—until he has exhausted local remedies—he cannot appeal to diplomatic action. This rule is thoroughly established in the practice of nations. It has often been asserted in the diplomatic correspondence of States."

Page 98.

"Some difficulty arises from the double function served by local remedies. They may be regarded, on the one hand, as a means of repairing a breach of international law for which responsibility is already existent; and, on the other hand, as a duty whose improper execution will itself bring responsibility upon the State. It cannot be said that responsibility appears only when local remedies have failed. The responsibility of the State may have been called into existence as a result of a previous illegality, in which case the failure of local remedies serves only to justify an appeal to diplomatic interposition. If, however, the local measures of redress operate regularly to afford the alien the reparation which the law of the land permits, responsibility is thereby discharged. Again, if the alien has received an injury which is not in itself internationally illegal, his failure to secure proper redress from the State may at this point, for the first time, engage the responsibility of the State. Whether the State has an anterior responsibility or not, it must usually be permitted to use its own agencies of redress where it has provided them; and the failure of these agencies may either create an original responsibility where none has existed hitherto, or serve to carry the case on to diplomatic procedure if responsibility was already engaged."