THE JURISPRUDENCE OF THE GENERAL CLAIMS COMMISSION, UNITED STATES AND MEXICO

THE JURISPRUDENCE OF THE GENERAL CLAIMS COMMISSION, UNITED STATES AND MEXICO

UNDER THE CONVENTION OF SEPTEMBER 8, 1923

PROEFSCHRIFT

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CHAPTER I

INTRODUCTORY

Importance of the decisions of the General Claims Commission

If it is true that the world has become smaller by the increasing intercourse between nations, it is also true that, contrary to what might have been expected, it has become more complicated. Numerous problems of a political, economic, and juridical character have sprung from the closer contact between citizens, corporations and governments of different countries, and have been added to those existing already in ages past. One of these problems, the systematical exploration of which has only been started since the beginning of this century, is that of the international liability of States for damages suffered in its territory by aliens.

Although the rules pertaining to the treatment of individual aliens by States draw much less public attention, and might therefore seem of less interest than those concerning the direct relations between States as a whole, it will be easy to realize that in the everyday practice of international law the firstmentioned occupy a greater place. Hence the responsibility in which these rules must find their concrete expression and sanction are of great significance, as is nowadays generally recognized [1]).

This subject is important from the *economic* point of view inasmuch as it affects the position of individuals and corporations carrying on business in a foreign country. In the field of *political* relations the subject plays a considerable role since the allegation of such a liability has often been the cause of, or the pretext for, political demands. Finally and mainly, the subject has become a large chapter of *international law*. How important the decisions

[1]) Cf. Eustathiadès, La Responsabilité internationale de l'Etat pour les actes des organes judiciaires, Note introductive.

rendered upon international claims are, has been shown by the immense interest given to compilations such as those produced by Moore, Ralston, and Borchard.

To the general interest which attaches to international claims as such, is added, in the case of those between the United States of America and Mexico, the fact that they have for more than a century played a considerable part in the history of the foreign relations of Mexico in general, and of those with the United States in particular [1]).

Finally the decisions of the General Claims Commission between the United States and Mexico are of a particular interest because of the penetrating, elaborate and remarkably lucid way in which many of them — and particulary of those rendered under the Presidency of Professor van Vollenhoven — dealt with certain items of international law. The following quotations may suffice to testify of the recognition which this fact has found in litterature:

> ,,From the point of view of the contribution of this arbitration to the body of international law, the 1300 pages of opinions, rendered after arguments had been heard ad libitum, will remain as a source from which may be drawn thoroughly studied and carefully reasoned statements on many points in the law of nations" . . . . .
>
> ,,Whatever may be the estimate of the arbitration thus far, it is clear that its contribution in the development of international law through the decided cases is noteworthy."
>
> (Mc.Donald and Barnett," The American-Mexican Claims Arbitration," American Bar Assocation Journal, 1932, pp. 185 and 187.)

> ,, ... la *General Claims Commission* instituée le 8 septembre 1923, pour statuer sur les réclamations réciproques entre les Etats-Unis et le Mexique, offre une jurisprudence abondante qui méritait une étude toute particulière. Les ,,opinions" des arbitres faisant partie de la commission constituent une contribution précieuse pour le droit international" (Eustathiadès, La responsabilité de l'Etat pour les actes des organes judiciaires, p. 16).

See also a few appreciations of one of the Commission's most important decisions on pages 84 and 85.

[1]) See upon this subject: Rippy, The United States and Mexico; Callahan, American Foreign Policy in Mexican Relations; Dunn, The Diplomatic Protection of Americans in Mexico; Feller, The Mexican Claims Commissions, 1923—1934.

Other works dealing with the decisions of the General Claims Commission

The circumstances mentioned would sufficiently justify a book solely devoted to these decisions, unless they had previously been discussed with the attention they would seem to deserve. This, we believe, is not the case. Several works of a general character have mentioned some of the opinions of the Mexican-American tribunal and quoted a few of its pronouncements. Among these books may be mentioned: Eagleton, The Responsibility of States in International Law; Dunn, The Protection of Nationals; Ralston, Supplement to the 1926 Revised Edition of The Law and Procedure of International Tribunals. Necessarily, however, the attention and space consecrated to the opinions in question in works having such a broad scope is extremely limited, with the inevitable result that many of the Commission's arguments, constituting valuable contributions to legal learning, were not mentioned and others not discussed in such a fundamental way as they would require. Indeed, we shall even several times have to draw attention to the fact that opinions are quoted or referred to in a very incomplete way, or so as to give a thoroughly incorrect impression of their intended effect [1]).

The most fundamental study of the decisions of the General Claims Commission is contained in the excellent work of Mr. A. H. Feller, „The Mexican Claims Commissions, 1923—1934." It will be realized, however, that even in this work it was impossible to give to the opinions all the consideration they required, when it is seen that all the decisions dealt with in the present study are, together with all the decisions rendered in the same fields of law by six other Claims Commissions, compressed into less than 120 pages [2]). It is evident, of course, that the value of a scientific study is not determined by its length, but it is equally evident that a collection of opinions of which the considerations of general interest alone take up a few hundred pages already, would, for a fundamental examination, need more attention than can be

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[1]) See pp. 92, 147, 149, 175, 195 and 272.

[2]) op. cit. pp. 83—201. The rest of Feller's book is dedicated to an elaborate discussion of subjects, which for this very reason have been left outside the present study. Vide infra p. 4.

given to them when treated in conjunction with the decisions of six other Commissions within such a limited space.

Another disadvantage of the wide scope of the books referred to is that the little space devoted to the opinions of the General Claims Commission compels the reader who wishes to quote any particular decision to consult the original edition of the opinions.

Mention must furthermore be made of a work published by the American Commissioner in the General Claims Commission, Fred K. Nielsen, which is called „International Law applied to Reclamations." This title is completed by the restriction, in smaller capitals: „mainly in cases between the United States and Mexico." In fact 625 out of 700 pages of the book consist of a reprint of the opinions written by the author as a member of the General Claims Commission. It is said in the preface that such has been done „for purposes of illustration" to the first 75 pages of the book. Further on, however, the author says that this first part consists of a summary of the views laid down in the opinions printed in the second part. No mention is made of the many — often entirely differring — opinions written by other members of the same Commission, and hardly any of the views previously expressed upon similar cases by authors or international tribunals. No consideration is given to arguments brought forward in defence of conceptions opposite to that of the author. In view of these facts it must be stated that Mr. Nielsen's book can not be considered as more than a reprint of his own opinions, however great its value as such may be.

In these circumstances it seemed desirable that a study with a more limited object should deal with the said opinions only. At the same time, however, it seemed desirable to avoid any unnecessary duplication. Hence a few matters not directly connected with substantive international law and constituting independent chapters, which Mr. Feller has already treated in detail, have been left out of consideration in this monography. This applies particularly to:

the historical background of Mexican-American claims and of the creation of the General Claims Commission;
matters of evidence;
matters of procedure. [1])

[1]) The latter subject, which has been taught by Mr. Feller for several years at Harvard University, has received his special attention.

Object of this book

The aim of the present study is to render more easily accessible the contents of the decisions given by the Mexican-American Claims Commission, and to draw the attention to the value for international law of many of them. This aim involved:

a. mention of those of the decisions which are apt to serve as precedent;
b. quotation of all dicta and arguments of general interest;
c. critical examination of these insofar as they pertain to questions subject to much controversy, involve a departure from former decisions, or for some other reason are not so much supported by authority as to render any comment superfluous.

Quotations will be limited to the minimum compatible with the object defined, i.e. we shall try to insert enough of the text of the awards to remove the necessity of consulting the original complete edition of the opinions, without, at the same time, quoting textually statements which may be summarized and without loss be rendered in our own words. Italics in the quotations are our own, except where it is mentioned that they appear in the orginal text.

The three volumes containing the opinions and edited by the Government Printing Office, Washington, will hereinafter be referred to as follows:

Will be indicated as: I: ,,Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico, February 4, 1926, to July 23, 1927";

will be indicated as: II: ,,Opinions of Commissioners under the Convention concluded September 8, 1923, as extended by the Convention signed August 16, 1927, between the United States and Mexico, September 26, 1928, to May 17, 1929",

will be indicated as: III: ,,Opinions of Commissioners under the Convention concluded September 8, 1923, as extended by subsequent Conventions, between the United States and Mexico, October 1930 to Juli 1931".

Origin of the Mexican-American General Claims Commission [1])

Between 1875 and 1910 the government of Porfirio Diaz was able to maintain a period of tranquility and settled conditions in Mexico. Complaints by aliens during this time were rare, and generally settled through the ordinary diplomatic channels [2]). It was not until 1910 that the subject of claims regained actuality in the relations of Mexico with foreign powers. In this year the Diaz regime was ended by the Madero revolution, and from that moment onward internal disturbances became almost chronic, with the inevitable consequences such a state of affairs would have on the safety and interests of foreigners in the country. Madero was turned out of power in 1913 by Huerta, who in his turn had to combat the revolutionary activities of Carranza, Villa and Zapota. The first-mentioned became president in 1914, but was overthrown again by Obregon in 1920.

Owing to the disturbed conditions inevitably resulting from all these and other troubles in Mexico, many claims of American citizens had arisen against the Mexican Government. Negotiations with a view to their settlement began as early as December 1912 and were repeatedly taken up, without sucess, nor did steps initiated the Carranza administration to provide for the liquidation of the claims by a Mexican national commission lead to any satisfactory solution [3]).

It was not until 1921 that the parties reached the stage of concrete proposals. The United States presented a draft claims convention providing for the decision by a mixed commission of all claims of citizens of the United States against Mexico and all claims of citizens of Mexico against the United States which had been presented by either government to the other since the signing of the Claims Convention of 1868, as well as of any other such claims as might be presented within a specified time. The Mexican government, however, in accordance with the position often taken up by South-American States, did not wish to recognize any

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[1]) For more elaborate details with regard to the history of Mexican-American relations, the Mexican revolutions after 1910, and the negotiation of the 1923 Convention we may refer to the first two chapters of Feller, The Mexican Claims Commissions; see also the books mentioned in note 1 on page 2.

[2]) Cf. Dunn, The Diplomatic Protection of Americans in Mexico, p. 274.

[3]) Cf. Feller, The Mexican Claims Commissions, pp. 15—20.

responsibility under the law of nations for the acts of unsuccessful revolutionists, although it was willing to make compensation for damage suffered on such account. It put forward a counter-proposal suggesting the conclusion of two separate conventions, one relating to claims of Americans against Mexico arising from acts by revolutionary forces between November 20, 1910, and May 31, 1920, the other relating to all other claims of citizens of both countries. The claims covered by the first Convention were to be decided „in accordance with the principles of equity, since it is the desire of Mexico that its responsibility shall not be fixed in accordance with the general principles of international law, but from the point of view of magnanimity, it being sufficient that the alleged damage may exist and that it may have been due to one of the causes enumerated". Under the second Convention, on the contrary, claims were to be decided „in accordance with the principles of public law, justice or equity." In the summer of 1923 these drafts were definitely adopted, with small changes, by a Mexican-American Commission; they constituted the so-called „Special Claims Convention" and the „General Claims Convention", instituting accordingly the „Special Claims Commission" and the „General Claims Commission". The former treaty was signed at Mexico City on September 10, 1923, the latter at Washington on September 8, 1923, after which they were duly ratified.

Activity of the Commission

The General Claims Convention determined in its sixth article that:

> „The Commission shall be bound to hear, examine, and decide, within three years from the date of its first meeting, all the claims filed . . . ."

Whereas the Commission met for the first time (for organisational purposes) on August 30, 1924, it was to decide, according to this stipulation, before the end of August 1927 all the claims submitted to it. This time limit, however, proved in practice to be far too short. Out of 2.781 claims filed by the United States only 51 had been finally decided, and out of 836 Mexican claims no more than 9 had received a final decision.

Hence, on August 16, 1927, a Supplementary Convention was signed according to which

> „. . . . the term assigned by article VI of the Convention of September 8, 1923, for the hearing, examination and decision of claims for loss or damage accruing prior to September 8, 1923, shall be and the same hereby is extended for a time not exceeding two years from August 30, 1927 . . . ."

It was at the same time agreed:

> „that during such extended term the Commission shall also be bound to hear, examine and decide all claims for loss or damage accruing between September 8, 1923, and August 30, 1927 . . . ."

During this period another 63 of the American claims were decided.

On September 2, 1929, another Supplementary Convention was signed, extending, in the same way as the former, the Commission's life until August 30, 1931. After an opinion had been rendered in 25 cases, all filed by the United States, the activity of the Commission came to an end owing to internal difficulties between the President and the Mexican as well as the American Commissioner [1]).

Composition of the Commission

The General Claims Convention in the second part of its first article gave the following rule with regard to the constitution of the Commission to which claims had to be submitted:

> „One member shall be appointed by the President of the United States; one by the President of the United Mexican States; and the third, who shall preside over the Commission, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within two months from the exchange of ratifications of this Convention in naming such third member, then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at the Hague . ."

In the case of a Commissioner ceasing, for whatever reason, to act as such, the same rule was to govern the selection of his successor.

Under this provision the tribunal was composed as follows:

[1]) See Feller, op. cit. pp. 60—61 for the subsequent attempts to provide a more efficient method of settling the remaining claims.

Commissioner for the United Mexican States:

Fernandez McGregor, from the beginning until the end of the Commission's activities.

Commissioner for the United States of America: [1])

Edwin B. Parker, January—Juli 17, 1926; succeeded by:

Fred. K. Nielsen, until the end.

Presiding Commissioner:

Professor C. van Vollenhoven, of Leyden University, Netherlands; selected by mutual agreement of the two Governments; from the beginning until August 30, 1927; succeeded by:

Dr. Kristian Sindballe, of Denmark; appointed by the President of the Permanent Administrative Council of the Permanent Court of Arbitration; of June 16, 1928 until July 1, 1929; succeeded by:

Dr. H. F. Alfaro, of Panama; selected by mutual agreement of the two Governments; from May 27, 1930, until the end of the Commission's activities.

Scheme of this book

It seems logical to begin this book with an analysis of the Commission's dicisions with regard to its jurisdiction (Chapter II). The question will be then considered which persons were admitted to act as claimants before the commission (III). Closely related to these two subjects is that of the validity and the effect of a „Calvo clause" (IV). The question then arises for which acts a state may be held responsible (V), which immediately entails the problem of responsibility for acts of revolutionairies. After mention will have been made of some opinions dealing with contractual liability of a State (VII), chapters VIII to XIII will be dedicated to the liability on account of international delinquency; a justification of the subdivision of this subject is given in chapter VIII (p. 132). Finally the last three chapters will deal with subjects which could not be included in the above subdivisions.

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[1]) Before Mr. Parker two other American lawyers served as American Commissioners, but they took no part in the decision of any cases.

CHAPTER II

JURISDICTION OF THE COMMISSION

Definition in the Convention of September 8, 1923

The General Claims Commission derived its competency from the will of the Governments of Mexico and the United States of America. Hence the extent and limits of its jurisdictional power were determined by the instrument creating it, which laid down the principles by which it had to be guided in its decisions, viz. the Convention signed at Washington on September 8, 1923.

Article I of this Convention defined this jurisdiction as follows:

> ,,All claims (except those arising from acts incident to the recent revolutions) against Mexico of citizens of the United States, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America by citizens of Mexico, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties; all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, assocation or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to; and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity."

The phrasing of this article is not particularly distinguished either for its clearness or for its precision. According to this wording the Commission would have jurisdiction over three different categories of claims:

a. claims of citizens of one State against the other;

b. claims for losses or damages suffered by citizens of either country as a consequence of losses or damages sustained by a corporation or the like, in which the citizens had a substantial interest;

c. claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice.

We are unable to perceive any difference between groups a. and c.[1]) Truly the first clause requires that the claims must be „of citizens", which is not mentioned in the third clause; and on the other hand this clause does not contain the qualification that the loss or damage must „originate from acts of officials or others acting for either Government and resulting in injustice". It will be agreed, however, that no claim could be taken into consideration for a loss or damage which is not alleged to originate from acts of officials or others acting for a Government, or which is not alleged to have resulted in injustice; both, imputability to the respondent Government and international wrongfulness, are conditions for the allowance of a claim, as will be stated more elaborately in Chapter VIII. On the other hand it will be seen from the first section of the next chapter that the Preamble as well as several other provisions of the 1923 Convention clearly show its authors to have envisaged only claims for losses or damages suffered *by a citizen* of either State.

The second clause, although very useful in removing all doubt as to whether claims might also be brought forward for *indirect* damage suffered by a national as a consequence of a damage sustained by a corporation, etc. [2]) can hardly be said to constitute a category quite separate from that of claims for damages originating from acts of officials resulting in injustice; at the utmost it can only be said to constitute a special form of such claims.

Altogether it would have been more satisfactory to give one general definition of claims falling within the Commission's

[1]) To the same effect: Feller, The Mexican Claims Commissions, p. 31.
[2]) Feller, op. cit. p. 31.

jurisdiction, that definition comprising the requirements of both the first and the third clauses, and to add a special interpretation clause providing that this definition was understood to *include* the group envisaged in the second clause.

Finally, it has with reason been remarked by Feller that the final clauses:

> „and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may be filed by either Government within the time hereinafter specified."

do not seem to serve any purpose, and that it is not even clear whether they refer to the third group only, as would according to the grammatical construction be the case, or to all three categories. The same criticism might particularly be applied to the term „such claims".

However, the opinions contain no indication that the wording has in practice given rise to any difficulties.

Claims „incident to recent revolutions"

The Convention of September 8, 1923, concluded between the United States and Mexico, was accompanied and completed by the conclusion of a separate convention on the tenth of the same month, providing for the settlement of claims arising out of revolutionary disturbances in Mexico. A „Special Claims Commission" was created for the examination and decision of claims of that character, which consequently were excepted from the jurisdiction of the General Claims Commission. This exception found its expression in the Convention of September 8 in the following provisions.

The Preamble opens with the words:

> „The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on Juli 4, 1868, of the Claims Convention entered into between the two countries (without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention), have decided to enter into a Convention with this object . . . ."

Article I, defining the General Commission's jurisdiction, excludes from „all claims" coming within it:

> „those arising from acts incident to the recent revolutions";

and Article VIII contains the exception:

> „claims arising from revolutionary disturbances and referred to in the preamble hereof".

The Convention of September 10, on the other hand, elaborately defines the claims falling within the jurisdiction of the Special Claims Commission. A considerable number of difficulties arose, with regard to the question whether any particular claim should be submitted to one Commission or the other. Mention is even made, in an opinion, of several hundreds of claims filed by the American Agent with both Commissions. Nevertheless in only about ten cases in the course of its existence, was the General Claims Commission called upon to render an opinion upon this question of jurisdiction. These decisions are obviously of very little general importance as precedents, and we shall only very briefly mention the contents of a few of them.

A claim based upon an allegation of illegal arrest and detention, i. e. upon a deficient administration of justice, which neither arose out of, nor could be attributed to, revolutionary movements, was held not to be excluded from the Commission's jurisdiction by the mere fact that it arose in a period of revolutionary disturbances [1]). The same reasoning led the Commission to take jurisdiction in a case where payment was demanded for services rendered to Mexican authorities during a very unsettled period of revolutions [2]), and the decision added:

> „in order then, that this Commission may declare itself to be without jurisdiction it is not enough to demonstrate the existence of some connection between certain facts which took place during those nine and a half years and the several revolutions, but it is necessary to show that the loss or damage giving rise to the claim was due to revolutionary disturbances". (III, p. 3.)

The escape from prison of the murderer of an American, not being due to a direct action of revolutionary forces, but merely

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[1]) *Jacob Kaiser*, II, p. 80.
[2]) *Pomeroy's El Paso Transfer Company*, III. p. 1.

to the prison guard's fleeing at their approach, was not considered as an act incident to a revolution, nor was the failure to reapprehend the convict, since no connection between such failure and the revolution was established [1]).

An interesting attempt to show a fundamental difference between the claims subject to the jurisdiction of the General, and those subject to the competency of the Special Commission was made in the case of *Genie Lantman Elton* [2]):

> ,,With respect to the question of jurisdiction which was raised for the first time in the Mexican brief, it was contended by counsel for the United States in oral argument that, while by the so-called Special Convention of September 10, 1923, Mexico had undertaken to make compensation in satisfaction of certain claims *ex gratia*, the claims coming before the so-called General Claims Commission of September 8, 1923, must be determined in accordance with principles of international law; in other words, the General Claims Commission is a court of international law, while the Special Commission may consider claims outside of international law and decide them in accordance with its views of justice and equity. The instant claim, it was argued, is a claim predicated on a denial of justice growing out of improper criminal trial. It is therefore a case, it was stated, which should properly be adjudicated by the General Claims Commission through the proper application of international law. Since Mexico has a right to have claims arising under international law adjudicated by the General Claims Commission, the United States must have that same right, it was said, or the General Claims Convention lacks mutuality."(II, p. 304).

The Commission, however, did not concur in this view:

> ,,The distinction which it was sought to make in the argument in behalf of the United States with respect to cases arising under international law and therefore cognizable by the General Claims Commission and other cases outside of international law which may be decided by the Special Claims Commission is not entirely clear. It would seem to be unnecessary for the Commission to concern itself with political reasons or other reasons which may have prompted the two Governments to conclude the Special Claims Convention with the purpose of adjudicating certain claims on the basis of an *ex gratia* settlement and without the application of rules or principles of international law. But it seems to be clear that the jurisdiction of each Commission is not primarily defined on the basis of some grouping of claims from the standpoint of

[1]) *Hazel M. Corcoran*, II, p. 211.
[2]) II, p. 301.

> susceptibility of determination under international law. The claims generally described in the Special Claims Convention would be susceptible of determination by an international tribunal applying international law." (II, pp. 305—306).

The last statement is then elaborately illustrated.

Furthermore it was decided that robbery by unknown persons in a period of revolutionary disturbances was not an act incident to recent revolutions [1]; the same was held about the nonfulfilment of a contractual obligation undertaken on behalf of a brewery by a person who was illegally placed in charge of the brewery by revolutionary forces. [2] Likewise jurisdiction was taken over a claim based upon „non-payment of an obligation", which had arisen after the expiration of the period which, according to the Special Claims Convention, embraced claims arising during recent revolutions and disturbed conditions [3] On the other hand the General Claims Commission in three cases declared itself to be without jurisdiction on account of the fact that the acts complained of were committed by the troops of revolutionary generals. [4].

Jurisdiction over contract claims

After having limited itself on two occasions [5] to the simple statement that claims based upon the alleged non-performance of contractual obligations were not necessarily outside its jurisdiction as defined by the General Claims Convention, the Commission in connection with the claim of the *Illinois Central Railroad Company* (I, p. 15) explained its view more fully [6].

The Commission begins with an introduction in which it argues that it will be sufficient for the disposal of this case to examine and apply the clause in the Convention of 1923 which

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1) *Sarah Ann Gorham*, III, p. 132; see for the elaborate arguments concerning the meaning of the Special Claims Convention: III, pp. 134—136.

2) *American Bottle Company*, II, p. 162.

3) *Macedonio J. Garcia*, I, p. 146.

4) *Clara Rovey and George E. Boles*, I, p. 5;
C. E. Blair, II, p. 107;
Frank LaGrange, II, p. 309;

5) *Thomas O. Mudd*, I, p. 10 and *Joseph E. Davies*, I, p. 13.

6) This decision was referred to in the cases of the *North American Dredging Company of Texas*, at I, p. 22; the *Home Insurance Company*, at I, p. 56; and *Genie Lantman Elton*, at II, p. 306

gives it jurisdiction over „all claims against one Government by nationals of the other for losses or damages suffered by nationals or by their properties." It continues:

> „4. Before entering upon this examination the Commission feels bound to state that any representation of international jurisprudence, and especially of the jurisprudence of the Mexican Claims Commission of 1868, intended to proclaim in a general way that such jurisprudence was either in favor of jurisdiction over contract claims or disclaimed jurisdiction over contract claims, is contrary to the wording of the awards themselves. Whatever statements from authors in this respect it may be possible to quote, a perusal of the very awards clearly shows that not only either allowance or disallowance of contract claims is not their general and uniform feature but that it is even impractiable to deduce from them one consistent system. A rule that contract claims are cognizable only in case denial of justice or any other form of governmental responsibility is involved is not in them; nor can a general rule be discovered according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the government as an authority. It seems especially hazardous to construe awards like the umpire's in the Pond case, the Treadwell case, the De Witt case, the Kearny case, etc. (Moore, 3466—3469), as if they decided in favor of jurisdiction over contract claims, but dismissed the claims on their merits. As, moreover, no claims convention or arbitration treaty known to the Commission used exactly the wording of the present Convention of September 8, 1923 (though the Treaty of August 7, 1892, between the United States and Chile comes near to it: Moore, 4691), the Commission has to seek its own way."

In the following paragraph it is eleborately argued that the expression „all claims for losses or damages suffered by persons or by their properties" is extremely broad, broader even than almost any provision in similar previous treaties with Mexico. Paragraph 6 is more worth quoting again:

> „6. Must these opening words of Article I be construed in the light of the closing words of paragraph (1) of the same article, reading that the claims should be decided „in accordance with the principles of international law", etc., to the effect that „all claims" must mean all claims for which either Government is responsible according to international law? The conclusion suggested exceeds what is required by logic and in the Commission's

view goes too far. If it be true that all the claims of Article I should be decided ,,in accordance with the principles of international law,'' etc., the only permissible inference is that they must be claims of an international character, not that they must be claims entailing international responsibility of governments. International claims, needing decisions in ,,accordance with the principles of international law'', may belong to any of four types:

a. Claims as between a national of one country and a national of another country. These claims are international, even in cases where international law declares one of the municipal laws involved to be exclusively applicable; but they do not fall within Article I.

b. Claims as between two national governments in their own right. These claims also are international and also are outside the scope of Article I.

c. Claims as between a citizen of one country and the government of another country acting in its public capacity. These claims are beyond doubt included in Article I.

d. Claims as between a citizen of one country and the government of another country acting in its civil capacity. These claims too are international in their character, and they too must be decided ,,in accordance with the principles of international law'', even in cases where international law should merely declare the municipal law of one of the countries involved to be applicable.

It seems impossible to maintain that legal pretensions belonging to this fourth category are not ,,claims''. It seems equally impossible to maintain that they are not ,,international claims''. If it were advanced that a state turning over claims of this category to an international tribunal waives part of its sovereignty, this would be true; but so does every treaty containing provisions which depart from pure municipal law, as the majority of the treaties do. It is entirely clear that on several occasions both the United States and Mexico expressly gave claims commissions jurisdiction over contract claims, showing thereby that in principle conferring on an international tribunal jurisdiction over contract claims is not contrary to their legal conceptions. The so-called Porter Convention of the Second Hague Peace Conference of 1907, to which both the United States and Mexico are parties, though having for its object the prevention of the use of force in collecting debts growing out of contract obligations until other methods, including arbitration, had been exhausted, nevertheless is a striking illustration of the recognition of contract claims as proper subjects for submission to an international tribunal. The Commission concludes that the final words of Article I, which provide that it shall decide cases submitted to it ,,in accordance with the principles of international law, justice and equity'', prescribe the rules

and principles which shall govern in the decision of claims falling within its jurisdiction but in no wise limit the preceding clauses, which do fix this Commission's jurisdiction." [1]).

Paragraphs 7, 8 and 9 are concerned with arguments of no general importance, in particular the intention of the negotiators of the 1923 Covention, from which it is also concluded that claims arising from breach of contractual obligations are included within the terms of Article I of the Treaty of 1923. The opinion then goes on:

„10. That there may be no possible confusion of thought, the Commission expressly states that in what is above written it has not considered the problem whether in the absence of a claims convention a foreign office would be entitled to resort to diplomatic intervention on account of the nonperformance of contractual obligations owing to one of its nationals by the government of another country. Some high executive authorities have denied this right; others have held that it could not be doubted. It is not for this Commission to pronounce upon this problem; the Commission bases its opinion with respect to its jurisdiction on the terms of an express claims convention." [2])

In view of the express statement of the Commission that it has only considered the question whether *under the Convention of 1923* claims based upon a breach of contract could be submitted to it, we may refrain from an examination of the wider problem whether such claims may, according to general rules of international law, be submitted to and allowed by international courts. It seems useful, nevertheless, to draw the attention to a few aspects of the *Illinois Central Railroad Co* decision which relate to the establishment of international practice with regard to this problem.

1. Nothwithstanding the said restriction made by the Commission, it will often be possible to apply a similar reasoning to other cases of the same character which may be submitted to international tribunals charged with the consideration of „all claims of citizens of one State against the Goverment of a foreign State", so long as the terms used in the instrument ruling the Commission's activity do not differ essentially from this definition.

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[1]) I, pp. 17—18.
[2]) I, p. 20.

2. Although the Commission may perhaps be right in saying, with reference to former international awards involving this question, that „it is impracticable to deduce from them one consistent system," it is nevertheless undeniable that a great number of them contain the point of view that contract claims are not outside the jurisdiction of a claims commission. It seems particularly difficult to concur with the view expressed in the opinion, that the *Pond*, *Treadwell* and *DeWitt* cases do not contain a decision in favour of jurisdiction over contract claims. It may be remembered that in those cases Umpire Thornton said:

> „that claims arising out of contracts come under the cognizance of the commission, but as these contracts are made voluntarily between the parties, the umpire thinks that the validity of the contract should be proved by the clearest evidence, and that it should also be shown that gross injustice has been done by the defendant." [1]

> „the commission ought not to take cognizance of claims which have arisen out of contracts between citizens of the United States and the Mexican Government, entered into voluntarily by the former, unless the validity of the contracts should be proved by the claimant's evidence, and it should also be shown that gross injustice has been done . . . . ." [2]

> „All claims, etc., arising from injuries to their persons or property by authorities, etc., comprise claims arising out of violations of contracts . . . . That the commission has, by the wording of the convention, jurisdiction over claims arising out of contracts the umpire cannot doubt . . . ." [3]

It may be deduced from these quotations that contract claims should be allowed in the presence of clear evidence of

a. the validity of the contract, and

b. gross injustice done to the claimant,

but that contract claims are not in principle excluded from the jurisdiction of a claims commission.

In a great many other cases as well jurisdiction over contract claims has been taken by arbitral tribunals, in support of which we may rely upon the following statement of such an authoritative writer as Ralston:

1) *Pond* case, Moore, Arbitrations, p. 3647.
2) *Treadwell* case, Moore, p. 3469.
3) *DeWitt* case, Moore, p. 3466.

„Many cases of contract between foreigners and the government of Venezuela were received by the Venezuelan commissions of 1903 and acted upon without any objection being raised to their nature, and without any hesitancy on the part of the Commissions . . . . .

References to many other cases of contract including broken concessions and unpaid bonds will be given later, and it will appear that nothwithstanding the general attitude of umpires of the Mexican Commission, other commissions and umpires have found little difficulty in the way of awarding sentences against governments for nonperformance of their contract obligation under protocols varying but slightly in their terms from those of the Mexican Commission." [1])

3. It must be remarked that the statement of the Commission:

„it is entirely clear that on several occasions both the United States and Mexico expressly gave claims commissions jurisdiction over contract claims, showing thereby that in principle conferring on an international tribunal jurisdiction over contract claims is not contrary to their legal conceptions"

as far as it regards the policy of the United States is contrary to statements made by other authors. Thus Borchard says:

„. . . . . the general rule followed by the United States, although not by all other governments, is that a contract claim cannot give rise to the diplomatic interposition of the government unless, after an exhaustion of local remedies, there has been a denial of justice, or some flagrant violation of international law." [2])

„Coming now to the practice of governments, it cannot be said that the countries of continental Europe make any substantial distinction between claims arising out of contract and those arising out of other acts. The United States, however, and at times Great Britain, have limited their protection considerably in the case of ordinary contract claims." [3])

And Hyde says:

„it may be doubted, however, whether the mere breach of a promise by a contracting state is generally looked upon as amounting to internationally illegal conduct . . . . In the estimation of statesmen and jurists, international law is not regarded as denouncing the failure of a state to keep such a promise, until at least there has been a refusal either to adjudicate locally the claim arising

[1]) Ralston, The Law and Procedure of International Tribunals, p. 75. To the same effect: Decencière-Ferrandière, La Responsabilité Internationale des Etats, p. 115.

[2]) Diplomatic Protection of citizens abroad, p. 284.

[3]) Op. cit. p. 286.

from the breach, or, following an adjudication, to heed the adverse decision of a domestic court." [1])

And again it is stated by Eagleton:

„it seems clear that the United States does not regard a mere breach of contract as in itself internationally illegal." [2])

4. The opinion rendered in the *Illinois Central Railroad* case is criticized by Feller for having failed to point out that even if the Commission had jurisdiction over contract claims it would have to apply a municipal, in this case Mexican, law. [3]) We believe that the distinguished author overlooked the fact that the argument before the Commission was not whether the *effect* of the contract had to be determined by the Commission according to one law or the other, but whether the Commission *had jurisdiction at all* over the claim. It seems justified, then, that the tribunal concentrated its attention upon this piont, which was exclusively dependent upon international law.

Effect of acknowledgment of obligation upon jurisdiction

In the *Illinois Central Railroad* case the Mexican Agent's motion to dismiss was based, apart from the two grounds dealt with in the two preceding sections, on the allegation that, since the obligation itself was not denied by Mexico, no controversy existed for the decision of the Commission. The latter however held:

„12. Nonperformance of a contractual obligation may consist either in denial of the obligation itself and nonperformance as a consequence of such denial, or in acknowledgment of the obligation itself and nonperformance nothwithstanding such acknowledgment. In both cases such nonperformance may be the basis of a claim cognizable by this Commission. The fact that the debtor is a sovereign nation does not change the rule. Neither is the rule changed by the fact that the default may arise not from choice but from necessity." [4])

Article V of the Convention (exhaustion of local remedies).

Article V of the Convention governing the Commission's activity read as follows:

[1]) International Law, pp. 546—547.
[2]) Op. cit., p. 161.
[3]) The Mexican Claims Commissions, p. 178.
[4]) I, p. 20.

> ,,The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses and damages, agree that no claim shall be dissallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim."

Only a few unimportant decisions were rendered relative to this provision. In the case which has just been dealt with [1]) it was, for instance, invoked with respect to the Commission's jurisdiction over contract claims. But the Commission, with reason it seems, had no hesitation

> ,,in rejecting the contention that while under Article V the legal remedies need not be ,,exhausted" some resort must nevertheless be had to the local tribunals before the claim can be so impressed with an international character as to confer jurisdiction on this Commission." [2])

This decision seemed to be required by common sense and logic. The principle underlying the requirement that local remedies must be exhausted before recourse is had to an international tribunal, is that a state is not internationally liable, or that at any rate such liability can not be made the basis of a claim, unless the claimant has in vain tried to obtain redress before the tribunals of the state. If the said requirement was expressly excluded by Article V, this means that the intention has been to accept international liability even in the absence of a previous recourse to domestic courts. This intention would be frustrated if nevertheless *some* resort to local courts were required.

Similarly in view of this article a defence based upon a failure to resort to local remedies was rejected in the *Daylight* (on pages 248 and 249 of vol. I), *Cook* (on page 319 of vol. I) and *Venable* cases (on page 368 of vol. I)

The only more important question raised in connection with article V was whether it prevented the application of a so-called Calvo clause in a contract. This point will be dealt with in a subsequent chapter.

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[1]) *Illinois Central Railroad Company*, I, p. 15.
[2]) I, p. 20.

Claims connected with conflicts between Governments. Administrative acts during occupation

El Emporio del Cafe S.A. [1]), a Mexican corporation, paid export duties to American authorities for shipments of coffee at Veracruz, Mexico, in August 1914, when that city was occupied by American troops. The same duties, however, had already been paid to the Mexican authorities before entering into the occupied zone of Veracruz. The coffee was afterwards reimported into Mexico somewhere outside the occupied zone. According to Mexican law the export duties should in case of re-importation into the country be refunded. This was done by the Mexican, but not by the American authorities. Mexico now reclaimed on behalf of the Emporio the sum paid to the American officials, whereupon the American Agent filed a motion to dismiss. In its interlocutory opinion the Commission pronounced itself upon three different aspects of claims with a political background. It said:

> ,,Had Mexico on behalf of the claimant merely alleged that the American authorities were not entitled to perform any act of administration at Veracruz, and stopped there, then the Commission would have dismissed this claim; not, to be sure, because of the political background of said occupation, for the Commission shall have to decide very likely several controversies with political backgrounds . . . . .
> . . . . . While the individual claimant was twice compelled to pay customs duties on the basis of the Mexican tariff laws which, according to these very laws, were due only once; and while one of these payments must therefore have been unlawfully enforced, the Commission is not clothed, by the terms of the Convention under which it is constituded, with jurisdiction to inquire and decide which payment was legal and which illegal. A controversy of this character, constituting a controversy between the two Governments themselves, does not change its nature when presented by either Government in the shape of the claim of an individual, and such a controversy has not been submitted to this Commission by the provisions of the Convention under which it is acting.
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> 3. But the administrative acts of the American representatives during such occupation can and must be examined to determine to what, if any, extent they invaded the rights of Mexican nationals to their damage. The Memorial alleges that while the Mexican tariff laws which the American authorities undertook to adminis-

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[1]) I, p. 7; the facts were almost the same in the *Fabian Ross* case, I, 59.

> ter authorized the collection of export duties which were actually collected, they also required that the duties so paid should be refunded to the shipper when and if the shipments on which duties were paid were reshipped into Mexico. Assuming the truth of said allegations, it follows that the claimant was entitled to such refund from the American authorities, which has not been made." [1])

These quotations imply three rules with regard to the jurisdiction of a claims Commission over claims with a background of international politics. They can perhaps thus be expressed:

I. *A claim is not outside a Claims Commission's jurisdiction by the mere fact that political aspects are involved in it.*

II. *However, claims necessitating a decision upon a controversy existing between the Governments themselves, independently from that claim, are not cognizable by a Claims Commission.*

III. *This need not prevent such a Commission from judging the propriety of the manner in which one of the Governments carried out a certain activity toward a citizen of the other, even if the right to carry out such activity is the subject of a dispute between the two Governments.*

Although the Commission based itself expressly upon the terms of the Convention under which it worked, it seems to us that these principles are sufficiently sound to be applied in other cases where a Claims Commission has to judge a claim with a political flavour.

The first is a question of practical convenience. Claims commissions are very often set up, as was the one whose opinions are discussed in this book, with the object of settling the complaints of citizens of one country concerning acts imputable to another, which have been committed in times of political friction between the two. If such a Commission were to dismiss all cases with a political background, many of these complaints would have to remain unsettled.

The second rule is not perfectly self-evident. It may easily happen that the subject of the controversy is an action which violates some rule of the law of nations; if in addition it has caused damage to a citizen of the other State, all the elements of liability for an international delinquency are present. On the other hand, a claim based upon damage suffered by a national is,

[1]) I, p. 8.

strictly taken, also a „controversy between two Governments". For both these reasons the words used by the Commission are somewhat vague, and might create confusion. What then is the special character of those „claims involving a controversy between two governments" which should be excluded from the jurisdiction of a Claims Commission? In our opinion it is this: the ordinary type of claim only constitutes a controversy between two governments on account of the fact that one of the states sustained an injury on the part of the other *through* and *in* the person of one of its citizens. The claims which the Commission wanted to exclude from its jurisdiction are different: these require a decision upon a separate controversy which existed already between the Governments, independently from any injury suffered by the claimant. In other words the distinction which the Commission wanted to establish might be formulated: the claims for which a Claims Commission is generally created are those based upon an injury primarily affecting the claimant individual, whereas controversies constituted by an injury primarily and directly affecting the State, regardless of any damage suffered by the claimant, are generally outside its competency.

This principle laid down in the Commission's opinion is also supported by a former international award, rendered by the Claims Commission between the United States and Great Britain. Alexander McLeod, a British subject, had been arrested in the United States upon the charge of complicity in the destruction of a steamer, which act, however, he committed at the orders of the British Government. The latter settled the affair with the American Government, assuming full responsibility, and McLeod was released, but with considerable delay. When a claim was brought forward in his favour it was dismissed by Umpire Bates on the ground:

> „From this time the case of the claimant became a political question between two governments .... The question, in my judgment, having been settled, ought not now to be brought before this commission as a private claim." [1]

Likewise it was decided in the *Stevenson* case, on the basis of

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[1]) Moore, International Arbitrations, p. 2425.

the terms of the protocol under which the Commission acted, that claims of a nation as such were outside its jurisdiction [1]).

The third rule might at first sight give rise to some doubt. Is it possible to decide upon the propriety of the manner in which a governmental action has been carried out, without also deciding upon the question whether the Government was entitled to carry out such action at all? We think it is possible. Supposing that a government occupies and takes over the administration of foreign territory in time of war, then a decision as to the wrongfulness of the occupation would require a decision on the wrongfulness of the whole war; this is a political question, or, at the outside, a legal dispute *directly between governments*; hence damages cannot be claimed on behalf of a citizen of the occupied territory merely on the ground that the occupation was wrongful. But there appears to be no reason why an idemnity could not be awarded for improper carrying out of the administration in the occupied territory. A decision to that effect, or one absolving the administration from blame, need not in any way prejudice upon the question of the propriety of the occupation itself. Nor are the interests of either of the States in dispute impaired: if the occupation was rightful, justice is fully done by a decision on the propriety of the manner in which the administration was carried out; if the occupation was wrongful, it might seem that the claimant (occupied) State had not had its full share in case of a decision absolving the administration from blame; but then it is open to that State to recover its damage on the ground of wrongfulness of the occupation.

In the case before us the Commission applied the second principle by saying that *if* Mexico had merely alleged that American authorities were not entitled to perform any act of administration at Veracruz, *then* the Commission would not have taken jurisdiction. This supposition became a reality in the case of *David Gonzalez* [2]), in which the facts were substantially the same as those upon which the claim of the Emporio del Cafe was based, but in which the sole ground for demanding repayment of the duties levied was the fact that the American authorities in the occupied country had compelled their payment. A decision upon

1) Ralston, Venezuelan Arbitrations of 1903, p. 451.
2) I, p. 9 and I, p. 69.

that point would have implied a decision upon the rightfulness of the occupation of Veracruz by the United States, and this the Commmission was not competent to give.

The same argument was applied to the claim of *Armando Cobos Lopez* [1]), who complained that, as a result of the American occupation, the Naval school at Veracruz, of which claimant was a student, was closed, with the result that he was unable to continue his naval career.

Effect of rank of delinquent official upon jurisdiction

In addition to the abovementioned principles one further decision worth mentioning was contained in the award on the claim of *El Emporio del Cafe S.A.* [2]). Apparently the jurisdiction of the Commission was challenged on the ground that the occupation of Veracruz, during which the events complained of occurred, was decided by the President of the United States with the approval of the Congress. But the Commission held that this circumstance did not

> ,,affect the question presented, for in determining the jurisdiction of this Commission the rank, be it high or low, of the national authorities whose acts are made a basis for complaint is immaterial." [3])

This seems a logical consequence of the principle, set out subsequently in this book, that the rank of the authority whose act is alleged to be violative of international law, is immaterial with regard to the wrongfulness of the act or the liability of the state for it. If the high position of the acting authority can not exclude liability it necessarily can not exclude jurisdiction either, otherwise the right of redress would still be rendered illusory.

Claims based on acts of a municipality in its civil capacity

One of the grounds for the motion to dismiss the claim of *Thomas Q. Mudd* [4]), which has already been mentioned in this

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[1]) I, p. 12.
[2]) I, p. 7.
[3]) I. p. 8.
[4]) I, p. 10.

chapter, was the contention that claims arising out of acts of municipalities in their civil capacity were outside the jurisdiction of the Commission. It was decided, however, that

> „*even if the claim were exclusively based* on alleged nonperformance of obligations arising from contracts in which the Calvo clause had been embodied, and *on acts of a municipality in its civil capacity*, even then it would not necessarily follow as a legal conclusion that the claim does not fall within the General Claims Convention." [1])

Questions of competency as between tribunals of one State.

The claim of *C. W. Parrish* [2]), an American national who was arrested, tried and sentenced in Mexico for swindling and embezzlement, was based, inter alia, upon the allegation that the judge who tried him, had no competency to do so, since the case fell within the jurisdiction of a judge of a neighbouring Mexican State. Professor van Vollenhoven, supported by Commissioner Nielsen, arrived at the conclusion that the correctness of this allegation was not established [3]).

Mr. McGregor in a dissenting opinion rejected this alleged ground of liability for a more fundamental reason. Although this Commissioner, too, held that the judge who tried Parrish was competent to do so, he advanced some other reasons for not taking into consideration this allegation, one of which was:

> „that the question of jurisdiction between the courts of a State is purely domestic." [4])

and that

> „the international decisions cited by the Government of the United States all refer to international jurisdiction."

It is not quite clear whether the Mexican lawyer by this remark meant to say that a question of jurisdiction between the courts of a State can not in principle be taken into consideration by an international tribunal. If that was his view, it should not pass without a word of objection. First of all it should be remarked that the Commissioner himself, as well as the majority, dealt

[1]) I, p. 11.
[2]) I, p. 473.
[3]) I, p. 476.
[4]) I, p. 480.

elaborately with the question whether the Mexican judge in this case had had jurisdiction or not. But besides it cannot be said, we believe, that there is any rule of international law which automatically, as a matter of principle, withdraws such a question from the jurisdiction of an international Claims Commission. A body of that character has to decide whether certain treatment of an alien by a Government is wrongful under international law. As it will be seen in chapter IX, such wrongfulness may consist of the fact that the treatment departed so far from that permitted by domestic law as to constitute in itself an inadmissible discrimination against a foreigner. Hence, as will be explained more elaborately in Chapter XI, the fact that a national tribunal heard a case which was outside its jurisdiction may in certain circumstances very well constitute an international delinquency. It follows that a Claims Commission must be deemed perfectly entitled to consider the point whether the limit between the jurisdictions of national tribunals has been respected.

Difference between a defence raising a question of jurisdiction and one based on the merits of the case

A lengthy consideration of the fundamental difference between matters pleaded in defence with respect to substantive law and those relevant to the question of jurisdiction was given by Commissioner Nielsen in his dissenting opinion in the case of *C. E. Blair* [1]). This American citizen had been assaulted and mistreated in Mexico by a bandit; the latter was arrested and put in jail, but released by one of the leaders of the Madero revolution. The United States alleged that Mexico was responsible for this failure to punish the culprit; Mexico, on the other hand, contended that the claim belonged to the group of those „arising from acts incident to recent revolutions", that was excepted from the Commission's jurisdiction. The majority of the tribunal accepted this view. The American member, however, attacked it vigorously. It would appear that his disagreement resulted mainly from a different understanding of the basis of the claim: whereas the majority opinion states that it was exclusively based upon a denial

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[1]) II, p. 107.

of justice resulting from the release of the bandit from prison, the American Commissioner pretends that it was brought to recover compensation for damage suffered in the way of physical injuries and property losses on account of the bandit's assault. Whereas this could only be ascertained on the basis of the precise contents of the Memorial, and is merely of incidental value, we need not pause to consider further the part of Mr. Nielsen's opinion which deals with this controversy.

Of more importance is the expression of a few general principles preceding the arguments just mentioned. They read:

> „The record in the instant case is extremely vague and confusing, and the argument made in behalf of the United States relating to jurisdictional matters was very meagre. I consider this to be very unfortunate in view of the great importance of the question of jurisdiction which has been raised. In my opinion a proper disposition of the case requires that the Commission apply to the allegations of liability made by the claimant Government fundamental rules and principles with respect to jurisdiction which in my opinion are generally applicable to cases coming before domestic tribunals and to cases before international tribunals.
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> Jurisdiction may be defined as the power of a tribunal to determine a case conformably to the law creating the tribunal or other law defining its jurisdiction . . . . . (follow a few precedents).
>
> Generally speaking, when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitious allegations. Matters pleaded in defense with respect to the merits of the case are not relevant to the question of jurisdiction . . . . . (follows a mention of three precedents).
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> Arbitral tribunals seem occasionally to have fallen into some confusion with respect to this last mentioned point. Thus it appears that, when it has been pleaded in defense of a claim that a claimant has failed to resort to local remedies, the plea has been considered as one that raised a question of jurisdiction before an international tribunal. *Cook's case*, Moore, International Arbitrations, Vol. III, pp. 2313, 2315. The proper view would seem to be that in such a case the issue is whether the claim is barred by the substantive rule of international law with regard to the necessity for recourse to legal remedies prior to diplomatic intervention.
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> So in reclamations involving alleged breaches of contractual obligations it seems that occasionally the insertion into contracts

of stipulations designed to prevent a resort to diplomatic protection has been regarded as raising a question of jurisdiction. *Case of Flannagan, Bradley, Clark & Co.*, Moore, *International Arbitrations, Vol.* IV, p. 3564; *Turnbull, Manoa Cy (Limited), and Orinoco Cy (Limited) cases, Venezuelan Arbitrations of* 1903, *Ralston's Report*, pp. 200, 245. Under international law a government has a right to protect the interests of its nationals abroad through diplomatic channels and through the instrumentality of an international tribunal. Whether according to that law that right may be restricted by contractual obligations entered into by the nationals of one country with the government of another country is not necessary for me to discuss. The question appears clearly to be one of substantive law and not of jurisdiction. Tribunals that have proceeded as if a jurisdictional question were involved seem in reality to have decided the cases according to their views of the merits and then nominally to have based their decisions on a point of jurisdiction." [1])

We have not been able to discover in the pages here quoted any argument of lasting value. Essentially they contain four pronouncements.

The first contains a definition of jurisdiction, and cannot be said to give anything that has not been expressed or realized by almost any author or tribunal [2]). The same applies to the statement that matters pleaded in defence with respect to the merits of a case are not relevant to the question of jurisdiction.

Everybody will agree. The question, however, is precisely *what* matters pleaded in defence are relevant to the merits of a case, and what to jurisdiction. The dissenting opinion does nothing to clarify this difficulty. It mentions two controversies. It has indeed been subject to much dispute whether a failure to resort to local remedies excludes international liability itself, or whether it merely deprives the claimant of the right to make his complaint a subject of international intervention, the liability existing non the less. And as a result of this controversy it may also be said that there are almost as many supporters as opponents of the view that a Calvo clause in a contract, if valid, excludes the jurisdiction of an international tribunal. But with regard to both these issues the above quotations only show: *a*) that

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[1]) II, pp. 108—110.

[2]) This definition was repeated in substantially the same way in two later decisions: *Genie Lantman Elton*, I, on p. 306; and *International Fisheries Company*, III, on p.243.

all the precedents mentioned by Mr. Nielsen conflict with his own conception, and *b*) that he gives nor eason whatsoever for taking an opposite view; he merely states that „the proper view would seem to be" and that „the question clearly appears to be one of substantive law". In these circumstances we may refrain from probing into the question whether the dissenting opinion was right or not, and limit ourselves to enregistering Mr. Nielsen among the adherents of the thesis that a failure to resort to the national courts has nothing to do with jurisdiction.

CHAPTER III

CLAIMANTS

Character of a claim

In five decisions the General Claims Commission pronounced upon the fundamental problem of the character of an international claim. For a clear understanding of the matter it may be useful to recall a few basic points involved.

In theory, and broadly speaking, two opposite conceptions are possible. The first is that an international claim is a demand of a State against another State for the reparation of injury suffered by the claimant State itself *in* the person of one of its citizens [1]; the claim, once it is espoused by the Government, becomes a national claim, and the private interest in it is irrevelant from the point of view of international law. [2]. This system can be developed in two ways: either the state itself may take action through the agents which it appoints for this purpose; or it may allow the injured citizen to do so *on its behalf*, thus authorising the latter to act in a way as its agent. The opposite conception is that of an international claim as a demand by a private citizen of one State against a foreign State for the reparation of an injury suffered by the citizen itself. In theory this view could be given effect by allowing the citizen to sue directly the foreign state before an

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[1]) This point of view was adopted by: Anzillotti, Cours de Droit International, p. 518; the same author in Revue Gén. de Droit Int. Public. 1906, p. 8; Umpire Plumley in the *Stevenson* case, Ralston, Venezuelan Arbitrations of 1903, pp. 450—451; in the *Norwegian Shipping Claims*, A.J.I.L. 1923, p. 366; Permanent Court of International Justice in the *Mavromatis Palestine Concessions* case, Publications of the P.C.I.J. Series A, No. 2. See also cases referred to by Borchard, Diplomatic Protection of Citizens abroad, pp. 366 *et seq.*; Decencière-Ferrandière, La responsabilité Internationale des Etats, pp. 35—36; Schoen, Die Völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen, p. 32 *et seq.*

[2]) Rejected by U.S. and Germany Mixed Claims Commission, A.J.I.L., 1925, p. 628

international tribunal. This, however, has up till now not been permitted except by virtue of a specific agreement between governments; as a rule international courts have only been competent to take into consideration actions brought by states [1]). But even so the claim might be considered as having been brought forward by the State as an agent on behalf of the citizen [2]); the intermediary of the State would thus be considered only as a procedural requirement of international law, the State being the trustee of its citizens in their relations with the world abroad. The problem, in other words, is, roughly speaking, whether an international claim must be considered as the claim of a Government, or as that of a citizen, i.e. whether the rights involved are State or individual rights. The answer is of practical importance on account of its effect upon, amongst others, the following questions [3]).

1. Can a citizen renounce by a so-called Calvo clause his right to invoke his Government's protection in disputes arising out of his contract with a foreign State? [4])

2. Is an international tribunal entitled to enquire in any particular case whether a claimant rightfully presented his claim to his Government for espousal?

3. Is a Government entitled to take up and present to an international tribunal without the authorization of its subject, a claim arising out of a wrong suffered by that subject?

4. When a Government has lawfully presented an international claim, is the citizen whose rights are involved, entitled to effect its withdrawal?

5. Does the claim subsist after the bond of allegiance between the victim and the State has ceased to exist?

6. Has the private claimant a right to the pecuniary benefit flowing from the claim?

7. Is the citizen bound by a settlement of the claim by the

[1]) See particularly upon this point: Le Fur, Précis de Droit International Public, p. 357; Schulé, Le droit d'accès des particuliers aux jurisdictions internationales.

[2]) This view was taken e. g. in the *Hersent* and *Cerruti* cases, Merignhac, Traité théorique et pratique de l'arbitrage international, p. 215; *Aboilard* case, Revue Générale de Droit International, 1905, doc. p. 13; *Miliani* case, Ralston, Venezuelan Arbitrations of 1903, p. 754; *Metzger* case, op. cit. p.579; *Tattler* case, A.J.I.L. 1921, p. 298. See further Schulé, Le droit d'accès des particuliers aux juridictions internationales, p. 35 *et seq.*

[3]) Cf. Decencière-Ferrandière, op. cit. pp. 36—38.

[4]) See Chapter IV, regarding 2°.

Government, and, on the other hand, is the Government not bound by a settlement of the claim by the citizen?

The character attributed to a claim will depend greatly upon the view taken of the position of individuals under international law, in so far that if the theory favoured by most authorities is accepted, viz. that states alone are subjects of public international law, [1]) then an international claim can only be considered as the claim of a State, and nothing else. It would, however, be beyond the scope of this book to discuss the problem of the individual's standing under the law of nations; nor does it enter within the aim of this book to go fully into all the above questions. It is only necessary here to determine what view the Commission took of the claims it had to decide, and whether this view was in accordance with the Commission's charter, the Convention of September 8, 1923.

The Commission on several occasions expressed as its opinion that the claims over which it had jurisdiction were primarily claims of private individuals.

This was stressed, e.g., in connection with the question of nationality, in the case of *William A. Parker* [2]).

> ,,2. The nationality of the claim presented has been challenged on several grounds. In response to this challenge it is contended that when a Government espouses a claim of one of its nationals against another Government the private nature of the claim and the private interest of the claimant therein ceases to exist and the claim becomes a public claim of the espousing Goverment. From this premise the proposition is deduced and pressed that the espousal of a claim by either Government before this Commission and the allegation in the memorial of facts as distinguished from conclusions from which it would follow that the claim possessed the nationality of said Government is *prima facie* evidence that it is impressed with such nationality, subject to rebuttal by affirmative evidence to the contrary which may be offered by the opposing Agent. This contention is rejected by the Commission. *It is clear that the Treaty of 1923 does not deal with any government-owned claims but does deal throughout with private claims of citizens which have been espoused by their respective Governments.* Provision is even made in certain cases for a restitution of a ,,property or right . . . . to the claimant" (Article IX of the Treaty). However, the Commission does hold that the control of the Government,

[1]) This view was expressly rejected by the Commission; vide infra, p. 309.
[2]) I, p. 35.

> which has espoused and is asserting the claim before this Commission, is complete. In the exercise of its discretion it may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When, on such request, a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In excercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. *But the private nature of the claim inheres in it* and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that *it is subject to the absolute control of the nation espousing it.*" [1])

Thus the Commission clearly expressed the opinion that the claims it had to settle were private claims of individuals, although it recognized that such claims, when espoused by a Government, were under the exclusive control of the latter. In the case before us the tribunal deduced from this conception that it was entitled to require convincing evidence on the part of the claimant Government establishing the nationality of the claimant as its subject.

Quite apart from the question of the correctness of the Commission's conception of the nature of the claims submitted to it, it seems to us that there was no justification for basing upon this conception any conclusion with regard to the burden of proof. There seems to be in fact no connection between the two. No doubt it could be defended that if a claim is considered to be the action of a citizen, presented by the intermediary of a Government, it is incumbent upon the claimant to prove that the Government had the right to act on his behalf. But equally if the other view be taken and the State considered as acting on its own behalf in respect of injury it has itself suffered in the person of one of its citizens, then the State will still be obliged to prove that it has sustained damage, which means that it will have to prove that the injured individual was its subject.

A somewhat different, and perhaps more defensible, application of the Commission's private-claim-theory was made in the

[1]) I, pp. 35—36.

case of the *North American Dredging Company of Texas* [1]), where a so-called Calvo clause was involved (see on this subject Chapter IV). The Presiding Commissioner here considered:

> ,,19. Claims accruing prior to the signing of the Treasty must, in order to fall within the jurisdiction of this Commission under Article I of the Treaty, either have been ,,presented" before September 8, 1923, by a citizen of one of the Nations parties to the agreement ,,to (his) Government for its interposition *with the other*", or, after September 8, 1923, ,,such claims" — i.e. claims presented for interposition — may be filed by either Government *with this Commission*. Two things are therefore essential, (1) the presentation by the citizen of a claim to his Government and (2) the espousal of such claim by that Government. But it is urged that when a Government espouses and presents a claim here, the private interest in the claim is merged in the Nation in the sense that the private interest is entirely eliminated and the claim is a national claim, and that therefore this Commission can not look behind the act of the Government espousing it to discover the private interest therein or to ascertain whether or not the private claimant has presented or may rightfully present the claim to his Government for interposition. This view is rejected by the Commission for the reasons set forth in the second paragraph of the opinion in the Parker claim this day decided by the Commission, and need not be repeated here." [2])

And in a subsequent paragraph of the same opinion it was said:

> ,,24. (a) The Treaty between the two Goverments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to fall within its jurisdiction must be that of a citizen of one Government against the other Government and must not only be espoused by the first Government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant." [3])

The suggestion that, when a claim is espoused by a Government ,,the private interest is entirely eliminated and the claim is a national claim, and that therefore a Commission can not look behind the act of the Government espousing it to discover the private interest therein" was also rejected by the decision rendered upon the claim of *Jennie L. Corrie* [4]), in these words:

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[1]) I, p. 21.
[2]) I, p. 30;
[3]) I, p. 32.
[4]) I, p. 213.

„4. Article I of the Convention requires not only the existence of a claim against either Government, but a claim vesting in a specific claimant at the time of its being filed. The Commission in either accepting claims or assuming jurisdiction over them is obligated to look behind the claim as espoused by either Government, and to determine whether there are individual claimants and who they are.

In paragraphs 2 and 3 of its opinion rendered March 31, 1926, in the case of William A. Parker the Commission rejected the contention that the sole claimants before this Commission are the Goverments and that the beneficiaries of the claims should be a matter of no concern to the Commission; and in paragraph 10 of its opinion rendered the same day in the North American Dredging Company of Texas case the Commission repeated that it is its duty to ascertain whether or not private claimants had presented or might rightfully present the claims to their Governments. The same view was held by the Umpire in the Metzger case[1]). The mere fact, therefore, that a private claimant, Jennie L. Corrie, did not exist at the time the claim was filed would, if nothing else could be brought forward, necessarily render acceptance of the claim impossible." [2])

A fourth time the Commission showed its conception of a claim as a private demand less explicitly. In the case of *Laura M. B. Janes et al.* [3]) elaborate consideration was given, as will be seen in Chapter X, to the problem of the foundation of so-called „indirect" responsibility in the law nations. With regard to this point the Commission, after having rejected the old theory of presumed state complicity, said:

„Once this old theory, however, is thrown off, we should take care not to go to the opposite extreme. It would seem a fallacy to sustain that, if in case of nonpunishment by the Government it is not liable for the crime itself, then it can only be responsible, in a punitive way, to a sister Government, not to a claimant." [4])

It appears from this dictum that in the Commission's opinion a defendant Government, against which a claim has been allowed, is not liable, normally speaking, toward the sister Government, but towards the claimant himself.

A few years later, when Professor van Vollenhoven had been replaced as Presiding Commissioner by Dr. Sindballe, the Com-

1) Ralston, Venezuelan Arbitrations of 1903, p. 579.
2) I, p. 214.
3) I, p. 108.
4) I, p. 117.

mission expressed itself in a different way than in the *Parker* and *Dredging Company* cases upon the requirements necessary for the presentation of a claim in order that the claimant may have locus standi before the Commission. When *W. C. Greenstreet, receiver of the Burrows Rapid Transit Company* [1]) claimed damages for the nonfulfilment of certain contractual obligations toward the Company, the respondent Government challenged his standing before the Commission because under American law his authority as a Receiver appointed by a Texas court was limited to the State of Texas. This view was in principle accepted by Commissioner Nielsen. Dr. Sindballe, however, held that even if it were considered as doubtful whether *under American law* Greenstreet had authority to deal with the claim, anyhow

> *„from the point of view of international law the claim, as having been espoused and presented by the Government of the United States, is duly presented."* [2])

Without going into the question whether in the present case the Receiver should or should not have been allowed locus standi before the Commission, it may be remarked that this statement seems to be based upon the principle that an international arbitral tribunal has no right to investigate whether a Government was entitled to present and espouse a certain claim, or — which has the same effect — whether a claimant was entitled to present his claim to his Government for espousal.

The same principle was accepted in an opinion written by Commissioner Nielsen upon the claim of the *Melczer Mining Company* [3]). The standing of this company as a claimant was challenged, upon, inter alia, the ground that the evidence in the case should have contained a statement showing that the United States had been given authority to file the claim in behalf of the company. But the tribunal held:

> „With respect to the argument that the record should contain some evidence that the claimant has invoked the assistance of the United States, it may be said that the Comission has repeatedly rendered awards in cases containing no evidence of this character. There can be no doubt that in international law and practice and

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[1]) II, p. 199.
[2]) II, p. 200.
[3]) II, p. 228.

under the terms of the Convention of September 8, 1923, either Government has a right to press claims before the Commission on proper proof of nationality. It may be assumed that it would be very unusual for a government to press a claim in the absence of any desire on the part of the claimant. There is a recorded precedent in which the claimant undertook to withdraw a case presented by Great Britain to an international tribunal, which held, however, that the claimant had no power to do so so long as the government espoused the claim. The tribunal in its opinion said that Great Britain derived its ,,authority to present" a claim not from the claimant or its representatives, ,,but from the principles of international law" and presented the claim ,,not as the agent" of the claimant ,,subject to having its authority revoked, but as a sovereign, legally authorized and morally bound to assert and maintain the interests of those subject to its authority", and that how and when it should move to assert those interests was, so far as other States and the tribunal were concerned, ,,a matter exclusively for the determination of that sovereign." *Cayuga Indians case, American and British Claims Arbitration under the Special Agreement of August 18, 1910, American Agent's Report, pp. 272—273.*" [1])

Both opinions just cited evidently stressed the national character of a claim and expressed the idea that, from the point of view of international law, the private interest in it, if not entirely abrogated, is at any rate in certain respects irrelevant. This was said still more clearly in the *Dickson Car Wheel Company* case [2]), in which Mr. McGregor said for the Commission:

,,The relation of rights and obligations created between two States upon the commission by one of them of an act in violation of International Law, arises only among those States subject to the international juridical system. There does not exist, in that system, any relation of responsibility between the transgressing State and the injured individual for the reason that the latter is not subject to international law." [3])

It may now be asked what the character of the claims presented under the 1923 Treaty was according to the provisions of that instrument itself. Here it would seem that Professor van Vollenhoven's construction of these claims as private demands finds a strong support in the terms used by the authors of that document.

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1) II, pp. 231—232.
2) III, p. 175.
3) III, pp. 187—188.

In the first place the Preamble twice mentions as object of the convention the settlement and adjustment of „*claims by the citizens of each country against the other.*" Article I says that there shall be submitted to a Commission „All claims .... against Mexico *of citizens of the United States,* whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America *of citizens of Mexico etc.*"

Similarly Article V says: „The High Contracting Parties, being desirous of effecting an equitable settlement of the claims *of their respective citizens* thereby affording *them* just and adequate compensation for *their* losses or damages .....". All these articles do not speak about „Claims of Governments", nor even of „claims on behalf of citizens", but about „claims of citizens".

In the second place it will be noticed from the words which we have further italicized in Article V that the aim of the settlement of the claims appears to have been the indemnification *of the private claimants* for *their* losses and damages, which seems hardly compatible with the theory that the *State* claims, in its own right, and for its own damage.

Furthermore it must be admitted that indeed Article I, as was pointed out by Professor van Vollenhoven in the Dredging Company case, contains the express requirement of presentation of the claim by the citizen to his Government for interposition, since the article, after an enumeration of the claims over which it gives jurisdiction, continues: „*and which claims may have been presented to either Government for its interposition with the other* since the signing of the Claims Convention concluded between the two countries July 4, 1868, ...". This provision indicates that none of the two Governments would be entitled to press a claim against the other for loss or damage suffered by one of its citizens, *if that claim had not been presented to it by the citizen injured.* This requirement, too, seems to be inconsistent with a conception of an international claim as the demand of a Government for reparation of a wrong which it has itself suffered in the person of one of its citizens.

Finally an argument in favour of the interpretation given

to the Convention by Mr. van Vollenhoven can be found in its Article IX, which opens with these words: „The total amount awarded in all cases decided *in favour of the citizens of one country* shall be deducted from the total amount *awarded to the citizens of the other country* . . . ."

Here again, the authors of the document did not use the term „cases decided in favour of one country", but: „cases decided in favour of the citizens of one country", and — which is more significant still — not „amount awarded to one country", nor even „amount awarded to one country in behalf of its citizens", but: „amount awarded *to the citizens* of one country". No doubt, if a claim were considered as a demand of the State itself, the amount awarded would in practice ultimately reach the pocket of the private citizen injured, but that would be an exclusively internal affair of the State; a strict application of such a conception requires the awarding of a sum *to the State*, it being immaterial from the point of view of international law, whether that State will, in its turn, hand the sum down to its citizen [1]).

Whether those who drafted the General Claims Convention were fully aware of the significance of the terms they used and of the dispositions they inserted, may perhaps be doubtful. They gave sufficient grounds at any rate, for saying that the Commission under the Presidency of Prof. van Vollenhoven was perfectly justified in interpreting the meaning of the Convention in the way it did, i.e. as dealing with private, not with Government-owned claims.

This opinion is probably not shared by Feller. So, at least, we gather from the fact that, after having mentioned some of the expressions cited above, he points out that

> „On the other hand, the control of the state over these claims is clearly apparent." [2])

In support of this contention he reminds us that the designation of the members of the Commission, as well as of the agents and counsel, was within the control of the governments; that payment was to be made to the governments, and not to the

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[1]) See e.g. Borchard, Diplomatic Protection of Citizens Abroad, pp. 359, 360, 383—385, and cases quoted there.

[2]) The Mexican Claims Commissions, p. 87.

individuals; that according to the Rules claims could only be filed, and documents only presented, by or in the name of the Government agents. In our opinion, however, all these regulations only established a *procedural* intermediary of the Governments. This, as was pointed out in the beginning of this chapter, may very well be a form of application of the private-claim-theory. The only provision which might perhaps be considered to apply actually to the nature of the claim is, that the contracting parties, i.e. the Governments „agree to consider the result of the proceedings of the Commission as a full, perfect, and final settlement of every such claim". (Article VIII) This may be said to be something more than a mere requirement of a procedural character: here the governments actually disposed of the content of the claims in a way by which their citizens' rights were in a certain respect abrogated .This restriction, however, to the private nature of the claims to be presented was recognized by the Commission in saying that, once a claim is espoused, it is subject to the absolute control of the nation espousing it.

It will be noted that the conception of an international claim which was given expression in the 1923 Treaty as well as in the four opinions first mentioned in this section, was contrary to that most often accepted by international writers and tribunals. Thus Mr. Borchard states:

> „. . . . the private claim becomes merged in the public demand of the Government, so that, from the international point of view, the Government, having made the claim its own, assumes the character of the party claimant.
>
> . . . . . .
>
> By espousing a claim for its national for injuries inflicted by a foreign State, the claimant government, acting in its sovereign capacity, makes the claim its own and therefore acts neither as agent nor trustee for the claimant.
>
> . . . . . legally it is unquestionable that the state is the real party in interest, and that the individual claimant has no legally enforceable control over the claim, either in its presentation or in the distribution of any award which may be made." [1])

The following conclusions may be drawn from what has been said in this section:

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[1]) Borchard, the Diplomatic Protection of Citizens abroad, p. 357; see also the precedents mentioned bij this author, and in note 1 on page 33 above.

Under the General Claims Convention of 1923, and in the light of its phrasing, claims could with reason be considered as the private demands of individuals for reparation of damage suffered by themselves.

This was also the view expressed in four opinions by the Commission under the Presidency of Professor van Vollenhoven. In consequence it held that an international tribunal is entitled to look behind the claim and determine the private interest in it.

At the same time it was recognized, however, that a claim, when espoused, is under the complete control of the espousing government, so as to render any compromise or other action taken by that government binding upon the claimant.

The Commission also, but, we suggested, without justification, deduced from the private nature of a claim that the claimant government is bound to procure convincing evidence of claimant's nationality.

Under the Presidencies of Dr. Sindballe and Dr. Alfaro the Commission returned to the classic theory of a claim as the demand of a government for compensation for damage which it has itself sustained IN its citizens; it is then sufficient that a claim is espoused by a government, and an international commission can not look behind the government's act.

Right of action of heirs as representatives

The right of heirs or executors to recover indemnity for personal injuries suffered by a deceased person received a lengthy discussion in the case of *Fanny P. Dujay* [1]), an American woman, who, in her capacity of executrix of the estate of her deceased husband, claimed an idemnity on account of illegal arrest and detention suffered by the latter at the hands of Mexican authorities. It was contended by Mexico that the claimant

> ,,has no legal personality to appear and to ask an award for personal injuries which were suffered by Captain Dujay."

The United States with regard to this point contended:

> ,,that a claim on behalf of the executor or personal representative of a decedent to recover indemnity for personal injuries suffered

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1) II, p. 180.

by the latter during his lifetime is clearly recognized by international law. The issue raised is governed exclusively, it was argued, by that law. It was further contended that, if the question whether a claim such as that presented in the instant case survived to the executrix should be considered to be governed by a rule of domestic law, and specifically, the law of the domicile of the injured person, then the claim did survive under the law of the State of Texas which was the domicile of Dujay at the time of his death. However, the fundamental contention on which counsel relied is that the issue presented is governed by international law, and that under that law a claim can be maintained on behalf of the executrix. He argued that his contention was clearly supported by numerous precedents of international tribunals, and that a proper decision on the issue raised must be reached in the light of precedents of that character." [1])

The Commission, by the voice of Mr. Nielsen, gave two fundamental decisions with respect to this claim. It determined that, according to the rules laid down by the Commission, and having regard to the attitude of former international tribunals, *a claim arising from injustice suffered by a deceased person may be presented on behalf of his legal representatives*. Secondly it decided that *the question whether an international claim passed to the heirs must be decided by international law and not by domestic law.*

The first decision was clothed in the following terms:

,,Rule IV, paragraph 2, sub-section (i), prescribed by this Commission pursuant to Article III of the Convention of September 8, 1923, provides that a ,,claim arising from loss or damage alleged to have been suffered by a national who is dead may by filed on behalf of an heir or legal representative of the deceased." This rule appears to be in harmony with procedure sanctioned by international tribunals, numerous decisions of which are cited in the counterbrief of the United States. That this is so can be shown by references to a few illustrative cases in which claims have been filed in behalf of heirs or legal representatives. Among the numerous cases cited are cases concerned with injuries that have resulted in death; cases in which it appears that injuries inflicted were of such a nature as to have contributed to death; cases involving both loss or destruction of property and physical injuries; and cases arising solely out of personal injuries." [2])

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[1]) II, p.p. 181—182.

[2]) II, p. 185. Almost the same language was employed in the case of *Halifax C. Clark and Olive Clark, joint executors of the estate of Alfred Clark, deceased*, III, p. 94.

With respect to the second principle mentioned above the following considerations were put forward:

„The impropriety of giving application to any rule or principle of domestic law in relation to a subject of this kind is readily perceived. An international tribunal is concerned with the question whether there has been a failure on the part of a nation to fulfill the requirements of a rule of international law, or whether authorities have committed acts for which a nation is directly responsible under that law. The law of nations is of course the same for all members of the family of nations, and redress for acts in derogation of that law is obviously not dependent upon provisions of domestic enactments. Domestic law can prescribe whether or not certain kinds of actions arising out of domestic law may be maintained by aliens or nationals under that law, but it is by its nature incompetent to prescribe what actions may be maintained before an international tribunal. If domestic law should be considered to be controlling on this point we should have the *reductio ad absurdum* that redress for personal injuries conformably to international law might be obtained in a country like Venezuela in which the principles of the civil law with respect to the survival of actions may obtain, and no redress for the same violation of international law could be obtained in another country where the principles of the common law obtained.

An examination of domestic law may often be useful in reaching a conclusion with regard to the existence or non-existence of a rule of international law with respect to a given subject. But analogous reasoning or comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to the relations of States towards each other. International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The purpose of a proceeding before an international tribunal is to determine rights according to international law; to settle finally in accordance with that law controversies which diplomacy has failed to solve. That is the purpose of arbitration agreements such as that under which this Commission is functioning. It would be a strange and unfortunate decision which would have the effect of precluding an international tribunal from making a final pronouncement upon the merits of any such controversy, because some rule of a particular system of local jurisprudence puts certain limitations on rights of action under domestic law. Arbitration as the substitute for further diplomatic exchanges or force would fail in its purpose. The unfortunate delays incident to the redress of wrongs by international arbitration are notorious. Injured persons often die before

> any redress is vouchsafed to them. A decision of this kind would seem to put a premium on such delays which would be conducive to the nullification of just claims.
> . . . . . This claim, that arose and was presented to Mexico many years ago, may well be regarded as a property right. Had it been settled when presented, Dujay or his estate would have had the benefit of it. It is competent for this Commission to pass upon the merits of the claim in the light of the terms of submission stated in the Convention of September 8, 1923." [1])

Summarized, these considerations involve five arguments. If the survival of an action were governed by domestic law, the following would be the results:

1. The liability of a State on account of a violation of international law would be dependent upon a domestic enactment, which is inadmissible, since domestic law is by its nature incompetent to determine what actions may be maintained before an international tribunal.

2. It might occur that for a citizen of one State it would be possible, and for the citizen of another country it would at the same time be impossible to obtain redress for the same international delinquency.

3. Arbitration would fail in its purpose if an arbitral tribunal could by a rule of domestic law be precluded from making a final pronouncement upon the merits of an international controversy.

4. It would put a premium upon the unfortunate delays in international arbitration procedures and encourage obstructive tactics dictated by the hope that the injured person may die before the claim can be decided.

5. It creates the unfair possibility that the estate, and therefore the heirs, would be deprived of a benefit which they would have enjoyed if only the claim had been settled during the lifetime of the deceased.

It seems to us that these arguments contain plenty of reason to justify Mr. Nielsen's second conclusion, and to give lasting value to his opinion in the *Dujay* case. Besides both his conclusions are thoroughly supported by a number of precedents. [2])

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[1]) II, pp. 189—191.

[2]) See those mentioned in the opinion and by Feller, The Mexican Claims Commissions, p. 105, note.

Independent right of action of relatives

It will have been noted that the preceding section dealt with the right of heirs to bring action *as legal representatives* of the deceased, i.e. to press the claim which the person injured would have pressed himself had he remained alive. This should be clearly distinguished from the question how far relatives may have an *independent* right of action, when they themselves have suffered loss or damage, as a result of a wrong done to the person directly injured. The latter situation, in our idea, involves some form of indirect damage: the relatives suffer damage as a result of an injury which is directly inflicted upon someone else. The independent right of action of relatives will therefore be discussed in the chapter dealing with indirect damage. Here we may limit ourselves to the statement that in several cases [1]) awards were rendered in favour of the relatives of wrongfully killed Americans, which awards took into account the financial support the relatives received from the deceased. This, in our view, can only mean that the relatives were not acting as representatives of the deceased, but in their own right and on their own behalf.

We shall have occasion to refer later to the case of *Charles S. Stephens and Bowman Stephens* [2]), brothers of an American citizen who was killed by a reckless use of firearms on the part of Mexican guards, in which case the Commission even allowed *satisfaction for indignity suffered* by a brother who had not sustained any pecuniary loss as a result of the death [3]).

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[1]) *J. W. and N.L.Swinney*, I, p. 131.
Francisco Quintanilla et al., I, p. 136.
Agnes Conelly et al.. I, p. 159.
William T. Way, II, p. 94.
Mary Evangeline Arnold Munroe, II p. 314.

[2]) I, p. 397.

[3]) In Feller's view this decision seems to go rather far, The Mexican Claims Commissions, p. 112.

CHAPTER IV

THE CALVO CLAUSE

Questions with regard to the validity and effect of the so-called „Calvo-clause" in contracts were discussed in connection with two claims. Both times very elaborate and valuable opinions were rendered by the Mexican-American Claims Commission.

Contents of the opinions

The *North American Dredging Company of Texas* [1]) had entered into a contract with the Government of Mexico for dredging at a Mexican port. Article 18, incorporated by Mexico as an indispensable provision, inseparable from the other terms of the contract, read in translation as follows:

> „The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract, either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment [2]) of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

It was alleged that the Dredging Company suffered damage as a result of a breach of the contract on the part of the Mexican Government.

The jurisdiction of the Commission was now challenged, on the

[1]) I, p. 21.

[2]) See note [2]) on page 54.

ground, inter alia, that a contract containing the so-called Calvo-Clause deprives the party accepting it of the right to submit any claims connected with his contract to an international commission.

The opinion rendered in this case is signed by Commissioners C. van Vollenhoven and Fernandez McGregor. But to anyone familiar with the style and spirit of van Vollenhoven, there can hardly remain any doubt that this reasoning sprang from the mind of the Leyden lawyer.

We have endeavoured throughout this book to limit quotations to the minimum required by the general juridical importance of each decision and necessary for the purpose of enabling the reader to use this book without consulting the complete text of the opinions; this time, however, it seems impossible to render full justice to the arguments contained in the decision without reproducing it here almost in its entirety.

It will perhaps be easier to follow the reasoning if we begin by summarizing the important paragraphs.

4: It is not necessary to choose between the extremes of denying the Calvo clause altogether and upholding it fully in all cases.

5: Upholding it in the present case need not mean that all nations may lawfully bind foreigners to relinquish all rights of protection.

6: Individuals can have a personal standing under international law.

7: Since a citizen has the right to expatriate himself, *a fortiori* he has the right to loosen to a certain extent by means of a Calvo clause the ties with his country.

8: The Calvo clause can only be rejected if it is clearly repugnant to a generally recognized rule of international law.

9: There exists no such rule prohibiting all limitation of the right of protection.

10: The meaning of the present Calvo clause was only a promise not to ignore local remedies.

11: Such a promise is not illegal in so far as it only limits the right of protection, without destroyng it.

12: Nor is it inconsistent with the law of nature.

In paragraphs 13—21 the foregoing principles are applied to the circumstances of this particular case.

22—23: A Calvo clause, whose object it was to preclude a Government from protecting its citizens abroad against violations of international law, would be declared void by the Commission; nor would it uphold any stipulation limiting the right of protection, and not being a term of a contract agreed to by both parties. But if such a term exists, the claimant is bound to exhaust local remedies before obtaining his State's protection.

24: Summary of the case.

The following is the part of the opinion which would seem to be of general interest.

> „4. The Commission does not feel impressed by arguments either in favor of or in opposition to the Calvo clause, in so far as these arguments go to extremes. The Calvo clause is neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved be saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law. By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached.
>
> 5. At the very outset the Commission rejects as unsound a presentation of the problem according to which if article 18 of the present contract were upheld Mexico or any other nation might lawfully bind all foreigners by contract to relinquish all rights of protection by their governments. It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so." [1])

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[1]) I, p. 23.

„7. It is well known how largely the increase of civilization, intercourse and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty. As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. There was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence, and when even if he had changed either of them his government sought to lay burdens on him for having done so. To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself, but short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.

Lawfullness of the Calvo clause

8. The contested provision, in this case, is part of a contract and must be upheld unless it be repugnant to a recognized rule of international law. What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance. Only in case a provision of this or any similar tendency were established could a parallel be drawn between the illegality of the Calvo clause in the present contract and the illegality of a similar clause in the Arkansas contract declared void in 1922 by the Supemre Court of the United States (257 U.S. 529) because of its repugnance to American statute provisions. It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attemping to accomplish the purpose of the Calvo clause.

9. The commission does not hestitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause. While it is true that Latin-

American countries — which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law — are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (Treaty between the United States and Peru dated September 6, 1870, Volume 2, Malloy's United States Treaties, at page 1426; article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, ,,If all of the means of enforcing your right under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connection with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?" and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, ,,I promise."

11. Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his government. But while any attempt to so bind his government is void, the Commission has not found any generally recognized rule of positive international law which would give to his government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself — abuses which are intolerable to any selfrespecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and if these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and ist inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerstone: instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

Interpretation of the Calvo clause in the present contract

13. What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: ,,being deprived, in consequence, of any rights as aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract.*"[1]) Both the commas and the phrasing show that the words ,,in any matter connected with the contract" are a limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed bt the laws of Mexico and to use the remedies existing under such laws. The closing words ,,in any matter connected with the contract" must be read in connection with the preceding phrase ,,in everything connected with the execution of such work and the fulfillment [2]) of this contract" and also in conection with the phrase ,,regarding the interests or business connected with this contract." In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim ,,regarding the interests or business connected

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[1]) Italics appearing in the original text.

[2]) Whereas in the original text of the opinions the word fulfilment is regulary written with a double *l*, this orthography is for reasons of correctness maintained in the passages quoted in the present work.

with contract", the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But the provision did not, and could not, deprive the claimant of his American citizenship and all that it implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that this contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subcribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in a inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived, and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfillment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so impinges upon a souvereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of article 18 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law — in some respects the citizen has greater rights and larger duties, in other respects the foreigner has — article 18

only purposes equality between the foreigner and Mexicans with respect to the execution, fulfillment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and stimulate friendly relations between nations if in the future such important clauses in contracts as article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon article 18 in this instance, which if adopted would result in striking it down as illegal." [1])

The Commission then points out that in the present case

,,the claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of its contract had no existence in fact." [2])

Applying further the principles set forth in the preceding paragraphs to the claim under consideration, the Commission finds:

,,20. Under article 18 of the contract declared upon the present claimant is precluded from presenting to its Government any claim relative to the interpretation ot fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law commited by Mexico to its damage, it might have presented such a claim to its Government which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its Government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I." [3])

It is of importance to note, that in the opinion of the Commission the effect of the Calvo clause is not even diminished by art. V of the Treaty, to the effect ,,that no claim shall be dissallowed or rejected by the Commission by the application of the general

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1) I, pp. 24—29.
2) I, p. 29.
3) I, p. 30.

principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim" [1]; for the Commission held:

> ,,This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the Treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its Government and the claim therefore can not become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either Government to set aside an express valid contract between one of its citizens and the other Government." [2]

The Commission returns to the general effects of its conception of the Calvo clause:

> ,,22. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has deraigned title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subcribed in writing, howsoever it may operate or affect his claim, preclude him from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the Treaty.
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> 23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction nothwithstanding the existence of such a clause in a contract subcribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and

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[1] I, p. 30.
[2] I, p. 31.

> interpretation of the contract he will have resort to local tribunals, remedies and authorities, and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim." [1]

In conclusion the Commission summarizes all its arguments in different words and decides that the case is not within its jurisdiction.

Before examining critically this opinion,it seems useful first to mention the other judgment dealing with the Calvo clause, which was rendered 5 years later on the claim of the *International Fisheries Company*. [2]

The opinions written in this case do not contain such fundamentally important arguments as the one dealing with the claim of the North American Dredging Company, but their importance resides in the vehement attack made by Commissioner Nielsen on the theory laid down in that opinion, and in the fact that despite his attack the majority of the Commission, though under a new President, adhered to the principles laid down in 1926.

Commissioner McGregor's opinion, which through Presiding Commissioner Dr. Alfaro's concurrence became decisive, begins by showing that certain recents events indicated a tendency in the usage of nations to accept the validity of the Calvo clause as interpreted in the North American Dredging Co.s case. Thus for instance he says:

> ,,Both Agencies made reference to the research work conducted by the League of Nations with relation to the international law codification of the matter under discussion. The question submitted by the League of Nations to the chancelleries of the world was the following: What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy? Both agencies agreed that the Government of Great Britain replied that His Majesty's Government accepted as good law and was contented to be guided by the decision of the Claims Commission between Mexico and the United States of America in the case of the North American Dredging Company of Texas . . . ."
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> ,,With respect to the research work conducted by the League of Nations it may be observed that not all of the replies received from

[1] I, pp. 31—32.
[2] III, p. 207.

19 States were unfavorable to the contention of the validity of the Calvo clause. The replies submitted by Germany, Australia, Bulgaria, Denmark, Great Britain, Hungary, Norway, New Zealand and the Netherlands, are in practical accord with the opinion expressed in the decision of the North American Dredging Company of Texas.

A study of the basis of discussion No. 26, drawn up by the Committee for the Codification Conference, shows this similarity in points of view more clearly." [1])

After having quoted the said basis and the bases completing it, the opinion continues:

„It will be seen by the foregoing that such an authoritative international body as the Committee of the League of Nations, after presenting it to the principal States of the world, establishes a doctrine which can be reconciled in all of its parts to that laid down by this Commission in the decision of the case of the North American Dredging Company of Texas." [2])

And the Commissioner concludes this part of his reasoning by saying:

„In my opinion then, the instant case must be determined in accordance with the doctrine established in the decision of the North American Dredging Company of Texas case." [3])

After which Mr. McGregor proceeds to a study of the Calvo clause in question, which was contained in article 32 of a contract between the Mexican Government and a Mexican Company called „La Pescadora S.A.", almost all of whose shares were held by the International Fisheries Co. It reads:

„The Concessionary Company or whosoever shall succeed in its rights, even though all or some of its members may be aliens, shall be subject to the jurisdiction of the courts of the Republic in all matters the cause and action of which take place within its territory. It shall never claim, with respect to matters connected with this contract, any rights as an alien, under any form whatsoever, and shall enjoy only the rights and the measures for enforcing them that the laws of the Republic afford to Mexicans, foreign diplomatic agents being unable therefore, to intervene in any manner with relation to the said matters." [3])

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[1]) III, pp. 209—210.
[2]) III, p. 211.
[3]) III, p. 212.

His conception of this stipulation is as follows:

> ,,The said article unquestionably contains, in its two gramatically separate paragraphs, two distinct stipulations .... The first part .... contains nothing but the general principle of International Law that all aliens are subject to the jurisdiction of the country in which they reside and must therefore abide by all laws and decrees of the lawful authorities of the country.'' [2])
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> . . . . . .
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> ,,The language of this second part of Article 32 is perfectly clear; it does not require interpretation of any nature. It is clearly for the purpose of establishing that the persons who derived rights form the contract-concession of March 10, 1909, shall not bring into question matters with respect to that contract except in the courts of Mexico and conformably to Mexican law, diplomatic intervention, on the other hand, being prohibited with respect thereto.
>
> The contractual provision under examination does not attempt in any manner to impede or to prevent absolutely all diplomatic intervention, but tends to avoid it solely in *those matters arising from the contract* itself, with its fulfillment and interpretation. It certainly comes, therefore, within the doctrine laid down in the decision rendered in the case of the North American Dredging Company of Texas . . . . .'' [3])

Such are the general arguments which have a bearing on the effect of the Calvo Clause. It may still be mentioned how the Commission applied this effect in the present circumstances.

The act upon which the claim was based, then, consisted of the cancellation by the Mexican Government of the contract, Mexico alleging that such action had been in perfect compliance with an article in the contract, authorizing cancellation under certain circumstances. The American Agency, on the contrary, contended that the circumstances required by the article had not been present, and that accordingly the present case ,,was one not of nonfulfillment of contract, but one of international delinquency incurred directly by the State, of a denial of justice, of a wrongful act.'' But the Commission was not influenced by this manner of presenting the affair:

> ,,Nothwithstanding the aspect given to them by the American Agency, the facts were held by this Commission to be matters

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[1]) III, p. 212.
[2]) III, p. 213.

relating to the contract to which the North American Dredging Company of Texas was a party." [1])

Quite justly it held that

,,The question . . . . which arose between the Company and the Mexican Government, was that of ascertaining whether or not the concessionary had become liable to the cancellation provided for in article 34, and this question must necessarily be considered as included within what this Commission understood by fulfillment or interpretation of the contract containing a Calvo clause, when it decided the case of the North American Dredging Company of Texas. The cancellation in question, in the case which must now be decided, was not an arbitrary act, a violation of a duty abhorrent to the contract and which in itself might be considered as a violation of some rule or principle of international law, requisites to be established in order that the Commission might take jurisdiction, nothwithstanding the existence of a clause partaking of the nature of the Calvo clause in a contract subscribed by a claimant. (Par. 23 of the decision cited.)" [2])

Dr. Alfaro, the Presiding Commissioner, supported the Mexican judge in sustaining the doctrine established in the matter of the North American Dredging Company of Texas, because:

,,That decision has received the approval of the highest authorities on International Law and constitutes an appreciable contribution to the progress of this science. The decision in question was a material assistance in clarifying the opinions previously expressed on the validity or invalidity of the said clause.

The decision mentioned, establishes therefore a just and reasonable middle ground. It protects, in a measure, the defendant State, preserving at the same time the rights of the claimant in the event of a denial of justice or international delinquency.

The clause in question, as understood by this Commission in the decision cited is not violative of any canon of International Law and appears simply to enunciate that which independently of the clause is the rule of International Law in the premises." [3])

Objections of Mr. Nielsen

Commissioner Nielsen however, who was not yet a member of the Commission at the time when the first opinion dealing with the Calvo clause was rendered, devoted no fewer than 60 pages to

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[1]) III, p. 220.
[2]) III, p. 218.
[3]) III, pp. 222—223.

an impassioned attack upon it. The grounds upon which it is based are scattered all over the 60 pages. Arrayed in order and pruned of its many repetitions his reasoning seems to come down to seven fundamental objections to the majority opinions of 1927 and of 1931. Six of them appear immediately on the second and third pages of the opinion, which part must therefore be quoted in its entirety.

We have italicized and numbered the sentences containing the essence of each objection.

> „*I consider that the Commission construed the language of the contractual provisions involved in that case in such a way as to give them a meaning entirely different from that which their language clearly reveals — a meaning not even contented for by Mexico.* (1º) In order to do that the Commission resorted to both elimination, substition and rearrangement of language of the contractual provisions. These artifices were embellished by quotation marks. And the Commission went so far as to ground its interpretation fundamentally on the insertion in a translation of a comma, which does not appear in the Spanish text of the contract. It seems to me to be almost inconceivable that matters involving questions of such seriousness, not only with respect to important private property rights, but with respect to international questions, should have been dealt with in such a manner. I am impelled to express the view that the Commission's treatment of matters of international law involved in the case did not rise above the level of its processes in arriving at its construction of the contractual provisions — a construction based on a nonexisting comma.
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> *The Commission's discussion of the restriction on interposition was characterized by a failure of recognition and application of fundamental principles of law with respect to several subjects.* (2º)
>
> Principally among them are:
>
> (a) The nature of international law as a law between nations whose operation is not controlled by acts of private individuals.
>
> (b) The nature of an international reclamation as a demand of a Government for redress from another Government and not a private litigation.
>
> (c) A remarkable confusion between substantive rules of international law that a nation may invoke in behalf of itself or its nationals against another nation, and jurisdictional questions before international tribunals which are regulated by covenants between nations and of course not by rules of international law or by acts of private individuals or by a contract between a private individual and a Government.
>
> International law recognizes the right of the nation to intervene

to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The right was recognized long prior to the time when there was any thought of restrictions on its exercise. *The question presented for determination in considering the effect of local laws or contractual obligations between a Government and a private individual to restrict that right therefore is whether there is evidence of a general assent to such restrictions.* (3°)

The Commission decided the case by rejecting the claim on jurisdictional grounds, although it admitted and stated that the claim was within the jurisdictional provisions of the Convention of September 8, 1923, which alone of course determined jurisdiction. (4)°. Although the case was dismissed on jurisdictional grounds, the Commission made reference to international law but did not cite a word of the evidence of that law. A few vague references to stipulations of bilateral treaties have no bearing on the case, except that possibly the language of those stipulations serves to disprove the Commission's conclusions; the most casual examination into abundantly available evidence of the law disproves those conclusions. The Commission did not concern itself with any such evidence.

The Commission seemed to indicate some view to the effect that the contractual stipulations in question were in harmony with international law because they required the exhaustion of local remedies, and that therefore the claim might be rejected. *The commission ignored the effect of article V of the Convention concluded September 8, 1923, between the United States and Mexico, stipulating that claims should not be rejected for failure to exhaust local remedies.* (5°). [1])

. . . . . .

,,The Commission stated repeatedly that contractual provisions could not bar the presentation of a claim predicated on allegationse of ,,violations of international law" or of ,,international illegal acts." It also stated that the claimant did not waive his right to apply to his Government for protection against such acts. The claim of the North American Dredging Company of Texas was of course predicated on allegations of that nature. *The Commission was authorized to consider such claims, yet it said that it was without jurisdiction in the case and threw out a case of the precise nature which it stated it was required by the Convention to adjudicate.* (6°)" [2])

One may suggest that if the Commissioner had limited his strictures to these two pages, his opinion would not have lost

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[1]) III, pp. 226—227.
[2]) III, p. 228.

any fundamental value and would have gained much in simplicity and clearness. The rest of the 60 pages are almost exclusively dedicated to repetitions of these arguments, not counting several passages consisting of sneers at the majority opinion, with which is not necessary for us to deal. [1]). One representative example will suffice to demonstrate the judge's repetitiveness and manner of scattering his arguments.

His fourth objection, to the effect that the Commission rejected the claim on jurisdictional grounds because of a clause in a private contract, in spite of the fact that it clearly was within its jurisdiction as defined in the convention of 1923, appears on p. 227 in the passage already cited. It is then repeated some ten times in the following terms:

On page 228:

> ,,The Commission nullified the jurisdictional provisions of the Convention, although the claim was obviously within the language of those provisions."

On the same page:

> ,,The Commission in the dredging company case said that ,,the claim as presented falls within the first clause of Article I of the Treaty describing claims coming within this Commission's jurisdiction." This is, of course, true. But in spite of the fact that the two Governments framed a treaty giving the Commission jurisdiction over the case, the Commission decided that jurisdiction was determined by a contract signed between the company and Mexico in 1912 for the dredging of a Mexican harbor. It appears, therefore, that the Commission found that an American national could make a contract with the Mexican Government in 1912 which operated to destroy provisions of a treaty concluded between the United States and Mexico in 1923."

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[1]) Thus e.g.: ,,Mexico undoubtedly attempted to forestall intervention, but when the Commission attempts to define a purpose to avoid abuses which have not taken place, it is perhaps not strange that fantasy should take such flights as to describe nonexistent things as ,,intolerable to any self-respecting nation" and ,,prolific breeders of international friction.

There would seem to be a want of logic in the Comission's apparent desire to attribute a measure of viciousness to the assertion of legal rights as compared with the denial of rights" (III, p. 262).

,,If one might allow himself to speculate as is done so freely in the commission's opinion as to what might have happened had certain things happened that never did happen, it would be interesting to conjecture what the Commission's decision would have been *if a claim had* been presented predicated on a denial of justice . . . ." (III, p. 271).

On page 229:

„The instant claim, like the claim of the dredging company, is based on wrongful acts such as are referred to in the jurisdictional provisions of the Convention. More particularly, it is within the specific provisions stipulating jurisdiction when an allotment is presented, as was done in the present case. But my associates find that jurisdiction is determined by a contract with respect to rights to fish in Mexican waters in 1909 *by a Mexican national* with the Mexican Government. So that in this case an American national did not even participate in the remarkable performance, which I do not understand, of wiping out the Commission's jurisdiction under a treaty made nearly a quarter of a century after the date of the contract with respect to fishing."

On page 230:

„The Presiding Commissioner does not explain how the rights of a claimant are preserved by a decision which, in disregard of jurisdictional provisions of an arbitration treaty, throws a case out of court on supposed jurisdictional grounds . . . . ."

On page 243:

„Generally speaking, when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitions allegations. Matters pleased in defence with respect to the merits of the case are not relevant to the question of jurisdiction."

On page 244:

„There is of course no rule of international law that concerns itself with the jurisdiction of arbitral tribunals. Nations deal with that subject in arbitral agreements which they conclude for the purpose of creating arbitral tribunals to determine the rights of nations and of claimants. The claimants have nothing to do with the determination of the jurisdiction of such tribunals. Business arrangements wich they may enter into from time to time with a Government can not be invoked to nullify the jurisdictional provisions of international arbitral covenants concluded by nations. Contracts made by private persons to exploit lands or mines or to dredge a harbor or as in the instant case to conduct fishing operations do not determine the jurisdiction of arbitral tribunals."

On the same page:

> ,,It may be noted with reference to observations of this kind, making use of somewhat high-sounding relative terms, that a contractual stipulation drafted many years prior to an arbitration treaty should certainly not have, in determining the jurisdiction of an arbitral tribunal ,,more worth than a treaty" which created the tribunal and defined its jurisdiction."

On pages 268 and 269:

> ,,It is stated in the Commission's opinion that ,,the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction." That is obviously true, and therefore the claim should not have been rejected by the Commission. But the Commission continues, stating that the claim is not one ,,that may be rightfully presented by the claimant to its Government for espousal." In other words, even though the two Governments have agreed by language which the Commission states includes the claim as presented, the Commission concludes that the claimant could not rightfully present it to the claimant's Government. It follows that the logical conclusion of the Commission is that some contract made by the claimant with the Government of Mexico in the year 1912, operated to the future destruction of the effect of an international covenant made between the United States and Mexico 11 years later than the date of the contract between the claimant and Mexico."

And on page 272:

> ,,The Commission decided that the case was not within its jurisdiction, in spite of the fact that it stated that the clear language of the jurisdictional provisions of Article I of the Convention of September 8, 1923, embraced the claim."

These quotations may suffice to give an impression of the method selected by Mr. Nielsen to present his arguments scattered over 60 pages.

It is necessary now to examine closely the reasoning adopted by the majority opinions and by Mr. Nielsen. In order to adhere as strictly as possible to the contents of the opinions, we propose to follow the points raised by Mr. Nielsen. The reasoning in the Dredging Company opinion can be summarized on the same lines:

1°. The meaning of Calvo clauses in general and of the present one in particular is to restrict the right of protection and of

interposition by imposing upon the contracting alien an obligation to exhaust local remedies.

2°. A citizen is entitled to limit in this way his right to resort to his government for protection, since he is even entitled at the present day to abandon his citizenship completely, thus destroying all ties linking him to a State.

3°. Since the contested provision is part of a contract subscribed by the claimant, it must be upheld unless it is repugnant to a generally recognized rule of international law. Accordingly the question whether citizens have been accorded, in the theory and practice of international law, the right to bind themselves by a clause of this kind, must be judged by looking to see whether there is evidence clearly establishing that such as right has *generally* been *denied.*

4°. There being no such evidence, the claimant was entitled so to limit his right and having done so, could not thereafter rightfully present a claim to his Government for espousal, when he never tried to obtain redress through the means open to him in the defendant State. If he has not done so, the Commission has no jurisdiction.

5°. Article V of the Convention of 1923 merely excludes application of the *general* principle that legal remedies must be exhausted, but it does not set aside an express stipulation of a valid contract. Besides it is not applicable to claims which according to Article I are not subject to the Commission's jurisdiction.

6°. The Calvo clause, in general as well as in the present case, merely excludes international intervention with respect to any matter connected with the fulfilment, execution, or enforcement of the contract. It does not, and never can, exclude that protection with respect to any violation of international law.

A critical examination of the arguments put forward on both sides gives rise to the following considerations.

1°. *Interpretation of the Calvo clause.*

Commissioner Nielsen did not attack the majority's view with regard to the Calvo clause in general. He had no need to do so, firstly because in his opinion the meaning of the clause in the present case was quite a different one, and secondly because he held that, whatever its meaning, it was deprived of effect by

Articles I and V of the Treaty under which the Commission worked (his arguments 4º and 5º).

Indeed it seems fairly useless to determine *in abstracto* what is the meaning of the Calvo clause, since no one form is generally used and the intention of the parties in any particular case can only be deduced by construing the words they have adopted to express their aim. In the Dredging Company case these ran as follows:

> „The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract." [1])

In the second case it read:

> „The concessionary Company or whosoevershall succeed in its rights, even though all or some of its members may be aliens, shall be subject to the jurisdiction of the courts of the Republic in all matters the cause and action of which take place in its territory. It shall never claim, with respect to matters connected with this contract, any rights as an alien, under any form whatsoever, and shall enjoy only the rights and the measures for enforcing them that the laws of the Republic afford to Mexicans, foreign diplomatic agents being unable therefore, to intervene in any manner with relation to the said matters."

Anyone reading these words without prejudice, and particularly those of the first clause, can hardly doubt that Mr. Nielsen was right in saying that their obvious intention was to exclude *all* possibility of diplomatic intervention or interposition. In our opinion the object of the Mexican Government in inserting these clauses clearly was to ensure *that it would be in exactly the same position as if it had concluded the contract with Mexicans*, in

[1]) I, p. 22.

other words: to ensure that no foreign Government would ever present any claim deriving directly or indirectly from the existence of this contract. We find it difficult to accept the explanation given in the 1927 decision: that the exclusion of rights as an alien and of diplomatic intervention ,,in any matter connected with this contract" was intended by the parties not to apply, for instance, to a breach of the contract which, in the claimant's opinion, was confiscatory in its effect. Again, it seems somewhat arbitrary to hold that the expression ,,,foreign diplomatic agents being unable to intervene in any manner with relation to the said matters" does *not* mean to exclude diplomatic intervention in case of a denial of justice in connection with the contract [1]). Although it may perhaps be possible to defend such a thesis on strictly juridical grounds, it can hardly be doubted that the intention of the contracting Government was a different and more far-reaching one, for if the meaning of the term were really as limited as the opinion holds, it would contain nothing but a confirmation of the general rule that local remedies must be exhausted before diplomatic protection can be invoked. And it seems hardly conceivable that sich emphatic, express and oft repeated terms as the present clause contained, should be inserted by the Government into the contract merely to confirm a principle already applicable. In particular one may well ask what words it is suggested the parties should have used if they *had* wanted to exclude all diplomatic protection, even after the exhaustion of local remedies? It is of course impossible to declare in a contract that *no* diplomatic intervention whatsoever upon any ground whatsoever will be permitted in favour of the individual party. *Some* reference to the contract in relation to which the parties desired to exclude international claims whether arising out of it directly or indirectly, is inevitable. How could that reference be made in more embracing terms than ,,a matter connected with this contract"?

However, as will be pointed out later,[2]) little practical importance attaches to the question whether the intention of a

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[1]) To the same effect Feller, who, on page 189 of his book, calls this construction ,,a perversion of language", and Dunn, The Diplomatic Protection of Americans in Mexico, p. 409 *et seq.*

[2]) vide infra, p. 86.

Calvo clause is to exclude *all* diplomatic intervention, or merely to impose the obligation to recur to local courts first.

2°. *Rejection of the clause in its extreme form.*

Here again it seems to us that the argument used by Professor van Vollenhoven cannot be accepted. In paragraph 7 of his opinion, he argues that, with the progress of civilization, the individual has gained the right to decide upon the ties between himself and his native country, since he is allowed nowadays to expatriate himself. *A fortiori* therefore he would have the right to *loosen* those ties. This argument is not as logical as it may seem at first sight.

First of all it does not seem perfectly correct that nowadays the indivudial has the right to expatriate himself of his own free will. This right was denied, e. g., by England until 1870, and is still denied at the present day by Argentine, whereas several other States require the permission of their authorities as a condition for the validity of expatriation. [1])

In the second place it must be said that even if the individual *would* have the right to expatriate himself, thereby destroying entirely the ties linking him to his State, it does not necessarily follow that he would also have the right to *loosen those ties to a certain extent.* Nationality implies a number of mutual rights and obligations between the State and the national, and even if the latter would be entitled to throw off the whole complex of these rights and obligations in its entirety, this would not necessarily imply his right to diminish certain of these rights and obligations as he would please.

Finally van Vollenhoven's reasoning is incompatible with the theory adhered to by most authorities, that the basis of all international claims is that the harm, injustice, indignity, etc. suffered by a citizen at the hands of a foreign State, is a harm, injustice, indignity, etc. suffered by his State. [2]) Commissioner Nielsen says it once — in a somewhat inappropriate context — in the following words:

> ,,With respect to the right of a nation to prefer a reclamation against another nation is it proper and useful to bear in mind that

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[1]) Wheaton, Elements of Int. Law, pp. 299 and 305.

[2]) See Chapter III, Section: ,,Character of a claim".

> the right is fundamentally grounded on the theory that an injury to a national is an injury to the state to which the national belongs."

Therefore the citizen cannot weaken or destroy the right of his State to ask redress for the wrong which that *State* has suffered *through* him. The right of self-expatriation may perhaps be defended on the ground that primarily the individual alone is affected and will have to bear the consequences of his act. But if a person waives his right to seek redress under international law, it would be his *State* which would thus be affected in its rights.

The foregoing criticism does not necessarily imply that the conclusion to which van Vollenhoven's commission comes is wrong; it merely shows (a) that *this* particular *argument* cannot be accepted, and (b) that a citizen has no right to exclude in anticipation *all* diplomatic protection of his government in respect of possible wrongful acts committed by other States against him.

On the other hand the argument advanced by Commissioner Nielsen with respect to this point, while in itself sound, does not militate against the validity of the Calvo clause in the limited interpretation favoured by the Commission. The argument is again formulated many times, for instance:

> „ . . . . assuredly no nation can by a contract with a private individual relieve itself of its obligations under international law, nor nullify the rights of another nation under that law." [1])

and another time:

> „It is difficult to perceive, however, since international law is a law made by the general consent of nations and therefore a law wich can be modified only by the same process of consent among the nations, how the contract of a private individual with a single nation could have the effect either of making or modifing international law with respect to diplomatic protection." [2])

Certainly contractual obligations undertaken by a private citizen can not „make or modify international law with respect to diplomatic protection". Hence they could never entirely ex-

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[1]) III, p. 234.
[2]) III, p. 252.

clude all right of protection. But if a contract clause imposes upon an individual the obligation with respect to certain complaints to exhaust local remedies, thus merely confirming a rule of the law of nations, which is generally applied and very often upheld by international decisons [1]), it seems to us that such a clause does not attempt to modify international law, nor to relieve a nation of its obligations under that law. Therefore the American Commissioner's argument obliges us to reject the Calvo clause in its extrame meaning, but does not necessarily prevent its acceptance in the more limited sense.

Our conclusion must be that neither the argument of the Presiding, nor that of the American Commissioner, was sufficient basis for the conclusions their authors drew from them, but that both demonstrate the same thing, viz., that a Calvo clause intended to oust *all* international intervention with respect to any particular matter, is inconsistent with international law. This merely confirms a rule well established in international theory and practice [2]).

3°. *Lawfulness of the clause in its limited form.*

The controversy is whether it is necessary, in order that the Calvo clause should be lawful, that there be evidence of a general assent to it in internatioanl law (Nielsen), or whether it is sufficient that there should be no evidence of a general rejection of it (the majority opinion).

Mr. Nielsen's argiment is this: the right of international protection existed and was recognized long before the Calvo clause was ever thought of; hence any limitation of that right (such as the clause purports to effect) must in its turn be generally recognized before it can be considered as lawful. The majority's

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[1]) Borchard states with regard to this principle that it „is so thorougly established that the detailed citation of authorities seems hardly necessary", Diplomatic Protection of Citizens Abroad, p. 818.

[2]) „In any event it was held that the citizen could not contract away the right of his government to interpose diplomatically in his behalf, the right of his government to intervene being superior to the right or competency of the individual to contract it away". Borchard, op cit. p. 294; see also p. 809. Likewise Eagleton says: „there can be no doubt whatsoever of his (i.e. the contracting individual's) complete incapacity to contract away his state's right to interpose in his behalf, should it care to do so", and the author adds in a note: „This proposition is well established in the practice of states and of arbitral tribunals", Responsibility of States, p. 170. Precedents are to be found at the places here quoted. See further: Dunn, The Protection of Nationals, p. 171; Ralston, The Law and Pocedure of International Tribunals, pp. 59—72; Decencière-Ferrandière, La Responsabilité Internationale des Etats,p. 170.

argument is: an express contract obligation undertaken by an individual towards a foreign government must not be held void unless it is clearly violative of some generally recognized rule of the law of nations.

On this point the reasoning of the Leyden professor appears to be the sounder one. It may be true that international law is a law for the conduct of nations and that it cannot be changed by acts of private individuals, but it is equally true that it recognizes, in principle, the right of individuals to undertake obligations towards states by way of contract. The only limitation upon this right is that individuals cannot enter into obligations infringing State rights recognized by the law of nations. Now what exactly is the State right sanctioned by international interposition? It is this, that a nation need not tolerate any wrong inflicted upon it by any other nation; or, to put it in another way, that every international wrong should be made good by the delinquent State. Is *this* right violated by the Calvo clause in its limited form? We think not. When an individual has received wrongful treatment at the hands of a foreign official who is not supreme in his country, three possibilities are open: *either* the individual seeks redress by appealing to higher authorities and is successful, *or* he does so and is unsuccessful, *or* he fails to do so at all. In the first case the wrong is repaired; in the second case it is not immediately so, but the injured State has an international claim by which it can obtain reparation; only if the third supposition is realized, an international wrong is left unrighted, but this is *due to the individual's own fault*, and there appears to be no reason for a claim in his favour.

From the foregoing we may infer that recognition of the Calvo clause in its limited form does not, in the last resort, deprive a State of its right to ask redress for an injury suffered by its citizens at the hands of other States. It merely imposes upon the contracting *individual* an obligation to appeal to the courts of the contracting state before enlisting the aid of his own government. We are not able to perceive that there should be anything illegal or inadmissible in such an obligation; on the contrary [1]).

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[1]) The lawfulness of the Calvo clause in its limited sense was accepted in Base of

It might appear at first sight as if the same reasoning applied to the Calvo clause in its wider form, since there too it is the indivudial's own free act which results in the impossibility of recourse to diplomatic intervention. Still this is a fallacy. The difference is that by the extended clause the citizen excludes *all* possibility of intervention, whereas by the limited clause it is only excluded insofar as the individual himself has not complied with the duty undertaken by virtue of the clause. In other words: *the clause in its extended form would create the possibility that an international injury could be inflicted without any way being open to obtain redress, whereas under the clause in its limited form an injury can remain unrepaired only as a result of an omission by the injured invidual himself and the possibility of international injury remaining without redress is thus excluded. Thus in the second case there is always a means of obtaining redress for an international wrong, and in the first case there is none. And since the only purpose of the right of intervention is to enable a state to obtain such redress, this right is not impaired by the Calvo Clause in its limited form.*

4º. *Calvo clause and jurisdiction.*

The three members of the Commission agreed that the present claim entered into the group of those defined by the jurisdictional provisions of the Convention of September 8, 1923. But there was a difference of opinion as to the question whether the jurisdiction was nevertheless excluded by a stipulation in a private contract. This point is put by the American Commissioner in this form: can the jurisdictional provisions of a treaty between two states be rendered inoperative by the stipulations of a private contract between one of these states and a subject of the other. When formulated this way, there can be little doubt that the answer must be to the negative if the meaning of the contractual clause is contrary to the treaty provision, and covers the same point. However, the question precisely is, whether such was the case in the situation before us. Now it will be seen in the follow-

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discussion no. 26 of the Hague Conference for the codification of international law; even in that sense it is denied however by:

Decencière-Ferrandière, La Responsabilité Internationale des Etats à raison des dommages subis par des étrangers, p. 169;

Strupp, Eléments de Droit International Public, Vol. I, p. 136; the same author in R.D.C. Vol 8 p. 80;

Hoyer ,La Responsabilité Internationale des Etats, p. 121; Ténékides: Revue Générale de Droit International Public, 1936, pp. 270—284.

ing section (5⁰) that the 1923 Convention by its Article V stipulated that jurisdiction should not be excluded by application of the *general* principle that local remedies must be exhausted, but that this does not necessarily exclude an appeal to a *specific contract clause* to the same effect. This means that the contract clause in question was not covered by Article V of the Treaty, wich only applied to the *general rule of international law*; thus the terms of the contract and of the Treaty were not really opposed and the question which of them should prevail is of no interest.

The above considerations are based upon the assumption that the defence of non-exhaustion of local remedies goes to the question of jurisdiction. A more fundamental question, however, is, whether such a defence has any bearing at all on jurisdiction, or whether it goes to the merits of the case. This point was only briefly raised by Commissioner Nielsen in his dissenting opinion in the *International Fisheries Company* case [1]).

> „Jurisdiction may be defined as the power of a tribunal to determine a case conformably to the law creating the tribunal or other law defining its jurisdiction. . . . . .
>
> Generally speaking when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitious allegations. Matters pleaded in defence with respect to the merits of the case are not relevant to the question of jurisdiction." [2])

This was a repetition of a statement pronounced by the same Commissioner in an earlier opinion, which has been dealt with in Chapter II, and where he added:

> „Arbitral tribunals seem occasionally to have fallen into some confusion with respect to this last mentioned point. Thus it appears that, when it has been pleaded in defense of a claim that a claimant has failed to resort to local remedies, the plea has been considered as one that raised a question of jurisdiction before an international tribunal . . . . . The proper view would seem to be that in such a case the issue is whether the claim is barred by the substantive rule of international law with regard to the necessity for recourse to legal remedies prior to diplomatic intervention." [3])

It is interesting to note that this Commissioner was an adher-

[1]) III, p. 207.
[2]) III, pp. 243—244.
[3]) *C. E. Blair*, II. p. 107.

ent of the view mentioned in the quotation. But since his opinion contains no justification for this attitude, it is unnecessary to enter into the question of its soundness.

However, even *if* the view be taken that the exhaustion of local remedies is a condition precedent to the existence of international liability, i.e. a substantive element of international delinquency, almost the same result follows. It can then be said that there is no international delinquency so long as the claimant did not carry out his contractual obligation to resort in first instance to the national tribunals. The only difference then is that the claim would not be dismissed on jurisdictional grounds, but would be disallowed on the ground that there is no international delinquency.

5°. *Calvo clause and art. V of the Convention.*

Commissioner Nielsen repeats many times that, by its decision in the Dredging Company case, the Commission did not merely violate article I, governing its jurisdiction, but also article V of the Convention under which it was established, directing

> „that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim."

Professor van Vollenhoven's decision with respect to this point was based on two arguments. The first was that

> „. . . . if under the terms of article I the private claimant cannot rightfully present its claim to its Government and the claim therefore cannot become cognizable here, Article V does not apply to it, nor can it render the claim cognizable . . . . ." [1])

This reason does not seem to be very convincing, in fact might even be called a *petitio principii*: the Commission considered the claim not to be rightfully presentable under article I precisely on account of the fact that claimant did not comply with his duty to resort to local remedies first. But if indeed the purpose of Article V was, as Mr. Nielsen contended, to exclude under all circumstances an appeal to that duty, then of course the Commission should have taken jurisdiction.

The second argument was to the effect that the article merely excluded application of the *general* principle, leaving intact

[1]) I, p. 31.

express contract stipulations to the same effect. This seems more defensible, although not quite self-evident. The words of the article do in fact suggest that its intention was merely to exclude the general principle. Otherwise it would have been natural and logical to say: „that no claim shall be dissallowed or rejected on the ground that the legal remedies have not been exhausted", instead of: „by the application of the general principle, etc."

The reasoning of the Commission requires a defence against the criticisms which have been levelled at it. Borchard [1]), although accepting the tribunal's conclusion as a matter of expediency and justice, expressed some doubt as to whether Article V permitted the construction put upon it in the opinion. Dunn calls the Commission's reasoning that Article V was not applicable to the present claim because the latter was not „rightfully" presented under Article I a „circuitous argument." [2])

Feller criticizes the reasoning as „bounding over the hurdle with admirable nonchalance". How, this author asks, can a failure (on the part of the claimant) to observe a term of a contract vitiate jurisdiction (of an international Commission)? He then endeavours to justify the result reached by the Commission — which he considers desirable — in a different way. "The contract" he argues, „is governed by Mexican law, and it is to that law that the Commission must look in deciding whether there has been a breach." Now although Article V „removes the application of the *international law* principle, the principle of *Mexican law* embodied in the contract still „operates as between the claimant and the Mexican Government". [3])

To begin with it must be noted that Feller based his rejection of the tribunal's construction only upon the Commission's first argument, which we cited above and also rejected; but he gives the impression of having overlooked the second ground, which appeared to be the stronger one. The same applies to Dunn's criticism.

Apart from this Feller's reasoning, however tempting at first sight, appears to be based on a fallacy. It is questionable already whether the contract is governed exclusively by Mexican law.

[1]) Decisions of the Claims Commissions, United States and Mexico, A.J.I.L., 1926, p. 540.

[2]) The Diplomatic Protection of Americans in Mexico, p. 411.

[3]) The Mexican Claims Commissions, p. 191.

In fact if this were the case, all the painful investigations of this and former arbitral commissions as to the lawfulness under international law of a Calvo clause embodied in a contract would have been perfectly superfluous, since the only deciding question would then have been whether the domestic law of the contracting State admitted a clause of that nature. But even if „the contract is governed by Mexican law" and even if „it is to that law that the Commission must look in deciding whether there has been a breach" yet it is certainly not to *that* law, but to *international* law, that the the Commission must look in deciding whether it has jurisdiction. So it was done in the Dredging Co opinion, and for that reason the construction there given seems preferable to the one suggested by Feller. The difference between the two may be summed up by saying that the latter understood the emphasis of Article V to be on the exclusion of „the general principle of *international* law", whereas the Commission understood it to be on the exclusion of „the *general principle* of international law".

6º. *Calvo clause and international delinquency.*

The Commission's majority held both times that the Calvo clause merely prevented recourse to diplomatic protection with respect to the fulfilment, interpretation and enforcement of a contract; under this conception the clause did not, and in fact *could* not, abrogate the claimant's right to invoke, nor his Government's right to extend, such protection against a „violation of international law (internationnally illegal acts) whether growing out of this contract or out of other situations."

The American judge asserted that the claim before him *was* based upon an internationally illegal act, viz. the destruction of foreign rights. The act complained of in the first case was breach of contract; in the second cancellation of the contract otherwise than as provided for by the agreement which is equally a breach of contract. In our opinion there can be no doubt that both these acts related to „the fulfillment, interpretation and enforcement of the contract", and were in the most direct manner „matters connected with this contract". Although for this reason we fully accept the majority decisions in both cases, viz. that the Calvo clause fully applied to the complaints submitted, we must suggest that the definitions used by the Commission are capable of improvement. It was from their somewhat confusing

character that Commissioner Nielsen's sixth objection resulted. The decisions presented as an antithesis „non-fulfillment of a contract " and „internationally wrongful acts". Now it has sometimes been asked whether in fact the non-fulfilment, on the part of a Government, of a contract between that Governement and a foreigner, cannot in itself constitute an internationally wrongful act. It is unnecessary to examine that question here, however interesting it might be, since an affirmative answer would only prove that the Commission used a confusing terminology, and would not affect the distinction it sought to make between claims to which the Calvo clause applies and those to which it does not. That intended distinction is apparently meant to be one between *claims based upon the mere non-fulfilment of a contract*, and *claims based upon other grounds of international liability*. This distinction has already been made before with regard to the Calvo clause. Thus, for instance, Borchard has stated:

> „Nor has the presence of the Calvo clause in the contract, by which the alien contractor undertakes to make the local courts his final forum and the forego his right to claim the diplomatic protection of his own government, been considered as denying to the claimant's government the right to interpose in his behalf, where there has been an arbitrary annulment of the contract by the local government." [1])

> „If, however, the renunciation goes so far as to preclude recourse to diplomatic protection, even in cases of denial of justice, the renunciation of protection will not be considered as binding upon the claimant's government . . . . . Again, if there has been a confiscatory breach of the contract by the Government, the claimant will be relieved from the stipulation barring his right to make the contract the subject of an international claim." [2])

Eagleton emphasizes the distinction still more sharply:

> „On the one hand, if there has been a mere breach of the contract on the part of the state, the alien has no claim under international law, he must avail of himself of local remedies, as international law demands of him in any case, whether he has so contracted or not. On the other hand, if there has been a confiscatory breach of the contract by the State, or other procedure making local redress fruitless, ... he has rights of recourse to his own state, under international law, entirely independent of his contract." [3])

[1]) Borchard, The Diplomatic Protection of Citizens Abroad, p. 294.
[2]) Op cit. p. 809; see also p. 789.
[3]) Responsibility of States, pp. 170—171.

Whatever may be the value of this distinction, it must be stated that both *the Dredging Co* and *the International Fisheries Co* cases are striking examples of the extreme difficulty in practice of drawing a line between the two categories intended. In the first case the allegation was simply one of a breach of contract; in the second case the contract had been explicitly cancelled by the Mexican Government on the ground, or pretext, that the claimant had failed to comply with a clause in his contract binding him to establish within the space of two years certain shops, non-performance of which term would *eo ipso* authorize Mexico to cancel the contract. Both times the majority of the Commission — with reason it would seem — held that the issue was included within the words „fulfilment and interpretation of the contract". But with regard to both cases the American Agency, as well as Mr. Nielsen, argued strenuously that such behaviour constituted an internationally wrongful act, justifying immediate interposition.

In fact it seems extremely difficult to distinguish exactly between a „confiscatory breach" or „arbitrary annulment" of contract on the one hand, and a „mere breach" of contract on the other hand. All that may be learned in this respect from the two cases under consideration is that the difficulty is increased by using the vague phraseologie employed by the Commission to the effect that the Calvo clause excludes an appeal to international protection with respect to „any matter connected with the contract", but permits it with respect to „internationally wrongful acts".

Furthermore both cases may serve as examples of acts which do not fall in the second category. It may therefore perhaps be concluded: *The exclusion, by the Calvo clause, of an alien's right to invoke his government's intervention before having sought to obtain justice in the defendant state, merely relates to differences concerning the interpretation of the contract and to complaints of a simple non-fulfilment of it, but not to other grounds of international liability. It does not enter into this latter category*:

a) when the respondent State, without being guilty of any particular arbitrary behaviour towards the claimant, has simply omitted to fulfil its contractual obligations;

b) when the respondent state expressly invokes a stipulation of the contract in defence of its action.

7°. *Origin of the Calvo clause.*

One more ground was adduced by Mr. Nielsen in support of his rejection of the Calvo clause. Although it is not directly an attack upon the reasoning of the majority opinions, this argument must for the sake of completeness be mentioned here. It can be found on page 236 of the dissenting opinion:

> ,,Domestic laws are not finally determinative of an alien's rights. Nations which have been accorded membership in the family of nations can not isolate themselves from the system of law governing that membership and deny an established right of interposition, a right secured by international law. It is very interesting to note that the distinguished protagonist whose name has been given to these contractual stipulations, which are intended to preclude diplomatic interposition, evidently formulated his views in the light of a concept that a nation fulfills its duties by according to aliens the same treatment as is accorded to nationals, and that no nation should intervene to obtain for its nationals anything more, either as regards rights or remedies. In his work on international law he says:
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> ,,America as well as Europe is inhabited today by free and independent nations, whose sovereign existence has the right to the same respect, and whose internal public law does not admit of intervention of any sort on the part of foreign peoples, whoever they may be." (*Le Droit International Théorique et Pratique*, 5th Ed., I, Sec. 204, p. 350.)
>
> ,,It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity." (VI, Sec. 256, p. 231).
>
> ,,The rule that in more than one case it has been attempted to impose upon American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside." (III, Sec. 1278, p. 140)
>
> It can scarcely be necessary to observe that such declarations do not define the character and scope of rights secured in favor of aliens by rules of international law or by stipulations of treaties. Conformity by authorities of a Government with its domestic law is not conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point. Acts of authorities affecting aliens cannot be explained to be in harmony with international

law merely because the same acts are committed towards nationals." [1])

The passages quoted by Mr. Nielsen remind us of the principles upon which the Calvo clause was originally based. No one will deny that he was right in rejecting them and we shall have occasion in later chapters of this book to give several illustrations of the fact that in the law of nations „national treatment" is not a conclusive standard of the propriety of governmental behaviour.

But again it must be said that this criticism of the American Commissioner only holds good as against the extensive form of the Calvo clause, which was rejected by the majority opinions. He reasoned: Calvo was of the opinion that an alien has the same rights as a national, and no more; hence, according to Calvo, if a foreigner suffers an injury he is entitled to the same facilities for obtaining redress as nationals, but no more; which means, that he may appeal to the tribunals of the country, but not to his own Government. According to this theory the Calvo clause would merely be the confirmation in a contract of a generally applicable principle .Now since Calvo's theory has been generally rejected, the Calvo clause in contracts cannot be accepted either.

However, Mr. Nielsen forgets that Calvo's error was to exclude *all* international intervention, so that only a clause having the same object, i.e. an extensive Calvo clause, should be rejected on the same ground. But his argument does not affect what we have called the „limited Calvo clause", which has a different object, viz. to oblige the alien to submit complaints of non-fulfillment to the national judiciary.

Summing up, it may be said that Commissioner Nielsen's argument here discussed does not affect the limited Calvo Clause, but it demonstrates two facts:

a. Calvo based himself on the conception that a foreigner has no right to anything more than „national treatment".

b. hence he did not recognize any right of international intervention whatsoever. *From this fact it may be deduced that the original Calvo Clause indeed meant to exclude all diplomatic protection, and that the „Calvo Clause" in its limited form, as upheld by Dr. Van Vollenhoven, bears his name improperly.*

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[1]) III, p. 236.

Conclusions

Having at last threaded our difficult way through the complexities of the Calvo clause, we have reached the same conclusion as the majority of the Commission did in both cases discussed, viz. that the claim was outside its jurisdiction.

Of more importance, however, is the question whether it has been found possible to follow everywhere the road taken by the majority of the tribunal when it decided upon the claim of the *North American Dredging Co.* This is not the case. We felt obliged to depart from it on two points. In the first place it seemed difficult to accept the interpretation put by the opinions on the clauses in question (argument 1°.). In the second place the argument drawn from a citizen's right to abandon his nationality appeared to be void (arg. 2°.). It may still be added that in the third place the distinction between claims to which the Calvo clause is applicable and those to which it is not, was not very clearly defined (arg. 6°.). But the opinion appeared to be justified by sound reasoning as well as by present international practice with regard to the main issue, viz. that the clause in its extreme form is inconsistent with international law (arg. 2°.), whereas in its limited form it is not (arg. 3°.). The majority opinion also appeared to be right in deciding that there was no real conflict between the clause of the private contract and the jurisdictional terms of the treaty (arg. 4°.). Finally we saw that the clause in its limited form does not, strictly taken, deserve the name „Calvo clause" (arg. 7°.).

It will be noticed that the clause in the restrictive sense as here accepted contains nothing but an explicit confirmation of the rule of local redress, which is generally recognized in international practice. In fact this is the sense in which the clause is understood and recognized nowadays. Thus it is stated by Borchard:

> „The weight of authority supports the view that the mere stipulation to submit disputes to local courts is confirmatory of the general rule of international law and will be so construed by the national government of concessionaries." [1])

and by Eagleton:

[1]) Borchard, The Diplomatic Protection of Citizens Abroad, p. 809; to the same effect this author, A. J. I. L., 1927, p. 539.

„The so-called Calvo-clause ..... must be regarded as a superfluous statement of the rule upon which responsibility is founded." [1]

„The sole effect of the clause is to compel the alien to submit to the ordinary rules of international law for his protection." [2]

Because of this it has sometimes been asserted as for instance in the above quotation, that a Calvo clause of this type has no effect whatsoever, and is therefore superfluous. However, it may be pointed out, that the two cases dealt with, show that the clause may be of use in certain circumstances, viz.:

a. in the presence of a treaty stipulation excluding the general rule of local redress, it may take outside an arbitral tribunal's jurisdiction cases over which, in the absence of a Calvo clause, jurisdiction would exist;

b. in cases in which the claimant did not resort to local remedies, it emphasizes the fact that he definitely failed to carry out his own obligation;

c. in several other special situations the clause may have some effect, as is pointed out by Summers in an article in the Revue de Droit International, 1931, p. 572.

It must furthermore be remembered, as is done by Mr. van Vollenhoven, that the clause has been useful in checking what we might call an excessive „interventionitis" of which some great powers have at times suffered in their dealings with weaker and less well organized states.

Finally it me be stated with Dr. Alfaro that the opinion written in the case of the *North American Dredging Company of Texas* „has received the approval of the highest authorities on Intertional Law, and constitutes an appreciable contribution to the progress of this science."

To this the following statements and facts bear witness.

„This decision is in accord with the general jurisprudence of arbitral commissions in previous cases involving jurisdiction of claims arising out of contracts containing the so-called Calvo clause." [3]

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1) Responsibility of States, p. 168.

2) Responsibility of States, p. 171; Dunn, Protection of Nationals, p. 171; see also authors cited above, at the end of arg. 2°.

3) Garner, British Yearbook of International Law, 1927, p. 182.

„The opinion seems to offer the most complete exposition of the Calvo clause in contracts which has yet been made." [1]

„La décision de la North American Dredging Company contre la Mexique semble énoncer les principes modernes." [2]

„Despite the criticism to which the opinion in the North American Dredging case is open, it has had an inportant influence. It has generally been accepted to this extent: a contractual stipulation which purports to bind the claimant not to apply to his government to intervene in the event of a denial of justice or in respect of violations of international law is void, but a contractual stipulation that the local courts shall have exclusive jurisdiction over all matters pertaining to the contract is valid and binding on an international tribunal." [3]

„His Majesty's Government in Great Britain accept as good law and are content to be guided by the decision of the Claims Commission of the United States of America and Mexico in the case of the North American Dredging Company of Texas . . . ." [4]

Thus read the reply of the British Government to the questionnaire sent out by the Preparatory Commission for the 1930 Conference for the Progressive Codification of International Law. The United States of America equally based their reply on the Dredging Co decision. [5] Finally that decision was supported and taken as basis in three cases decided by the British-Mexican Claims Commission of 1923. [6]

Only Dunn appears not to appreciate what he calls „the extraordinarily involved logic of the opinion of the majority in the North American Dredging Company case" [7], a criticism which does not seem quite justified.

The way to proceed with cases involving the Calvo clause.

We may conclude this chapter with a few words on what we conceive to be the most important result of these investigations

1) Eagleton, Responsibility of States, p. 175, note.
2) Summers, Revue de Droit International, 1931, p. 581.
3) Feller, The Mexican Claims Commissions, p. 192.
4) League of Nations, Conference for the Codification of International Law, Bases of Discussion, III: Responsibility of States for Damage caused in their territory to the Person or Property of Foreigners, p. 134.
5) Op. cit. Supplement, p. 22.
6) *Mexican Union Railway.* Decisions and Opinions of Commissioners, p. 157; *Vera Cruz Railway*, ibid. p. 207; *Interoceanic Railway of Mexico*, ibid. p. 118.
7) The Protection of Nationals, p. 122.

into the field of the Calvo clause, viz. the fact that the arguments and considerations set out at least enable us to see clearly the various points at which the road forks and where a judge called to adjudicate upon the effect and validity of a Calvo clause will have to decide which path to follow. In our opinion the following questions should successively be asked in every such case:

I. What is the object of the clause under consideration? Is it a. to prevent all diplomatic protection with regard to the contract (extreme and original form) or b. only to oblige the contracting citizen to submit complaints concerning the performance of the contract to the authorities of the contracting country before applying to his own government for intervention (limited form)?

II. Is that clause lawful under the *ius gentiun*? The difficulty here is what to do in case Ia. As we have endeavoured to show, this form is incompatible with the right of protection, which is generally recognized in international law. The question then arises: should such a clause be treated as *entirely* void, or should it be given as much of its effect as is lawful? In our view the intention of the contracting parties should not be defeated unless this is absolutely necessary, where it can be treated as valid in part at least; accordingly we prefer the second solution. [1]) This means that the clause will at any rate oblige the individual party not to invoke his government's protection in case of non-fulfilment of the contract, before he has tried the means of redress open to him in the contracting State.

In other words: *a Calvo clause in its extreme form can under the law of nations only have the effect of a Calvo clause in its limited form.*

This is the reason why we have stated several times that the exact meaning of the clause in a concrete case is of little importance, since it is only its limited effect which is valid. Hence we need only consider case Ib.:

Is the Calvo clause admissible in its limited form? We have explained before why we considered the answer to be to the affirmative (a). If, however, the opposite view is taken (b), the clause should simply be declared null and void and not be taken into further consideration.

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[1]) A different view seems to be taken by Feller, op. cit. p. 200.

III. If these two questions have been answered, the point of jurisdiction will generally have been dealt with. Sometimes however a third difficulty may rise, viz. if, as in the present case, *the treaty contains a special article excluding a defence based upon a citizen's failure to exhaust the remedies available in the defendant state*. It will then depend upon the wording of that article, whether it has the effect of invalidating *any* defence based on such failure, or whether it merely excludes the application of the general principle,without touching private contract stipulations.

CHAPTER V

ACTS IMPUTABLE TO A STATE

As will be pointed out in Chapter VIII, one of the five conditions of international liability is an act on the part of a State, or more accurately: an act imputable to a State, which means that the act causing damage to a foreigner must have been an act for which the defendant State can be held responsible; it must be possible to impute the act to that State. The question then is: what are the acts for which a State must bear responsibility towards its sister States? The answer generally given is: that a State is responsible when a person *authorized* to act for the State, was acting *on its behalf*, when committing the act. In other words: the person must : *a.* be an *official*, an *agent*, of the defendant state, and *b.* in the particular case have acted in that capacity. The question as to how far a third condition must be fulfilled before the State is held accountable, viz. that the official must have acted *within his competency*, will receive consideration further on, in connection with the claim of *Thomas Youmans* [1]).

Questions with regard to the capacity of certain persons to bind a Government contractually were not raised before the American-Mexican tribunal, except in one case where some doubt arose with regard to the contention of a claimant that he had been entitled to asssume that a certain person was authorized by a Government to contract on its behalf. All other decisions upon the subject to be treated in this chapter were rendered in connection with liability for *delictual* acts.

Appearance of authorization

In international law no less than in municipal law it may happen that a corporated body must be held to be bound by a contract

[1]) I, p. 150.

entered into by its agent without authority, because the persons dealing with the agent were reasonably entitled to expect the agent to be a duly authorized representative of the body corporated in that behalf.

This question was raised in the *Davies* case, quoted elsewhere, one of the defences of the Mexican Government on that occasion being that its Financial Agent in the United States, in a contract entered into on behalf of his Government, had expressly stated that he had no power to bind the incoming administration of President Obregon. The Claims Commission said:

> „It is probably a general rule of domestic law in many countries that a State is responsible for and is bound by acts of its agents within the limits of their functions or powers as defined by the national law, but when acts are done in excess of powers or functions so defined, the State is not bound or reponsible." [1]

In this case the Agent had a general authority to bind his Government. In view however of his explicit reservation inserted in the contract with regard to future governments, and also having regard to the fact that the new administration had not recognized or availed itself of the contract, it was not to be bound.

On another occasion a Government was held not liable on a contract entered into, and a guarantee given by, a person who was its Industrial Agent, but who never expressly mentioned the Government in his dealings with the claimant. [2]

Agents whose delictual acts may be imputed to a State.

In the jurisprudence of the Mexican-American Claims Commission Governments were held responsible for the wrongful acts of the following officials:

judical authorities (in all cases of denial of justice and illegal arrest and detention);	
frontier guards	(*Walter Swinney*, I, p. 131);
deputy sheriff	(*Francisco Quintanilla*, I, p. 136);
soldiers	(*Guerrera Vda de Falcon*, I, p. 140; *Thomas H. Youmans*, I, p. 150; *Agnes Connelly*, I, p. 159; *G. L. Solis*, II, p. 48; *Lillie S. Kling*, III, p. 36);

[1] I, p. 200.
[2] *American Shorthorn Breaders Assocation*, I, pp. 280 and 287.

officers	(*Garcia and Garza*, I, p. 163; *S. J. Stallings*, II, p. 224);
officer, acting on order of Prefect	(*Jesus Navarro Tribolet*, III, p. 68);
policemen	(*Margaret Roper*, I, p. 205; *Francisco Mallén*, I, p. 254; *John V. Byrne*, II, p. 223);
superintendant of National Railways under Government control	(*H. G. Venable*, I, p. 331);
locomotive crews of the same (in principle)	(*H. G. Venable*, I, p. 331; see pp. 387—389,
general	(*Bond Coleman*, II, p. 56);
„alcalde" (judicial police officer)	(*William Way*, II, p. 106);
customs authorities	(*Peter Koch*, II, p. 118) *Louis Chazen*, III, p. 20)
municipal President	(*Laura A. Mecham and Lucia Mecham Jr.*, II, p. 168);
fiscal agent	(*Samuel Davies*, II, p. 282).

Minor officials

Very seldom did a doubt arise as to the responsibility in principle of a Government for the acts of certain agents. The most important issue in this respect related to „minor officials".

The murderer of an American subject having been allowed to escape from prison by an assistant jail-keeper, Mexico denied responsibility for the acts of a minor official of this kind [1]). The argument was not accepted by Commissioner Nielsen, who wrote for the Commission:

> 6. „An examination of the opinions of international tribunals dealing with the question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to which application has been given in cases in which the question has arisen. To attempt by some broad classification to make distinction between some „minor" or „petty" officials and other kinds of officials must obviously at

[1]) *Gertrude Parker Massey*. I, p. 228.

> times involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. . . . . .
>
> 7. The question which has been raised in the instant case, and not infrequently in cases coming before international tribunals, is not one that can properly be determined in the light of generalities such as are frequently found in the opinions of tribunals." [1])

In rejecting the thesis that states are not responsible for the acts of their minor officials the Commission acted in conformity with many precedents and the view taken by authoritative writers. Thus Hyde says:

> „It may be observed again that the inferiority of rank of the official is not decisive of the character of his conduct, or of the responsibility of the State for the consequences thereof". [2])

Likewise Eagleton states:

> „A survey of the cases reveals that other elements than the position or rank of the agent are of importance in determining state responsibility for his acts." [3])

Finally the same view was taken by the Hague Conference of 1930 for the Codification of International Law. The thesis of non-responsibility for minor officials , only defended by the Egyptian Government, [4]) was not accepted and did not pass in Basis of Discussion No.12, which was unanimously adopted as Article 8, par. 1. An express question of the Rumanian delegate as to whether minor officials possessed the same representative character as superior officials, was expressly answered to the affirmative by Prof. de Visscher, rapporteur on the subject. [5]).

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[1]) I, pp. 230—231.

[2]) International Law, I, p. 510.

[3]) The Responsibility of States in International Law, p. 47 ; see also cases mentioned there, and by: Strupp, Das Völkerrechtliche Delikt, pp. 39—41, and Buder, Die Lehre vom Völkerrechtlichen Schadensersatz. pp. 56—57, who both arrive at the same conclusion, as do: Kelsen, Unrecht und Unrechtsfolge im Völkerrecht, p. 33; Decencière-Ferrandière, La Responsabilité des Etats, pp. 65 and 97.

[4]) S. d. N. C. 351 (c), M. 145 (c), 1930, V, p. 97.

[5]) S. d. N. C. 351(c), M. 145(c), 1930, V, p. 83.

It should be noted, on the other hand, that responsibility for acts of minor officials has previously repeatedly been denied, notably by Borchard [1]) and in the *Slocum* [2]), *Blumhardt* [3]), *Smith* [4]) *Leichardt* [5]) and *Selkirk* [6]) cases. It might well be defended, however, that in most of these cases the true reason for the disallowance of the claim was a failure to try and obtain redress from higher officials.

At the same time as it rejected the theory that States are not responsible for acts of their minor officials, the Commission gave the following positive standard : the principal points to be considered in connection with the question whether a government may be held responsible for the acts of certain officials are (1) *the character of the act committed, and* (2) *the nature of the function* performed by the perpetrator. What Mr. Nielsen meant by these expressions can be better understood by looking at his decision in regard to point (1):

> ,,17. In considering the question of a nation's responsibility for acts of persons in its service, whether they be acts of commission or of omission, I think it is pertinent to bear in mind a distinction between wrongful conduct resulting in a direct injury to an alien — to his person or his property — and conduct resulting in the failure of a government to live up to its obligations under international law. [7]) The cases which have been cited are concerned with the former; the instant case with the latter.
>
> 18. I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, that the nation must bear the responsibility for the wrongful acts of its servants." [8])

and to point (2)

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1) The Diplomatic Protection of Citizens Abroad, p. 189.
2) Moore, Arbitrations, p. 3140.
3) Op. cit. p. 3146.
4) ibid.
5) op. cit. p. 3134.
6) op. cit. p. 3131.
7) It is remarkable that this is the only sentence out of the whole opinion which is quoted in Ralston's ,,Supplement to the Law and Procedure of International Tribunals." (p. 61). All the other, in our idea at least as valuable, arguments of Mr. Nielsen are not even mentioned, except in a few words on page 172.
8) I, pp. 233—234.

> „Whether or not the keepers of jails may properly be designated as minor officials, they are assuredly entrusted with highly important duties. The point is more important than the amount or character of their official emoluments or the particular definition or designation of their position under the domestic law of the country." [1]

There can, in fact, be no objection to the second observation; it certainly seems preferable to look at matters of substance rather than of form in determining the status of an official. But the argument upon point (1) should not pass without some comment.

Mr. Nielsen in the above quoted paragraph 18 says that in cases of indirect responsibility a nation should be held liable for the acts of all its servants, whatever their rank. It is not quite clear whether he meant to imply that in cases of *„direct"* responsibility a government should *not* be liable for acts of minor officials. If that was his intention, a reservation should be made. Whatever may be the value of the distinction made between cases of „direct" and „indirect" responsibility in the law of nations, at any rate they have this in common that they are *both* based upon the failure of a Government to live up to its international obligations. If there is no such failure there can be no international liability. We do not see why in the first case a State should *not*, and in the second *should* be responsible for the acts of minor officials [2].

It is not difficult to understand the origin of Mr. Nielsen's idea. In all the cases of direct responsibility he cites, the claim was disallowed because the claimant failed to seek redress through local remedies for damage directly suffered as a result of the action of minor officials. But this does not mean that the State was not responsible for the acts of those minor officials. As it is quite clearly said by a distinguished American author:

> „In view of the fact that so many of these opinions refer to the rule of local redress, there seems very good ground for stating the proposition in the following terms: if damages were denied in these cases, it was not because the injury was caused by a minor official, for whom the government was not responsible, but because local redress had not been exhausted." [3]

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1) I, p. 236.
2) To the same effect: Feller, The Mexican Claims Commissions, p. 142.
3) Eagleton, The responsibility of States in International Law, p. 48.

That the Commission itself did not deny State responsibility for acts of minor officials is shown by the *Venable* case, in which, as stated above [1]), it was implicitly accepted that Mexico would have been liable for the causing of a train accident by a train crew of the Government Railways, if the fault of that crew had been sufficiently established [2]). In our opinion there can be little doubt that a locomotive driver should be considered as a ,,minor official". If not, who should be? Similarly, in the *Roper* case [3]) the defence raised by the Mexican Agent that a country is not responsible under international law for damage caused by such minor officials as policemen, was expressly rejected, having regard both to the nature of the action of the policemen in this case and to the terms of Article I of the 1923 Convention. Finally it may be remarked that several of the officials mentioned in the first section of this chapter, in whose case responsibility was imposed, might be classified as ,,minor officials".

Position of a sindico

Another doubt arose as to the juridical status of a ,,sindico", being a trustee in bankruptcy in Mexico. In the *Venable* case [4]) four locomotive engines, not belonging to the debtor, had been attached in bankruptcy proceedings and entrusted to a ,,sindico", and while in his custody they were entirely demolished. The Presiding and the Mexican Commissioners took the view that a ,,sindico" was not a Government official. Since the position of such a person is not only of importance with regard to Mexico, the arguments of the Dutch judge may be quoted here:

> ,,22. The present situation, however, is different. When a court places a bankrupt estate in the custody of some kind of trustee (in Mexico: a ,,sindico" and an ,,interventor"), it does the same thing for an estate that it does for specific goods of a debtor when allowing a plaintiff to attach them in order to preserve for his benefit property on which eventually to execute a future award rendered is his favor. Such goods are not taken into custody by the courts themselves; a private citizen is appointed trustee, acting for the

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[1]) p. 90.
[2]) I, p. 387.
[3]) I, p. 205.
[4]) I, p. 331.

benefit of the plaintiff, or the plaintiff himself is appointed for this purpose. Likewise, in many countries a bankruptcy trustee, such as the Mexican ,,sindico", cannot be considered as an official, or as one ,,acting for" the Government; he acts ,,as representative of the creditors" (*Ralston, Venezuelan Arbitrations of 1903*, p. 172). The *Institut de Droit International*, in the rules on bankruptcy law it adopted in 1902 in its session of Brussels, styled persons like this Mexican ,,sindico" ,,the representatives of the estate" (*les représentants de la masse*; Articles 4 and 5). The draft convention on bankruptcy law inserted in the final protocol of The Hague conference on private international law of October-November, 1925, attended by delegations from twenty-two states (including Great-Britain), established in its article 4 that the syndic can take all conservatory measures or administrative measures and execute all actions ,,as representative of the bankrupt or of the estate" (*comme représentant du failli ou de la masse*). It is true that the British delegation left this conference before its close, but not because of any difference of views as to the position of the trustee; and, moreover, in the present case the position of the bankruptcy trustee should be considered in the light of Mexican, not of Anglo-Saxon, law. In countries with bankruptcy legislations such as the Mexican Code contains, direct responsibility for what happens to the bankrupt estate lies not with the government. In the present case it rested either with Familiar, a railway superintendent at Monterrey, under whose care the engines had been placed at the time of their attachments and under whose care they had been left on October 4, 1921, by the ,,sindico" Leal; or the responsibility rested with this ,,sindico" .... or with the combination of ,,sindico" and ,,interventor". Laws like that of Mexico intentionally refrain from laying the heavy burden of these responsibilities on personnel of the courts." [1])

The Commissioner for the United States attacked this construction:

,,It would seem to me strange if counsel for Mexico is correct in his contention that the ,,sindico" cannot be regarded under Mexican law as an official of the court, and that he is merely a representative of the estate of the bankrupt, a ,,private person", as he was called, for whom there is no responsibility on the part of Mexico. The ,,sindico" under Mexican law besides being a custodian of property subject to direction of the judge having jurisdiction in the bankruptcy proceedings, seems also to perform in a measure duties such as are performed by the referee under the bankruptcy law of the United States, who in a sense might be

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[1]) I, pp. 343—344.

called a sub-judge..... The determinations of such a sub-judge with regard to the nature of claims presented by creditors against a bankrupt, the property that is subject to the payment of debts, the debts that are due, preferences of claims, are all questions of a judicial character which may ultimately come before the court for final action. But if it is a fact that such judicial questions are not dealt with in any way by the ,,sindico", they, of course, are handled by the judge. Surely it can not be said that under Mexican law property may be seized by order of a court and that thereupon all the important proceedings with regard to the disposition of property not belonging to a bankrupt and with regard to the proof of debts and the distribution of property to satisfy those debts are entirely left by the judge to creditors to be adjusted as private, nonjudicial matters, the creditors being turned loose to help themselves to the estate of the bankrupt. Nor can it be plausibly maintained that in a case in which the property of an alien is involved there is no responsibility on the part of Mexico for anyone whatever may happen to the property." [1])

In any case, irrespective of the formal denomination or status of a ,,sindico" in Mexican law, he wanted to apply here the principle he had expressed with the agreement of his colleagues in the *Massey* case:

,,Under the law of the United States the receiver and trustee and other persons connected with bankruptcy proceedings are officers of the court. Under international law a nation has responsibility for the conduct of judicial officers. It was suggested by counsel for the United States that, if in connection with a bankruptcy proceeding, or as distinguished from the disposition of assets of a bankruptcy, a proceeding to obtain the release of property not part of the asssets of a bankrupt, such officials of a court were guilty of gross misconduct, the United States could not deny responsibility for their acts in the light of Article I of the Convention of September 8, 1923, under which the contracting parties are responsible for the acts of officials or others acting for either Government. And I am of the opinion that the Government of Mexico can not be without responsibility for persons performing the same kind of duties in Mexico merely by the fact, if it be a fact, that such persons are not designated or considered as officers under Mexican law. Mexican law requires them to conserve property seized in bankruptcy proceedings. *It is the character of functions which persons perform and the manner in which those functions are discharged that determine the question of responsibility.*" [2])

[1]) I, p. 366.
[2]) I, p. 367.

What acts of agents are imputable to the State?

As has been stated, it is a well established principle in national as well as in international law, that a State is only responsible for acts of its representatives *in their official capacity*, i.e. when they act *as such*. Sometimes it has in addition been required that the wrongful act of the agent be *within the scope of his competency* or, to borrow a term from municipal law, within the scope of his employment. [1]) On the other hand most authors have definitely denied the existence of such a condition in international law. [2])

These two requirements have often in the law of nations given rise to some difficulty, particularly in connection with the acts of soldiers [3]). The Mexican-American tribunal too had to deal with this issue on several occasions.

In the case of *Thomas H. Youmans* [4]) the Commission, without expressly pronouncing itself against either of these two conditions, emphasized the necessity of giving them a very restricted application so far as soldiers are concerned. The question arose in the following circumstances. Two American engineers became involved in a quarrel with their Mexican workmen, whereupon a threatening mob surrounded their house. The Mayor of the city ordered a Lieutenant to put an end to the riot with his troops.

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[1]) „As a matter of fact the State is not responsible either for all its administrative officers or for all of their acts. It may be said, first of all, that for such of their acts as are personal and *outside the scope of their functions*, they alone are liable . . . ." (Italics ours) Borchard, The Diplomatic Protection of Citizens Abroad, p. 185; cf. Moore, Digest, VI, par. 1000).

[2]) A. de Lapradelle et N. Politis, Recueil des Arbitrages Internationaux, II, p. 301; Anzilotti, Teoria Generale della Responsabilita dello Stato nel Diritto Internationale, p. 167; the same author, „La Responsabilité Internationale des Etats à raison des dommages soufferts par des étrangers", Revue Générale de Droit International Public, 1906, p. 289, and : Cours de Droit International, pp. 470—471; Charles de Visscher, Responsabilité des Etats, Bibliotheca Visseriana, II, p. 99; the same author, „Notes sur la Responsabilité internationale des Etats et la Protection diplomatique d'après quelques documents récents", Revue de Droit International et de Législation Comparée, 1927, p.253; Eagleton, Responsibility of States, pp. 55—56; Buder, Die Lehre vom Völkerrechtlichen Schadenersatz, p. 59 and p. 64; see furher authors mentioned in the lastmentioned book on p. 64, note 39; Decencière-Ferrandière, La Responsabilité internationale des Etats, p. 68 *et seq.*, and cases there cited; Maúrtua and Brown-Scott, Responsibility of States for damage caused in their territory to the person or property of foreigners, pp. 10 and 25; Schoen, Die Völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen, p. 45, and precedents mentioned by this author in note 8 on p. 46.

[3]) Decencière-Ferrandière, op. cit. p. 72.

[4]) I, p. 150.

These, however, instead of dispersing the mob, opened fire upon the house, and took the lead of an attack upon it, which resulted in the murder of the two Americans. Mexico contended that it should not be held liable for the wrong committed by ten soldiers and an officer acting in violation of the orders given to them. It invoked the two rules that a State is not liable for the illegal acts of an official accomplished outside the scope of his competency, nor for the acts of soldiers committed in their private capacity. The Commission clearly pointed out, however, that if all illegal acts of officials contrary to their duty were considered to be committed „outside the scope of their competency" or „in their private capacity", no responsibility could ever be imposed upon the State.

> „Apart from the question whether the acts of officials referred to in this discusson have any relation to the rule of international law with regard to responsibility for acts of soldiers, it seems clear that the passage to which particular attention is called in the Mexican Government's brief is concerned solely with the question of the authority of an officer as defined by domestic law to act for his Government with reference to some particular subject. Clearly it is not intended by the rule asserted to say that no wrongful act of an official acting in the discharge of his duties entrusted to him can impose responsibility on a Government under international law because any such wrongful act must be considered to be „outside the scope of his competency." *If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable.*
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> . . . . . .
>
> But we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officier. *Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.*" [1])

It might seem that in this passage the Commission implied by

[1]) I, pp. 157—159.

recognized that the act of an official can only create international responsibility for the State when it has been an act *a.* committed in his official capacity, and *b.* within the scope of his competency. This would be of particular interest with regard to the second condition, in view of the controversy which, as has been stated, exists upon that point. However, it seems more likely that the Commission had in view a general — although negative — standard for the application of these rules which ought to constitute a satisfactory solution both for the adherents and the opponents of requirement b.

The standard implied in the opinion is this: *the mere fact that the official acted wrongfully or contrary to his duty does not effect that state can decline responsibility on the grounds that its agent acted „in his private capacity" or „outside the scope of his competency".*

In fact we believe that the conflict between the adherents and opponents of the requirement mentioned as b. is a matter of words rather than of substance. The confusion arises from the different meaning attached to the term „outside their competency". When some tribunals or writers say that States are not responsible for acts of officials „outside their competency", they generally mean something different from those who assert that States are responsible for the acts of their officials, even if committed „outside of their competency". The meaning of the term in the first case is: „outside the general scope of the task entrusted to the official", „outside the normal scope of his employment", „outside the group of acts normally performed by an official possessing his status". In the second case, however, the meaning is: „*contrary* to the way in which he should fulfil his task", „contrary to the orders or rules he should obey"; the expression then refers to a *wrongful mode* of executing a task which it was *within the official's authority* to execute. [1]) A judge, for instance, who would promulgate a law, would act „outside the scope of his competency" in both senses. But a judge who renders an unjust judgment in order to help a friend, acts „within the scope of his competency", in so far as it is his task to render judgments; at the same time, however, he may in a different sense be said to

[1]) The distinction between the two sorts of acts is clearly made by Strupp, Das Völkerrechtliche Delikt, p. 39 *et seq.*

act „outside his authority", since it is his duty to fulfil this task in such a way as to apply the law, and not to promote the interests of his friends.

If it is thus realized that the controversy existing with regard to the requirement „within the agent's competency", is merely due to a misunderstanding as to the exact meaning of this term, it would seem that the clarification of the expression laid down in the *Youmans* opinion offers a perfectly acceptable solution of the problem. It is the merit of this opinion to have shown by the negative explanation which it gives, that the rule according to which responsibility attaches only for acts within the agent's competency is perfectly sound, if only it is properly understood, i.e. as not implying that responsibility can be avoided as soon as the official acted contrary to his duty. [1]) For this reason, too, we cannot agree with the conclusion reached by Feller with respect to cases involving this problem:

> „It is apparent that an exceedingly thin line separates acts performed within the scope of functions and acts performed outside this scope. Innumerable municipal courts have struggled with these problems of agency, and it cannot be expected that an all embracing formula can readily be found by international tribunals." [2])

The explanation given above of the controversy between the opponents and adherents of the requirement „within the agent's competency" seems to us to be more satisfactory than the one given by Eagleton, who attributes all judgments in which reparation has been disallowed for acts outside the agent's competency to the fact that claimants in those cases failed to exhaust local remedies. For the rest this author arrives at the same conclusion as ours, a conclusion which can perhaps best be justified by the words of Professor Charles de Visscher:

> „S'agit-il enfin d'actes commis par les fonctionnaires ou agents de l'Etat pour „actes de fonction", nous avons vu déjà qu'ils sont susceptibles d'engager sa reponsabilité même quand leurs auteurs, outrepassant les limites de leurs pouvoirs, ont violé la loi. En leur conférant une qualité officielle, en les utilisant dans ses relations avec l'étranger, l'Etat qui les a institués a accepté

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[1]) Cf. Strupp, op. cit. p. 42.
[2]) The Mexican Claims Commissions, p. 137.

que leur activité se déploie sous le couvert de son autorité; il en retire les avantages, il ne peut se dérober aux risques qui en forment la contrepartie." [1])

Finally, the distinction drawn above is one perfectly well known in the municipal law of several countries in relation to the liability of an employer for the acts of his servants or agents, and is one which would seem to offer a sound test in relation to State responsibility also.

Apart from the negative rule discussed in the preceding pages, the Commission applied a second standard, which pertains only to the question as to when soldiers must be held to have acted in their official capacity. In this respect the opinion confirms that *soldiers acting in the presence and under the command of an officer are acting in their official capacity.* It appears from a later opinion, however, that the Commission attributed to this standard, too, but *negative* value, insofar as it is not at all certain that soldiers *not* acting under the command of an officer must be considered to do so outside their official capacity. [2]) An American's cattle had been taken and killed for food by soldiers of Mexican Government forces camping on his ground. The tribunal decided that although they did not seem to have done so under the direct command of an officer, they could not be deemed to have acted in their private capacity, since in the said circumstances there certainly must have been some officer responsible for their station and doings. [3]) This award clearly tends to weaken the decisive importance often attributed to the circumstance that soldiers were acting by the order and under the command of an officer. And the Commission went still further in this direction when allowing the claim of *Lillie S. Kling* [4]) whose son had been shot by Mexican federal soldiers on patrol, when one late night, with some friends, he was noisy and fired shots for fun in the air

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[1]) La Responsabilité des Etats, Bibliotheca Visseriana, II, p. 99; see also the same at p. 96; further to the same effect: Schoen: Die Völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen, p. 48; Buder, Die Lehre vom Völkerrechtlichen Schadenersatz, p. 64; Anzilotti, Teoria Generale, p. 177; Eagleton, The Responsibility of States, p. 58.

[2]) To the same effect: Decencière-Ferrandière, La Responsabilité internationale des Etats, p. 72; Maúrtua and Brown Scott, Responsibility of States for damage caused in their territory to the person or property of foreigners, p. 24.

[3]) *G. L. Solis*, II, p.48.

[4]) III, p. 36.

in the neighbourhood of a military camp. The opinion stated:

> „It is further asserted in the brief that, without conceding that Kling was shot by soldiers, the latter were not under the command of an officer, and that therefore Mexico is not responsible for their acts.
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> In the affidavit of Stribling it is stated that a captain was among the Mexican soldiers. *Whether or not it be a fact that the soldiers were under the command of a captain is not a vital point in connection with the determination of the question of responsibility for the acts of soldiers.* Men on patrol duty are not acting in their private capacity, even though an officer may not be present on the spot where acts of soldiers alleged to be wrongful are committed." [1]

A similar question, relating this time to official or private acts of army doctors, arose in connection with the claim of *Louis B. Gordon* [2], who was wounded on a vessel by a bullet fired by an army doctor engaged in target practice somewhere ashore. The American Agency alleged: 1. that daily target practice was mandatory under the Mexican Army Regulations, and 2. that soldiers are on duty 24 hours a day, from which it concluded that the doctor was engaged in the performance of a military duty when wounding the claimant. But since these two points were not sufficiently established, the firing was assumed to be a private act outside the course of service, and the claim was disallowed.

How narrow the distance may be between official and private acts appears very clearly from the affair of *Francisco Mallén* [3], a Mexican Consul in Texas, who had twice been assaulted by an American deputy constable. The first time the man walked up to the consul in the street, and slapped him in the face. The second time he did the same in a streetcar and subsequently, showing his official badge, took the claimant to the county jail. The first was the deed of a private individual who happened to be an official, the second was the act of an official.

Liability was also imposed upon Mexico for the death of an American caused in error by a member of an informal but tacitly recognized guards organisation, because he was „acting for" Mexico, and should be considered as, or assimilated to, a Mexican soldier. [4]

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[1] III, p.p. 39—40.
[2] III, p. 50.
[3] I, p. 254.
[4] *Charles S. Stephens and Bowman Stephens*, I, p. 397.

CHAPTER VI

RESPONSIBILITY OF THE STATE FOR ACTS OF REVOLUTIONISTS

Contractual obligations undertaken by illegal administration

A judgment of fundamental importance was rendered upon the claim of *George W. Hopkins* [1]), an American subject, who complained of the fact that six postal money orders, which were purchased from the Mexican Government at its post offices, and presented in due time, were not paid for the reason that they had been issued by the illegal Huerta administration.

The General Claims Commission agreed that the assumption of power by Huerta was pure usurpation, and therefore illegal. It then examined the question as to how far the acts of an illegal administration can bind a country. In this respect a valuable answer was given, well worthy of being quoted in its entirety:

> „3. Before considering the question of the validity or nullity of acts done by or contracts entered into with a government administration of this character it is necessary to state at once the impossibility of treating alike all acts done by such an administration or all transactions entered into by an individual with it. There seems to be a tendency both in jurisprudence and in litterature to do so, to declare that all acts of a given administration, the legality of which is doubtful, must have been either valid or void. Facts and practice, however, point in a different direction.
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> 4. The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative offices. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are government services), the sale of railroad tickets (where railroads are operated by the government), the registration of births, deaths, and marriages, even many rulings by the police and the collection of several types of taxes, go on,

[1]) I, p. 42.

and must go on, without being affected by new elections, government crises, dissolutions of parliament, and even state strokes. A resident in Mexico who cleans the government bureaus or pays his school fee to the administration does not and can not take into consideration the regularity or even legality of the present administration and the present congress; his business is not one with personal rulers, not one with a specific administration, but one with the government itself in its unpersonal aspect.

5. The difficulty of distinguishing between the government itself and the administration of that government arises at the point where the voluntary dealings and relations between the individual and the government agencies assume a personal character in support of the particular agencies administering the government for the time being. To this class belong voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like. But the ordinary agencies, departments, and bureaus of the government must continue to function nothwithstanding its principal administrative offices may be in the hands of usurpers, and in such a case the sale and delivery to these necessary and legitimate agencies of supplies, merchandise, and the like, to enable the government itself in its unpersonal aspect to function is a very different transaction from one having for its object the support of an individual or group of individuals seeking to maintain themselves in office. The character of each transaction must be judged and determined by the facts of the particular case.

6. A similar distinction arises in the field of international law. There are, on one side, agreements and understandings between one nation and another changing or even subverting its rulers, which are clothed with the character of a free choice, a preference, an approval, and which obviously undertake to bear risks of such a choice. There are, on the other hand, many transactions to which this character is alien. Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, the treasury, and the foreign office – whatsoever the relation of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favor of any of the contesting groups or parties. International payments (for a postal union, etc.) will be received from such government; delegates to an international conference will often be accepted from such government. Between the two extremes here also there is a large doubtful zone, in which each case must be judged on its merits.

7. Facts and practice, as related to the Huerta administration in Mexico, illustrate the necessity of a cleavage in determining the validity or nullity of its acts.

8. In the field of international relations the distinction is apparent. Where preexisting relations with government agencies continued under such circumstances as not to imply either approval or disapproval of the new administration or recognition of its authority these transactions must be treated as government transactions and binding on it as such rather than transactions had with a particular administration. The routine diplomatic and consular business of the nation continued to be transacted with the agencies assuming to act for the government and which were in control of the foreign office, the treasury, and the embassies, legations, and consulates abroad. Even the United States, though placing its stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept its embassy in Mexico City open for the transaction of routine business, entrusting it to a chargé d'affaires, and maintained its consulates throughout Mexico. Such relations, so maintained, were entirely unpersonal; they constituted relations with the United Mexican States, with its Government as such, without respect to the status of the individual assuming to act for the Government." [1])

The judgment then shows that in the case under consideration the validity of purely routine acts of the illegal administration was even recognized by the succeeding Carranza administration by accepting the validity of registrative acts and even of bonds issued with the view of paying pre-existing debts of Mexico. The Commission concludes that the sale of postal money orders clearly falls „within the category of purely government routine having no connection with or relation to the individuals administering the Government for the time being."

It seems to us that there is nothing to be objected or added to the important principle put forward in this opinion. Basing itself upon it, the Commission held Mexico bound by contracts entered into by the Huerta administration with respect to the following objects:

postal money orders:

George W. Cook, I, p. 318,

John A. McPherson, I, p. 325,

National Paper and Type Company, II, p. 3,

Francis J. Acosta, II, p. 121;

services relating to automobiles:

Lee A. Craw, II, p. 1,

[1]) I, pp. 44—46.

deliveries of printing machinery, paper envelopes and similar goods, made to various departments of the Mexican Government;

National Paper and Type Company, II, p. 3,

Parsons Trading Company, II, p. 135;

delivery of school benches to the Mexican Ministery of Public Instruction and Fine Arts;

George W. Cook, II, p. 266.

Some doubt rose in the Presiding Commissioner's mind as to the character of the purchase of ambulances:

> „.... The purchase of ambulances, however, in my opinion is not a part of the ordinary routine of government business. It comes within the doubtful zone mentioned in paragraphs 5 and 6 of the opinion in the *Hopkins* case. As such, it is much more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking „having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme), and therefore should, under the principles laid down in the said opinion, be assimilated to the first group, to wit, the routine acts". [1])

The Commission in the abovementioned *Hopkins* case did not content itself with drawing, in the paragraphs quoted, a line between the impersonal routine acts of an illegal government, for which the country is always liable, and the personal, particular acts of such government; it even determined by which acts of the latter kind the State may be bound:

> „But it by no means follows that if the contracts of the claimant Hopkins, evidenced by postal money orders, should be treated as contracts with the Huerta administration in its personal aspects Mexico is not bound by such contracts. The question then arises, how far can an administration which seizes the reins of government by force and is illegal in its inception bind the nation? It will be born in mind that an administration of illegal origin either operates directly on the central authority by seizing, as Huerta did, the reins of the government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation; or it comes into being through attacking the existing order from without and step by step working toward the center. The acts of an organization of the latter type become

[1]) I, pp. 304—305.

binding on the nation as of the date territory comes under its domination and control *conditioned* upon its ultimate success. The binding force of such acts of the Huerta administration as partook of the personal character as contradistinguished from the Government itself will depend upon its real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people of Mexico. As long as the Huerta regime was in fact the master in the administration of the affairs of the Government of Mexico its illegal origin did not defeat the binding force of its executive acts (award of 1901 in the Dreyfus case between France and Chile, Deschamps et Renault, Recueil international des traités du XXe siècle, an 1901, 394). Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves. Even while still in possession of the capital and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment it apparently was no longer the real master of the nation." [1])

An application of the rule stated in this paragraph, that acts of a revolutionary movement which attacks the existing government from without „become binding on the nation as of the date territory comes under its domination and control conditioned upon its ultimate success" is to be found in the *United Dredging Company* case [2]). It was there contended on behalf of the United States of America, and not denied by Mexico, that it was responsible for the obligations of the so-called „Constitutionalists", headed by General Carranza — who as successful revolutionists established themselves in power in Mexico — although the obligation in question was undertaken at a moment when a great part of the country was still under the control of Carranza's predecessor and opponent Huerta.

It seems desirable to point out that the liability of a State for the acts of the two different kinds of revolutionary administrations mentioned by the Commission is even of a fundamentally different character. If a revolutionary movement seizes the reins of government at the latters very seat, thus establishing itself as the central authority of the country, even though part of the territory may not be under its control, the acts of such

[1]) I, p. 48.
[2]) I, p. 394.

government are held to be binding upon the State, *because they could be considered as acts of the country*. If however a revolution starts somewhere in the province, gradually spreading over other regions, until it brings the capital within its power, obligations undertaken by its representatives can not be considered as having been undertaken by the country. They remain obligations of the revolutionary movement, and it is only when the government and that movement have become one and the same juridical person, that the obligations of the latter become obligations of the State. This explains why the acts of an illegal government of the first type remain binding upon the State if the movement after a short time cannot maintain itself, whereas this is not the case with acts of an illegal government of the second type which fails to succeed; the binding force of the acts of such a government is, as the opinion says: „conditioned upon its ultimate success".

The reader may have noticed that in the whole opinion the Commission never used the expression „de facto government", nor the current distinction between „general" and „local" de facto governments. Why this was done is not clear. Still it would seem that what the Commission designed as „illegal administration", „usurpers", „administration of illegal origin" or „administration paramount over (part of) the territory and the people of the country", is nothing else but what is usually called a „de facto government". It is generally recognized that the acts of such a government are binding upon the State. [1])

Successful revolutionists

The statement in the *Hopkins* opinion, that the binding force of the acts of what we might call a local de facto government is conditioned upon its ultimate success, constitutes a confirmation of the well established rule that a State may be held responsible for the acts of successful revolutionists. [2]) At the same time it shows that this rule finds its full application particularly with regard to revolutionary administrations of the second type: with regard to the acts of an illegal government which has held the reins of government of the country as a whole, it is

[1]) Strupp, Das Völkerrechtliche Delikt, pp. 90—92.
[2]) Cf. Ralston, The Law and Procedure of international tribunals, pp. 615—618.

immaterial whether the movement has ultimately succeeded or not.

It has already been mentioned that in the *United Dredging Company* case [1]) liability was imposed upon Mexico for an obligation undertaken by the „Constitutionalist" revolutionary movement of General Carranza at a moment when a great part of the country was still under the control of his opponent, the Constitutionalists afterwards having succeeded in establishing themselves in power.

A second time liability was imposed for the acts of an agent of the Carranza Government, committed at a moment when this movement was still in the process of conquering the country. The forces of General Carranza, having taken the town of Monterrey in April 1914, seized a brewery in it and placed a certain Elosua in charge thereof. Elosua, *on behalf of the brewery*, entered into contracts with the *American Bottle Company* [2]). After the end of the seizure the brewery refused to execute these contracts, whereupon the American Company claimed from the Mexican Government the damage suffered on this account. The Commission held that

> „The seizure of the brewery was a revolutionary measure and not a legal act that could give Elosua authority to enter into a contract in behalf of the brewery company." [3])

and held Mexico responsible for the damage caused by this illegal act of the Carranza movement, committed in its revolutionary stage.

Damage caused by delictual acts of insurgents

It has been seen in the last example that responsibility for the acts of successful revolutionists attaches, not only in respect of their contractual obligations, but also of their illegal acts.

A different question arises as to State responsibility for damage sustained as a result of illegal acts of *unsuccessful* revolutionists. On this point it is a principle maintained by South-American states in particular that a Government cannot be held responsible

[1]) I, p. 394
[2]) II, p. 162.
[3]) II, p. 165.

for losses sustained by foreigners as a result of revolutionary disturbances, civil war, and the like. [1]) Now, such damage may be sustained in two ways: on the one hand the injury may be inflicted upon aliens by the insurgents themselves; on the other hand a loss may result from the fact that the government, owing to the disturbances, in some way fails to fulfil its international duties towards aliens. [2]) The latter question will receive consideration in the next section.

With regard to damage caused by the insurgent forces themselves, the principle stated means that a claim for compensation cannot be based merely upon the behaviour of such forces; the demand can only be admitted if it is based in last resort upon acts of the respondent government itself [3]). Acts constituting a basis for an international award however may just as well be acts of omission as acts of commission. [4]) Accordingly, if aliens have suffered an injury at the hands of insurgents as a result of an omission of the government, e.g. a failure to provide sufficient protection, a claim may well be based upon such a failure.

From the foregoing two conclusions may be drawn with respect to the cases of so-called responsibility for acts of revolutionaries:

1. it should be borne in mind that the allowance of an indemnity is in reality always based upon a failure of the respondent government itself and not upon a responsibility for acts of the insurgents;

2. most claims of this type, if not all, will enter into the category of claims based upon a lack of protection.

This can be illustrated by the claim of *G. L. Solis*, submitted

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[1]) Anzilotti, La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers, Revue Générale de Droit International Public, 1906, p. 307; Buder, Die Lehre vom Völkerechtlichen Schadensersatz. pp. 188—189; Decencière—Ferrandière, La Responsabilité Internationale des Etats, p. 148; Le Fur, Précis de Droit International Public, p. 361.

[2]) Cf. Decencière—Ferrandière, La Responsabilité internationale des Etats, p. 158 *et seq.*

[3]) Strupp, Das Völkerrechtliche Delikt, pp. 103—108 and cases there cited; Decencière-Ferrandière, op. cit. p. 152 *et seq*; Huber, Réclamations britaniques dans la zone espagnole du Maroc, Rapports, La Haye 1925.

[4]) Cf. Calvo, III, p. 121 *et seq.*; Hoyer, La responsabilité des Etats à raison de crimes ou de délits commis sur leur territoire au préjudice d'étrangers, pp. 40 *et seq*; Buder, Die Lehre vom Völkerrechtlichen Schadenersatz, p.p. 182—184; and many cases cited by these authors.

to the Mexican-American Claims Commission. [1]) One of the complaints of this American citizen was that cattle had been taken from him by the de la Huerta revolutionary forces, and that federal troops stationed in force in the locality of his ranch made no effort to protect nor to recover his property. The Commission, having regard to former decisions of arbitral tribunals, reached this conclusion:

> „It will be seen that in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection." [2])

In so far as this case of „responsibility for acts of insurgents", as well as other similar cases, in reality constitutes a claim based upon a lack of protection, we may refer to chapter XII of this book, where we shall attempt to show that the standard applied by the Commission ought to be completed by a third condition: circumstances must have been such as to require special protection. This element, however, will generally be present in cases of disturbance, which explains why it has not been expressly required by international tribunals in such circumstances.

For the reasons stated above, it seems incorrect and confusing to speak, as the opinion quoted does, of „responsibility for acts of insurgents"; there is no such responsibility; the government can only be responsible for its own faults, although the damage sustained may but indirectly be caused by such faults [3]).

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[1]) p. 48, see pages 51—53.

[2]) II, p. 53.

[3]) Responsibility for acts of revolutionaries was previously frequently denied by international tribunals, e.g. in the following cases:
Wyman case, Moore, Arbitrations, p. 2978;
Walsh case. Moore, op. cit., p. 2978;
Hanna case, Moore, op. cit., p. 2982;
Opinion No. 8 of the *Spanish Treaty Claims Commission* under the treaty of 1898;
Aroa Mines case, Ralston, Venezuelan Arbitrations of 1903, p. 344;
Kummerow, Otto Redler & Co, Fulda, Fischbach and *Fredericy cases* op cit. p. 526;
Sambiaggio case, op. cit., p. 666, and many precedents there cited;
Guastini, case, op. cit., p. 730;
De Caro case, op cit., p. 810;
Padron case, op. cit., p. 923.
On the other hand liability was expressly or implicitly admitted for damage

This fact was better realized in the opinion rendered upon the claim of the *Home Insurance Company* [1]), which sought compensation for the seizure of two carloads of coffee at Puerto Mexico by the revolutionary forces of General de la Huerta when he was in control of that city. The tribunal decided that this revolt being a formidable and very menacing uprising, the Obregon government „did not fail in the duty which in its sovereign capacity it owed to Westfield Brothers to protect their property." [2]) This opinion did not once make use of the incorrect construction of „responsibility for acts of insurgents", and implicitly recognized the principle that such responsibility in reality can only be based upon a failure of the government itself.

Damage resulting from wrongful government acts which were caused by insurgents

The second way in which an alien may sustain a loss as a consequence of internal disturbances in a country is through the lawful government itself failing in some way, as a result of a rebellion, to fulfil its obligations towards foreigners. It will be noticed that this form is exactly the opposite of that dealt with in the preceding section. There the situation was: damage directly caused by revolutionists, but indirectly by an omission of the government itself, hence liability of the latter; here it is: damage caused directly by the government, but indirectly and in reality by the revolution. In this latter case the rule that a State cannot be held responsible for injury resulting from revolutions was upheld by the Commission on two occasions.

The first time Mexico defended itself against a complaint of a „denial of justice" by asserting that the region where a murder had been committed was at the time in the control of a revolutionary faction. The Commission, although rejecting this defence on the facts of the case, and emphasizing the condition that the

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caused by revolutionists, but in the last ressort due to failures of the Government itself:

Sambiaggio case, Ralston, Venezuelan Arbitrations of 1903, p. 666;
Henriquez case, op. cit. p. 896;
Revesno case, op. cit. p. 103;
Home Missionary Society case, Moore, Arbitrations, p. 2291.

[1]) I, p. 51.
[2]) I, p. 58.

government's failure must really have been occasioned by the insurgents, admitted the principle:

> „The change of authority due to internecine disturbances may seriously interfere with the discharge of governmental functions, and doubtless the Commission may well take account of a situation of this kind in considering a complaint against lax administration of justice. But assuredly authorities responsible for law and order in a community could not properly ignore a murder just because it had been committed three weeks before rebel forces were driven from the locality in which the murder took place. A different situation could be conceived if rebel forces had been in possession of a territory for years after a murder had been committed and if records in relation to the crime had in the meantime been destroyed, but no such situation is revealed in this case." [1])

In the same way the tribunal said in relation to the claim of *Minnie East* [2]):

> „All of this demonstrates that though a revolution, at certain times, can suspend the administration of justice, it does not necessarily produce this effect, for which reason it must be shown in each case by trustworthy evidence, that there was such suspension." [3])

Summing up, the conclusions which may be drawn from this chapter are:

In principle there exists no responsibility of a State under international law for damage caused by revolutionaries. However liability may be imposed for:

A. all contractual obligations which can be considered as routine administrative transactions (as distinct from personal acts of a particular administration), whether undertaken by a local or by a general illegal gouvernment;

B. contractual obligations which must be considered as personal acts of a particular administration, when undertaken by an illegal government which was in control of the country and held the reins of government, or

C. when undertaken by the leaders of a revolutionary move-

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[1]) *Louise O. Canahl*, II, p. 90, at p. 93.

[2]) III, p. 140.

[3]) III, p. 145; cf. Decencière-Ferrandière, La Responsabilité Internationale des Etats, p. 156: „La situatuon troublée d'un pays ne constitue pas une excuse qui justifie une conduite des autorités publiques contraire aux traités ou à la coutume internationale."

ment which was in control of some outer part of the country, but only if the movement has ultimately succeeded.

D. damage caused by wrongful acts of revolutionaries which were rendered possible by the government's own fault.

Never can liability be based merely upon illegal acts of revolutionists, nor upon behaviour of the government itself which would have been illegal if it had not been excused by the fact that it resulted from a revolution.

CHAPTER VII

CONTRACTUAL LIABILITY OF A GOVERNMENT

It has been stated above that the Commission did not consider claims based upon non-fulfilment of a contract by a Government to be outside its jurisdiction.

Tacit recognition.

In consequence the Commission several times pronounced upon the question whether, and in what circumstances, a Government is bound by a contract which it tacitly recognized by its behaviour, although the contract in itself would perhaps not have been binding upon the Government.

William A. Parker [1]) had sold and delivered typewriters to various Departments of the Federal Mexican Government, or had rendered services in the nature of repairs to typewriters. It being contended that these deliveries and repairs had not been ordered by any person possessing authority to do so on behalf of the Government, the Commission decided:

> „.... whether the individuals to whom deliveries were made, had, or had not, authority to contract for Mexico, certain it is that if the respondent actually received and retained for its benefit the property which the claimant testifies he delivered to it, then it is liable to pay therefor under a tacit or implied contract even if the individual to whom delivery was made had neither express nor apparent authority to contract for it." [2])

In annver to the claim of *Joseph E. Davies* [3]) the Mexican

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[1]) I, p. 35.
[2]) I, p. 41.
[3]) I, p. 197.

Government asserted that a contract into which it was alleged to have entered, was a nullity, inasmuch as it was governed by Mexican law, under which an agreement of this sort was void. However, since the Government had made several payments in execution of the contract, the Commission considered it to be immaterial whether the contract might indeed be null and void under Mexican law, and decided that:

> „In considering the arguments advanced to support the contention that the contract is void under Mexican law, the Commission can not ignore the fact that the Mexican Government paid Davies $ 30.000 in three payments made at different times. No showing has been made to the Commission which would warrant it in pronouncing a nullity a contract which the Mexican Government on several occasions clearly recognized as valid." [1])

Deciding upon the claim of *W. C. Greenstreet* [2]), receiver of the Burrowes Rapid Transit Company, the Presiding Commissioner, Dr. Sindballe, speaking for the Commission, held the Mexican Government bound to the said Company by a contract, which, although not expressly made in the name of that Company, had been executed by it with full knowledge of the Mexican authorities. [3])

These three decisions were in accordance with the view previously taken by the American and British Claims Tribunal [4]), when it decided that the United States must be taken to have assented to a contract by which one of their consuls acquired the services of an attorney, because although they knew of it they did not object to his employment for their benefit, and this quite apart from the question of the competency of the consul to act in the manner stated.

Exemption from taxes. Mere liberality

The (fourth) claim of *George W. Cook* [5]) raised some questions with respect to contractual obligations. The claimant, owner

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[1]) I, p. 200.
[2]) II, p. 199.
[3]) Cf. also case of *Boulton, Bliss and Dallett*, Ralston, Venezuelan Arbitrations of 1903, p. 26.
[4]) *Hemming* case, A.J.I.L., 1921, p. 293.
[5]) III, p. 61.

of a real estate in the State of Jalisco, Mexico, erected a building there, relying upon the State Government's promise to recommend to the State legislature that his property would be exempted from the payment of the corresponding real estate tax. The State Congress complied with the recommandation, but a few years later a new, additional, tax upon urban property was imposed and also levied upon Cook's property. The tribunal decided:

1°. that the mere promise of the Government was not in itself an exemption, neither did it create any right in favour of claimant;

2°. that *the right of a state to levy taxes cannot be the subject of a contract, but that even if contractual exemptions were admitted these should be construed in favour of the state.*

> „In all cases relative to tax exemption it is necessary to bear in mind the generally accepted standards of construction. The right of the State to levy taxes constitutes an inherent part of its sovereignty; it is a function necessary to its very existence and it has often been alleged, not only in Mexico, but in the United States and other countries that legislatures, whether of states or of the federation cannot legally create exemptions which restrict the free exercise of the sovereign power of the State in this regard. The Supreme Court of Mexico has held on several occasions this class of exemption to be illegal. (Semanario Judicial de la Federacion 5a epoca, Vol. 4, pp. 982–987). In the same sense, and in line with numerous decisions rendered at various times by courts of the United States of America, vigorous dissenting opinions to the doctrine approved by the majority have been filed in the highest court of this country. (Corpus Juris, Vol. 12, Par. 668.) And even in those cases in which the said majority of the Supreme Court of the United States has held that that right inherent to the sovereignty of a State might be the subject of a contract, it has also ruled that the exemptions should be strictly construed in favor of the State!" [1])

> 3°. „It may be added as a corollary that *the liberality of a State in granting an exemption is essentially revokable for the reason that it creates no vested rights in him who enjoys it.* It is well established that an exemption granted merely for reasons of policy, where the state and the citizen have no agreement to their mutual advantage, must be regarded only as an expression of the pleasure of the said state and of the citizen; and the law which grants it, as all general laws, is subject to amendment or repeal at the option of the

[1]) III, p. 64.

legislature, and it is immaterial whether during the time it has been in force the parties in interest have acted in reliance thereon (Cooley, On Taxation, p. 69.)" [1])

Position of stockholders with regard to rights and obligations of a stock company

The case of a *International Fisheries Company* [2]), which was fully discussed in a preceding chapter, contained an interesting element relating to contractual obligations. It will be remembered that a contract, containing in its art. 32 a Calvo clause, had been signed by „La Pescadora S.A.", a Mexican company whose stock was almost entirely in the hands of the claimant Company, which was American. The contract was afterwards annulled by the Mexican Government on the ground, or pretext, that „La Pescadora S.A." failed to comply with a certain obligation of the contract, non-fulfilment of which would entitle Mexico to cancel the contract. Reparation was claimed for the loss which resulted from this cancellation for the International Fisheries Co., as the almost exclusive stockholder. From the Mexican side the jurisdiction of the Commission was challenged on the ground that the contract contained a Calvo clause. The American Agency, however, replied that article 32 was not binding on the claimant company, because that stipulation was accepted solely by the Mexican Company; the claimant company being merely the possessor of a number of shares in the Mexican company, it could not be considered as having agreed to the contract, and as having thereby relinquished in any manner its right to seek diplomatic intervention in matters relating to the contract-concession. Commissioner McGregor however, supported by Dr. Alfaro, held:

„It is necessary, in this connection, to recall that paragraph 22 of the opinion in the case of the North American Dredging Company of Texas, established that in order for a clause of this nature to prosper, it must be applied only to claims based on express contractual provisions in writing and signed by the claimant or by some person through whom the claimant derives title to the particular claim.

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[1]) III, p. 65.
[2]) III, p. 207.

Now „La Pescadora, S.A." was, as its name indicates, a stock company organized in accordance with Mexican law. But in accord with the present theory with respect to stock companies, I do not believe it to be debatable that the holder of shares of stock therein is in the last analysis the beneficiary of a fixed part of the rights of the company, with the limitation that they cannot be exercised directly at any time except through the procedure and in the words established by the Company's constitution and by-laws. This being the case it is clear that the stockholder not only *derives*, but directly *has*, (subject to the aforementioned limitation) all the rights accruing to him as astockholder therein. By virtue thereof, it must be recognized that the International Fisheries Company, a stockholder of the Mexican fishing company which owned the contract-concession of March 10, 1909, had the same rights and obligations which are derived from the contract-concession granted to the „Pescadora" itself, with the limitation that the exercise thereof appertained to the appropriate company authorities." [1])

. . . . . .

„Now the International Fisheries Company had acquired the stock, which it states is had, from „La Pescadora, S.A." at a time prior to the acquisition by the second company of the conctract-concession made with the Mexican Government on March 10, 1909, and certainly approved such acquisition together with all of its obligations in the meeting in which this matter was submitted. It must further be borne in mind that the International Fisheries Company had, according to the evidence, at that time 985 parts of all the stock, or almost the total amount, from which it is clear that it planned, negotiated and really carried out on its own behalf, through the medium of „la Pescadora, S.A.", thc contract-concession with the Mexican Government, in the full knowledge of the stipulation required by this Government in Article 32. It appears, from all of these reasons, that the contention is not acceptable that the International Fisheries Company must not be considered as deriving rights from the very contract-concession in question."[2])

The question of jurisdiction in this case presented, as far as we can see, three different aspects.

The first is the one dealt with by the decision. What is the position of stockholders in a stock company with regard to the rights and obligations of the company?

With regard to this point the decision, as appears from the passages quoted, answers: The stockholder, both according to a general rule and owing to the circumstances of the present case,

[1]) III, p. 214—215.
[2]) III, p. 215.

owns and bears a proportionate part of the rights and obligations of the stock company, only subject to the limitation that they cannot be exercised or their fulfilment demanded unless by the corporation acting as a whole.

In our view neither of the reasons assigned can be accepted as valid. This is not the place to discuss the problem of the character of a corporation, and all the theories issued thereupon, but it must be said that there seems a certain boldness in asserting as a general principle that stockholders do not only *derive* rights from a stock company, but do themselves possess its rights, in their own behalf, subject only to a limitation with regard to the exercise thereof. Many distinguished lawyers and tribunals of repute have held that the rights and obligations of a stock company are something definitely distinct from the collective rights and obligations of its members. Thus Borchard states:

> „That the nationality of the corporation rather than that of the stockholders must control the jurisdiction of international tribunals in claims growing out of corporate losses appears evident from the fact that the corporation, the trustee, possesses the entire legal and equitable title to a claim as part of the assets of the corporation, whereas the stockholder possesses only an equitable right, enforceable in a court of equity, to an accounting and to compel the proper management of the company by its directors. The stockholder, therefore, having no legal title to the corporate property of a solvent corporation, can hardly be recognized by an arbitral tribunal acting under the usual form of protocol as a proper party claimant and only under exceptional protocols, as will presently be noticed, has this been done." [1])

Decisions to the same effect were rendered e.g. in the following cases.

With regard to a claim against Venezuela of *Baasch and Romer*, Dutch stockholders in a Venezuelan company, Umpire Plumley decided:

> „The shareholders being Dutch does not affect the question. The nationality of the corporation is the sole matter to be considered".[2])

Similarly in the *Henriquez* case the Umpire did not take jurisdiction over a claim of a Dutch stockholder in a Venezuelan partnership. [3]).

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[1]) Diplomatic Protection of Citirens abroad, p. 624.
[2]) Ralston, Venezuelan Arbitrations of 1903, p. 906.
[3]) Ralston, op. cit. p. 910.

In the *Kunhardt* case Commissioner Paúl said:

„The shareholders of an anonymous corporation are not co-owners of the property of said corporation during its existence."

And Commissioner Bainbridge in the same case held:

„The real interest of Kunhardt & Co. is an equitable right to their proportionate share of the corporate property after the creditors of the corporation have been paid." [1])

. . . . . .

„.... the property of a corporation in esse belongs not to the stockholders individually or collectively, but to the corporation itself." [2])

A similar view was taken in the *Standard Oil Co.* case. [3])

If the view of these authorities is right, its validity cannot be affected in the present case by the circumstance that 985 out of 1000 shares belonged to one stockholder, that the company acted with his knowledge and approval, or by any other circumstance tending to show that it was in fact the shareholder who acted. But even so it does not necessarily follow that the American Company, which was a shareholder of one of the contracting parties, but not itself a party to the contract, could not have been admitted as a claimant before the Commission. That is a second and altogether different question. The Convention under which the Commission was established, provided for the submission of „all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest." Consequently the Commission would have been perfectly justified — apart from exceptional circumstances such as the presence of a Calvo clause — in admitting the American company as a claimant without treating it as a party to the contract. The difference is that the American company would then have been admitted as a claimant not on the ground that it was the real party to the contract, but on the ground that *indirectly* it was that company which suffered the damage. This, we believe, constitutes an exam-

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1) Ralston, op. cit., p. 63.
2) Ralston, op. cit,. p. 67.
3) A.J.I.L., 1928, p. 411.

ple, and at the same time an argument in favour, of the recognition of international liability for indirect damage which will be advocated in Chapter XIII. In this manner are also to be explained, in our opinion, a number of recent decisions mentioned by Ralston and de Visscher as indicative of a tendency to adopt the principle „that equitable consideration would justify appeal by stockholders to their governments when wronged". [1])

Adoption of this view in international law would present the threefold advantage of:

a) respecting the theory adopted in the municipal law of many countries, that a stock company is a separate juridical entity with rights and obligations different from those of its shareholders;

b) adhering to the international jurisprudence which until recently recognized the same theory;

c) at the same time meeting the requirements of equity which demand the possibility of intervention in favour of shareholders who have suffered damage *through* the company.

Now in the present case, apart from this fundamental question whether the International Fisheries Company could be admitted as a claimant at all, the situation was complicated by the fact that a Calvo clause had been signed by the Mexican stock company. Consequently, when it is accepted that a shareholder is not himself invested with the rights and obligations of the stock company, but that nevertheless he may be admitted as a claimant when he has sustained indirect damage as a result of damage inflicted upon the corporation, the third question which should be answered, and which in this case should finally have determined the decision with regard to jurisdiction, was: can a Calvo clause, signed by the direct victim, be invoked against the indirect victim of the non-fulfilment of the contract? This question was unfortunately not considered by the Commission.

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[1]) Ralston, The Law and procedure of international tribunals, p. 154; de Visscher, Revue de Droit International et de Législation Comparée, 1934, pp. 627—633; 1936 pp. 481—484. In one of these awards, the Administrative Decision No. 7 of the United States and German Claims Commission, A.J.I.L., 1926, p. 185, it was even expressly said that such claims should be admitted as claims for *indirect* injury: „American" corporations were advisedly included in the enumeration of those through which as a stockholder an American national may *indirectly* suffer . . . ."

CHAPTER VIII

ELEMENTS OF LIABILITY FOR INTERNATIONAL DELINQUENCY

Generally required elements

What elements does the law of nations require as conditions for liability for an international delinquency? This point was repeatedly discussed by Commissioner McGregor, the first occasion being in his dissenting opinion in the first *Cook* case [1]).

> „In order that an international claim of the nature of those over which this Commission has jurisdiction, may arise properly, it is necessary (1) that there may be a transgression, on the part of the State, of some principle of international law, and (2) that there may be at the time of filing the claim evident damage to a citizen of the claimant State, directly caused by such transgression." [2])

And again in his dissenting opinion in the *Chattin* case [3]).

> „What is to be determined, as already stated (and this agrees with the definitions which have been given as to what is an international claim), *is whether there exists an injury*, and whether the act which causes it violates *any rule of international law*, (italics of McG.) regardless of whether the act is intentional or not."
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> . . . . . .
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> „The important thing, it is insisted, is that the act which gives rise to the claim *causes damage in violation of a rule of international law*, (italics of McG.) and this is very difficult to determine when it is a question of judicial acts. There are many acts of this nature which, although involving a violation of domestic law, either do not cause measurable damages, or do not violate any specific international principle, and, in both cases, lacking one of the elements of the claim, the latter does not accrue." [4])

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[1]) I, p. 311.
[2]) I, p. 317.
[3]) I, p. 422.
[4]) I, p. 463.

Later on the Mexican judge repeated this view in an opnion supported by Dr. Alfaro, then Presiding Commissioner (*Dickson Cat Wheel Company*) [1]:

> „Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard. The above cited Convention requires further the existence of damage suffered by a national of the claimant Government. *It is indispensable therefore, in order that a claim may prosper before this Commission, that two elements coexist: an unlawful international act and a loss or injury suffered by a national of the claimant Government.* The lack of either of these two elements must necessarily be fatal to any claim filed with this Commission." [2]

It appears that according to Commissioner McGregor two elements are necessary:

(1) a violation of international law by a State

(2) causing damage to a citizen of another State.

In these two is implied the third element required by municipal law, which has received strikingly little attention in most treatises dealing with the subject of international responsibility: that of *causality*. When dealing with the elements required for international indemnification it has often been said without further discussing the matter, or it has even been omitted to say, that the damage must have been *caused* by the transgression of a rule of international law. Nevertheless the exact meaning of this „caused" is of the utmost importance. If a State confiscates the property of foreigner A, thereby causing A's bankruptcy, and his sister in her grief commits suicide, so that her fiancé, foreigner B., of the same nationality, cannot marry her and thereby sustains material or moral loss, there certainly is an international delinquency on the part of a State, causing damage to B. The State, however, will never in these circumstances be condemned to indemnify B, and the reason is that the damage is too remote. Accordingly the word „causing" can not be taken in an unlimited sense. What the limitation is which must be applied is a question which will be studied in Chapter XIV in connection with liability for indirect damage.

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[1] III, p. 175.
[2] III. p. 187.

The two elements mentioned appear at a closer consideration to be composed of more than one element each. It is recognized that there must be an international delinquency. This in its turn implies two conditions: there must be: (a) an internationally wrongful act (b) imputable to the State [1]). It is the first requirement that is the more difficult to establish, and therefore most international awards are solely concerned with that question. But the second one may equally well give rise to difficulties. When is an act imputable to a State? This question has been dealt with in chapters V and VI.

Similarly the condition that there must be damage sustained by a foreigner can be split up into the questions (a) whether there is damage and (b) whether the person suffering it is a national of the claimant State. Difficulties with regard to damages and nationality will be discussed in Chapters XV and XVI.

The same result is obtained by an examination of Article I of the Convention of September 8, 1923, which provides that there shall be submitted to the Commission inter alia „all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice". An analysis of the elements this provision contains again shows that the following are required:

„losses or damages",
„originating from",
„acts resulting in injustice",
„of officials or others acting for either Government."

The fifth condition, that the damage must be sustained by a national of the claimant State, is absent from the definition of that category, but it may be taken as implied in the opening words of the article which read: „All claims against Mexico of citizens of the United States, ...for losses or damages suffered by persons or by their properties;", and this should apply to the category defined further on in the article.

Summing up it may be said that both the General Claims Convention and the Mexican member of the Commission confirmed the following principle of international law:

A state is liable under the law of nations if there is an interna-

[1]) Cf. Anzilotti, La responsabilité internationale des Etats à raison des dommages soufferts pas des étrangers, Revue Gènerale de Droit International Public, 1906, p. 13.

tionally wrongful act imputable to that state (international delinquency) causing damage to the subject of another state.

An analysis of this rule has shown that the following elements are required for international liability on this account:

(1) *„an internationally wrongful act"* i.e. an act contrary to some rule or duty of international law;

(2) *„imputable to the State"*, i. e. the State must be liable for the wrongful act, it is necessary that the act can be imputed to the State;

(3) *„causing"*, i. e. there must be a certain link of causation between (1) and (4);

(4) *„damage"*,

(5) *„to a subject of a foreign State"*, i. e. the claimant must be a national of the claimant State.

Of course it is of no *fundamental* importance whether the requirements found above are considered as five separate elements, as we have done here, or whether they are compressed into two conditions, like the opinions mentioned did. But it seems to us that there is some practical value in pointing out that there are five conditions, the non-fulfilment of any of which may result in the rejection of an international claim.

Sometimes arbitral tribunals and writers have required the presence of two more conditions for the existence of international liability, viz. that there has been fault on the part of the transgressing state [1]), and that the claimant has exhausted the remedies open to him in that State. This was stated by Commissioner McGregor in his dissenting opinion in the *Chattin* case, which has partly already been quoted before in this chapter:

> „However, it seems that Anglo-Saxon practice has tried to establish this difference between judicial and executive acts; with regard to the latter, it has been said that once there exist the two elements, damage to a citizen of another country and violation of international law, the indemnization accrues at once, without any further steps, whereas such is not the case when dealing with judicial acts, for it is then necessary that the remedies furnished by the local law be exhausted, and further, that the act involves bad faith, willful neglect of duty, or very defective administration of justice."

It might be of interest to see what attitude the Commission adopted with regard to these two requirements.

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[1]) See authors mentioned in note 1 on p. 130.

Fault

Only one of the Commissioners once expressed himself in words which might perhaps be understood to imply the requirement of fault. In the *Chattin* case the Netherlands Presiding Commissioner wrote an opinion that will be discussed more fully in connection with the subject of denial of justice (Chapter X). After having specified the difference between so-called „direct" and „indirect" State responsibility he continued (paragraph 10):

> „The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term „denial of justice" in its broader sense may partly be in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive it is different." [1])

At first sight it might seem that the „outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man" which van Vollenhoven requires with regard to indirect liability in connection with all three branches of government, and to direct liability for the judiciary, is nothing but a certain degree of *fault*. But it is equally possible that the author of these lines merely wanted to give a standard for the determination of the wrongfulness of the government acts mentioned. In

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[1]) I, p. 427.

that case the condition of the presence of „an outrage, bad faith, etc." could not properly be regarded as a *separate element* of international liability, connected with the mental attitude of the delinquent official or State; its only bearing would be on the question of what standard ought to be applied in determining the wrongfulness of certain governmental acts. Its only effect then would be to make it more easy to establish the wrongfulness of the act in question in the case of executive and legislative, than in the case of judicial acts.

Of more importance, however, than its correct theoretical justification and classification is the fact that the very condition was in its entirety rejected by Commissioner McGregor in his dissenting opinion. After having expressed his agreement with the President's view of so-called indirect state liability as a direct liability of the State for its own acts or omissions, the Mexican judge continues:

> „14. If this is so, if the liability arising out of judicial acts of any kind is direct, then it is the same as the liability arising out of wrongful acts of the executive and legislative departments, it resulting therefrom that the three classes must be governed by identical principles, inasmuch as they do not differ essentially. The liability for executive or legislative acts of a government is not, then, stricter or greater than the liability arising out of judicial acts. It does not matter that some decisions may have established that acts of the executive or legislative departments give rise to liability even when they may not contain the element of bad intention. The intention has nothing to do in international law. What is to be determined, as already stated (and this agrees with the definitions which have been given as to what is an international claim), is whether there exists an injury, and whether the act which causes it violates any rule of international law, regardless of whether the act is intentional or not.
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> 15. However, it seems that Anglo-Saxon practice has tried to establish this difference between judicial and executive acts; with regard to the latter, it has been said that once there exist the two elements, damage to a citizen of another country and violation of international law, the indemnization accrues at once, without any further steps, whereas such is not the case when dealing with judicial acts, for it is then necessary that the remedies furnished by the local law be exhausted, and, further, that the act involves bad faith, willful neglect of duty, or very defective administration of justice.

. . . . . [1])

17. With respect to the test that is applied to judicial acts, to wit, that in order to give rise to an international claim they must show bad faith, willful neglect of duty, or such a deviation from the practices of civilized nations as to be recognized at first sight by any honest man, it only serves to determine when judicial acts violate a principle of international law, it being unnecessary to apply this test to executive and judicial acts, as they, due to being more direct and simple, are more easily discerned when they deviate from a certain international rule. The important thing, it is insisted, is that the act which gives rise to the claim causes damage in violation of a rule of international law, and this is very difficult to determine when it is a question of judicial acts. There are many acts of this nature which, although involving a violation of domestic law, either do not cause measurable damages or do not violate any specific international principle, and, in both cases, lacking one of the elements of the claim, the latter does not accrue. I believe, in view of the foregoing, that to admit the classification of liability arising out of judicial acts into direct and indirect results in the confusion of the first class with the liability arising out of acts of the executive and the legislative; and as it is attempted to apply to the latter a stricter test (the Presiding Commissioner holds that the liability for these acts is unlimited and immediate), this test would seem applicable also, by analogy, to the so-called direct liability for judicial acts, to the detriment of the respectability of decisions, so much proclaimed by publicists and by arbitral tribunals." [2])

It should only be noted that the last sentences show that the Commissioner did not quite understand the result his President wanted to reach with regard to the limitation of liability. Van Vollenhoven said:

> „Acts of the *judiciary*, either entailing direct responsibility or indirect liability, are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, willful neglect of duty, or insufficiency of action apparent to any unbiased man." [3])

It appears from this quotation that van Vollenhoven, as we have endeavoured to show in the scheme drawn up above, does *not* want to consider the *direct* liability for *judicial* acts unlimited and immediate, as Mr. McGregor seems to believe, but that, on

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[1]) Paragraph 16 of the opinion is quoted in the next section.
[2]) I, pp. 461—463.
[3]) I, 427.

the contrary, he wanted to apply to that category the limitation of liability. For the rest, however, the criticism of the Mexican Commissioner seems perfectly sound.

We may conclude from the foregoing that, although it is not impossible that van Vollenhoven intended to require a certain degree of fault with respect to liability for certain categories of international delinquencies, his Mexican colleague at any rate expressly denied the existence of any such requirement. In so doing the latter decided in conformity with the majority of modern writers [1]).

Exhaustion of local remedies

With regard to the exhaustion of local remedies the Mexican Commissioner, in the following paragraph of his opinion just mentioned, further remarks:

> „16. In my opinion, different things are confused and tests are applied which should serve for widely different classes of ideas. With respect to exhausting local remedies, I maintain, together with many publicists, that it should always be required with regard to any class of acts. An international claim should not accrue except as a last resort and not immediately as desired by the practice of Anglo-Saxon countries, which establish such principle because in them the State can not be sued. I consider that it is more dangerous to admit the right to an immediate claim when referring to wrongful acts of the executive or legislative, as a nation will resent more this procedure if it is a question of acts of the organs in which apparently sovereignty rests conspicuously, than if it is a question of violations made by its tribunals. The most important thing in the world is the preservation of peace among nations, and this is attained only through the most constant respect for sovereignty. If a nation inflicts damage on a citizen of another, the one who causes the injury should be given the opportunity to repair it *through her own means* (italics from McG.),

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[1]) Anzilotti, Teoria generale della responsabilita dello stato nel diritto internationale, pp. 178—180; the same, R.G.D.I.P., 1906, pp. 287—291; Fauchille, Annuaire de l'Institut de Droit International, 1900, p. 234; Bourquin, idem, 1927, I,pp. 504 *et seq.*; Decencière-Ferrandière, La responsabilité internationale des Etats à raison des dommages subis par des étrangers, pp. 80—85; Dumas, La responsabilité internale des Etats à raison des crimes et délits commis sur leur territoire au préjudice des étrangers, Recueil des Cours, 1931, II, p. 211. Fault is required, on the contrary, by Strupp, Das Völkerrechtliche Delikt, pp. 46 *et seq*; Schoen, Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen, pp. 51 *et seq.*; Le Fur, Précis de Droit Int. Public, pp. 354—356.

> and these are generally represented by judicial remedies. In this sense, it can be said that all claims accrue from a denial of justice. Hence, in this respect there is no difference between claims arising out of acts of the different agencies of a State." [1])

It is difficult to understand why a nation should resent more an international complaint concerning an act of its executive or its legislature, than one concerning its judiciary. It seems likely, on the contrary, that a nation would feel greater resentment at an aspersion upon the conduct of one of its tribunals than at a similar aspersion with regard to some executive officer. This, however, is a minor matter.

It is not easy, having regard to the above quotations, to draw any definite conclusion as to the Commission's view of the rule that local remedies must have been exhausted. On this point there is a well-known controversy, some authors defending the view that the exhaustion is really an element of international liability, so much so that international wrongfulness does not exist and the liability does not arise until local remedies have been exhausted [2]), whereas others are of the opinion that international liability arises immediately upon the commission of an international delinquency, considering the defence that national remedies have not been exhausted as a mere procedural rule, which renders temporarily inoperative the procedure of diplomatic interposition. [3])

On the one hand Mr. McGregor seems to adhere to the former view, since he says in the *Chattin* case, that

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[1]) I, p. 462.

[2]) Thus e.g. Borchard, Diplomatic Protection of Citizens Abroad, p. 198; the same author, Theoretical Aspects of the International Responsibility of States, Zeitschrift für Ausländisches Recht und Völkerrecht, I, 1, p. 236 *et seq.*; Hoyer, La Responsabilité Internationale des Etats, p. 45.

[3]) Thus e.g. Eagleton, Responsibility of States, p. 23: „The rule of local redress is the deviding line between the substantive and the procedural aspects of responsibility. Liability exists from the moment in which the internationally illegal act is established," and on page 49 the same author says that the defence that local remedies have not been exhausted „is not to deny the existence of responsibility, which appears at the moment an internationally illegal act is committed by an Agent of the State. There is merely denied to the claimant a certain procedure in pressing his claim — the right of diplomatic interposition." See also: op cit. pp. 24, 57, 98 and 99; Decencière-Ferrandière, La responsabilité internationale des Etats à raison des dommages subis par les étrangers p. 114; Friedmann, Epuisement des voies de recours internes, R.D.I.L.C. 1933, p. 19 et seq.; Hyde, International Law, pp. 492—493; Buder, Die Lehre vom Völkerrechtlichen Schadenersatz, pp. 155—157; this author also gives an account of the discussion upon this issue in the Hague Conference of 1930.

> „An international claim should not accrue except as a last resort and not immediately as desired by the practice of Anglo-Saxon countries."

and:

> „If a nation inflicts damage on a citizen of another, the one who causes the injury should be given the opportunity to repair it *through her own means* (Mc Gregor's italics), and these are generally represented by judicial remedies. In this sense, it can be said that all claims accrue from a denial of justice." [1])

On the other hand it must be noted that, when enumerating the elements of international responsibility in the *Cook* and *Dickson Car Wheel Company* cases he does not mention at all the exhaustion of local remedies. This, however, may very well be due to the fact that, by its Article V, the Convention under which the Commission acted excluded an appeal to this general rule. In the face of these circumstances it seems impossible to say that the General Claims Commission supported one or the other point of view. All that can be concluded is that Mr. McGregor adhered to the principle that an international claim can not be allowed unless local remedies have been exhausted, irrespective of which branch of Government was the author of the act upon which the claim is based.

In this book the considerations and decisions of the General Claims Commission concerning international responsibility on account of an international delinquency are mentioned and discussed in connection with the elements to which they pertain. One chapter (V) has been consecrated already to the question as to what acts can be considered as „acts imputable to a State". In connection with this problem it has been investigated in how far a State can be held responsible for damage caused by revolutionists (Chapter VI). Now the next five chapters (IX—XIII) will be devoted to the most difficult question: which acts are internationally wrongful? After that the subjects of causality, of damage, and of nationality will receive consideration.

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[1]) I, p. 462.

CHAPTER IX

INTERNATIONAL DELINQUENCY GENERAL

Standards to be applied

The General Claims Commission laid down in clear terms three rules for the determination of an international delinquency. All three are to be found in the *Neer* case [1]). They were there formulated in connection with a denial of justice, but since they are of general importance for *all* international delinquencies, it seems preferable to discuss them here.

L. F. H. Neer and Pauline Neer had based a claim upon alleged lack of diligence and lack of intelligent investigation on the part of Mexican authorities in prosecuting the persons guilty of having killed Paul Neer in Mexico. On this point Commissioners van Vollenhoven and McGregor said:

> „But in the view of the Commission *there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.*
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> 4. The Commission recognizes the difficulty of devising a general formula for determining the boundary between an *international delinquency* of this type and an *unsatisfactory use of power* included in national sovereignty. In 1910 John Bassett Moore observed that he did „not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (American Journal of International Law, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (le caractère fuyant et complexe) of a denial of justice seems to defy any definition (Recueil des Arbitrages

[1]) I, p. 71.

Internationaux, II, 1923, p. 280). It is immaterial whether the expression „denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which — under the name of „denial of justice" — applies to acts of the judiciary, will apply — be it under a different name — to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) *that the propriety of governmental acts should be put to the test of international standards*, and (second) *that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*" [1])

The opinion then continues with a few sentences in which a third principle may be considered to be laid down:

„Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.

5. It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guanacevi might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task." [2])

The tribunal, in the passages we have italicized, expressed the following important principles of international law:

1. In International Law the propriety of the acts of a State should be judged by international standards.

2. *In order to constitute an international delinquency an act should fall so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*

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[1]) I, pp. 72—73.
[2]) I, pp. 73—74.

This second rule may be considered as a limitation upon the first: not *all* proceedings that are below international standards justify an international award; when the deficiencies are not very serious they only constitute „an unsatisfactory use of power included in national sovereignty."

Commissioner Nielsen, in his separate opinion, also mentions these two rules but in less precise terms:

> „It may perhaps be said with a reasonable degree of precision that the propriety of governmental acts should be determined according to ordinary standards of civilization, even though standards differ considerably among members of the family of nations, equal under the law. And it seems to be possible to indicate with still further precision the broad, general ground upon which a demand for redress based on a denial of justice may be made by one nation upon another. It has been said that such a demand is justified when the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage." [1]

The limitation established by the second rule was repeated on several occasions by the Commission, observing

> „that it can not render an award for pecuniary indemnity in any given case in the absence of convincing evidence of a *pronounced degree of improper governmental administration.*" [2]

The third rule contained in the *Neer* opinion touches upon the

Responsibility for acts of different branches of government.

3. *With respect to the liability of a Government on account of an internationally wrongful act it is immaterial whether the wrongfulness of its behaviour derives (a) from the fact that the authorities administering the municipal law did not comply with that law, or (b) from the fact that municipal law rendered it impossible for them to act up to international standards.*

This is the expression, in different words, of the principle that a State may be held responsible for its legislative as well as for its judicial and administrative activity: in the first case mentioned there has been a fault on the part of the executive or the judiciary, in the second on the part of the legislature. This principle is nowadays generally admitted. [1] So the rule does not

[1] I, p. 78.
[2] I, p. 100; *Leopold E. Adler.*
[1] Cf. e. g. Eustathiadès, La Responsabilité Internationale de l'Etat pour les actes des organes judiciaires, p. 30, and examples mentioned, ibid., note 2.

contain anything new, but it may be useful to put it this way, because governments are often tempted to defend themselves by an appeal to municipal law against allegations of wrongful acts committed by their officials. It should be clear that no such excuse can exculpate them; it can only help them in so far, that an international tribunal will hesitate more to declare a *law* at variance with international law than the act of some executive authority.

Almost the same pronouncement was made soon after in an opinion to be dealt with more elaborately hereafter [1]) in which it was observed;

> „3. The killing and its circumstances being established, the Commission has to decide, whether the firing as a consequence of which the girl was mortally wounded constituted a wrongful act under international law. *It is not for this Commission to decide whether the author could or should be punished under American laws.....*
>
> The only problem before this Commission is whether, *under international law,* the American officer was entitled to shoot in the direction of the raft in the way he did." [2])

The same principle was once again mentioned by the Presiding Commissioner in an opinion written on the claim of *H. G. Venable.* [3])

The facts underlying this claim being rather complicated, we may leave them aside for the moment, merely stating briefly that Venable complained of certain court proceedings in a bankruptcy case and that the Mexican Agency resisted his claim on the ground that these had been in accordance with Mexican law. Van Vollenhoven remarked:

> „Even if here was not willful neglect of duty, there doubtless was an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. *Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial."* [4])

and the American Commissioner, although disputing the construction put upon Mexican law by the defendant Government, em-

1) *Garcia and Garza,* I, p. 163.
2) I, p. 165.
3) I, p. 331.
4) I, p. 345.

phasized that even if the fault lay with the law, this would not exempt Mexico from international responsibility:

> „.... it seems clearly to be an established principle of international law that a foreign litigant should have the same opportunity to establish his case as a citizen has. ... It seems to be clear that both the judge and the ‚sindico' took the position that the one obstacle to the release of the engines was that the owner should apply and did not apply. This position, counsel for Mexico contended, was properly grounded on Mexican law. If that be a correct construction of Mexican law, then of course the court would not by a refusal to deliver to a lessee be denying Venable remedies granted by Mexican law to Mexican nationals, and *if he suffered a denial of justice, that was inherent in the law.*" [1])

> „All questions discussed in connection with this claim with respect to Mexican law and procedure in relation to the disposition of the assets of a bankrupt in satisfaction of claims of creditors are entirely irrelevant to a proper disposition of the case. The Commission is not called upon to reach conclusions with regard to such matters. There is not before the Commission any question with regard to the duties of a judge or a sindico or an interventor in dealing with the assets of a bankrupt. The fundamental point in the case before the Commission obviously is whether there is responsibility on the Mexican Government because of the treatment of property which was not part of a bankrupt's estate and which was taken possession of by Mexican authorities and stolen after it was seized." [2])

The Commission's decisions recognizing international responsibility for legislative acts are in conformity with the view generally taken. [3]).

It is seen from this section that the Commission upheld the rules that under international law the propriety of governmental acts should be put to the test of international standards

[1]) I. p. 362.

[2]) I, p. 365.

[3]) „The legislature is an organ of the state for whose acts the state is directly responsible ..... When acts of legislation have been deemed violative of the rights of aliens according to local or international law, foreign governments have not acquiesced in the theory of the non-liability of the state and have on numerous occasions successfully enforced claims for the injuries sustained by their subjects." Borchard, Diplomatic Protection, p. 181; „A state can not evade responsibility under the plea that it legislation is a sovereign act." Eagleton, Responsibility of States, p. 63; de Visscher, Responsabilité des Etats, Bibliotheca Visseriana II, p. 94; Anzilotti, Cours de Droit International, p. 472, and Teoria generale della responsabilita dello Stato nel diritto internazionale, p. 160.

and that it is immaterial whether the wrongfulness of such acts derived from the fault of executive or judicial authorities or whether it was inherent in municipal law. Two consequences immediately follow from these principles.

Position of aliens

The first consequence is that according to international law foreigners in a certain country may very well have greater or lesser rights than citizens. [1]) This was repeatedly recognized by the Commission. Thus, when speaking about the Calvo clause it remarked

> „that equality of legal status between citizens and foreigners is by no means a requisite of international law — in some respects the citizens have greater rights and larger duties, in other respects the foreigner has ...." [2])

The same view was expressed with more emphasis in another opinion rendered the same day [3]):

> „16. If it be urged that under the provisions of the Treaty of 1923 as constructed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not acord to its own citizens." [4])

And when deciding upon a claim for maltreatment, [5]) the Commission said:

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[1]) Thus: Anzilotti, La responsabilité internationale des Etats à raison des domages soufferts par des étrangers, Revue Générale de Droit International Public, 1906, p. 18 Decencière-Ferrandière, La Responsabilité internationale des Etats, p. 59.

[2]) *North American Dredging Company of Texas*, I, p.28.

[3]) *George W. Hopkins*, I, p. 42.

[4]) I, pp. 50—51.

[5]) *Harry Roberts*, I, p. 100.

„Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization." [1])

Finally the conclusion put forward in this section was also laid down in the *Mallén* case [2])

„.... one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a „special protection" should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been."[3]

Limited value of municipal law as a standard

The second consequence of the principles adopted by the Commission in determining the international wrongfullness of governmental acts is that compliance with municipal law is not in international law the ultimate test for the propriety of such acts. On the one hand a certain act may very well be in absolute harmony with municipal law and still be internationally wrongful,on the other hand it may be at variance with municipal law and still not constitute such an injustice towards a foreigner as will amount to a violation of international law.

The first possibility was impliedly recognized in several of the statements quoted in the last two sections. It was stated expressly by Commissioner Nielsen in a separate opinion written upon the claim of *Teodoro Garcia and M. A. Garza* [4]);

„It is conceivable that domestic laws, just as they may contravene international law in their operation on property rights of aliens may, by their sanction of personal injuries under certain circumstances, offend broad standards of governmental action the failure of observance of which imposes on a nation, as arbitral tribunals have frequently held, the liability to respond in damages under international law." [5])

[1]) I, p. 105.
[2]) I, p. 254.
[3]) I, p. 258.
[4]) I, p. 163.
[5]) I, p. 175.

As to the second possibility (variance with domestic law which does not amount to an international delinquency), this was implied in the rule laid down in the *Neer* case, that deficiencies merely constituting an unsatisfactory use of power do not create international liability; for such „unsatisfactory use of power" generally consists of the violation of local legal prescriptions of minor importance.

These two possibilities, however, are realized but exceptionally. Experience shows, and this is readily understandable, that an act at variance with municipal law is seldom deemed to come up to international standards and that still less often a national law is deemed to be below international standards of civilization. In the great majority of cases conduct towards a foreigner which does not conform with local law, is also at variance with the law of nations. This is particularly so when the violation of a local law, be it willful or by neglect, can be considered as a discrimination to the prejudice of a foreigner, i.e. in cases of a denial of justice. These facts explain why international awards so often go into the question whether the action complained of was in accordance with local law, although, as we have seen, this is not, from the international point of view, the ultimate test. *The only value which can under the law of nations be attributed to domestic law as a standard is, on the one hand, that if the behaviour complained of shows a pronounced departure from that law to the prejudice of a foreigner, there is an international delinquency, and, on the other hand, that if the action is in accordance with that law, international commissions will perhaps hesitate to declare that the national law is below international standards of civilization. But it should always be kept in mind, that compliance with local prescriptions is not in itself a conclusive test.*

This limited value to be attributed to municipal law as a standard of international wrongfulness was expressed in an opinion signed by all three members of the Commission [1]:

> „Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought

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[1] *Harry Roberts*, I, p. 100.

to trial may be useful in determining whether detention has been unreasonable in a given case." [1])

And in a later decision Commissioner Nielsen said:

„International law does, generally speaking, require that an alien be given equality before the law with citizens .... It is therefore of course pertinent in any given case of a complaint of unlawful detention to take account of provisions of local law." [2])

The words „generally speaking" probably show that the judge had in mind the limitation that treatment in accordance with municipal law is not *always* a proof of international propriety.

Some examples may be quoted of condemnations of a Government by the commission for damage inflicted upon a foreigner through failure to comply with its domestic law.

Liability was imposed upon Mexico for damage suffered by one *George W. Cook* [3]), when the Government, in violation of Mexican law, declared stamps invalid without giving three months' notice so as to allow holders an opportunity to exchange them.

The same whas done when a Mexican „Alcalde" (judicial police officer) issued a warrant for the arrest of an American which did not show on the face of it a ground for the arrest, as prescribed by Mexican law. [4])

Equally it was decided that taxes paid by an alien, in accordance with a Mexican law later on declared by the Supreme Court of Mexico to be inconstitutional, had to be returned. [5])

How to proceed in determining the existence of an international delinquency

The principle that international responsibility of a State may be predicated not only upon acts of its executive, but also of its judiciary, its legislative, and even its constituent powers, although expressly approved, as we saw, by all the Commissioners, caused some difficulties. In several cases we have noted differences of opinion between Commissioners in connection with this rule

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[1]) I, p. 103.
[2]) *Louis Chazen*, III, p. 34.
[3]) I, p. 311.
[4]) *William Way*, II, p. 94.
[5]) *Henry W. Peabody and Company*, II, p. 222.

which in our view arose only out of different methods of proceeding when investigating the existence of an international delinquency. Accordingly, although this question was never expressly dealt with in the awards, we think that a discussion here to determine what is the most useful system, might be fruitful.

The difficulty arose whenever there was a doubt as to whether a certain executive or judicial act did or did not comply with municipal law. The point may be clearly illustrated by the opinion rendered upon the claim of *Teodoro Garcia and M. A. Garza* [1]).

An American officer on duty on the American border of the Rio Grande, discovering some people on a raft, trying to cross the river in contravention of local prescriptions, fired in order to make them stop and unfortunately killed a young girl on the raft. The officer was sentenced by a court-martial for violation of a military regulation forbidding firing on unarmed persons on the river. The President of the U.S. gave a contrary decision. Upon these facts Mexico complained of unlawful killing as well as of a denial of justice. The second ground will be dealt with later. On the first point Commissioner van Vollenhoven in par. 3 of the majority opinion wrote the following sentences, already quoted:

> „The killing and its circumstances being established, the Commission has to decide, whether the firing as a consequence of which the girl was mortally wounded constituted a wrongful act under international law. It is not for this Commission to decide whether the author could or should be punished under American laws..... *The only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did.*" [2])

Commissioner Nielsen, however, considering this same question, observed:

> „The precise question before the Commission is whether the act of Lieutenant Gulley, held by the court of last resort not to be in violation of the law of his country, is one for which his Government is liable under international law. Whether the United States is so liable must, in my opinion, be ascertained by a determination of the question whether American law sanctions an act that outrages ordinary standards of civilization. It is conceivable that domestic laws, just as they may contravene international law in

[1]) I, p. 163.
[2]) I, p. 165.

their operation on property rights of aliens may, by their sanction of personal injuries under certain circumstances, offend broad standards of governmental action the failure of observance of which imposes on a nation, as arbitral tribunals have frequently held, the liability to respond in damages under international law."[1])

. . . . . .

„And as I have heretofore observed, since the Commission cannot properly challenge the construction put upon penal laws of the United States by the court of last resort in connection with the case of Gulley, it must determine whether laws under which his action was not punishable obviously fall below the standard of similar laws of members of the family of nations." [2])

. . . . . .

„Domestic laws may by their operation on property rights of aliens contravene international law. And in any case in which an international reclamation is predicated upon such an infringement of the law of nations it is of course not a defence to say that a court of last resort has properly construed a law to authorize action against which complaint is made. But in reaching a conclusion whether an international delinquency has been committed in any such case, in which the decision of the court as to the meaning of the law is accepted as final, it is proper to determine whether the law has authorized or sanctioned a wrongful act. As I have observed, it is conceivable that domestic law by its sanction of personal injury may, under given circumstances, offend broad standards of governmental action which civilized nations may be expected to observe. And in a case involving an alleged personal injury permitted by domestic law of a nation, it is a proper test of the nature of the alleged wrongful act to compare the law of that nation with similar laws of other nations." [3])

. . . . . .

„It may be pitiable that he shot at all, but it should be borne in mind, as I have endeavoured to point out, that *the question which must be considered in the instant case is whether the laws if the United States, under which shooting in those circumstances is not unlawful, are so at variance with the laws of other members of the family of nations as to fall below ordinary standards of civilization.*"[4])

Whatever may be thought of the verbose manner in which the American Commissioner explained the reason for his dissenting opinion, it seems evident, particularly from the sentences we have italicized, that his disagreement resulted from a different con-

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[1]) I, p. 175.
[2]) I, p. 177.
[3]) I, p. 178.
[4]) I, p. 184.

ception as to the method of investigation that should be followed in determining whether an internationally wrongful act has been committed. In his view the first question to be regarded is whether the act is in conformity with national law. If it is, one must decide whether that law falls below the standard required by international law; if, on the other hand, the answer to the first question is in the negative, the act can be judged on its own merits.

The route followed by van Vollenhoven is different, although it leads to the same result. He investigates immediately whether the act is below international standards, be it in compliance with municipal law or not. If the answer is in the affirmative, that is deemed sufficient to justify an award; if it is to the negative, it may still be that the act is so much in disaccordance with national law as to be *thereby* internationally unlawful, viz., if it constitutes an unlawful discrimination to the prejudice of a foreigner.

The two systems may briefly be expressed in the following scheme:

METHOD I:

First question: Is act in conformity with municipal law?

Second question: *a*. If so, is municipal law below international standards?

b. If not, is act in itself below international standards?

METHOD II:

First question: Is act in itself, quite apart from its accordance with municipal law, below international standards?

Second question: *a*. If so, there is an international delinquency, and no second question is needed.

b. If not, is act at variance with municipal law in such a way as to constitute an international delinquency by that single fact?

It does not need much thought to conclude that Method II is the more practical, because in many cases only one question need be answered, that concerning compliance with local law being irrelevant so soon as the first answer is to the affirmative.

It is besides the most *logical* system. Acts as dealth wit here

may be the result of *a.* unauthorized acting on the part of an official, *b.* execution of instructions of higher authorities, *c.* execution of the laws or rules of the country. In all three cases the State is equally responsible for the act; this means that for the purpose of determining the international wrongfulness of the act, it is immaterial which of these three forms is present. The question of conformity with national law then becomes of interest only if independently of municipal law the act is *not* internationally wrongful. For it may be, as we have said before, that such an act nevertheless cannot be justified from an international point of view, because of its departing from national law, viz., if it constitutes a discrimination to the prejudice of foreigners.

Method II was applied in three more opinions.

Judging the claim of *Toberman, Mackey and Company* [1], the Mexican member said on behalf of the Commission:

> „I do not believe that there is any clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise which comes in through its Custom Houses, for the mere purpose of exercising the sovereign right of collecting import and export duties. It is conceivable that, under certain circumstances, the State may assume certain obligations in the exercise of sovereign acts of this nature; but, if such obligation is not established very clearly, it cannot, in my opinion, be imposed on the State. The question lies in determining whether the law of such State (in this case, Mexican law) imposes on custom houses the obligation of guarding, at all times and without limit like a good pater familias, all goods and merchandise which pass through its port of entry. Mexican law in this respect is sufficiently clear, according to my opinion." [2]

Evidently it was here first decided that the act in itself did not violate any rule of international law, and only after that was the question considered whether it constituted a transgression of municipal law.

The method was laid down more clearly again by the Presiding Commissioner van Vollenhoven in the *Venable* case [3] in a sentence we have already quoted;

> „Even if here was not willful neglect of duty, there doubtless was an insufficiency of governmental action so far short of inter-

[1] I, p. 306.
[2] I. p. 308.
[3] I, p. 331.

national standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial." [1])

This time Commissioner Nielsen followed the same path in his separate opinion:

„*All questions discussed in connection with this claim with respect to Mexican law* and the procedure in relation to the disposition of the assets of a bankrupt in satisfaction of claims of creditors *are entirely irrelevant to a proper disposition of the case.* The Commission is not called upon to reach conclusions with regard to such matters. There is not before the Commission any question with regard to the duties of a judge or a ‚sindico' or an interventor in dealing with the assets of a bankrupt. The fundamental point in the case before the Commission obviously is whether there is responsibility on the Mexican Government because of the treatment of property which was not part of a bankrupt's estate and which was taken possession of by Mexican authorities and stolen after it was seized." [2])

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[1]) I, p. 345.
[2]) I, p. 365.

CHAPTER X

INTERNATIONAL DELINQUENCY (*continued*) DENIAL OF JUSTICE.

There is much uncertainty and difference of opinion among authorities on international law concerning the exact meaning and extent of the expression „denial of justice". It has been the great merit of the Claims Commission under the Presidency of van Vollenhoven to have expressed itself very clearly and fully on this subject. In particular it rendered three penetrating and important opinions in the field of „denial of justice": one dealing with the problem as to what *kind* of acts can be considered as such [1]; one dealing with the *standards* that should be applied to determine the existence of a denial of justice [2]; and the third dealing with the theoretical *basis* for so-called „indirect" liability of a Government in cases of a failure to punish a wrongdoer [3] [4].

The Chattin case

The claim of *B. E. Chattin* [5] was based on the fact that he had been illegally arrested and kept in prison for many months and that the court proceedings were irregular. It is not quite clear

[1] *Chattin*, I, p. 422.
[2] *Neer*, I, p. 71.
[3] *Laura Janes*. I, p. 108.
[4] We are unable to understand why the „Supplement to the Law and Procedure of International Tribunals" mentions in connection with the subject of this so-called „indirect liability" the cases of *Chazen*, (III, p. 20), *Dickson Car Wheel Company* (III, p. 175) , and *Way* (II, p. 94). The claim of *Louis Chazen* was based upon (a) wrongful confiscation of some of his merchandise, and (b) illegal arrest and detention, as well as mistreatment. It would be difficult, therefore, to draw from it any argument pertaining to the subject of responsibility for failure to take proper steps against someone who has injured an alien. The same applies to the *Dickson Car Wheel Company's* claim, based upon damage resulting from the seizure by the Mexican Government of certain railway lines. The claim of *William T. Way*, finally, was based upon (a) the failure to punish the murderers of an American subject, and (b) the fact that the murderers themselves were Mexican officials. The sentences quoted by Mr. Ralston from the opinion, however, relate exclusively to ground (b).
[5] I, p. 422.

from the opinion which of these circumstances led the American Agency to allege the existence of a „denial of justice", but that is irrelevant to the fundamental question whether there was such a denial, since all three acts could merely impose *direct* responsibility upon the respondent Government, which fact was the very cause of the broad arguments to be mentioned here. The three Commissioners rendered separate opinions each; it is particularly in those of the President and of Commissioner McGregor that valuable observations as to the extent of the category under consideration are to be found.

The President begins by drawing attention to the difference between „direct" and „indirect" responsibility, a difference existing as well within as without the group of acts constituting a „denial of justice".

> „7. In the *Kennedy* case and nineteen more cases before this Commission it was contended that, a citizen of either country having been wrongfully damaged by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage. A governmental liability proceeding from such a source is usually called „indirect liability", though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) for that very act. Such cases of *indirect governmental liability* [1]) because of lack of proper action by the judiciary are analogous to cases in which a government might be held responsible for denial of justice in connection with nonexecution of private contracts, or in which it might become liable to victims of private or other delinquencies because of lack of protection by its executive or legislative authorities.
>
> 8. Distinct from this so-called indirect government liability is the *direct responsibility* incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen. If such governmental acts are acts of executive authorities, either in the form of breach of government contracts made with private foreigners, or in the form of other delinquencies of public authorities, they are at once recognized as acts involving direct liability; for instance, collisions caused by public vessels, reckless shooting by officials, unwarranted arrest by officials, mistreatment in jail by officials, deficient custody by officials, etc.

[1]) Italics in paragraghs 7 and 8 appear already in the original text.

As soon, however, as mistreatment of foreigners *by the courts* is alleged to the effect that damage sustained is caused by the *judiciary* itself, a confusion arises from the fact that authors often lend the term „denial of justice" as well to these cases of the second category, which are different in character from a „denial of justice" of the first category." [1])

He then attacks the use of the word in the sense of *direct* responsibility.

„It would seem preferable not to use the expression in this manner. The very name „denial of justice" (dénégation de justice, déni de justice) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice. In the British and American claims arbitration Arbitrator Pound one day put it tersely in saying that there must be ,,an injustice antecedent to the denial, and then the denial after it." (Nielsen's *Report*, 258, 261).

9. How confusing it must be to use the term „denial of justice" for both categories of governmental acts, is shown by a simple deduction. If „denial of justice" covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, „denial of justice" is applied to acts of executive and legislative authorities as well as to acts of judicial authorities — as is often being done — there would exist no international wrong which would not be covered by the phrase „denial of justice", and the expression would lose its value as a technical distinction." [2])

Subsequently he explains his view as to the importance of the distinction:

„10. The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as

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[1]) I, pp. 425—426. The two paragraphs here cited seem to us to be primarily concerned with the meaning of the term „denial of justice", the difference between „direct" and so-called „indirect" liability only being stressed with a view to arriving at a more correct use of the expresssion „denial of justice". In Ralston's „Supplement to the Law and Procedure of International Tribunals" however, these considerations are only quoted in connection with indirect liability (p.164), and they are not even mentioned in connection with the meaning of the term „denial of justice" (paragraph 579f).

[2]) I, pp. 426—427.

cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term „denial of justice" in its broader sense may be partly in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive it is different." [1])

. . . . . .

„11. When, therefore, the American Agency in its brief mentions with great emphasis the existence of a „denial of justice" in the *Chattin* case, it should be realized that the term is used in its improper sense which sometimes is confusing. It is true that *both* categories of government responsibility — the direct one and the so-called indirect one — should be brought to the test of international standards in order to determine whether an international wrong exists, and that for *both* categories convincing evidence is necessary to fasten liability. It is moreover true that, as far as acts of the *judiciary* are involved, the view applies to *both* categories that „it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country" (*Garrison's* case; Moore, p. 3129), and to *both* categories the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals." [2])

The ideas contained in these passages mainly relate to two

[1]) I, pp. 427—428.
[2]) I, p. 429.

issues. The first, which will particularly require our attention in this chapter, is the exact meaning of the term „denial of justice" and the limits of the category of international delinquencies which it covers. The second pertains to the degree of fault or wrongfulness required with respect to different groups of international delinquencies; this has been discussed in chapter VIII. A third point touched upon in the opinion (paragraph 7) was the use of the term „indirect liability", which will be dealt with in a subsequent section of this chapter.

Van Vollenhoven's ideas upon the first two subjects can best be expressed in the following schemes:

Denial of justice

in its broadest sense comprises:

direct liability	*indirect* liability
for acts of the	
judiciary	judiciary
executive	executive
legislative	legislative

Now van Vollenhoven, basing himself upon several former judgements, desires to limit the expression to *indirect* responsibility for acts of the judiciary. The categories he proposes can be put into the same scheme in the following way:

for acts of the:	*Direct liability*	*Indirect liability*
judiciary	„Defective administration of justice"	„Denial of justice"
executive	Other international delinquencies	
legislative		

The practical importance of the division, according to van Vollenhoven, is that in *both* categories of judicial acts and in the cases of *indirect responsibility* for executive and legislative acts, the liability of the Government is limited to cases of outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental administration, whereas in the case of *direct* responsibility for executive and legislative acts, the government is liable even for faults committed by mere neglect or clumsiness, without any bad faith. Van Vollenhoven repeats this view in the *Venable* case [1]);

> „If acting without right or authorization, he damaged any such contract right (i.e. vested in any national or foreigner-*author*)—in the present case: Venable's — his being unaware of its existence would not exclude or diminish Mexico's liability for what this official of the National Railways (under government control) illegally did. *Direct responsibility for acts of executive officials does not depend upon the existence on their part of aggravating circumstances such as an outrage, wilful neglect of duty, etc.*" [2])

This conception may be illustrated thus:

A government is responsible

for acts of the:	*Directly*	*Indirectly*
judiciary	only in cases of outrage, bad faith, wilful	
executive	even in cases of neglect and the like, without any bad faith	neglect of duty, or manifestly insufficient governmental administration
legislative		

Meaning and extent of the term „denial of justice"

Without wishing here to enter into a discussion of the numerous theories put forward upon the meaning of the expression „denial of justice" [3]), we may remind the reader that the following conceptions have, inter alia, been advocated:

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[1]) I, p. 331.
[2]) I, p. 338.
[3]) Upon this whole subject cf. the clear and penetrating study of Eustathiadès, La Responsabilité de l'état pour les actes des organes judiciaires, pp. 92—139.

1. In its broadest sense the term embraces every violation of international law to the detriment of an alien [1]) ;

2. In a narrower sense, most accepted nowadays, it covers all conduct of the *judicial* authorities of a state constituting an unlawful discrimination to the detriment of a foreigner; [2])

3. In the narrowest sense, often suggested by Latin-American states, a „denial of justice" is only present when an alien has been refused access to a local tribunal, or when a judge has refused to pronounce upon his case; [3])

4. In a fourth, less restrictive sense the term comprises those cases in which a court has, in words or in fact, refused to afford a foreigner proper redress for a pre-existing injury which in itself did not impose liability upon the state. [4])

It seems that Professor van Vollenhoven intended to give to the expression a new meaning, different from all these, by limiting it to cases of so-called *indirect* liability for acts of the *judicial* authorities, i. e. where the latter failed to punish a person who has injured an alien.

We do not believe that any benefit would accrue from an acceptance of this meaning in international law. The use wich the Commissioner wishes to make of the expression „denial of justice" seems contrary to the very meaning of these words. What do they in fact signify? All the authorities, however much they may disagree on other points, are at one in requiring that *justice*

[1]) See e.g. Moore, Proceedings of the American Society of International Law at its 9th annual meeting held at Washington, pp. 18—19; Borchard, Diplomatic Protection of Citizens Abroad, p. 330; Ralston, The Law and Procedure of International Tribunals; p. 86, Hyde, International Law, I pp. 491—492; and precedents there quoted; Nielsen, International Law applied to reclamations, p. 11.

[2]) Thus e.g. Borchard *loc. cit*; also the definition given by Buder as a result of an examination of some international cases, Die Lehre vom Völkerrechtlichen Schadensersatz, p. 150; in the *Fabiani* case this was even called the most extended meaning: „In reality the contracting parties seem to have wished to attribute to the words „dénégation de justice" their most extended signification, and to include in them all the acts of judicial authorities implying a refusal, direct or disguised, to render justice" Moore, Arbitrations, p. 4895.

[3]) de Visscher, La responsabilité des états, Bibliotheca Visseriana, II, pp. 99—100; Comité d'experts pour la codification progressive du droit international, Rapport au Conseil de la S. d. N. (so called *Guerrero-report*), pp. 92 *et seq.*; cf. Eustathiadès, La responsabilité internationale de l'état pour les actes des organes judiciaires, p. 108 *et seq.*, and examples mentioned by this writer.

[4]) „Local remedies must be sought until a denial of justice appears; a denial of justice is a failure of local remedies."Eagleton, Responsibility of States in International Law, pp. 112—113; see also the statement on page 115 of the same book, containing the result of an examination of some seventy cases in which the term „denial of justice" was used.

must have been denied to an alien. This implies that justice must have been sought by an alien, but refused to him. This is precisely *not* the case in the category of so-called indirect state responsibility, to which Mr. van Vollenhoven wished to limit the expression. In those cases liability is imposed upon a State because it has failed to punish an individual who inflicted injury upon a foreigner . But such punishment was not at all something asked for by the injured alien in the courts of the defendant State. Hence it seems difficult to maintain that in cases of this character justice was denied to a foreigner by the judiciary of the State.

Punishment of the author of an offence against an alien is a measure of justice which not only is not asked for by the victim, but which he *could* not even ask for, since strictly speaking he has nothing to do with it, he has no beneficial interest in it. Many grounds may have been set up to justify and to explain punishment, but, at any rate, the private revenge of the injured individual is in most civilized countries no longer accepted as a sufficient one [1]); except perhaps with regard to a few delinquencies of an extraordinary character, the individual is not considered as having a *right* to the punishment of the wrongdoer. The obligation to punish is an obligation imposed by the law of nations, it exists only towards the *state* of which the victim is a national. Hence if the obligation is not fulfilled, that state suffers an injury, but it does so itself, directly and independently from any injustice sustained by the victim of the private offence.

We fully agree with the opinions expressed to this effect by a few writers in very recent years; thus Dunn says:

> „Just why this class of cases should be classified as „denial of justice", is difficult to understand. Is the purpose of criminal prosecution to provide a remedy for the injured individual? Or is it to prevent or discourage crimes? If it is the former, then this function of the state is merely that of providing vicarious revenge to the victim of the crime. The punishment of the criminal does not repair the injury of the victim nor provide reparation for his losses [2])."

If this is accepted as sound reasoning, it follows that the

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[1]) Dunn, The Protection of Nationals, p. 151; Feller, The Mexican Claims Commissions, p. 150.

[2]) The Protection of Nationals, p. 150; likewise, implicitly, Ralston, Supplement to the Law and Procedure of International Tribunals, par. 579f.

meaning of the expression „denial of justice" laid down in the *Chattin* opinion, as well as all the other above-mentioned meanings sometimes attributed to it, seem improper and objectionable. One must then necessarily concur in the conclusion reached by Feller:

> „It would be preferable to narrow the meaning of the term still further. Denial of justice would then be applied only where a direct injury is inflicted by the judicial authorities on an alien. Typical examples would be illegal arrest, illegal detention and prolonged delay or misconduct in the trial of an alien." [1])

If this is accepted the scheme ought to be:

<table>
<tr><th>for the actsof the:</th><th>Directly liability</th><th>Indirect liability</th></tr>
<tr><td>judiciary</td><td>„Denial of justice"</td><td>delinquency only causing damage to the State as a whole, not to an individual alien</td></tr>
<tr><td>executive</td><td colspan="2" rowspan="2">other international delinquencies</td></tr>
<tr><td>legislative</td></tr>
</table>

It seems that the grouping of international delinquencies into categories suggested by Mr. van Vollenhoven was not accepted by his fellow-Commissioners either. Mr. McGregor at least makes the impression of rejecting it, mainly owing to his view, exposed Chapter VIII, that the requirements for state liability are entirely the same for all the different groups of delinquencies distinguished by the Presiding Commissioner, so that the latter's division does not correspond with any real differences.

> „13. To appraise the defective administration of justice which the United States alleges in this case (the American Agent calls it denial of justice in his Memorial and Brief), the Presiding Commissioner has entered into a study of the differences which exist between wrongful acts when the latter are caused by the judicial

[1]) The Mexican Claims Commissions, p. 130; to the same effect: Ralston, op cit. par. 116a and 579f; and, implicitly, it seems, Le Fur, Précis de Droit International Public, p. 360.

department of a nation, on one hand, and the same acts when caused by either the executive or the legislative department. I believe that the grouping of things in categories is very beneficial, provided these arise from or show essential differences. Establishing purely formal categories, if useful for certain determined purposes of economy of thought, carry the danger of inducing one to commit transcendental errors. There is no doubt but that there is a slight difference between a judicial act which involves refusal to repair a previous wrongful act and a judicial act which, without a previous injury, causes the damage of itself. But this is not important in fixing the liability of the State. The latter exists only when the judicial act causes damage in violation of a principle of international law, and as much in the case of a previous wrongful act as in the case where the latter is lacking the State is only liable for its own act; in the first case, for the damage which is caused by its failure to repair a previous injury, and in the second, for the damage caused by its act violating the substantive or adjective law. In both cases the liability is direct, in international questions, as recognized by the Presiding Commissioner himself, when he says, in referring to so-called indirect liability: „Though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) ...." And I believe that the liability of this person, if a private person, is not an international question.

14. If this is so, if the liability arising out of judicial acts of any kind is direct, then it is the same as the liability arising out of wrongful acts of the executive and legislative departments, it resulting therefrom that the three classes must be governed by identical principles, inasmuch as they do not differ essentially."[1])

Commissioner Nielsen, whose opinion in the *Neer* case does not very clearly distinguish the two problems: extent of „denial of justice" and: standards to be applied, in a discussion of the second point, makes a few remarks about the first:

„The claim preferred[2]) by the United States is predicated on a denial of justice. I think it is useful and proper to apply the term denial of justice in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of government. I consider that a denial of justice may, broadly speaking, be

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[1]) I, p. 461; for continuation see chapter VIII, p. 129).
[2]) This word appears in the original edition.

properly regarded as the general ground of diplomatic intervention." [1])

Insofar as these sentences admit of any conclusion, it may be stated that the American Commissioner does not share the President's view that ,,denial of justice" should only be used for indirect liability for wrongful acts of tribunals, and that on the contrary he wishes to return to the formerly current view of denial of justice as embracing every kind of international delinquency.

Summing up the contents of the last two sections it may be said that, although Mr. van Vollenhoven's opinion in the *Chattin* case must without doubt be considered as of considerable value in the discussion on the limits of the category ,,denial of justice", Mr. McGregor's dissenting opinion seems to be right in asserting that the demarcation of this group suggested by the Presiding Commissioner does not have with regard to the standards of liability the practical consequences for which he contended. In addition we believe that this demarcation is not supported by international authority and that it is inconsistent with the very meaning of the words ,,denial of justice". On the other hand the President's argument attacking the use of the expression ,,indirect liability" in cases of a failure to punish a wrongdoer against an alien was not rejected by the other Commissioners, and in fact seems unobjectionable, as will be seen from a subsequent section, dealing with the *Janes* opinion, in which this point was more fully discussed.

Standards to be applied

The other point into which the Presiding Commissioner's opinion in the *Chattin* case went deeply was that of the standards to be applied to different categories of international liability. As appears from the paragraphs quoted of that opinion, Mr. van Vollenhoven expressed the view that with regard to all liability for its judicial activity, as well as to indirect liability for acts of the two other branches of government, a State is only liable if the wrong done amounts to an outrage, bad faith, wilful neglect of

[1]) I, pp. 77—78.

duty or very defective administration of justice. It is uncertain, as has been stated above, [1]) whether this was intended as the expression of the requirement of *fault*, or merely as a closer definition of what acts are internationally wrongful, i.e. as relating to the standard by which the wrongfulness of governmental behaviour should be determined in the law of nations. In view of the first possibility the pronouncements in the opinions in connection with this issue were discussed in the chapter dealing with the elements of international delictual liability (Chapter VIII). We saw there, that, whatever may have been the intention of the Netherlands Commissioner, his Mexican colleague at any rate firmly denied that the condition put forward by the former existed with respect to any category of international delinquencies.

The main standards laid down by the Commission for the determination of an international delinquency have been mentioned in chapter IX. We need only recall here that these standards were most often applied in cases of a „denial of justice", as this term was understood by the Commission, and most fully explained in a case involving that character. [2]) They will be found once more in the section dealing with the respect due to the decisions of national courts.

Another standard of some, though less importance, and especially applicable to complaints of a denial of justice, was adopted in the affair of *A. L. Harkrader* [3]) when it was said:

> „The Commission further is of the opinion that its conclusion whether the investigation that took place was below the minimum standard required by international law *must be based on a broad and general view of the steps taken, rather than on a criticism of some particular point.*" [4])

It was later on repeated in different words:

> „It is clear then, that in this case the auction sale did not take place within the time limit prescribed by law; but this delay cannot give rise to international responsibility, since in order that a particular formality of a proceeding which in general has been followed in strict accordance with the law, may cause such res-

[1]) p. 127.
[2]) *L. F. H. Neer and Pauline Neer*, I, p. 71.
[3]) II, p. 66,
[4]) II, p. 68.

ponsibility, it must be shown that it is the cause of the failure of the general proceedings to do justice, or, that it be shown that such particular formality causes in itself an injury to the claimant.[1])

Foundation of so-called „indirect" liability. The Janes case.

Very important considerations were put forward by the American-Mexican tribunal in the *Laura Janes* case [2]) in dealing with the theoretical foundation of indirect government responsibility in cases of denial of justice. This case may be considered as the prototype of over fourty claims of its kind presented to the commission, all based on the failure of Mexican authorities, to prosecute, apprehend, condemn or punish effectively the murderers of American citizens killed in Mexico.

The majority opinion, signed by Commissioners van Vollenhoven and McGregor, first briefly explains the tradional theory of presumed complicity:

„19. The liability of the Mexican Government being stated there remains to be determined for what they are liable and to what amount. At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor. The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty."

It then attacks this theory, setting forth in a very clear manner the fundamental differences existing between the delinquency of the unpunished person and that of the Government which failled to punish him:

„20. A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. Nobody contends either that the Mexican Government might have prevented the

[1]) III, p. 31, *Louis Chazen.*
[2]) I, p. 108.

murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type. separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State, so far from having transgressed its own penal code (which perhaps not even is applicable to it), has transgressed a provision of international law as to State duties. The culprit cannot be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the Government can be sentenced once the nonperformance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the nonpunishment of the murderer. If the murderer had not committed his delinquency — if he had not slain Janes — Janes (but for other occurrences) would still be alive and earning the livelihood for his family; if the Government had not committed its delinquency — if it had apprehended and punished Carbajal — Janes' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit. Even if the nonpunishment were conceived as some kind of approval — which in the Commission's view is doubtful — still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands."[1])

The opinion points out two unsatisfactory results of the old conception:

„The results of the old conception are unsatisfactory in two directions. If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would in cases like the present one, be to the pecuniary benefit of a widow and her children if a Government dit *not* measure up to its international duty of providing justice, because in such a case the

[1]) I, p. 115.

Government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit." [1])

Subsequently the Commission mentions several international awards which do not sustain the old construction, after which it proceeds to a profound and clear reasoning result- ing in the rejection of the old theory:

„22. The answer to the question, which of the two views should be accepted as consistent with international law in its present status, would seem to be suggested by the fact that here we have before us a case of denial of justice, which but for some convincingly logical reason, should be judged in the same manner as any other case of the same category. Denial of justice, in its broader sense, may cover even acts of the executive and the legislative; in cases of improper governmental action of this type, a nation is never held liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself. In cases of denial of justice in its narrower sense, Governments are held responsible exclusively for what they commit or omit themselves. Only in the event of one type of denial of justice, the present one, a State would be liable not for what it committed or omitted itself, but for what an individual did. Such an exception to the general rule is not admissible but for convincing reasons. These reasons, as far as the Commission knows, were never given. One reason doubtless lies in the well-known tendency of Governments (Hyde, I, 515; Ralston, 1926, p. 267) to claim exaggerated reparations for nonpunishment of wrongdoers, a tendency which found its most promising help in a theory advocating that the negligent State had to make good all of the damage caused by the crime itself. But since international delinquencies have been recognized next to individual delinquencies, since damages for denial of justice have been assessed by international tribunals in many other forms, and since exaggerated claims from one Government as against another have been repeatedly softened down as a consequence of arbitral methods, it would seem time to throw off the doctrine dating from the end of the eighteenth century, and return to reality.

23. Once this theory, however, is thrown off, we should take care not to go to the opposite extreme. It would seem a fallacy to sustain that, if in case of nonpunishment by the Government it is not liable for the crime itself, then it can only be responsible, in a punitive way, to a sister Government, not to a claimant. There

[1]) I, pp. 115—116.

again, the solution in other cases of improper governmental action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a Government; and this world-wide international practice was before the Government of the United States and Mexico when they framed the Convention concluded September 8, 1923. In the Davy case — a case, not of unpunished crime, but of inhuman treatment of a foreigner under the color of administration of justice — the award rightly stated [1]) that „there is left to the respondent Government only one way to signify .... its desire to remove the stain which rests upon its department of criminal jurisprudence." In the Maal case — a case of attack on a foreigner's personal dignity by officials — the award rightly stated [2]): „The only way in which there can be an expression of regret on the part of the government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way of money compensation." The indignity done the relatives of Janes by nonpunishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a Government. If this damage is different from the damage caused by the killing, it is quite as different from the wounding of the national honor and national feeling of the State of which the victim was a national.

24. The Commission holds that the wording of Article I of the Convention, concluded September 8, 1923, mentioning claims for losses or damages suffered *by persons or* by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief, and other similar wrongs. The Davy and Maal cases quoted are just two among numerous international cases where arbitrators held this view. The Commission does not think lightly of the additional suffering caused by the fact that a Government apparently neglects its duty in cases of so outstanding an importance for the near relatives of a victim." [3])

In conclusion some considerations are found concerning the influence of the new theory upon the sum to be allowed:

„25. As to the measure of such damage caused by the delinquency of a Government, the nonpunishment, it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character, and effect, the

[1]) Ralston, Venezuelan Arbitrations of 1903, p. 412.
[2]) Ralston, Venezuelan Arbitrations of 1903, p. 916.
[3]) I, pp. 117—118.

measure of the damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal. But a computation of this character is not more difficult than computations in other cases of denial of justice such as illegal encroachment on one's liberty, harsh treatment in jail, insults and menaces of prisoners, or even non-punishment of the perpetrator of a crime which is not an attack on one's property or one's earning capacity, for instance a dangerous assault or an attack on one's reputation and honour. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government's attitude. If the nonprosecution and nonpunishment of crimes (or of specific crimes) in a certain period and place occurs with regularity, such nonrepression may even assume the character of a nonprevention and be treated as such. One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation." [1])

Commissioner Nielsen wrote a „separate statement regarding damages", in which it seems he wishes to defend the old theory:

„Assuredly the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary. Certainly there is no violence to logic and no distortion of the proper meaning of the word „condone" in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing. *It seems to be equally clear that,* irrespective of what may be the particular facts of any given case, *a nation may logically be charged with responsibility for crime when it is shown that proper punitive measures have been neglected.* The degree of fault attributable to a nation will, of course, depend upon the facts of each given case. A community protects itself against crime by police measures to prevent offences against the law and by appropriate measures to punish wrongdoing. The prevalence of crime has often been ascribed to lax police measures and to a dilatory and ineffective administration of criminal jurisprudence resulting in the failure to apprehend

[1]) I, pp. 118—119.

> criminals, in inadequate punishment, or in no punishment at all. Correspondence which has been exchanged between the Government of Mexico and the Government of the United States with respect to controversies pending for arbitration, and which is included among the records of the Commission, shows that each Government has from time to time pointed out the danger to the safety of its nationals of a lax administration of justice. It is clear that arbitral tribunals in assessing damages for the failure of authorities to punish wrongdoers have taken account of the damage caused by the wrongful acts of the culprits for which Governments have been held responsible. The opinions of some tribunals reveal that they have also taken account of other elements of damages, and I am of the opinion that that may properly be done." [1])

This whole passage, the essence of which is contained in the sentence we have italicized, appears to be intended as a defence of the old theory. But the only ground upon which this defence is based, would appear to be: „it seems to be clear that" , which cannot be considered very convincing. For the rest the Commissioner justifies his view merely by quoting a number of international lawyers and tribunals who have adopted the theory of complicity. Whether indeed all the cases he cites must be considered as sustaining that theory may well be left out of consideration here, since the majority opinion expressly recognizes that „at times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor." It appears that the Commission did not deny the existence of a certain practice to this effect, but that it on the contrary defended, for the reasons which it put forward, the abolishment of this practice and the replacing of the false theory by a more satisfactory solution. This seems also to have been overlooked by Eagleton, who devotes a special section to the *Laura Janes* case. This author says:

> „Logical and impressive as is the reasoning of the Presiding Commissioner in this opinion, the precedents arrayed by Mr. Nielsen, in his concurring opinion in support of the older theory,

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[1]) I, p. 123.

are equally impressive. Indeed, there can be no doubt that, as Mr. Nielsen says, practice has consistently supported the award of pecuniary damages where the state has not properly redressed injuries to aliens committed by individuals, in much the same measure as if the state were itself responsible for the damages arising from the act of the individual. This practice, however, does not provide the theoretical solution for which Mr. van Vollenhoven was seeking. The current doctrine rules, as has been seen, that the state is responsible only for its own act or, as in this case, its own omission. This is the position taken by the *Institut de Droit International* at its recent meeting. How, then, is theory to be reconciled with practice? By what logical connection can damages be assessed for the state's omission to exactly the same measure as for the act of the individual?

In the first place, it is believed that, as is elsewhere pointed out, the Grotian theory of complicity, or condonation, upon which Mr. Nielsen relied, is no longer acceptable." [1])

And his conclusion is:

„Or, finally, it may simply be said that practice has arbitrarily fixed as the measure of damages in such cases the actual material loss suffered because of the individual's act — an assumption broad enough to cover any or all of the preceding hypotheses". [2])

In our view it is clear that what the Commission set out to do was precisely to break the old custom of fixing the amount of the award at the value of the damage caused by the private individual's crime. Was the Commission right in rejecting the old theory of derivative liability, based on a presumed complicity?

Merits of the Janes opinion

It cannot be denied that there are essential differences, as enumerated in the award, between the delinquency of the wrongdoer and that of the state.

The wrongdoer	*The State*
1. is liable for murder;	1. is liable for not having acted up to its duty to punish;
2. has transgressed the penal code of his country;	2. has transgressed a rule of international law;

[1]) The responsibility of States, p. 194—195.
[2]) op. cit. p. 196.

3. can only be sentenced when his guilt or intention is proven;	3. guilt or intention of the State is immaterial;
4. caused the damage which results from the victim's death.	4. caused the damage which results from the nonpunishment.

The merits of the new conception, however, should be judged not only by its theoretical value, but also by its practical results. Now, the main effect of the theory upheld by Mr. van Vollenhoven is that the amount of the award is established independently of the damage caused by the private individual, merely by estimating the degree of seriousness of the governmental fault. We do not see what fundamental objection could be made to such a result. It seems to be the logical consequence of the conception nowadays admitted by authoritative writers [1]) that the responsibility of the state is a direct and independent responsibility for its *own* omission.

The theory laid down in the majority opinion has met with the approval of Borchard, who says about it, inter alia:

> „The Commission's theory of separating the individual crime from the government's delinquency, is, in principle, to be commended. .... The Commission's theory is useful .... because it is analytically correct and because it recognizes various degrees of governmental delinquency, from a continuous and notorious failure to punish any crime, the assumed equivalent of failure, after opportunity, to prevent, down to occasional and slight lapses, such as slowness of prosecution, inadequacy of punishment, etc." [2])

He doubts, however, whether „the complete mental separation of the private and the public offence, in measuring damages" is perhaps not „more fancied than real, more theoretical than actual", and whether it will in practice always be possible, or even desirable, to apply this theory strictly.

Hyde, on the other hand, although agreeing to the principle

[1]) Anzilotti: „La Responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", Revue Générale de Droit Int. Public, XIII, p. 14; Decencière-Ferrandière, same title, pp. 62 *et seq*; Schoen, Die Völkerrechtliche Haftung des Staates aus unerlaubten Handlungen, p. 38; Buder, Die Lehre vom Völkerrechtlichen Schadensersatz, pp. 35—38; Strupp, Das Völkerrechtliche Delikt, pp. 33—34; Cf. Bouvé, „Quelques observations sur la mesure de la réparation due en certains cas par l'état responsable," Revue de Droit International et de Législation Comparée, 1930, pp. 667 *et seq*.

[2]) A.J.I.L. 1927, p. 518.

that the „indirect" responsibility of the State is one for its *own* delinquency, has tried to uphold the old condonation theory against the Commission's attack with the following argument:

> „.... inaction that betrays unconcern on the part of a State whether the penalties of the law are to be visited upon him, who, in contempt of it, directs his criminal violence against a resident alien, deprives the State of defences which it might normally set up. It can no longer maintain as against the victim, that it is not answerable for the consequences of what has taken place. Thus, as the simplest explanation of the practice that sanctions the awarding of substantial damages, it may be said that a State which has failed in the performance of its international obligation in the matter of prosecution is not permitted to deny responsibility for damages caused by the criminal acts of individuals or mobs as measured by the pecuniary losses which they themselves have produced. This explanation does no violence to the facts; and it heeds the principle that damages should be computed in such a way as to disclose a causal connection between particular acts and losses resulting from them." [1])

We do not consider these observations sufficiently convincing to justify the condonation theory. The appearance of correctness which they might possess at first sight, is due to the somewhat unprecise phraseology employed. The author asserts that, on account of its failure to punish, the state „can no longer maintain, as against the victim, that it is not answerable for the consequences *of what has taken place.*"

Why? it may be asked. „The consequences of what has taken place" i.e. the damage sustained by an alien on account of a private crime, are in no manner consequences of the *State's* omission, i.e. the failure to punish. Similarly it does not seem fully correct to assert that „this explanation heeds the principle that damages should be computed in such a way as to disclose a *causal connection between particular acts and losses* resulting from them." The vague expression „particular acts" does not indicate whether the State's or the private individual's acts are intended. Consequently this sentence is liable to conceal the fact that although there *does* exist some causal connection between the *private individual's* act and the loss sustained, there is *none* between *the State's* act and that loss.

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[1]) A.J.I.L., 1928, p. 142.

Criticism of the solution suggested in the Janes opinion

If, for these reasons, the theory laid down in the *Janes* opinion seems unobjectionable insofar as it concerns the *foundation* and the *amount* of indirect state liability, or in other words: the *character* of the State's delinquency and the *damage* which it caused, a reservation should be made with regard to the Commission's view as to *who* suffered that damage, the moral indignity resulting from the non-punishment. The majority opinion says:

> „. . . . if the Government had not committed its delinquency — if it had apprehended and punished Carbajal — Janes' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit." [1])
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> . . . . . .
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> „The indignity done the relatives of Janes by nonpunishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a Government."[2])

It may be asked whether the indignity resulting from the non-punishment is indeed a damage caused *to the relatives* of the murdered person. Such a statement could only be accepted if we start from the conception that the relatives of a murdered person can set up a *right* to the punishment of the murderer. It seems difficult in these modern times to maintain the existence of such a right, and although many theories have been advanced to justify the punishment of crimes, that punishment is in most civilized countries nowadays not considered as the private right of the victim or his relatives. Any other view would put penal law back into the primitive stage of private revenge. [3])

This being the case, how much more difficult is it in international law to accept an individual's right of revenge as the basis of the obligation of states to punish wrongdoers against aliens. The basis of this obligation is that if a Government were to allow its citizens to be killed and damaged abroad without the perpetrator being punished, the security of its citizens abroad would be endangered, and furthermore it would lose prestige and the nation-

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[1]) I, p. 115.

[2]) I, p. 118.

[3]) To the same effect: Dunn, The Protection of Nationals, pp. 150—151, 178 and 185; Feller, The Mexican Claims Commissions, p. 150; see also above, p. 154.

al honour would be injured. From this it appears that the *nation* sustains moral injury and to a certain extent perhaps even material damage, when one of its nationals is killed abroad without the murderer being punished. The State in which the crime was committed is obliged to punish, but that is not an obligation toward the claimant, but toward the sister State. The lack of punishment does not, from a juridical point of view, inflict moral damage upon the claimant, but upon his State.

This objection to the decision rendered in the *Janes* case has also been made by Dunn, who has subjected the majority opinion to a severe criticism, which requires consideration here. It is stated in the following terms:

> „.... it must be obvious that the real explanation for the award is not to be found simply in this reputed desire of the majority to make good the material injury sustained by Janes' relatives as a result of the failure to punish the murderer of Janes. No such injury was either alleged or proved to have been sustained by the claimants. No one knows whether they felt any particular „grief" at the failure of the Government to prosecute the culprit, or any „mistrust and lack of safety" because of the Government's attitude, especially since it appears that they were residing in the United States at the time and had no intention of going to Mexico themselves. Certainly it would be difficult, if not impossible, to measure such feelings in terms of money." [1])
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> . . . . . .
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> „The underlying purpose of the award was clearly not to make good some fancied loss sustained by the relatives as a result of the failure to prosecute. In spite of the usual assumption to the contrary, such prosecution of crimes is not undertaken on behalf of the relatives of the deceased, but on behalf of the community at large; it is not primarily for the purpose of rendering „justice" to the victim, but to aid in the prevention of future crimes. The purpose of the award in this case was to express disapproval of the actions of the Mexican Government in failing to fulfill this function of prevention of crimes by diligent prosecution of those who commit them. It was in the nature of a penalty imposed on the Government for being derelict in its duties, not an effort merely to repair a material loss sustained by private individuals.
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> Even the amount of the award was clearly measured, not by the extent of the loss, if any, but by the extent of the delinquency of the Government. The majority admits this in their argument that the proposed measure of damages would allow the taking into

[1]) Dunn, The Protection of Nationals, p. 177.

account of the extent of the Government's delinquency, which would not have been possible under the old rule measuring the liability by the losses arising from the original crime." [1])

Dunn's objections are based on four points:

1. It was not certain that the claimants did feel grief or sustain moral injury at all;

2. „it would be difficult, if not impossible, to measure such feelings in terms of money";

3. „prosecution of crimes is not undertaken on behalf of the relatives of the deceased, but on behalf of the community at large";

4. the amount of the award was not measured by the extent of the loss or injury suffered by the claimants, but by the extent of the Government's delinquency.

As to 1. It seems somewhat theoretical to assert that perhaps the relatives felt no grief at all at the non-prosecution of the culprit. The point however is, that *juridically* this grief cannot be considered as a moral damage resulting from the non-punishment, and that it cannot constitute a basis for a private claim for reparation, because a private citizen has no *right* to have the wrongdoers punished.

As to 2. This objection, which is also brought forward by Feller [2]), does not hold. It may even be said to have been anticipated and disposed of by van Vollenhoven when he wrote:

„As to the measure of such a damage caused by the delinquency of a Government, the nonpunishment, it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. . . . . But a computation of this character is not more difficult than computations in other cases of denial of justice such as illegal encroachment on one's liberty, harsh treatment in jail, insults and menaces of prisoners, or even nonpunishment of the perpetrator of a crime which is not an attack on one's property or one's earning capacity, for instance a dangerous assault or an attack on one's reputation and honor." [3])

As to 4. This argument is stressed over and again by Mr. Dunn when, in support of his reasoning, he cites some other decisions

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[1]) Dunn, op. cit. pp. 177—178.
[2]) Op. cit. pp. 294—295.
[3]) I, p. 119

of the General Claims Commission, which were explicitly based upon the majority opinion in the *Janes* case [1]).

In these decisions too, the amount of the award was determined by the degree of the Government's fault, and no mention was even made of mental distress suffered in consequence of its omission. Hence the author concludes that the moral injury suffered by claimants was not the real basis of the award. [2])

This cannot, however, be considered as a conclusive argument. It seems quite logical, on the contrary, that *if* grief were suffered by the claimants because of the non-prosecution, the extent of that grief would be dependent upon the extent of the government's fault. Therefore the fact that damages were calculated upon the basis of the degree of that fault does not in itself prove that the real aim of the decision was not to repair the victim's mental suffering.

With regard to this objection of Dunn it is amusing to note that the *Janes* opinion was challenged by an other author on exactly opposite grounds. Whereas Dunn reproaches the Commission with having, in subsequent cases, taken into account the degree of the Government's fault, which it should not have done according to the principles of the *Janes* opinion, Feller [3]) reproaches the Commission with having failed, in subsequent cases, to base its awards *exclusively* upon the degree of the Government's fault as it should have done according to the principles of the *Janes* opinion. The latter, with reason, it would seem, argues that it would follow from the Janes opinion

> „that in cases of „indirect responsibility" recovery would be allowed only for the grief and indignity caused by a failure to prosecute the assailant, whereas in cases of „direct responsibility" recovery would be allowed as if the claimant had been injured by a private individual. .... Apparently, then, the seriousness of the degree of governmental misconduct is the one criterion which we can rely on in tracing the practice of the Commission in cases involving „indirect responsibility". We find some striking inconsistencies in practice." [4])

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[1]) *Laura A. Mecham*, II, p. 168;
Elvira Almaguer, II, p. 291;
Frank L. Clark, II, p. 300.

[2]) Dunn, op. cit. pp. 180—185.

[3]) The Mexican Claims Commissions, pp. 295—297.

[4]) Op. cit. pp. 295—296.

In a careful examination of the awards Feller shows that the tribunal did not in its decisions abide by these principles. It must be admitted that this criticism is well founded. However, we might submit that the value of the Commission's construction is not in itself affected by the fact that the tribunal did not fully apply its own principles.

Thus only Dunn's third argument remains valid: non-punishment of a wrongdoer does not inflict injury upon the private victim, but upon his state. This, in our view, is perfectly acceptable, for the reasons given above. And we found it sufficient to reject the construction adopted in the majority opinion as far as it tried to indicate the victim of the Government's delinquency.

We may conclude then that the reasoning contained in the *Janes* opinion seems perfectly justified insofar as it rejects the old theory of derivative liability based upon a supposed complicity of the State (paragraph 19 to 22 incl.), but that it is unsound insofar as it attempts to create a new positive solution (par. 23). Particularly unacceptable seems to be the Commission's assertion that:

> „Once this old theory .... is thrown off, we should take care not to go to the opposite extreme. It would seem a fallacy to sustain that, if in case of nonpunishment by the Government it is not liable for the crime itself, then it can only be responsible, in a punitive way, to a sister government, not to a claimant. There again, the solution in other cases of improper governmental action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a Government ...." [1])

No doubt claimants have often been given satisfaction for dereliction of duty on the part of a Government. But only for dereliction of a duty *towards that claimant*, e.g. if he had been arrested without sufficient cause, or if he had received insufficient protection. However, as has already been pointed out, the duty to punish the perpetrator of a crime against an alien is not a duty owed to that alien or his relatives, but one owed to his state.

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[1]) I, pp. 117—118.

Suggestion for a satisfactory solution

If, then, neither the old „condonation" theory, nor the construction suggested by the Commission are logically tenable, how is this confusing and much discussed problem to be solved? In our opinion there are three solutions imaginable.

The first consists in adopting the following line of thought: By not punishing the culprit the respondent State has deprived the foreign victim of the possibility of bringing a civil suit against that culprit and of obtaining from him reparation and satisfaction for the material and moral damage sustained on account of his private delinquency. Consequently the State must repair that damage [1]). Two objections to this construction are imaginable. In the first place if one looks at the cases in which claims arising out of non-punishment were brought forward, it will be evident that in the great majority of these the wrongdoer would not have been able to pay any sum worth while; most often he was a dismissed labourer, bandit, desperado, military or police official of low rank, or something similar. It might be replied, however, that this need not necessarily affect the duty of the State to pay the full sum which the victim *could* have demanded and *perhaps* obtained from the culprit, had he been apprehended. In the second place it might be objected that even although he is not apprehended or punished, the wrongdoer may still be submitted to a civil suit. However, this possibility may well be eliminated in practice: another glance at cases of this character shows that generally the wrongdoer, if not apprehended, disappears; and besides it may be assumed that it would as a rule be very difficult to obtain a civil judgement against the culprit from the very judiciary which failed to prosecute him.

A second solution could be found by simply admitting that it is impossible to give a satisfactory explanation for the linking up of the State's fault with the damage caused by the private crime, and concluding that since in spite of this, many tribunals have made this link, it can only be explained by adopting a juridical fiction to the effect that the damage suffered by the State by reason of the lack of prosecution is equal to that sustained by its

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[1]) Dunn, The Protection of Nationals, p. 174; Hyde, A.J.I.L., 1928, p. 140.

citizen by reason of the private injury[1]). Such a view seemingly finds some support in the fact that every international claim is based upon a fiction which to a certain extent is similar to the one suggested above, viz. the generally adopted presumption that the damage suffered by a State by reason of an international delinquency is equal to that sustained by its citizen by reason of that delinquency. It should not be lost from sight, however, that the fiction which would in the second solution suggested be necessary goes much farther: it would mean the assimilation of the damage sustained by the State through the non-punishment to that sustained by the citizen *through an entirely different fact*, to wit the wrongdoer's crime, whereas in the fiction which is the basis of every international claim the damage sustained by the State through an international delinquency is assimilated to that sustained by the citizen *through the same fact.*

From the point of view of theoretical justification the two solutions just mentioned are more sound than the old „condonement" theory. But there are two conclusive objections to them: they both lead to the same result as the old theory, that the measure of damages can only be the amount of the damage caused by the private crime. This has the disadvantage, as is shown in the *Janes* opinion, that the sum awarded may be quite disproportionate to the seriousness of the governmental delinquency. Furthermore it will be shown in the next section [2]) that this result appears to work out very unsatisfactorily in one type of cases, several examples of which were heard by the Mexican-American Claims Commission, viz. where the culprit is a government official. These two objections are important enough to reject both possibilities taken into consideration.

Quite an opposite solution would be to deny absolutely the existence of any State liability for the non-punishment of the perpetrator of a crime against an alien. This is what Ralston suggests [3]). This distinguished lawyer, starting from the rejection of the principle of liability *towards the private victim*, immediately concludes that there cannot be any liability whatsoever. His solution seems to us to go too far, for three reasons.

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[1]) Thus Eagleton, Responsibility of States, p. 196; see above, quotation on p. 166.
[2]) pp. 181—182.
[3]) Supplement to the Law and Procedure of International Tribunals, pp. 170—171.

It is in direct contradiction, not only as regards its theory, but also as regards its *practical result* (non-liability), to constant jurisprudence as well as to the practice of nations. Notwithstanding all the attacks which have, with good reason as we saw, and with success been directed at the theoretical foundation upon which liability in cases of this character was based, international practice has not in the least changed with regard to the liability itself. Thus in answer to the questionnaire of the preparatory committee for the 1930 Conference for the codification of international law, twenty-one nations unanimously gave expression to their conception that a State is liable for the failure of its authorities to prosecute a private individual who has caused damage to the person or goods of foreigners. [1])

Furthermore it seems undesirable as well as unjust that states should not incur any responsibility in case of failure of their administration in connection with the repression of crimes against aliens. To this Mr. Ralston objects that

> „there is not the slightest reason to believe that awards of the commissions have had the least effect in reforming such conditions (i.e. of looseness of administration), and that the greatest sufferer of lax administration is the country itself, on account of the indisposition of foreigners and foreign property to enter it."

This amounts to an assertion that e.g. a debtor need not be obliged to pay his debts, because in the long run he himself will suffer the greatest disadvantage from his failure to pay, and will therefore be obliged to abandon this habit.

Finally Mr. Ralston's suggestion finds no support in the principles of international law. If it is true, on the one hand, that the *private individual* has no right to see the person who injured him punished, it is also true, on the other hand, that *his State has* a right to see its citizens abroad protected in an efficient way, and their safety guarded; for this, the punishment of wrongdoers is an indispensable condition. [2])

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[1]) Bouvé, Quelques observations sur la mesure de la réparation due en certains cas par l'état responsable, Revue de Droit International et de Législation Compareé, 1930, pp. 661 and 663.

[2]) Attention must be drawn to the erroneous impression of the *Janes* opinion that might be conveyed upon readers of Ralston's Supplement to the Law and Procedure of International Tribunals, by the manner in which that opinion is treated. Out of all the pages cited above only two sentences are quoted, and these in such a way as might lead to the conclusion that the Commission associated itself with the old condo-

The only solution, finally, which possesses none of these disadvantages is precisely the one from which the *Janes* opinion tried to escape (par. 23), viz. *that the delinquent State is only liable toward the sister state, not toward the alien citizen, and this in an amount perfectly independent of the damage or indignity suffered by that alien.* [1]) The ground for this liability is that the respondent State committed a delinquency toward its sister State by not prosecuting the perpetrator of a crime against a subject of the latter. This seems sufficient reason for admitting liability. Whether such liability is of a „punitive" character, as was presumed by the Commission, and as is maintained by Dunn, is, in our opinion, immaterial. International law is still in a primitive stage of development, in which no sharp distinction is as yet made between civil law and criminal law, and many of its rules are influenced by conceptions which reign in the domain of criminal law.

Of course the claimant State is perfectly free, if it sees fit to do so, to pay the sum obtained from the defendant State over to those who suffered all the damage and grief resulting from the murder, i.e. the relatives; but it should then be clearly borne in mind that in the case under consideration such a payment would be purely *ex gratia*, and would not, as in other cases of reparations for international delinquencies, be based on the fact that the State suffered its damage *in* the damage of the claimant.

It may perhaps be asked whether the practical effect will be any different from that obtained by Mr. van Vollenhoven. In the majority of cases, indeed, only the juridical justification will be different, not the practical result. Entirely opposite results will be obtained, however, when the claimant State does not count amongst its citizens any relatives of the victim or others who suffered grief „by the foreign Government's omission": according

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nation theory (p. 124). For reasons which we are unable to grasp these sentences are furthermore quoted in a section about „Punitive or exemplary damages" (Par. 473a). Nowhere else in the book is notice taken of the elaborate considerations given in the opinion to the subject of so-called „indirect liability", and the reasoned rejection of the old complicity theory. Also it seems unjustified in face of the *Janes* opinion, to say, as Mr. Ralston does, that the question as to whether a rule of imputed liability in cases of so-called indirect denial of justice should be held to exists „is open for careful discussion and debate *such as it has never received*". (p. 170.)

[1]) The same solution, which is contrary to all precedents, is recommended by Brierly, British Yearbook of International Law, 1928, p. 49 and Dunn, The Protection of Nationals. p. 185.

to the principles of the *Janes* opinion a claim for failure of punishment would then be inadmissible, whereas in our view the right of the victim's Government should be entirely independent of the question whether any of its subjects suffered moral damage from the foreign Government's failure to live up to its obligations.

The solution here suggested, which we consider to be the logically inevitable consequence of Mr. van Vollenhoven's conception of indirect liability, has two important results. The first is that, as has already been stated [1]), the failure of a Government duly to prosecute, apprehend or punish the perpetrator of a crime on an alien cannot properly be termed a „denial of justice" [2]) If it is true that the injured alien has no private right to see that individual punished, then it cannot correctly be said that *justice is denied* to the alien when the defendant State fails to live up to its obligation of punishing the perpretator. Here again the case that an alien has been murdered and left no relatives, is illuminating. What will the authors, who assert that the victim of the private crime, or his relatives, are the person(s) to whom „justice is denied" by a failure to punish the murderer, decide in such a case? The necessary consequence of their view would seem to be that, since there is no person to whom justice is denied, the state of the murdered person cannot claim any indemnity when the murderer has not been punished. Still we believe that even these authors would hesitate to accept such a consequence.

Once more: there is a fundamental difference between cases of „indirect" and of „direct" liability, not with regard to the directness of the liability, but with regard to the manner in which the injured state suffers the injury: in cases of the latter type there is an injury suffered by an individual which constitutes an injury to his State; in cases of „indirect liability" there is no injury suffered by an individual at the hands of the respondent State, but nevertheless there is an injury suffered by the claimant State.

In the second place claims involving so-called „indirect responsibility" cannot correctly be said to be made *on behalf of a certain*

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[1]) Supra, pp. 154.

[2]) Dunn, The Protection of Nationals, pp. 150—151; Feller, The Mexican Claims Commissions, pp. 130 and 149—150; Ralston, Supplement to the Law and Procedure of International Tribunals, par. 116a and 579f.

citizen, as was customary under the Mexican-American Claims Commission. It is not the victim of the private crime (or, in case of murder, his relatives), who are aggrieved by non-punishment, but the State of which the victim is a national. Hence a claim cannot be said to be „on behalf of the citizen" in the ordinary sense, implying that the citizen suffered damage from the defendant State's delinquency; the term can only be used to mean that the claimant state intends to hand over the sum, which it might receive as satisfaction for its own moral damage, to the victim of the private crime from which the Government's delinquency resulted.

Apart from the decisions mentioned above [1]), the Commission has, on a much later date, under the Presidency of Dr. Alfaro, rendered one more award which might be said tacitly to support by implication the theory which considers the „indirect" responsibility of a government as original and distinct from its responsibility for the private delictual act which preceded the Government's delinquency.

In the affair of *Lilian Greenlaw Sewell* [2]) the Mexican Agency contested the Commission's jurisdiction because claims arising from revolutionary acts before May 31, 1920, had to be submitted to a Special Commission. The Commission held however:

> „It does not seem that this claim based on a denial of justice is incidental, in the manner required by the Articles mentioned, to the revolutionary movements in Mexico, it being proper to observe, further, that as the murder of Greenlaw was committed on May 1, 1920, and as the period fixed for claims arising from the revolutions, coming under the Special Claims Commission, terminated on May 31, 1920, it appears that the denial of justice here asserted as a basis of the claim, arose after the said 31st of May, 1920. For these reasons the Commission decides that it has jurisdiction over the instant case." [3])

This opinion seems to imply that the tribunal at that time still considered denial of justice as a separate and independent basis for a claim, and not as a derivative one.

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[1]) *Laura A. Mecham*, II, p. 168; *Elvira Almaguer*, II, p. 291; *Frank L. Clark*, II, p. 300.

[2]) III, p. 112.

[3]) III, p. 114.

Effect of the old and new theories concerning „indirect" liability in cases where the wrongdoer was a Government official

We should like to draw the attention to an opinion revealing another consequence which would, strictly speaking, result from the solution suggested in the *Janes* case, a consequence however of which the Commission itself does not seem to have been aware.

Walter Swinney [1]), when in a boat peacefully floating down a frontier river between Mexico and the United States, at a part where it was forbidden to cross the river with goods, was mistaken for a smuggler or a revolutionist and shot by a Mexican frontier guard. The United States claimed an idemnity on behalf of his parents, two causes of action being alleged, viz. the unlawful killing *and* a denial of justice, because the perpetrator had never been punished. The special feature of this case was that *the killing had been committed by a government official on duty*. In circumstances presenting this character, the theoretical basis upon which the indirect liability of a State is grounded becomes a matter of practical importance. No doubt the State must be held responsible for *two* separate unlawful acts: wrongful killing by one of its agents, and lack of prosecution or punishment, caused by the attitude of some of its other authorities. However, under the old theory of derivative liability, the lack of punishment has no other effect but to render the state liable for the act of the murderer. But in a case such as the present one, *it was already so liable*, since the illegal act was committed by an agent in his official capacity and within the scope of his competency. Hence the extent of the liability and the amount of the award will be exactly the same as if the State had not subsequently failed in its duty to punish the offender. In other words: *Under the old theory the lack of prosecution or of punishment does not impose any new liability upon the state, when the preceding unlawful act has been committed by one of its officials*. This means that a Government could, after a crime or an illegal act had been committed by one of its officials towards an alien, simply omit to prosecute him, with the certainty that such attitude would not increase its liability. It will be clear that this result is definitely unsatisfactory.

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[1]) I, p. 131.

The new theory worked out in the *Janes* opinion, as well as the one finally suggested in the preceding section, on the contrary, would render the state responsible for two separate and fundamentally different acts, for both of which it should pay a separate idemnity. By reason of the wrongful killing by its official it should repair:

a. loss of income sustained by dependent relatives of the victim;

b. (if satisfaction for immaterial damage is in principle recognized) moral indignity and pain suffered by relatives on account of the victim's death.

On account of the lack of prosecution or punishment it should repair:

c. moral indignity inflicted by the non-punishment.

Now, in the theory established in the *Janes* opinion, the amount of the reparation due by the state for an unlawful act of an official, in the absence of a subsequent lack of punishment, would only comprise a. and b. In the same theory, the amount of reparation due by a State for a mere failure to punish a private wrongdoer, in the absence of a preceding wrongful conduct on the part of an official, comprises only c. It follows from this simple reasoning that in the special case of the wrongdoer's being a government official the two separate grounds for the government's liability both find their expression in the sum awarded, which means that the unsatisfactory result to which the old theory would lead in a case of this type is avoided. This constitutes, as has been stated before [1]), a conclusive argument against the old condonation theory, as well as against all theories which would have a similar effect in this respect.

It must be noted here that in the *Swinney* affair the Commission itself did not seem to be fully aware of this logical consequence of its theory. Although it considered both reckless killing by the river guard and a denial of justice by a lack of effective prosecution proven, it held ,,that the claimants have suffered damages to the extent of $ 7000 *because of the killing of their son by Mexican authorities.*" [2]), and did not seem to make any allowance for the denial of justice. Sinilarly two more times the commission, having

[1]) p. 176.
[2]) I, p. 135.

found that an unlawful act had been committed by a State official, did not deem it necessary to make a separate inquiry into the liability on account of a denial of justice, although the culpable official had not been punished:

> „It is useless to inquire whether, apart from this liability, the United States might have been held responsible for a denial of justice in this case." [1])

> „In view of the results of the investigation made by American civilian authorities it seems to the Commission to be somewhat odd that the soldiers should not have been brought to trial. Apart from this point, however, the Commission is of the opinion that the killing of Falcón was a wrongful act for which damages may be assessed in the amount of $ 7,000.00 without interest." [2])

If the Commission in these opinions had strictly applied its theory expressed in the *Janes* case, it should explicitly have taken account of the suffering caused by the lack of prosecution and accordingly condemned the respondent Government separately for a denial of justice.

This inconsistency is the more astonishing as the tribunal on another occasion gave proof that it more fully realized the consequences of its own theory laid down in the Janes case.

The American citizen Edward Stephens had been shot by a Mexican who was, or at any rate by the Commission was ,,considered as assimilated to", a soldier. Not only, therefore, was the murderer an official, but furthermore he had never been punished. It is obvious that these facts were identical with those of the Swinney claim. This time however Mexico was expressly condemned on account of two separate delinquencies:

> „8. Apart from Mexico's direct liability for the reckless killing of an American by an armed man acting for Mexico, the United States alleges indirect responsibility of Mexico on the ground of denial of justice, since Valenzuela was allowed to escape and since the man who released him, Ortega, never was punished.
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> . . . . . .
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> 10. *Taking account of both Mexico's direct responsibility and its denial of justice*, and of the loss sustained by the claimants .... an amount of $ 7,000.00.—, without interest, would seem to express best the personal damage caused the two claimants by delinquencies for which Mexico is liable." [3])

[1]) *Francisco Quintanilla*, I, p. 136, at p. 138,
[2]) *Guerrero Vda de Falcon*, I, p. 142.
[3]) *Charles S. Stephens and Bowman Stephens*, I, pp. 400 and 401.

The allegations were similar again in the claim of *Teodoro Garcia and M. A. Garza* [1]), but since there the denial of justice was not held to be proven, that judgement does not afford a precedent. We shall consider it later, when discussing the liability of a government for unlawful killing by its representatives.

Respect due to national judiciary

On several occasions the Commission emphasized the rule that respect is due by an international tribunal to a national judiciary. This was clearly expressed in the decisions upon the claims of *Margaret Roper* [2]) and of *Ida Robinson Smith Putnam* [3]). In the first case the Commission in addition very justly declared that in examining complaints of denial of justice the rank of the judge whose action is complained of is an important factor:

> „To undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official — whether he be a judge or a police magistrate — having for its purpose the apprehension or possible prosecution of persons who may appear to be guilty of crime." [4])

It may be remarked that in this respect the Commissioner observed that an international tribunal

> „should look to matters of substance rather than form"

and that therefore it did not

> „consider the functions exercised by a Judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings." [5])

In the *Putnam* case the U.S. contended that Mexico had been guilty of a „denial of justice" by imposing on the murderer of an American subject a penalty out of proportion to his crime. The contention was rejected on the basis of the following consideration:

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[1]) I, p. 163.
[2]) I, p. 205.
[3]) I, p. 222.
[4]) I, p. 210.
[5]) I, p. 210.

„The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. [1]) *A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined.* Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law." [2])

The same principles were laid down by Commissioner Nielsen in his dissenting opinion on the claim of *Garcia and Garza* [3]). That claim has already been dealt with more fully. We need only repeat here that the President of the U.S.A., as the highest judicial authority in military matters, disapproved of and nullified a court-martial-sentence condemning an American officer for having unlawfully killed a Mexican citizen. This the Mexican Agency contended to be a denial of justice. The Commission very briefly disposed of this complaint by applying its traditional standard:

„In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court-martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. None of these deficiencies appears from the record." [4])

Commissioner Nielsen wrote a dissenting opinion in which he stated more elaborately:

„I am of the opinion that the Commission is bound by the President's interpretation of American law with respect to these two points. I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice; that is, when a decision reveals an obviously fraudulent

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[1]) Case of Margaret Roper, Docket No. 183, pararaph 8,
[2]) I, p. 225.
[3]) I, p. 163.
[4]) I, p. 169.

> or erroneous interpretation or application of the local law. Domestic laws may contravene the law of nations, and judicial decisions may result in a denial of justice, but assuredly it is a well-recognized general principle that the construction of national laws rests with the nation's judiciary. .... The grave charge made in the oral and written arguments advanced in behalf of the Mexican Government that the action of the President was a denial of justice, in that a proper sentence of a lower court was deliberately set aside as a matter of expediency and contrary to all the evidence in the records of the proceedings, probably requires no more discussion than that given to it in the opinion of the two other Commissioners. I have, however, very briefly indicated the character of the careful proceedings that were taken in this case. A denial of justice can be predicated upon the decisions of judicial tribunals, even courts of last resort. But attempts to establish a charge that a court of last resort has acted fraudulently or in an obviously arbitrary or erroneous manner are very infrequently made. This Commission has in the past broadly indicated its views as to what is required to establish such a charge. It is probably unnecessary, in view of what has already been said with regard to the proceedings in this case to say anything more for the purpose of showing that the decision of the court-martial imposing a sentence of dismissal on Lieutenant Gulley was not set aside merely as a matter of expediency, or that the construction and application of the law by the court of last resort was neither fraudulent, nor arbitrary, nor obviously erroneous, nor an act of expediency." [1])

Effect of punishment of delinquent official upon State responsibility

If a Government official has committed a delinquency rendering his country internationally responsible, and the government punishes him in consequence, what bearing could this fact have upon the State's liability? This question was unfortunately raised only once before the Commission, without receiving an answer [2]). The murderer of an American citizen had been put in jail in Mexico, but the prison guard allowed him to escape, which constituted a denial of justice on the part of Mexico. This country however repudiated responsibility on the ground that punitive measures had been taken against the jailkeeper. Commissioner Nielsen, in an opinion adhered to by the other Commissioners, said:

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[1]) I, pp. 173—174.
[2]) *Gertrude Parker Massey*, I, p. 228.

„Whatever bearing, if any, the arrest of the assistent jail-keeper, Vargas, might be considered to have on the question of Mexico's responsibility in this case, it is not a point of any material importance. With respect to this matter it may be observed, in the first place, that the record does not show that Vargas was prosecuted and punished, although there is evidence that he was arrested and spent some time in jail, and in the second place, that the conditions surrounding the imprisonment of Saenz reveal a situation of something more serious than an unexpected breach of trust on the part of a single minor official." [1])

It seems rather regrettable that a clear answer to the question was thus burked. In our opinion there should be no doubt that the arrest of the jail-keeper ought not to have any bearing whatsoever upon Mexico's responsibility for his fault. It seems inadmissible that a State should be allowed to avoid or diminish its liability towards other States for the delinquencies of an official merely by punishing him. That is no more than its simple duty, and the only connection it has with international liability is that a *failure to punish* would *aggravate* it. If in the given case no action had been taken at all against the jail-keeper, there would have been what we might call a *double*, or *continuing* denial of justice: first by allowing the murderer to escape, second by not punishing the author of that fault.

Nevertheless when the circumstances here suggested did come before the Commission, it did not render a larger award than if there had been only one denial of justice. It was in the *Stephens* case [2]) where Commissioner Nielsen stated:

„I think that the record clearly shows that the killing of one of them, Edward C. Stephens, by a Mexican soldier, in the presence and under the command of an officer, was inexcusable; that the person who did the shooting was allowed to escape; and that the person who permitted the escape was not punished, although he was charged with the offence of permitting the escape of a prisoner." [3])

In spite of this the award, written by the President, merely said:

„10. Taking account of both Mexico's direct responsibility and its denial of justice, and of the loss sustained by the claimants

[1]) I, p. 236.
[2]) I, p. 397.
[3]) I, p. 401.

> .... an amount of $ 7000.00, without interest, would seem to express best the personal damage caused the two claimants by delinquencies for which Mexico is liable." [1])

It might have been useful if it had been expressly stated that in these circumstances Mexico was liable for *three* delinquencies: murder by an official, and a *double* denial of justice.

Effect of an ultimate just decision upon responsibility for preceding judicial faults.

Are faults made by judicial authorities in the course of a process entirely repaired, and the State's liability for them satisfied, by the fact that a just decision has ultimately been rendered? This was the question with which the Commission had on three occasions to concern itself. It decided that, *although the answer will, generally speaking, be in the affirmative, there may be faults which are not redressed by a just final decision.*

Clyde Dyches [2]) had been arrested in Mexico on the charge of theft. After a very slow criminal process, which lasted a year, Dyches was sentenced to six-and-a-half years imprisonment. Upon his appeal from this decision, the penalty was after another year increased to eight years and five months. It was only after a second appeal that it was decided six months later that Dyches was not guilty of theft, but only of having entered some one else's premises without permission. The incarceration suffered by Dyches during all this time was considered sufficient penalty for that offence, and he was liberated.

Judge McGregor wrote in his opinion for the Commission:

> „.... in this case of an alleged illegal trial and defective administration of justice, the Commission finds itself confronted with a decision of the Supreme Court of Justice of Mexico ...., in which decision final justice is granted correcting the error that the local lower Courts may have made in finding the claimant guilty. Bearing this in mind, it might be said that there is no denial of justice in this case, but on the contrary, a meting out and fulfillment of justice. If the term within which all proceedings against Dyches were effected had been a reasonable one, it would be necessary to apply hereto the principle establishing the non-

[1]) I, p. 401.
[2]) II, p. 193.

responsibility of a State for the trial and imprisonment of an alien, even though he is innocent, provided there has been probable cause for following such procedure. . . . . The supreme Court of justice of the Mexican nation finally applied the law, conscientiously examining the charges made against Dyches and found him innocent, for which reason he would have no right to ask for indemnification for the deplorable error of the local courts which injured him. All the defects of procedure of which the claimant complains were, so to say, erased by the last decision which rendered justice to him. Thus, there is no need taking into account that this or that legal step was not taken.

But the fact remains that the procedure was delayed longer than what it should reasonably have been, in view of the simple nature of the case." [1])

Having regard, then, to the unreasonable delay, and to the fact that several maximum periods prescribed by Mexican law were far exceeded, an award of $ 8.000,– was made in favour of Dyches. Commissioner Nielsen added a brief separate opinion in support of this decision, in which he said:

„No doubt it is a general rule that a denial of justice cannot be predicated upon the decision of a court of last resort with which no grave fault can be found. It seems to me, however, that there may be an exception, where during the course of legal proceedings a person may be the victim of action which in no sense can ultimately be redressed by a final decision, and that an illustration of such an exception may be found in proceedings which are delayed beyond all reason and beyond periods prescribed by provisions of constitutional law. In my opinion that principle would be applicable in a case like the one before the Commission in which clearly unjustifiable delays took place in the proceedings before State courts which finally terminated with a sentence of eight years and five months for robbery of which Dyches was not guilty . . . ." [2])

On a later occasion, [3]) involving a complaint, not of excessive detention, but of detention upon insufficient grounds, combined with ill-treatment and holding „incommunicado", the *Dyches* opinion was invoked by the American Agent as „precedent that certain irregularities of procedure cannot be redressed even when a final sentence doing justice is rendered."

But the Mexican Commissioner wrote for the Commission:

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[1]) II, p. 196.
[2]) II, p. 198.
[3]) *Joseph A. Farrell*, III, p. 157.

„The Commission finds at once that the instant case differs from the Dyches case .... in the fact that in that case it was proven that the judicial proceedings were unduly delayed in violation of the Mexican law; in the instant case it appears that the proceedings were conducted entirely within the period designated by the law, the proceedings in both courts having lasted approximately five months." [1])

The claim was disallowed because the three grounds of complaint indicated were considered not established. The Commission did not say, however, that the principle laid down in the *Dyches* case would not have been applied if one of these grounds *had* been proven. Accordingly it seems to be going rather far to say, as Feller does, that

„The Commission very properly rejected this (i.e. the American Agency's) contention and pointed out that the *Dyches* case must be limited to the factual situation there presented, *i.e.* an undue delay of judicial proceedings in violation of Mexican law." [2])

The same applies to the statement made by Borchard that

„the decision of the court of last resort was deemed to have corrected all the errors of inferior officials, and this seems sound."[3]

As has been said, the cause of the disallowance of the claim of Farrell was not that the faults of inferior officials were deemed to have been corrected by the decision of a superior court, but that these faults were not sufficiently proven.

On the other hand the principle laid down in the *Dyches* case was once applied, in circumstances presenting quite a different character. [4]) With respect to a claim based upon the allegations *a.* that Mexican authorities failed promptly to prosecute two persons strongly suspected of having murdered two Americans, and *b.* that the punishment meted out to the murderers was inadequate, the Commission decided that the judgment rendered by the Mexican tribunal was unobjectionable, but nevertheless held that:

„For the laxity shown by some Mexican officials in the prosecution of the crime committed, Mexico must be responsible under

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[1]) III. p.p. 159—160.
[2]) The Mexican Claims Commissions, p. 146.
[3]) A.J.I.L., 1931, p. 738.
[4]) *Norman T. Conolly and Myrtle Conolly*, II, p. 87.

international law, and as *this laxity can only partly be considered as redressed by the arrest and the sentence of the criminals*, the Commission is of opinion that an amount of $ 2.500, U. S. currency, should be awarded." [1])

This decision is the more remarkable because here a question of so-called ,,indirect responsibility" was involved, contrary to the *Dyches* case, in which the ground invoked was one of direct responsibility.

Facts constituting a so-called indirect denial of justice

About fifty claims based upon an allegation of ,,denial of justice" were decided by the General Claims Commission. We have dealt in the preceeding sections with the general principles applied or stated in some of these decisions. Although the particular acts complained of on each separate occasion are of less general interest, it seems desirable to mention them here, since they might serve as precedents.

It will be noticed that all these were cases of so-called ,,indirect responsibility". We have explained above [2]) why in our opinion the basis of this form of liability cannot properly be termed ,,denial of justice", since no justice is denied to the private claimant. If therefore the expression ,,denial of justice" is used in the following pages, this has been done only because the Commission used the term thus — in our opinion improperly — in most of its awards.

It will also be remembered that Mr. van Vollenhoven even wished to limit the use of the expression to cases of this category, i.e. to ,,indirect liability" for acts of the judiciary. Accordingly the term was not used [3]) in cases of ,,direct liability" (to which it should in our personal opinion particularly be applied) such as: illegal arrest and detention, maltreatment in prison, undue delay and other failures in the course of proceedings, when suffered by the claimant in the respondent State. Prof. van Vollenhoven termed these cases ,,defective administration of justice." In order to respect the use made by the Commission of the expres-

[1]) II, p. 90.
[2]) pp. 154—156 and 177.
[3]) Except once: *vide infra*, p. 202.

sion „denial of justice" we propose to treat these claims in a separate chapter on „Wrongful treatment suffered at the hands of police and judicial authorities"; the more so as persons consulting this work will perhaps find it more convenient to have these cases brought together.

The commonest cases can be devided into five types:

failure on the part of authorities to prosecute effectively	}	a wrongdoer.
„ „ „ „ „ „ „ apprehend		
„ „ „ „ „ „ „ try satisfactorily		
„ „ „ „ „ „ „ sentence adequately		
„ „ „ „ „ „ „ execute the punishment of		

All of these grounds for liability have regularly been admitted in the law of nations [1]).

Evidently two or more of them will often appear together. Therefore the Commission rightly said in the *Janes* case:

> „One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of a denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release: prosecution and light punishment; prosecution, punishment and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation." [2])

It will be helpful to deal with the cases here according to their categories.

Lack of prosecution

On the basis of the following facts compensation was awarded for denial of justice, because the authorities were guilty of unwarrantable delay, negligence, and lack of assiduity in prosecuting criminals.

A murder took place at the El Tigre Mining Co. The police „commissario", although informed of it within five minutes, delayed an hour assembling his policemen and asking for horses

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1) Decencière-Ferrandière, La Responsabilité des Etats, pp. 123—126; Eustathiadès, La Responsabilité internationale des Etats pour les actes des organes judiciaires, pp. 179—194.

2) I, p. 119.

in order that they should be mounted. He then started in pursuit of the murderer, who had departed on foot, but failed to apprehend him. The latter remained for a week at a ranch six miles south from El Tigre and later on information reached the authorities that he was at a certain place 75 miles south of El Tigre. No steps were taken and the murderer was never arrested or punished [1])

An American had been carried off by bandits, and detained in the mountains for one day; the Mexican authorities failed to take any action against the criminals and even when at last some fifty mounted men of auxiliary forces were ready to pursue them, their Colonel refused permission to do so. [2])

Another American, *Richard Newman* [3]), was detained for many months by bandits. Upon the news of his abduction orders to effect his rescue were issued, but were not executed. A few years later the criminals surrendered to the military authorities, but were not brought to trial, nor punished.

After a hold-up resulting in the death of an American, the competent authorities on the following day apprehended fifteen persons and detained them on suspicion for some time. One of these confessed, and furnished the names of the other assaillants, shortly after which he was shot when attempting to escape. After a similar fate had befallen the second principal author of the crime, the other suspected persons were released on bond and no further steps were taken, in the proceedings started against them. Since there was no evidence that the grounds for suspicion had proved unfounded, the international tribunal decided that the release had been unlawful and no complete prosecution and punishment had taken place, which constituted a light degree of denial of justice. [4])

A similar decision followed the failure of the authorities to investigate the action of an officer, who, perhaps lawfully, had had a foreigner arrested and shot. [5])

In regard to the murder of the son of *Martha Ann Austin* [6])

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[1]) *Laura M. B. Janes*, I, p. 108.
[2]) *S. J. Stallings*, II, p. 224.
[3]) II, p. 284.
[4]) *Elvira Almaguer*, II, p. 291.
[5]) *Jesús Navarro Tribolet et al*, III, p. 68.
[6]) III, p. 108.

the Commission held that the responsibility of Mexico was greatly diminished by the absence of a notification of the occurrence to the authorities, but that nevertheless it seemed impossible that these should have had no knowledge of it. Accordingly their omission to take any steps rendered the Government liable.

Denial of justice was also held established where there had been laxity in ascertaining the names of the crew of a train that had been attacked and robbed with complicity of the crew, delay of a year in effecting the arrest of guilty highwaymen; and failure to arrest eight other men indicated by the culprits as accomplices. [1])

Lack of apprehension

The Commission held that the failure to apprehend the assailants of an American geologist, — whether they were bandits or insurgents — as long as such was possible, would create a denial of justice, if it had sufficiently been established, which however was not the case. [2])

In a case where no, posse, was sent out to pursue a murderer until after four days had passed and orders of arrest were not issued until half a year later, Mexico was declared not to have fulfilled her duty to take appropriate steps for the purpose of apprehending the criminals [3]).

The same was decided when robbers succeeded in escaping owing to the refusal of a municipal President to aid his colleagues in the pursuit and when no warrant of arrest was isued for several months. [4])

International liability was also imposed upon Mexico in the case of *Norman T. Conolly and Myrtle H. Conolly,* [5]) where the following facts were established: The „Ministerio Publico" refused to issue warrants of arrest against two men gravely suspected of having murdered two Americans; one of them subsequently confessed; nevertheless no warrant of arrest was issued against the other until after one year; and even then the arrest was

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[1]) *Lilian Greenlaw Sewell,* III, p. 112.
[2]) *Bond Coleman,* II, p. 56.
[3]) *J. J. Boyd,* II, p. 78.
[4]) *Laura A. Mecham, and Lucian Mecham,* II, p. 168.
[5]) II, p. 87.

not effected until four months later, when the assailant presented himself voluntarily.

This decision does not, in our opinion, deserve the criticism to which it has been subjected by Feller, who states that „the assailants were duly arrested and prosecuted and were convicted of homicide during a fight", and that nevertheless the Commission directed compensation to be paid on the ground „that Mexico was responsible for a denial of justice for failure to prosecute these assailants for robbery", which Feller considers to be „most extraordinary". [1] The author, however, by his words, does not give a wholly correct impression of the opinion and of the facts on which it was based. In the first place the main judicial omission upon which the award was based was precisely that, as has been exposed, the assailants were *not* duly arrested. Besides, Feller does not mention that several other circumstances were established which strongly suggested that the Mexican authorities, instead of doing their utmost to apprehend and try the criminals as soon as possible, endeavoured to avoid such measures. Finally it was apparently on the *combination* of all these circumstances, and not solely on the failure to institute a prosecution, that the award was based, since the opinion concludes:

> „For the laxity thus shown by some Mexican officials in the prosecution of the crime committed, Mexico must be responsible under international law ...." [2]

The only point then, upon which an attack could have been based, is the Commission's thesis that a final sentence doing justice does not necessarily repair previous judicial faults. [3] Upon this point however, the decision is not challenged by Feller.

Lack of trial.

In the following cases it was decided that a Government was liable for denial of justice by reason of its failure to try properly someone who had committed a crime against a foreigner.

Four coloured American seamen in Tampico had been prevented from returning to their vessel by some Mexicans who pretended

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1) The Mexican Claims Commissions, p.153
2) II, p. 90.
3) See above pp. 186—188.

that another American had just complained of having been robbed by the negroes. Policemen were fetched, and one of them fired shots in the air to intimidate the negroes, who thereupon jumped into the water in order to escape, where they were shot and drowned. The District Judge, 18 months later, without even having heard the American who had been robbed, decided that there was no crime to be prosecuted. [1]).

In the *Swinney* case [2]) the tribunal held that there was „no reasonable doubt that the Mexican judicial authorities acted with a laches which must strike painfully not only those interested in the deceased men, but anyone who learns what happened." The Mexican authorities during the first weeks did not hear the American eye-witnesses, and then only did so on the strong and repeated insistance of American representatives. A request from the American Embassy to have the case brought to trial had no effect.

The dragging-out of the judicial proceedings for six years after the murderer had already been indicted by a jury, on the simple pretext that an eye-witness could not be produced, was held to amount to a denial of justice. [3])

In a case where the author of a mutilation, committed during a shooting party, after correct preliminary proceedings was released on bond and never put to trial, the Claims Commission said:

> „International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty. It is possible that in certain cases the police or judicial authorities might declare the innocence of a defendant without bringing him to trial in the fullest sense of the word. But if the data which exist in a case indicate the possible guilt of a defendant, even in the slightest degree, it cannot be understood why he is not tried to the extent of determining his responsibility." [4])

A failure to summon eye-witnesses of a murder „justified the conclusion that the appropriate authorities were wanting in proper discharge of their solemn duties". [5])

[1]) *Margeret Roper*, I, p. 205; *Mamie Brown*, I, p. 211; *Daisy Sanders and Rosetta Small*, I, p. 212.
[2]) I, p. 131.
[3]) *Salome Vda de Galvan*, I, p. 408.
[4]) *John D. Chase*. II, p. 19.
[5]) *Ethel Morton*, II, p. 151.

Nine Mexicans, arrested on suspicion of being implicated in the murder of an American, were released or permitted to escape within a few days, and were never reapprehended, although they had not been examined fully with reference to the crime. [1])

Lack of adequate sentence.

The Commission held that a so-called „denial of justice" was established where a Mexican court had treated the attempt of a deputy constable to kill an American consul as a mere disturbance of peace, fining him $ 5,–, and because the constable „was neither punished in any disclipinary way, nor warned that he would be discharged as soon as a thing of this type happened again." [2]) Mr. Ralston mentions this decision as an example of state responsibility for the actions of police officers. We do not see how such a classification can be defended in view of the opening words of the very paragraph of the opinion in which the above view appears, which read:

> „5. Direct responsibility of the United States for this first assault has not been alleged. Denial of justice is alleged, on the ground that the court treated an attempt to kill Mallén as a mere disturbance of the peace." [3])

Deciding upon the claim of *Georges Adams Kennedy* [4]), who became crippled as a result of a fight with, and provoked by a dismissed employee, the latter being sentenced to two months imprisonment, Commissioner McGregor with the approval of his colleagues, observed:

> „5. The second ground on which a denial of justice is based, is, that the sentence of two months' imprisonment imposed on Robles is out of proportion to the seriousness of his crime. This assertion seems justified. In fact, I think that the international duty which a state has duly to punish those who, within its territory, commit a crime against aliens, implies the obligation to impose on the criminal a penalty proportionate to his crime. To punish by imposing a penalty that does not correspond to the nature of the crime is half punishment or no punishment at all." [5])

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1) *Sarah Ann Gorham*, III, p. 132.
2) *Francisco Mallén*, I on p. 257.
3) I, p. 256.
4) I, p. 289.
5) I, p. 292.

Twelve and six years imprisonment respectively for a crime punishable capitally under the Penal Code (attack on train coupled with murder, committed by highwaymen) were equally considered inadequate punishment [1]), as well as a sentence of four years upon a Mexican officer who killed an American during the course of a dispute. [2])

The decision rendered in the *Sewell* case has given rise to the following objection on the part of Feller:

> „It is submitted, that an international tribunal should not undertake to interpret local laws for the purpose of determining any such question as adequacy of punishment." [3])

We do not think that this criticism is fully justified. It has been seen that a breach of the international duty to punish the offender of an alien may just as well consist of an omission to punish at all as of the imposition of an inadequate punishment. This principle is recognized by Feller himself [4]) with respect to the *Kennedy* case, just mentioned. Now the inadequacy of a punishment may be determined either according to the standard of civilized nations, or according to the domestic law of the country. It is evident, therefore, that for the purpose of determining whether the present punishment was adequate according to municipal law, the provisions of that law will have to be determined, and this may render it necessary to interpret those provisions.

Lack of execution of sentence. Amnesty.

It is a sound principle of international law that a demand for reparation may be based on a denial of justice even though a wrongdoer has properly been apprehended, tried and sentenced, where the criminal has not served his sentence. This rule was applied to several claims:

The escape of the murderer of an alien showed that the Government had not wholly fulfilled its international obligation to punish the wrongdoer. [5])

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[1]) *Lillian Greenlaw Sewell*, II, p. 112.
[2]) *Ethel Morton*, II, p. 151, see p. 159.
[3]) The Mexican Claims Commissions, p. 153.
[4]) Op cit. p. 153.
[5]) *Ida Robinson Smith Putnam*, I, p. 222.

In the *Massey* case, already quoted, where an assistant jail-keeper had permitted the murderer of an American subject to leave jail, Commissioner Nielsen, approved by his colleagues, held:

> „25. There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison." [1])

It will be remembered that in this case the Mexican Government sought to avoid liability on the ground that appropriate measures had been taken against the assistent jail-keeper.

It has equally been mentioned already that in the *Stephens* case an award was rendered *inter alia* because a Government officer had discharged the murderer of a foreigner from prison. [2])

Another escape of a criminal from prison was excused because it had taken place in the disturbance resulting from the approach of revolutionary forces, but the failure to reapprehend him afterwards, due to slackness, was not. [3])

The provisional release from jail of convicts sentenced to six years' imprisonment, after serving only two years of their sentence, was deemed to justify an award. [4])

A special form of failure to execute a sentence may reside in the grant of an *amnesty*. On an occasion when an amnesty act had been passed and interpreted by the President of Mexico in such a way as to cover a robbery and murder in which the victim was a United States subject, the Commission, by the voice of its President, said:

> „There would seem no doubt but that granting amnesty for a crime has the same effect, under international law, as not punishing such a crime, not executing the penalty, or pardoning the offense." [5])

It should be noted that in this particular case no prosecution whatsoever had yet been begun; in principle, however, amnesty, when amounting to a denial of justice, should be classed with lack of execution of a sentence.

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[1]) I, p. 236.
[2]) I, p. 397.
[3]) *Hazel M. Corcoran* II, p. 211.
[4]) *Lillian Greenlaw Sewell*, III, p. 112.
[5]) *F. R. West*, I, p. 405.

Facts insufficient to constitute denial of justice.

For the same reason for which we have mentioned the facts which were held to constitute a denial of justice, it seems desirable to set out here, in so far as they have not yet been noted in connection with other subjects, the facts which were held insufficient to impose liability for a „denial of justice".

We stated already that in the *Neer* case the Commission held that

> „there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand."
>
> 4. The Commission recognizes the difficulty of devising a general formula for determining *the boundary between an international delinquency of this type and an unsatisfactory use of power* included in national sovereignty." [1])

Accordingly the mere fact that in the early morning after the commission of a murder the authorities might have acted in a more vigorous and effective way than they did, was not a sufficient ground for an international award.

An „Alcalde" (Mexican judicial police officer), named Torres, indignant at not having been saluted with the respect due, by one Clarence Way, sent out two men to arrest Way, giving them a warrant that did not show any ground on the face of it, and putting a revolver into their hands with the order that they should arrest Way in whatever manner they found suitable. There was a fight and the men killed Way. The Alcalde was prosecuted and sentenced to the period of confinement he had already served since his arrest. It was argued for the United States

> „that the sentence of the court was not in accordance with the facts, and that it bears unmistakable evidence of intentional leniency towards him.
>
> It was argued that Torres was the instigator and actual author of the crime; that those who did the killing were merely his tools for the consequences of whose acts he must be considered to be responsible; that he should therefore have been punished for the crime of murder; and that the failure so to punish him resulted

[1]) I, pp. 72—73.

in a denial of justice for which the Government of Mexico is responsible." [1])

The Claims Commission however disallowed the claim, since Torres has been tried and sentenced in accordance with Mexican law. [2])

The mere fact that local authorities were dilatory in taking steps, and especially that the police officer did not arrive at the scene of the crime until 11 a.m. although he had immediately been notified about the murder which took place at 7.15 a.m., was not sufficient to establish an international delinquency. [3]) Nor is the mere failure to have suspected persons shadowed for the purpose of obtaining evidence of guilt. [4])

An American engineer, found dead on a track motorcar was thought to have been stoned. Soldiers, sent out along the track, found two men named Ruelas and Flores, who ran away on their approach, and who had been seen by two boys throwing stones at the engineer. Ruelas was subsequently arrested, but soon released, because medical experts stated that heart failure had been the cause of the death, although they added that this might have been caused by one of the wounds found on the body. Flores was never arrested, and the boys were never heard. Dr. Sindballe, as President, said for the Commission:

„The Commission is not called upon to decide whether the conclusion thus arrived at by the Mexican authorities is right or wrong. At any rate, it is not so clearly wrong that a denial of justice can be predicated thereon. Neither can it be said that the failure to bring Ruelas to trial constituted a denial of justice. It would seem that, with the exception of Flores' testimony, the authorities had such evidence of importance as might be expected to be available. The report of the medical expert tended to exculpate Ruelas. That the latter had fled and hid and afterwards tried to establish an alibi could hardly be conclusive against him, especially in view of the fact that he, who was only 18 years of age, was pursued and shot at by soldiers." [5])

The Commissioner for the United States agreed

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[1]) II, p. 99.
[2]) *William Way*, II, p. 94.
[3]) *Lottie Sevey*, II, p. 216.
[4]) *Adele Darden Blount*, II, p. 226.
[5]) II, p. 321.

„that the Commission is not called upon to decide whether this conclusion is right or wrong .... But of course we are called upon to determine whether or not the action of the local Mexican authorities in this case was right or wrong." [1])

And from the whole of the facts he concludes that the action was insufficient. Whether his conclusion was right or wrong, it seems to us that the standard adopted in this case [2]) by the Presiding Commissioner was not nearly as strict as that which would have been applied by his predecessor.

The acquittal of two persons who, while at target practice, hit a man on a passing ship, it being uncertain whose shot it had been, does not amount to an international delinquency, even though proceedings were unduly delayed. Mr. Nielsen dissented [3]).

The failure to comply with a sentence absolving a murderer from criminal responsibility on account of mental alienation and ordering his confinement in a lunatic asylum, was held not to be an international delinquency. [4])

The Presiding Commissioner, Dr. Alfaro, wrote for the Commission:

„The international duty of Mexico was fulfilled with the apprehension and trial of the accused and any failure or omission subsequent to the sentence which exempted him from criminal responsibility, even in the event of its being fully proven, would not involve the Mexican nation in any international responsibility. Those failures or omissions do not constitute a denial of justice such as that which results from those cases wherein, there existing a failure or omission punishable by law, the authorities of a country refuse to comply with their own legal provisions as interpreted by the courts." [5])

This decision confirms that not *every* failure on the part of a State to give effect to a decision of its courts necessarily renders a State internationally liable.

As to the failure to take the testimony of available witnesses, it was said:

„That omission certainly would have been serious in its effect on the international responsibility of the Government of Mexico,

1) II, p. 322.
2) *Mary N. Hall*, II, p. 318.
3) *Louis B. Gordon*, III, p. 50.
4) *Jane Joynt Davies*, III, p. 146.
5) III, p. 149.

if it had been established that the testimony of such persons was so important and decisive that its lack would have caused the failure of the investigation." [1])

Here again we find an application of the rule, stated above, that not *every* little fault justifies an international claim.

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[1]) *Sophie B. Sturtevant*, III p. 169.

CHAPTER XI

INTERNATIONAL DELINQUENCY (*continued*)

WRONGFUL TREATMENT SUFFERED AT THE HANDS OF JUDICIAL AND POLICE OFFICIALS.

Many were the claims brought before the Commission based on wrongful arrest or detention, imprisonment for an unwarranted period, maltreatment during detention, or on some other forms of unlawful treatment suffered by an alien at the hands of judicial authorities and those acting under their orders. It should be kept in mind that the category now to be dealt with could be brought within the term ,,denial of justice" in the larger sense, accepted by some authors; even under our limited conception, explained in the previous chapter, most of the acts in question could be held to constitute a denial of justice in its original meaning, particularly those consisting of a refusal of certain fundamental rights to an arrested alien.

It may be noted that in all the opinions upon these questions the term ,,denial of justice" is used but once. [1]) Most of these cases have been decided on the basis of the circumstances accompanying the treatment complained of. It would take too long and would be of little assistance to explain in detail the facts of each claim. Accordingly we shall mention only the considerations of general interest and the facts of the more important decisions. Most of the cases depended upon one or more of the following complaints:

arrest without sufficient ground;
excessive period of detention;
failure on the part of authorities to inform the arrested foreigner of the grounds of the charge or suspicion existing against him;

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[1]) *Walter McCurdy*, II, p. 139.

refusal to permit the accused to communicate with his consul or other persons;
bad treatment during dentention.

We shall deal with the decisions of the Commission under these heads. [1])

Illegal arrest

In all its opinions the Commission based itself on the rule of international law that the *arrest of a foreign subject without sufficient ground, i.e. without probable cause, constitutes an internationally wrongful act on the part of the arresting state.* Whether in any given case reasonable grounds justified the arrest is of course a matter of appreciation of facts and of determination of local law.

Several times [2]) the Commission concluded that, where there was no convincing proof of absence of sufficient cause, no award could be rendered on this ground. It is obvious that in so doing the Commission accepted the view *that it is not the task of the respondent Government to prove the existence of a probable cause, but that it is incumbent upon the claimant Government to prove its absence*; in other words the Commission in practice started from a *presumption of lawfulness of the arrest.* It is remarkable that the Commission itself did not seem to realize that it was doing so; in relation to the claim of *Walter H. Faulkner* [3]) it says:

> „The Commission does not need any theory about presumption of lawfulness of governmental acts to hold, that in the matter of justification of an arrest the mere statement of the person who suffered the arrest cannot be deemed sufficient." [4])

As to what circumstances may justify an arrest the following opinions were rendered:

The causing of a railway accident being punishable under Mexican law, the arrest of a train engineer suspected of being responsible for a train collision was not illegal. [5])

The claimant *Chattin* [6]) having been arrested on a charge of

[1]) With regard to these items cf. Eustathiadès, La responsabilité internationale de l'Etat pour les actes des organes judiciaires, pp. 152—179.
[2]) *Walter Faulkner*, I, p. 86; *Russell Strother*, I, p. 392; *Peter Koch*, II, p. 119.
[3]) I, p. 86.
[4]) I, p. 88.
[5]) *Mary Ann Turner*, I, p. 416.
[6]) I, p. 422.

fraudulent sale of railroad tickets, the charge being merely based on the accusation of another suspect, it was decided that

> „a statement, insufficient as evidence for a conviction, can under Mexican law (as under the laws of many other countries) furnish a wholly sufficient basis for an arrest and formal imprisonment." [1]

Another claimant [2], having been arrested on a charge of making seditious proposals to a Mexican lieutenant, the Commission agreed

> „that the Mexican authorities who brought about his arrest had sufficient cause, required by international law, as there were grounded suspicions that the claimant was committing a crime for which Mexican law provides a penalty." [3]

An American, of whom even the American consul thought that he would probably be convicted, and whose imprisonment was confirmed by a higher court, was not considered to have been arrested without probable cause [4]. Nor was a claimant against whom several charges were preferred and supported by witnesses.[5]

Violation of a Mexican judge's order prohibiting the removal of lumber, constituted sufficient ground for an arrest. [6] So did the procuring of a revolver for a murderer. [7]

On the other hand an arrest without a written order of the competent authority, setting forth the grounds for the arrest, as required by Mexican law, was considered illegal. [8]

Excessive period of detention pending criminal proceedings.

On this point the opinions were generally based upon the principle expressed in the *Roberts* case [9]:

> „.... it is necessary to consider whether the proceedings instituted against Roberts while he was incarcerated exceeded reasonable limits within which an alien charged with crime may be held in custody pending the investigation of the charge against him. Clearly there is no definite standard prescribed by international

1) I, p. 425.
2) *Jacob Kaiser*, II, p. 80.
3) II, p. 82.
4) *Peter Koch*, II, p. 119.
5) *Clyde Dyches*, II, p. 196.
6) *Oscar Franke*, III, p. 73.
7) *Joseph Farrell*, III, p. 157.
8) *L. J. Kalklosch*, II, p. 126.
9) I, p. 100.

law by which such limits may be fixed. *Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case.*" [1])

In accordance with this idea it was decided in the *Roberts* and in some other cases [2]) that the exceeding of the maximum period allowed by the law of the country where the arrest was effected, is illegal.

In the last of these cases, the majority opinion, after having determined that the claimant was unlawfully detained according to Mexican law for a period of five days, repeats that

„International law sets no time limit for the detention of an accused before being formally remitted to the Judicial Authorities; *each case must be considered on its merits bearing in mind the lofty principle of respect for the personal liberty* of the individual." [3])

Commissioner Nielsen added a personal opinion which takes a slightly different view:

„Of course international law does not fix the period for the detention of an accused person prior to his being given a hearing before a judge, since international law does not prescribe for the nations of the world any code of rules for the administration of criminal jurisprudence. But this Commission and other international tribunals have repeatedly awarded damages for illegal detention or excessive periods of imprisonment. *International law does,* generally speaking, *require that an alien be given equality before the law with citizens,* and equality is secured to aliens by the fundamental law of Mexico and of the United States. *It is therefore of course pertinent in any given case of a complaint of unlawful detention to take account of provisions of local law.*" [4])

There seems to be a slight difference between the three last quoted statements: whereas the first considers an examination of local law to be *useful,* the second does not mention that standard at all, and the third seems to consider it as the only test. But the second statement although not mentioning explicitly the examination of local law, does not exclude it either; and it may

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[1]) I, p. 103.
[2]) *Mary Ann Turner,* I, p. 416; *Clyde Dyches,* II, p. 195; *Louis Chazen,* III, p. 25.
[3]) III, p. 26.
[4]) III, p. 34.

be taken that the words of the American judge give a more far-reaching impression than they were meant to do, since he was careful to say „generally speaking", which makes allowance for exceptions. Anyhow there can be no doubt, in view of the general standards for the determination of international delinquencies set out in chapter IX, that it is the first mentioned opinion — which is in addition signed by all three Commissioners — which expresses the right principle: *examination of local law may be useful, but it is not the ultimate test.* That respect for the legal period of municipal law is not necessarily conclusive in international law appears clearly from some other cases: in one the Commission held that the general unsettledness existing at the time excused a detention beyond the period allowed for detention without a regular hearing [1]), and in another case *a detention was declared to have been unreasonably long although it did not exceed the limit of time prescribed by municipal law.* [2])

In the second case Dr. Sindballe wrote for the Commission:

> „It is argued by Counsel for Mexico that the time-limit fixed by Mexican law has not been exceeded. But this argument cannot be conclusive, *since the meaning of provisions fixing a time-limit for the duration of a detention is to establish a guarantee for the accused, but not to authorize detention during the maximum period of time in any case, even in the smallest.*" [3])

Failure to inform prisoner of reason for arrest; refusal to permit communication with other persons

The Commission held:

that there could be no excuse for unnecessary harshness in failing to inform the claimant, when arrested, of the nature of his case [4]);

that the allegation that the claimant was not permitted for several days to communicate with his consul, if proven, would have weight in determining the responsibility of the respondent Government; [5])

that failure to inform an accused alien of the charge proferred

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[1]) *Walter H. Faulkner*, I, p. 90.
[2]) *Peter Koch*, II, p. 118.
[3]) II, p. 120.
[4]) *Walter H. Faulkner*, I, p. 90.
[5]) *Walter H. Faulkner*, I, p. 90.

against him constitutes a defective administration of justice amounting to an international delinquency [1]);

„that the keeping of the claimant „incommunicado" and uninformed of the purpose of his detention constitutes a maltreatment and a hardship unwarranted by the purpose of the arrest"[2]). It should be noted with regard to the last decision that the word maltreatment was used here in a very improper sense, it being generally limited to harsh physical or mental treatment apart from the question of violation of legal provisions.

Another time a certain *Joseph Farrel* [3]) had been held 'incommunicado', i. e. he had been refused all communication with persons outside the prison; this was permitted by Mexican law. The American Agency asserted that the Mexican law which permitted 'incommunicacion' for such a long period „is below the required standards with respect to the treatment to be accorded to aliens subjected to prosecution", and he insisted that such treatment deprives the accused of the right of defence. But the opinion of Mr. McGregor, in which his colleagues concurred, decided:

> „The Commission is not prepared to state that a law which permits the ‚incomunicación' of an accused in a manner implying neither cruelty nor interference with the right of defense, is in violation of international law. The ‚incomunicación' permitted by the Code of Criminal Procedure of Zacatecas, (Article 340) must take place in such a manner as not to prevent the giving to the person so held all the assistance compatible with the object of that measure; the person held ‚incomunicado' may speak to other persons or communicate with them in writing, in the discretion of the Judge, provided that the conversation takes place in the presence of this official or that the letters be sent through him unsealed. Under these conditions, and if it does not totally prevent the accused from having an attorney to defend him, „incomunicación' does not imply a violation of international law."[4])

Ill treatment

Complaints of mistreatment were made very frequently, but were rarely accepted. On most of these occasions the treatment

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1) *B. E. Chattin*, I, p. 433.
2) *Daniel Dillon*, II, p. 63.
3) III, p. 157.
4) III, p. 161.

complained of was not sufficiently proven, being evidenced solely by the statements of the claimants themselves. As to the cases where the facts were convincingly established, the Commission in the *Roberts* case [1]) clearly expressed the rule to be applied.

It will be seen here too that in order to decide whether the treatment of an arrested foreigner constitutes an international delinquency, the Commission recurs to the principle that *such treatment should be put to the test of international standards*:

> „It was stated by the Agency that Roberts was accorded the same treatment as that given to all other persons.... Facts with respect to equality of treatment of aliens and nationals *may be important* in determining the merits of a complaint of mistreatment of an alien. *But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.*" [2])

In that case the facts, *inter alia*, that the claimant was put in a small room where at times thirty or fourty men were thrown together, and where no sanitary accomodations were found, all the prisoners depositing their excrement in a barrel in the corner of the room, were deemed „to warrant an indemnity on the ground of cruel and inhumane imprisonment". Another time „detention under intolerable circumstances of indignity and inconvenience" was considered to constitute a treatment of apparent international insufficiency, for which Mexico was liable.[3]) But the Commission did not see fit to base an award upon the facts that an arrested man had been compelled to walk 28 kilometers in 5 hours, in the rain, without food and drink, and had then been confined for an hour in a pen with goats and cows, after which he was released, being then obliged to walk another two miles to the nearest railroad station. [4]) Commissioner Nielsen dissented, considering that this treatment did justify an award. [5])

Other forms

In the *Chattin* case [6]), quoted before, van Vollenhoven, with

[1]) I, p. 100.
[2]) I, p. 105.
[3]) *Walter H. Faulkner*, I, p. 91.
[4]) *Oscar Frank*, III, p. 73.
[5]) III, 81.
[6]) I, p. 422.

most of whose points Commissioner Nielsen agreed, decided that the following deficiencies amounted to a „defective administration of justice":

consolidation of proceedings, but only as against persons who would have been prejudiced by the consolidation;

undue delay in the course of proceedings;

failure to inform the accused of the charge;

failure to confront the accused with witnesses;

the fact that hearings in open court lasted only five minutes;

continued absence of seriousness on the part of the Court.

Commissioner for Mexico however denied the responsibility upon these grounds; most of them he did not think sufficiently sustained by the facts, and the first he considered fundamentally wrong. On this point he remarked:

> „A consolidation cannot, in general, cause irreparable damage to the defendants; although the most advanced action has to wait for the more backward actions to mature, nevertheless the legal provisions which oblige the Judge to terminate the preliminary investigation (instrucción) of the cases within a definite period of time (five months in this case) remain in force; so that it is not evident that the consolidation could have prejudiced (in the international sense of the term) any of the defendants in this case.... I am of the opinion that a judicial decision of a sovereign State cannot be attacked by another State before an arbitral tribunal, because domestic precepts regarding consolidation may have been violated, as such internal violations cannot constitute a violation of international law or result in damage clearly shown to have been suffered by citizens of the claimant government." [1]

The facts of the *Venable* case were very complicated [2]. The main point under discussion, however, was whether the Mexican courts committed a denial of justice („defective administration of justice") by refusing to release four locomotive engines, attached on account of a bankruptcy, but not belonging to the bankrupt, on the ground that the request for release was made by the *lessee* and not by the *owner*, the Mexican Commercial Code stipulating that property not belonging to the bankrupt should be returned to its *owner*. Van Vollenhoven came to the conclusion that there has been a misuse of legal prescriptions, but not a sufficient degree of „defective administration of justice" to

[1] I, p. 453.
[2] I, p. 331.

constitute an international delinquency [1]).The Commissioner for the United States however held, with much reason, it seems to us, that a denial of justice was constituted by the attachment on the part of a Mexican court of four locomotives, valuing together $ 200.000.–, for a debt of hardly $ 900,–, taken in conjunction with the subsequent refusal to release the locomotives on the pretext that they had not been applied for by the owner himself; this notwithstanding the fact that the engines clearly and admittedly did not belong to the bankrupt debtor, and were only in his use, on account of a contract with the lessee of the engines, who in his turn was responsible for them to the owner.

It has been stated in Chapter II [2]) that in the *Parrish* case [3]), a Mexican district judge was alleged to have tried an American citizen without being competent to do so, because the felony with which the latter was charged had not been committed within the judge's district. With respect to this point Commissioner McGregor in his dissenting opinion remarked:

> „At any rate, as stated above, the question of jurisdiction can not cause damage to an accused except in very special and definite cases, as, for example, when the accused is tried by a military tribunal instead of a civil tribunal; consequently, a violation in this matter can not carry international liability." [4])

It has been stated in Chapter IX that an act departing from municipal law may nothwithstanding this departure be unobjectionable under international law, but that on the other hand an act may by the mere fact that it is at variance with municipal law be wrongful under international law, viz. when it constitutes a discrimination to the detriment of a foreigner. There seems to be no reason why this should not apply to the jurisdiction of a national judge: when a foreigner has been tried by a tribunal which was not competent to do so, this fact *may* — although it will not often — constitute a discrimination to the detriment of that foreigner, and therefore an international delinquency. Hence the statement of the Mexican Commissioner seems sound, if it is understood as saying that *practically* a violation of domestic law with regard to jurisdiction will seldom cause damage to an alien,

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[1]) I, p. 342.
[2]) Vide supra, p. 28.
[3]) I, p. 473.
[4]) I, p. 480.

but that all the same in certain circumstances it may do so, and therefore carry international liability. However, if this was the meaning of the Mexican lawyer's statement its final words are somewhat to broadly phrased.

Judging the claim of *Walter J. N. Mc Curdy* [1]) who complained, *inter alia*, of a denial of justice through the failure of the Mexican courts to try promptly an American, the Commission, apart from considering most of the allegations not sufficiently proven, expressed some general views upon the impropriety of admitting as interpreter one of the accusers in the same trial and of keeping in the safe the records of the proceedings that should have been public according to municipal law.

> ,,The Commission is surprised by the act of the Judge accepting Miles as interpreter even though presented, as he was, by two of the parties in the proceedings, but does not consider such act of the Judge as seriously defective. It also bears in mind that when the Judge himself had to name an interpreter he appointed persons not interested in the cases referred to.
>
> The American Agency also contends that after McCurdy's attorney had been appointed, the Judge ordered that the records be kept in the safe of the Court, disregarding the disposition of the Mexican Constitution providing that all proceedings must be public. .... the Commission conceives that there may be periods in a proceeding during which the records cannot be delivered to the public, even if they are at the disposal of the interested parties; such action would not be contrary to international law, especially, bearing in mind that several countries follow in matter of criminal procedure, the so-called inquisitorial or secret method such as was established in the State of Sonora, no one having ever pretended to consider such procedure as below the normal standards of civilization." [2])

A few claims were based on still other complaints, which were disposed of as follows:

the Mexican authorities, in preventing an American citizen, even when seriously ill, from leaving his ship, when it was commandeered by the Mexican Government, dit not commit an unwarranted arrest and detention, nor maltreatment. [3])

the refusal to release a claimant on bond cannot be said to be an international delinquency [4]).

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[1]) II, p. 137.
[2]) II, p.p. 145—146.
[3]) *Leonard Adler*, I, p. 97.
[4]) *Peter Koch*, II, 119.

CHAPTER XII

INTERNATIONAL DELINQUENCY (*continued*)

LACK OF PROTECTION

Standards to be applied

A good many claims were based upon the failure of a Government to fulfil its international obligation to protect foreign persons and their goods, that failure having caused damage to a subject of the claimant State. Such failure may evidently consist in a lack of protection against revolutionists as well as against criminals and bandits. The first category has been dealt with in the chapter concerning the responsibility for acts of revolutionary forces. But since the principles according to which the lack of protection should be judged are the same in both categories, it will be useful to quote here a pronouncement in the case of *G. L. Solis* [1]) though this was actually concerned with lack of protection against revolutionaries:

> *„It will be seen that in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so.* Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection." [2])

This statement is supported by former international decisions.[3])

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[1]) II, p. 48.

[2]) II, p. 53.

[3]) E.g. the opinion of Commissioner Palacio of the United States-Mexican Claims Commission of 1868 in the *Pratz* case, and the opinion of Umpire Thornton of the same Commission in the *Robinson* case; cf. Dunn, The Diplomatic Protection of Americans in Mexico, p. 282.

It appears, however, from a later judgement that the capacity to give protection should only be taken into account to a certain extent, and that the impossibility to do so should not be conclusive as to non-liability. When an American had been murdered in a locality where a condition of complete lawlessness existed, the authorities being unable to suppress this because part of the troops had been withdrawn for military operations elsewhere, the tribunal remarked:

> „The Commission has taken account of such matters in considering the subject of the capacity to give protection. *But there are of course limits to the extent to which they can justify a failure effectively to deal with lawlessness.* And conditions such as it appears existed in this region may also reveal both the necessity for urgent measures as well as a censurable failure of efforts on the part of authorities to deal with lawlessness." [1])

Effect of a special request for protection

Several times it was contended on behalf of Mexico that a third condition should be fulfilled before an idemnity for lack of protection can be granted: a *request for protection* must have been made to the authorities. The Commission seems to have accepted this condition twice:

George Adams Kennedy, [2]) assistant manager of a mine in Mexico, who was having difficulties with his employees, and expected a strike, twice sent a message to the Municipal President to ask for protection, which was not given. A riot started, in which Kennedy was seriously wounded. Nevertheless the Commission did not deem it proper to base an award on these facts, because the first demand for protection was „not such as to require the authorities to take extraordinary measures", and it was not certain whether the second, more urgent request, reached the President.

Another time two American employees at a Mexican mine were approached one afternoon by a Mexican labourer, who asked for an increase in wages. Upon their refusal he shot both of them. Counsel for the United States alleged that this double murder was the climax of a whole series of disorders at the mine, which proved a lack of protection. Dr. Sindballe however disallowed the

[1]) *Mrs. Elmer Elsworth Mead,* III, p. 152.
[2]) I, p. 189.

claim *because no previous request for protection had been made,* and because satisfactory protective measures were taken afterwards. Commissioner Nielsen, although agreeing that there was no liability, with good reason attacked the arguments of the Presiding Commissioner:

> „*In my opinion the fact that a request for protection is not revealed in the record of a case involving a complaint of lack of protection can have no important bearing on the merits of such a complaint under international law.* The fact that a request for protection has not been made does not relieve the authorities of a government from protecting inhabitants. Protection is a function of a State, and the discharge of that function should not be contingent on requests of the members of a community. On the other hand, *in determining whether adequate protection has been afforded in a given case, evidence of a request for protection may be very pertinent in showing on the one hand that there was necessity for protection and on the other hand that warning of possible injury was given to the authorities.* Of course such warning may also come in other ways as through information with respect to illegal acts." [1])

The same Commissioner explained his view more fully in the case of *Mrs. Elmer Elsworth Mead* [2]), where he delivered the decision of the tribunal:

> „The subject of requests for protection was discussed by counsel on each side. It was said in the Mexican Brief that evidence was not produced on the point whether protection was demanded. In normal conditions, in the absence of untoward occurences or unusual situations giving indication of possible illegal acts prompting precautionary measures for the prevention of such acts, requests of aliens to authorities for protection may obviously be very important evidence of warning as to the need of such measures. But the protection of a community through the exercise of proper police measures is of course a function of authorities of a State and not of persons having no official functions. The discharge of duties of this nature should not be contingent on requests of members of the community. And obviously *the fact that requests for protection are not made in a given case does not relieve authorities from their solemn responsibilities. In the determination of questions of international responsibility, evidence in relation to requests for protection has a bearing merely on matters pertaining to the need for protection and the warning conveyed by such requests.*
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> It would seem that the conditions existing in the locality in

[1]) II, p. 210; *F. M. Smith.*
[2]) III, p. 150.

> which the mines were located, and particularly the robbery committed in September 1923, may reasonably be considered as warning as to the need of protection, not only for the physical properties but for persons employed in the mines." [1])

We fully agree with Mr. Nielsen's remarks. The absence of a previous request for protection should never *by itself* be accepted as an excuse for the failure to protect a foreigner. It is an excuse only if, as in the first two cases just mentioned, circumstances were such that the authorities, but for a special request, would have no sufficient reason to take special measures. But in those cases it is the apparent *normality of the conditions*, requiring but the normal and ordinary measure of protection, and not the *absence of a demand* that justifies the conduct of the respondent State. For as soon as the circumstances surrounding and preceding the events on which the claim is based were abnormal, the absence of a special request is no longer an excuse. Therefore it is a fallacy to say that a preceding special request for protection is a *condition* for international liability on account of lack of protection. This is not stated sufficiently clearly in the opinions quoted.

In conclusion we may express the view here taken in this rule: *with regard to an allegation of lack of protection the presence of a special request for protection may be an aggravating circumstance* [2]), *its absence can never in itself be a sufficient excuse.*

But this does not imply that there is no third condition at all. As we saw, the real reason for disallowing a claim is never the absence of a request, but the normality of the local conditions; in other words: the fact that conditions did not require any extraordinary precautionary measures.

So in order to obtain a standard applicable to all cases of lack of protection, we should like to add to the two elements previously mentioned — ability to give protection, and want of diligence to do so — a third: *circumstances must have made it possible to foresee that special protection would be required. A request for protection*

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[1]) III, pp. 152—153.

[2]) „The claimants, as far as the evidence shows, never made any appeal to the Government for protection, as it was their right to do if they desired to obtain it, and although such appeal if made, might have had an important effect upon the question of liability." Cases of *Revesno*, *Bignosco*, *Stiz*, *Marchiero* and *Fanti*, Ralston, Venezuelan Arbitrations of 1903, p. 753.

may serve as an element contributing to the constitution of such circumstances.

That this third condition for an indemnity based on lack of protection was not especially mentioned in the *Solis* opinion is quite comprehensible: that judgement dealt with revolutionary disturbances, and in such cases the third condition is always fulfilled; it is automatically implied in the facts constituting the basis of the claim.

Later on one opinion has been rendered in which all three conditions were explicitly mentioned [1]:

An American having been killed by bandits in a hold-up of a money transport in the Tampico oil region, the United States complained of a lack of protection, on the ground that robberies and assaults had frequently been committed in that region, and the Mexican Government had failed to take proper measures. But the tribunal held that:

> „The mere fact that in a certain nation or specific region thereof a high coefficient of criminality may exist, is no proof, by itself, that the government of such nation has failed in its duty of maintaining an adequate police force for the prosecution and punishment of criminals. *In cases of this nature it is necessary to consider the possibility of imparting protection, the extent to which protection is required, and the neglect to afford protection,* and evidence as regards these elements is altogether lacking in the case under consideration." [2]

Special protection due to foreign consuls

The Commission twice touched upon the question of the degree of protection a consul is entitled to receive. Both times it took the view that, although consuls do not enjoy diplomatic immunities, or special prerogatives in comparison with other foreigners, they do have a right to ask that special care should be taken as to their safety, if that is in danger.

Francisco Mallén, [3] a Mexican consul in Texas, U.S.A., about whom something more will be said in the next paragraph, had twice been assaulted and mistreated by an American deputy

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[1] *Elvira Almaguer*, II, p. 291.
[2] II, p. 294.
[3] I, p. 254.

constable. In view of his official status the question was raised (Paragraph 6):

> „whether consuls are entitled to a ,,special protection" for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if ,,special protection" means that in executing the laws of the country, especially those concerning police and penal law, the government should realize that foreign governments are sensitive regarding the treatment accorded their representatives, and that therefore the Government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. Many penal codes contain special provisions regarding special felonies committed as against foreign diplomats; nobody will contend that such provisions exhaust the care which the Government of their residence is bound to observe regarding their security and welfare. In this sense one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a ,,special protection" should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been." [1])

And in his paragraph 14 the Presiding Commissioner continued:

> ,While recognizing that an amount should be added as satisfaction for indignity suffered, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries where their position approaches that of the diplomat. The Permanent Court of Arbitration at the Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned ,,the prestige of the consular authority" or ,,the consular prestige", but especially with reference to conditions in Morocco as they were before France established its protectorate." [2])

The last sentences are not quite clear, but it may be taken that van Vollenhoven meant to indicate that in a case such as the

[1]) I, pp. 257—258.
[2]) I, p. 264.

present one,where the national prestige was not injured, nor did the consul hold a position which, in the particular circumstances, required special respect, *the official capacity of the victim should not be permitted to influence the amount of the award.*

The Commissioner for the United States shared this view only up to a certain point, as appears from the last sentence of the following paragraph of his separate opinion:

> „A consular officer occupies a position of dignity and honor, and there are several recorded precedents revealing emphatic action taken by Governments to obtain redress for indignities or physical injuries inflicted upon consular officers in the countries of their residence. Diplomatic officers are accorded under international law certain privileges and immunities which do not extend to consular officers, and we find incorporated into domestic legislation provisions designed to carry out the obligations of international law with respect to matters of this kind. I think that international law undoubtedly secures to a consular officer the right to perform his functions without improper interference. And it would seem that, in a case in which his personal safety is threatened, authorities of the country of his residence may well be expected to take especial precaution to afford him protection. It is of course their duty to take proper steps for the protection of all aliens. But when indemnity is claimed before an international tribunal *solely as personal compensation to a consular officer who has been injured, I do not believe that a sum so large that it must properly be regarded as punitive damages or as redress for indignity to a nation can properly be awarded on the ground that the injured person is such an official.* Considerations that have prompted large demands of indemnity through diplomatic channels in connection with the adjustment of unfortunate incidents involving injuries to consular officers may clearly be of such a character that account may not be taken of them in connection with the determination of a claim such as that pending before the Commission.
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> *However, I do not intend to express the view that the fact that Mr. Mallén was a Consul may not be taken into consideration in determining the amount of indemnity to which he is entitled for the injury inflicted on him.*" [1]

The same judge repeated this view three years later in an opinion which was concurred in by both his then colleagues [2].

> „It seems clearly to be proper to take some account of the argument made with respect to the special position of a consular

[1] I, pp. 264—265.
[2] *William E. Chapman*, III, p. 121.

> officer. Consular officers do not enjoy immunities such as are accorded to diplomatic officers with respect to matters pertaining to exemption from judicial process and from taxation. But undoubtedly international law secures to them protection against improper interference with the performance of their functions. And it is well recognized that under international law and practice they have a right to communicate with local administrative authorities with respect to protection of their nationals. . . . . Assuredly a consul is privileged to communicate with such officials regarding the protection of himself and the property of his Government." [1])

Regarded broadly, the problem here is that of *the influence of the official status of the victim of an international delinquency upon the liability of the responsible government.* To obtain a clear view of this question it should be realized that in a case such as this the official character of the injured person *can influence the award to be rendered in three respects*: *Firstly because it may be that a consul has a right to special protection*; *secondly because his official status should be taken into account in weighing the personal moral indignity suffered*; *thirdly because the nation itself may have been injured in the person of its official.* The first point has a bearing upon the *degree of protection* due to consuls, i.e. upon the question whether they are entitled to more care than other foreigners or not; the second on the *indemnity payable to consuls* for their personal (moral) damage suffered through an international delinquency; the third on the *idemnity payable* for the indignity suffered *by the nation.* In other words: the official status of the consul can affect the answers to the following questions: *First*: *when* is there a lack of protection? *Second*: if that is the case, *what idemnity* should be paid to the *consul*? *Third:* what idemnity should be awarded to the *nation*?

That these three consequences are independent of each other is easily shown: It is quite possible for an idemnity to be awarded for indignity suffered by a consul and by his nation, without there being any question of a lack of protection, e.g. if the consul has been unexpectedly insulted. It is equally possible for an award to be rendered for an insult to the consul, taking account of his official character, without the nation's honour being involved; and equally the converse for conduct towards a consul to be

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[1]) III, p. 128.

deemed to amount to an injury to his nation, without constituting an injury to him personally.

It seems that the judges did not bear this distinction in mind, which resulted in their thinking that they disagreed where in reality they were speaking about different things.

As to the first point mentioned all the opinions quoted are unanimous to the effect that there may be circumstances in which a consul is sooner entitled to ask or expect precautionary measures than other foreigners.

As to the second point, we believe that this has been overlooked by van Vollenhoven. He was apparently aware of the difference between the question of „special protection" (first consequence) and the bearing of the victim's official position on the sum to be paid (second and third consequences), since he deals with those two points in different parts of his opinion (paragraph 6 and 14); but with respect to the latter he only expressed himself upon what we have called the third consequence, when he said that the indemnity should be raised by reason of the status of the victim *only* if the nation's honour was involved, or when circumstances were such that the consul's position approximated that of a diplomat. The Presiding Commissioner here apparently overlooked the second effect. Not so Commissioner Nielsen. This judge did not treat separately the problem of the „special protection" and that of the influence of the victim's status on the indemnity to be allowed. But with respect to the latter he did distinguish the third effect from the second, if not expressly, since his observations amount to this, that although the sum awarded should not be so high as to constitute a redress for the indignity suffered *by the nation* (third consequence), it should nevertheless be affected by the victim's official position (second consequence).

This would appear to be the right solution. There is no convincing reason why a consul should be personally indemnified for injury sustained by his nation in his person. But it is a general principle of national law, whenever redress for moral indignity is recognized — and there seems to be no reason why it should be different in international law — that in determining the amount, account should be taken not only of the financial circumstances, but also of the social standing of the victim. The consular capacity, we suggest, must undoubtedly form part of the latter.

Facts constituting a lack of protection.

The facts underlying the claim of *Thomas H. Youmans* [1]) will be explained elsewhere. On the basis of those facts a claim was made against Mexico not only on account of the participation of Mexican soldiers in the murder of Americans and the failure to punish those soldiers, but also because the soldiers failed to protect the foreigners. These allegations were held to constitute good causes of action.

> „It cannot properly be said that adequate protection is afforded to foreigners in a case in which the proper agencies of the law to afford protection participate in murder." [2])

An award on the same three points of complaint, including lack of protection, was rendered in the *Roper* case [3]).

The failure to dismiss a deputy constable after his assault upon a Mexican consul, and his re-appointment after a second, more dangerous assault, means a serious failure to protect a foreigner [4]).

Toberman, Mackay and Company [5]) claimed an indemnity from the Mexican Government for the value of hay damaged in a Mexican Custom House. Fernandez McGregor, on behalf of the Commission, disallowed the claim because international law does not oblige a State to take special care, as a private storage concern, of merchandise in its custom houses, and because Mexican law limits the period during which the customs may be liable for damage to one month, a period that had been amply exceeded.

Judge Nielsen comes to the same result, not, however, on the basis of Mexican law, but merely for lack of evidence. In principle, he thinks, Mexico might well have been held liable, regardless of the provisions of Mexican law, had a pronounced degree of negligence been made out:

> „I am not prepared to say that under the terms of the Convention of September 8, 1923, liability might not be fastened upon a government for the acts of its customs authorities in a case revealing negligence with respect to protection of imported commodities, particularly in a case that might reveal a purpose of making discrimination against an importer whose goods were damaged or destroyed." [6])

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[1]) I, p. 150.
[2]) I, p. 157.
[3]) I, p. 205.
[4]) *Francisco Mallén*, I, p. 254.
[5]) I, p. 306.
[6]) I, p. 310.

The claim of *J. J. Boyd* [1]), whose son was killed in Mexico by a party of bandits, was disallowed. Although it appeared that the nearest civil authority was established 50, and the nearest military garrison 70 miles away, these facts were not deemed sufficient to prove a lack of protection, since the district in question was very sparsely populated and no serious crimes had been committed there for a considerable time prior to the murder.

The fact that the Municipal President and some members of the Town Council took part in a meeting of labourers where the representatives of an American Company were forced to agree to shorter hours of work, and that in general the Municipal President took the side of the labourers, did not amount to a lack of protection, although afterwards one of the Americans was murdered by one of the labourers. [2])

The robbery of an American's house, just opposite a police station, shows a failure to protect foreign property. [3])

The American consul at Puerto Mexico one day informed three proper authorities of a threat made against all American consuls in Mexico, and requested adequate protection. His letters had no effect, and a few days later an attempt was made to murder him. Contrary to the Mexican Government's argument it was decided that there had been an explicit warning of immediate danger, which should have occasioned sufficient apprehension to necessitate the authorities taking special measures. Therefore there was a lack of protection, quite apart from the question of the official status of the consul. [4])

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[1]) II, p. 78.
[2]) *Lottie Sevey*, II, p. 216.
[3]) *Victor A. Ermerins*, II, p. 219.
[4]) *William E. Chapman*, III, p. 121.

CHAPTER XIII

INTERNATIONAL DELINQUENCY (*continued*)

OTHER KINDS OF INTERNATIONAL DELINQUENCIES

Reckless use of fire-arms

The Mexican-American tribunal several times expressed its disapproval of the frequent and reckless use made of firearms by officials in the region of the frontier between the two countries and always held the respondent Government responsible for death and damages resulting from it, on the ground that such reckless shooting was unlawful.

Walter Swinney, while engaged in a trapping expedition on the Rio Grande, was mistaken for a smuggler, and shot by a Mexican guard on duty on the Mexican bank of the river. The judgement which imposed liability upon Mexico was based on the following considerations:

> „It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe." [1]

Equally wrongful was the killing of a Mexican who was shot by American officers when swimming naked across the river. [2]

The majority of the Commission, by the voice of its President, explained its standard more fully in the case of *Garcia and Garza*[3],

[1] I, p. 133.
[2] *Guerrera Vda de Falcon*, I, p. 140.
[3] I, p. 163.

and put forward four conditions which must be satisfied before fire-arms may lawfully be used:

„4. The Commission makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life. The commission not only holds that there exists one, but also that it is necessary to state and acknowledge its existence because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard." [1])

„In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: a. the act of firing ,always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; b. it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood; c. it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; d. it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. [2]) In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms." [3])

A far less severe standard, however, was applied by the majority of the Commission under the Presidency of Dr. Sindballe. [4]) Four Americans, also engaged on a trapping expedition on the Rio Grande (where navigation is free), were ordered by a Mexican officer to halt and immediately after shot upon. The men leapt into the water and swam towards land, thereby losing their boats with all their contents This time the allegation of an illegal assault was rejected because it was not certain whether the soldiers shot into the air or upon the men, nor whether they shot without giving the men time to obey the order to approach. It would seem that Commissioner Nielsen was right

[1]) I, p. 165.
[2]) This standard seems to be approved by Borchard, A.J.I.L., 1927, p. 519.
[3]) I, p. 167.
[4]) *James H. McMahan*, II, p. 235.

in saying that this decision was at variance with other opinions of the Commission dealing with reckless shooting, particularly with that rendered in the *Garcia* case. Indeed we think that the behaviour of the Mexican officer clearly did not comply with the four requirements set forth in that judgment. Mr. Nielsen besides points out that in the *Swinney, Falcon, Garcia and Garza, Roper* and *Stephens* cases awards were rendered for unlawful shooting, although in all these cases there was some ground for suspicion, which here did not exist at all. He is equally right when he adds:

> „It is true that in former cases which I have cited loss of life resulted from use of firearms. Shooting that results in death or physical injury is a more serious offence than shooting which has no such fatal consequences. But shooting to be wrongful must not necessarily result in death. The unwarranted use of firearms is forbidden in order to prevent tragic occurrences." [1]

Finally it should be noted that the defence that the shots were only meant „to intimidate" was rejected in all the five opinions referred to above.

No international liability was held to lie where a policeman interfering with drunken seamen was attacked by them and then shot one. [2]

Responsibility of a Government for persons taken into its custody

It is an obvious and sound principle that a Government should answer under international law for persons it has officially taken into custody.

A young Mexican, *Alejo Quintanilla*, [3] suspected of having assaulted a young girl, was taken from his house by an American deputy sheriff in order to be transported by car to the county jail. The next day he was found dead by the roadside. He might have been murdered by the deputy sheriff, but many other explanations were equally possible. Still the United States were held responsible:

> „The most notable parallel in international law relates to war prisoners, hostages, and interned members of a belligerent army and navy. It would be going too far to pretend that a Government

[1] II, p. 248.
[2] *Alexander St. J. Corrie*, II, p. 133.
[3] I, p. 136.

> taking into its custody either war prisoners or hostages or interned soldiers is responsible for everything which may happen to them; but there can be no reasonable doubt that it may be called to account for them, that it is obligated to account for them, and that under international law it cannot exculpate itself by merely stating that it took these men into custody and that thereafter they have disappeared without leaving any trace. The Hague Conventions of 1907 are silent as to hostages; but as to war prisoners and persons assimilated to them (detained newspaper correspondents, etc.) they contain explicit provisions for the application of this principle (articles 13, 14, and 16 of the fourth Hague Convention of 1907); and the provisions of the fifth and thirteenth Conventions of 1907 concerning the treatment of interned army and navy men would be meaningless if the respective Governments were not obligated to account for the men they took into their custody. The case before this Commission is analogous. A foreigner is taken into custody by a State official. It would go too far to hold that the Government is liable for everything which may befall him. But it has to account for him. The Government can be held liable if it is proven that it has treated him cruelly, harshly, unlawfully; so much the more it is liable if it can say only that it took him into custody — either in jail or in some other place and form — and that it ignores what happened to him." [1])

In our opinion there is no need to have recourse to any parallel with war prisoners or the like to hold a Government responsible in circumstances such as these. It is sufficient to state that it is a general legal principle, recognized by all civilized nations, that anyone who has taken something into custody, is responsible for all that happens to it, whether by his own fault or through some other happening, unless he is able to prove in his defence that what happened, was impossible for him to foresee or to prevent. There is no reason why this rule should not apply to States in international law, since it impairs none of their sovereign rights and seems to be equally sound and obvious in their case as in the case of individuals.

The rule was elaborated in connection with *illegal* custody in the opinion rendered upon the claim of *Mary Ann Turner* [2]), whose husband died in prison after having been kept in arrest for two or three months longer than he should have been according to Mexican law. The Commission observed that

[1]) I, p. 138.
[2]) I, p. 416.

„Though there is no convincing proof that his death was caused by his treatment in prison, there can be no doubt but that, if at liberty, he would have been able to take better measures for restoring his health than he could do either in prison or in prison hospital. If having a man in custody obligates a Government to account for him, having a man in illegal custody doubtless renders a government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty." [1])

At first sight one might easily receive the impression from the opinion that the liability dealt with here is similar, or closely related to that resulting from illegal detention or maltreatment during detention. This, however, is a mistake. In the latter cases, dealt with in Chapter XI, there was always a complaint that the claimant had been illegally taken and held under arrest, or that he had suffered a certain form of treatment in prison; *the claim was based on wrongful acts the Government had committed itself*, through its officials. In this type of case, however, the claim is based neither on the wrongfulness of the detention, nor on a specific allegation of mistreatment, but simply on the principle that a State is responsible for what happens to the subject of another State it has taken into custody ; the claim is not directly based on some act attributable to the Government itself. *The liability on account of illegal detention and mistreatment is a liability for damage inflicted by the state's own wrongful acts, whereas that on account of taking into custody is a general liability, originating from a legal act of the state, but extending to all mishaps occurring during the custody, with the exception of those that it is established could not have been prevented.* That these two forms of liability are essentially different and independent of each other can easily be shown by the case we have just considered: the respondent Government could very well have been condemned on account of the illegal detention and maltreatment, *even if the claimant had not died.* In fact, in the judgement mistreatment *was* dealt with as a *separate* ground for liability, independent of the victim's death (paragraph 8). On the other hand it is quite imaginable that the claim would have been allowed, *even if the detention had not been longer than allowed by the law, and even if no mistreatment had been proven*, viz. if the respondent Government had not been able to establish convincingly some natural cause of death.

[1]) I, p. 420.

Responsibility of a Government for goods taken into its custody.

That a Government has to account for foreign goods which it has taken in charge, was admitted *in principle* in the *Nick Cibich* [1]) and *Venable* cases [2]).

In the first mentioned case the claimant had for a night been placed in a cell by the American police on account of his somewhat too alcoholic mood. The chief of police took charge of his money and locked it up, probably in a safe; but it was stolen during the night by a gang of bandits among whom where two defecting policemen. The Commission took the view that responsibility could only be imposed upon Mexico if the police had failed to take reasonable care in safeguarding the money. Since the circumstances did not justify such a conclusion, the claim was rejected. It might be deduced from this decision that the Commission here admitted by implication that a state *is* liable when its officials fail to take reasonable care of goods in their charge. This supposition is confirmed when notice is taken of a reference made to this decision in a later, somewhat analogous, case. [3]) The facts underlying that claim have been explained elsewhere. It is sufficient to quote here some words written by the same Presiding Commissioner who signed the *Cibich* decision:

> „21. There could have been no hesitation to answer in the affirmative (i.e. to hold Mexico liable-author) if the goods had been taken into custody by Mexican officials or other persons „acting for" Mexico. Then a direct responsibility of the government would have been involved. In paragraph 4 of its opinion in the *Nick Cibich* case the Commission held that Mexican police officers having taken a man's money into custody must account for it and would, apart from further complications, render Mexico liable if they did not." [4])

Bearing in mind that this was the principle underlying the *Cibich* opinion, we do not see any contradiction between this judgment and the award rendered in the *Quintanilla* case, as Feller does [5]). In that award which was cited in the preceding section, the United States were held liable because they could not offer any proper

[1]) I, p. 65.
[2]) I, p. 329.
[3]) *H. G. Venable*, I, p. 331.
[4]) I, p. 342.
[5]) The Mexican Claims Commissions, p. 142.

explanation of how a young Mexican taken into custody by an official and found dead the next morning had met his end. But even in that opinion it was emphasized that, although a Government has to account for a person taken into custody, it can by no means be held responsible for all that happens to him.

Confiscation.

The United Mexican States were held liable for illegal confiscation of foreign property on account of:

the seizure of a boat which was sent to enable a seriously wounded man to obtain medical assistance, no imperative necessity for the seizure being shown, and no compensation having been paid;[1])

the detention of two car-loads of wheat as security for the debts of a Mexican, continued even after the Court had been informed that an American, and not the debtor was in possession of the bills of lading; [2])

the seizure and subsequent destruction of a water pipe line four and a half miles long by order of the Mexican Government with the assistence of its soldiers [3]);

the seizure by Mexican soldiers of two boats with their contents, the owners of which had leapt into the water because of shooting by the soldiers [4]);

the confiscation of cords of wood by the fiscal agent of the State of Sonora, Mexico [5])

the confiscation and sale by auction, as a penalty for not complying with customs regulations, of a whole load of merchandise was considered illegal only as to 38 kilograms, for which claimant had a transportation permit [6]).

All these decisions are in conformity with the view taken by the majority of tribunals and writers, that confiscation of foreign property without reasonable indemnity constitutes a violation of the law of nations. [7]).

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[1]) *Bond Coleman*, II, p. 56, at p. 60.
[2]) *G. W. Mc. Near*, II, p.68.
[3]) *Melczer Mining Company*, II, p. 228.
[4]) Vide supra: „Reckless use of firearms" *James H. Mc Mahan*, II, at p. 242.
[5]) *Samuel Davies*, II, p. 282.
[6]) *Louis Chazen*, III, 20, see p. 32.
[7]) „There is a strong tendency to construe expropriation without idemnity as being contrary to the common law of nations, even though there should be no special convention on the subject",Maúrtua and Brown Scott,Responsibility of States for damage caused in their territory to the person or property of foreigners, p. 16.

CHAPTER XIV

CAUSATION AND INDIRECT DAMAGE

Causation

It was stated in Chapter VIII that a State is responsible for damage *caused* by its internationally wrongful acts, and that a certain link of causation between the act and the damage is a necessary factor.

The question is: how narrow a link? Nearly every act entails an almost endless chain of juridical consequences, all of which can in a certain sense be said to have been „caused" by the original act, in as much they would not have occurred without the original act (theory of the *conditio sine qua non*). It does not seem quite correct, therefore, to say, as Professor Salvioli does [1]) that there are damages which do, and such which do not entail an obligation to indemnify, the first being those which are a consequence of the wrongful act, the latter being those which are not. The question is rather this, that, since it is evidently impossible to hold a State, any more than an individual, responsible for *all* the consequences of its acts, some limitation must be applied to the requirement that the damage must have been „caused" by the illegal act of the State. In other words, a certain theory of causation must be adopted.

The consideration which immediately imposes itself in this respect is whether the responsibility should be limited to *direct damage*?

There has been a tendency, both in municipal and in international law, to establish such a limitation, and to refuse com-

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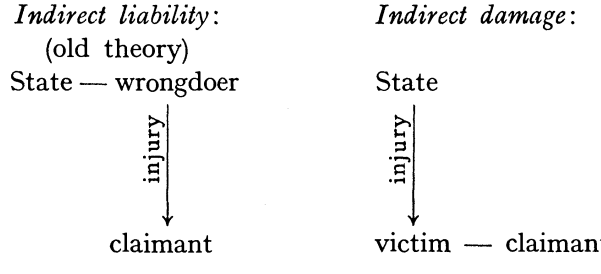
[1]) G. Salvioli: „La responsabilité des Etats et la Fixation des Dommages et Intérêts par les Tribunaux Internationaux", in Recueil des Cours de l'Académie de Droit International, 1929, III, p. 244.

pensation for so-called *indirect damage*. Hence the problem of *international responsibility for indirect damage* deserves profound examination, particularly as it is a problem which has been surrounded by much uncertainty and confusion.

It is desirable to draw attention to four preliminary points.

It should first of all be noted that, partly because of its name, partly because of one of the forms in which it may present itself, this problem may easily be confused with that of *international indirect responsibility for damage*. For indirect damage, as will presently be shown, may be suffered by someone other than the direct victim; there then exists, as in the case of so-called „indirect liability" (see Chapter VIII), a relation of liability between a State and two individuals. The difference is this: *indirect liability for damage*, as it was considered until recently, was liability imputed to a State for damage caused to the claimant by someone other than the defendant State; *liability for indirect damage* is liability imputed to a State for damage sustained by the claimant as a result of damage caused by the State itself, but to some other individual than the claimant. In the first case the State did not , according to the old conception, itself cause the damage: the *liability* was indirect; in the second case the claimant did not himself sustain the injury from the State: the *damage* is indirect. The difference may be expressed in this scheme:



In the second place it must be pointed out that considerable uncertainty has existed with respect to the word „indirect" in connection with damages; hardly ever has an attempt been made to adhere to one well-defined meaning. [1]) Hence there has been

[1]) To the same effect: Anzilotti „Cours de Droit International", p. 530; Dr. Anton Roth: „Schadenersatz für Verletzungen Privater bei Völkerrechtlichen Delikten", p. 45 and p. 70.

a well-marked tendency to term „indirect" all damage for which it was thought unfair to impose responsibility [1]). As a result of this practice the meaning of the word „indirect" was determined by the responsibility in each case: indirect damage started, where responsibility ceased. Thus the word „indirect" had no independent juridical meaning of its own and lost its significance. What lawyers really intended to say when they denied liability for such „indirect" damage, was, that the damage was too remote to justify liability, or, in other words , that there was no sufficient chain of causation between the wrongful act and the damage. But the question *when* the damage is too remote to impose liability, and *when* the link of causality is insufficient, was not answered by this arbitrary use of the word „indirect". The two questions: „is the damage indirect?" and „is the damage too remote to justify compensation?" are not identical, and must be kept well apart. It is of course possible to adopt the principle that a damage is too remote to justify compensation whenever it is indirect; but then the sense of the word „indirect" must be clearly and independently established. However, since apparently it has up till now been impossible to do this, it seems preferable to follow the suggestion of several writers [2]) and abandon entirely the confusing distinction between direct and indirect damage.

Our third remark relates to another misunderstanding which sometimes appears to exist in the minds of certain authors. André Hauriou, for instance, in an article on indirect damage in international arbitrations [3]) begins by saying that the question of indirect damages in international arbitrations only arises, when the question of the State's liability for the consequences of a certain act has been previously answered in the affirmative; in other words it would only affect the *extent* of the liability, i. e. the amount of the indemnity to be awarded. This seems too narrow a conception of the problem. The writer evidently has in mind only what will presently be termed „case I": indirect damage suffered by the direct victim itself. But the question of indirect damage may just as well determine the pri-

[1]) To the same effect; Anzilotti, op. cit. p. 532.

[2]) Anzilotti, Cours de Droit International, p. 533; Dr. Roth, op. cit. p. 71; Eagleton, Responsibility of States, p. 202.

[3]) A. Hariou: „Les dommages indirects dans les arbitrages internationaux", Revue Générale de Droit International Public, 1924, p. 203 *et seq.*

mary question whether there is any liability at all on the part of a State towards a certain person. It does so when there is no direct damage, as well as when the direct damage is suffered by someone other than the victim of the indirect damage (cases II, III, and IV).

This brings us to the fourth and most important preliminary remark.

Different forms of indirect damage.

It is of the utmost value for a clear understanding of this subject to realize something which has perhaps not been sufficiently present in the mind by authors and international tribunals when dealing with this matter, viz. *that indirect damage may in international law appear in four different forms, which can sharply be distinguished.* Notably Prof. Salvioli devotes only a short note in his article to „ the case that the remote damage is sustained by someone else than the first victim" [1]). We hope to show that this does not constitute *one* case, but three fundamentally different ones.

The four different cases which may present themselves are:[2])

I. The indirect damage is suffered by the direct victim.

II. The indirect damage is suffered by a different person of the same nationality as the direct victim.

III. The indirect damage is suffered by an alien of a nationality different from that of the alien who was the direct victim.

IV. The indirect damage is suffered by an alien, whereas the direct victim is a subject of the defendant State.

These four cases can perhaps be illustrated by the following schemes, in which the nationalities are represented by rectangles.

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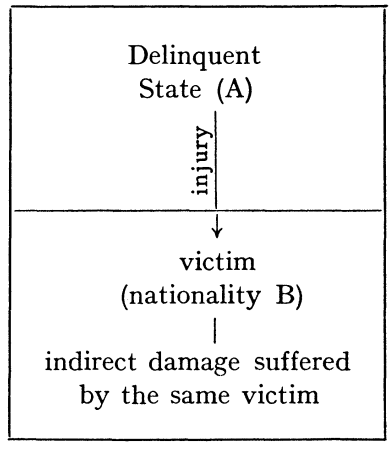
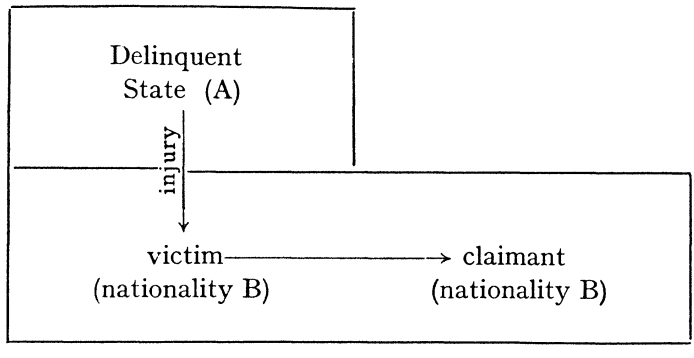
[1]) p. 251.

[2]) Strictly speaking a fifth form is imaginable: the direct victim is a „heimatlose". This form can be considered as involving the same consequences as case III,

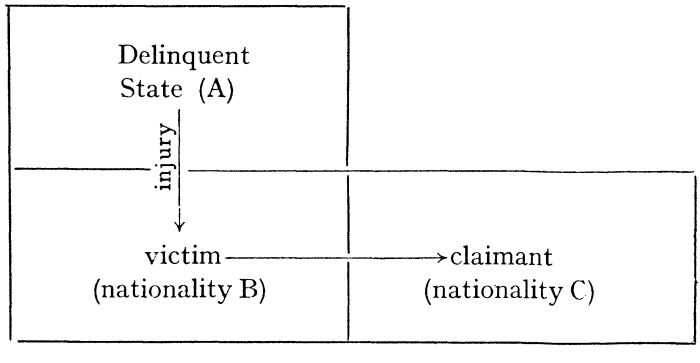
I.


Delinquent
State (A)
injury
victim
(nationality B)
indirect damage suffered
by the same victim

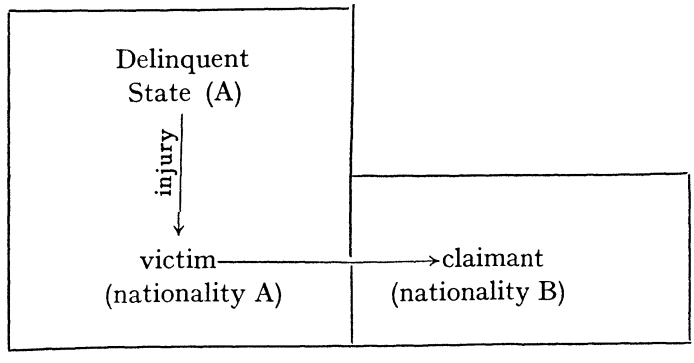
II.


Delinquent
State (A)
injury
victim
(nationality B)
claimant
(nationality B)

III.


Delinquent
State (A)
injury
victim
(nationality B)
claimant
(nationality C)

IV.



The question of the link of causality required appears in its purest form in case I. If a wrongful act of State A towards the direct victim is there established, its liability for the indirect damage is exclusively dependent upon the theory of causation adopted, whereas in cases II, III, and IV it is also dependent upon other issues, as will be seen presently. It results from this, firstly: that the theory of causation to be applied in international law can best be worked out by making use of cases of type I; secondly: that, if a certain general requirement of causality has been adopted, this does not imply that in all cases of type II, III or IV, in which the condition is fulfilled, liability will necessarily ensue.

It will be useful to bear in mind for the rest of this chapter the distinctions and principles here put forward.

Case I: Indirect damage suffered by the direct victim.

An example of the category of cases in which the direct victim himself suffered indirect damage is provided by the case of *Francisco Mallén* [1]) which we have already discussed several times. It will perhaps be remembered that compensation and satisfaction were awarded to this Mexican consul for an assault upon him by an American deputy constable. The question, however, was raised as to how far the consequences went for which the United States

[1]) I, p. 254.

should be held liable. The assault took place in October 1907, causing the claimant serious injuries for which he had to undergo medical treatment until November 12, 1907. No doubt the United States were liable for satisfaction for the suffering and compensation for its financial consequences during these two months. However, on February 2, 1908, Mallén had to enter a hospital and was operated for ailments which had subsequently disabled him. Evidently these did not constitute *direct* damage, since a considerable lapse of time, and a number of events, lay between the assault and the beginning of his later illness. The Commission came to the conclusion that there was no sufficient evidence to show that the ailments of February and their consequences were a result of what had happened the previous October. Had the tribunal limited itself to this statement, no objection could have been raised. But it added:

> „When accepting as the basis for an award, in so far as compensatory damages are concerned, the physical injuries inflicted upon Mallén on October 13, 1907, only those damages can be considered as losses or damages caused by Franco which are direct results of the occurrence." [1])

This sentence gives the impression that Professor van Vollenhoven meant to adhere to the rule often applied, that there can only be liability for the direct results of the illegal act. This impression is confirmed by the terms of a reference to this decision subsequently made by the same Commissioner [2]):

> „It is clear, however, that only those damages can be considered as losses or damages caused by Rochín, which are immediate and direct results of his telegram; see .... paragraphs 13 and 14 of the first opinion in the *Francisco Mallén* case." [3])

It has been said already that it seems utterly undesirable to maintain as a principle of the law of nations the limitation of international liability to direct damage, which principle was once again recognized in these statements. Its indesirability has, in our opinion, been sufficiently demonstrated by such authors as Anzilotti [4]), Eagleton [5]) and particularly by Dr. Anton Roth in

[1]) I, p. 264.
[2]) *H. G. Venable*, I, p. 331.
[3]) I, p. 338.
[4]) Cours de Droit International, pp. 532 *et seq.*
[5]) Responsibility of States, pp. 202 *et seq.*

his book on „Schadenersatz für Verletzungen Privater bei Völkerrechtlichen Delikten". This author shows, for instance, that it follows logically both from the very meaning of the term „damage", as well as from that of the term „reparation", that the *entire* damage caused by an international delinquency, i.e. even indirect damage, must be repaired. [1])

A second reason is that limitation of liability to direct damage must obviously work injustice. It does not satisfy one's sense of fairness to see, on the one side, a State guilty of an international delinquency, and on the other side, someone who suffered damage as an indirect result, but as a result none the less, and to know that all possibility of reparation being made to the victim is excluded in advance as a general principle. The circumstances of the *Mallén* case are not a good example to illustrate this, inasmuch as in that case it was not proven that the subsequent ailments indeed resulted from the illegal act. Let us suppose, however, that the Mexican consul was so heavily disabled as a result of the assault as to necessitate his being relieved of his office. This could not be considered a *direct* result of the assault; *directly* the dismissal would only have resulted from the disablement. Nevertheless it would have been only fair to hold the U.S. responsible for this consequence, however indirect it might have been, of the illegal act of one of its officials and we do not doubt that any international tribunal would have taken such a view.

In connection with the point of fairness the question may well be asked, where should the line be drawn between damage for which a state ought, and damage for which it ought not to be held responsible, if this line does not coïncide with the distinction between direct and indirect damage.

In the domestic law of several continental countries the test adopted nowadays is that of adequate „causation": the perpetrator of a wrongful act is only liable for damage which could *reasonably* and *normally* have been expected to result from his act; the damage must have been the *adequate* result of the delinquency [2]). It seems to us that this standard is as fair and sound in international law as it is in domestic law. [3])

[1]) Op. cit. pp. 40—41.

[2]) See for a more elaborate explanation of this theory: Roth, op. cit. pp. 78—82.

[3]) To the same effect: Salvioli, op. cit. p. 249; Roth, op. cit. p. 76: „Der Schaden für den Ersatz gefordert wird, muss von der völkerrechtswidrigen Handlung adäquat

In addition it may be said that it is supported, or at any rate not contradicted, by the precedents of international law. We do not ignore the fact that many decisions of international tribunals have refused to take account of indirect damage. Borchard [1]) even declares that „remote damages have uniformly been disallowed by Claims Commissions". The decisions to this effect are to be found: in note 2 on page 416 of Mr. Borchard's work, in note 1 on page 228 of Mr. Hauriou's articles, in the decision rendered in the case of *William Lee* [2]) and in Dr. Roth's book. [3]) But as it is also shown in the three lastmentioned works, a closer consideration of these decisions reveals the fact that the presumed refusal to allow compensation for indirect damage has rarely been dictated by the principle that no liability can ever be imposed for indirect damage; most of the decisions are to be explained by one of the following circumstances: 1. that the loss was too uncertain, i.e. that the probability that a certain profit would have been made in the absence of the wrongful act was too doubtful or speculative; 2. that the damage was too remote fairly to justify compensation; 3. that the judges, without attributing any clear and generally applicable meaning to the term „indirect damage", simply called indirect those for which they refused compensation, although in reality the damages for which compensation *was* awarded, were also indirect. [4])

An example of the first category will be found in the *William*

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verursacht, muss die „normale" Folge einer Völkerrechtsverletzung dieser Art sein." A different system is applied in English law, which has adopted the expression „direct cause" as indicating the relation which must exist between the act of the defendant and the damage suffered by the plaintiff. Although English jurisprudence has succeeded in giving this expression a far more constant meaning of its own than international jurisprudence, it has no more than the latter used the word „direct" in its strict logical signification, i.e. a cause so connected with the consequence that there is no intervening link in the chain of causation. Once this original signification is not maintained, the use of the word „direct" in our opinion, presents no advantage, and is apt to create confusion.

[1]) „Diplomatic Protection of Citizens Abroad", p. 416; also De Visscher, La responsabilité des Etats, Bibl. Visseriana, II, p. 119.

[2]) A. de Lapradelle et N. Politis, Recueil des Arbitrages Internationaux, p.p. 283—284.

[3]) pp. 54 *et seq.*

[4]) This third category in particular was in Anzilotti's mind when he declared: „Il en résulte qu'en se tenant à la surface, on peut dire, comme tant de personnes l'ont dit, que la jurisprudence arbitrale refuse la réparation des dommages indirects; en pénétrant plus profondément et en regardant la réalité des choses, on peut dire, avec plus de raison, qu'elle ne distingue pas entre les dommages directs et indirects." Cours de Droit International, p. 533.

Lee case. [1]) Other examples are the *Rudloff* and *Poggiolo* cases [2]), where no compensation was awarded for a loss of credit, not because this constituted an indirect damage, but because it was too remote, too uncertain, and too indefinite a loss. The first decision, in fact, was even expressly based on the following ground:

> „Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss.' (p. 198).

Likewise in the *Valentiner* case [3]) the rejection of a claim for indirect damage was merely based on the view that the loss of crop resulting from the draft of claimant's labourers by Venezuelan troops was too uncertain a loss. In our opinion it is impossible to maintain that such judgments prove the existence of a rule to the effect that idemnity for indirect damage is not recoverable under the law of nations. The same can be said about decisions of the second category, an example of which is the *Dix* case [4]): A revolutionary force having confiscated cattle from an American cattle breeder in Mexico, the latter, fearing that he might lose all his animals in this way, sold the rest of them at an inadequate price. Mexico was held liable for the value of the cattle taken, but not for the loss resulting from the sale of the rest. Commissioner Bainbridge for the Commission said:

> „Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."

If, however, one seeks the reason why the Commissioner rejected this particular claim, one finds that it was not that the damage was *remote*, i.e. indirect, but that it was *too remote*, i.e. the link of causality with the illegal act was not sufficiently close; the decision furthermore was based on the view that the damage was a normal consequence of the state of war. This shows that the fact that the damage was indirect, was not the real reason why the claim was rejected.

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1) vide infra, p. 243.
2) Ralston, Venezuelan Arbitrations of 1903, pp. 187, 847 and 870.
3) Op. cit., p. 564.
4) Op. cit., p. 7.

The third group of decisions, those which seemingly deny responsibility for indirect damage, but in reality recognize it, is represented by the *Fabiani* case [1]). An arbitral sentence had been rendered in favour of Mr. Fabiani. Owing to the failure on the part of the condemned state to comply with the award Mr. Fabiani was unable to pay debts, actually less in amount than the indemnity, and he was declared bankrupt. The arbitrator allowed an indemnity for the pecuniary damage and moral injury suffered by reason of the bankruptcy, which he considered an immediate consequence of the wrongful non-compliance with the earlier award by the defendant state. In our opinion however this was in fact clearly an *indirect* damage, having been caused by the wrongful act in combination with several other and later factors.

For the sake of completeness it may be added that the famous *Alabama* award, which was for long considered as the standard case establishing non-liability in international law for indirect damage, has nowadays ceased to be so regarded. In recent years it has been shown convincingly and sufficiently:

a. that the supposed rejection of liability for such damage does not derive from the wording of that award at all [2]);

b. that most, if not all, of the items of the indemnity awarded in that case were in reality for indirect damage, although they were not so termed; the decision therefore proves rather a *recognition* in the law of nations of responsibility for indirect damage. [3])

If, on the one hand, these decisions do not constitute a sufficient proof for the contention that „international law denies compensation for remote consequences", there are, on the other hand, cases which definitely establish the contrary.

To begin with a clear statement to this effect has been made by Judge Parker in the German-American Mixed Claims Commission. This is all the more interesting as it will be seen that the

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[1]) Lafontaine, Pasicrisie Internationale, p. 367.

[2]) See particularly *Roth* in his chapter on indirect damages, and the precedents there cited; also Yntema, Columbia Law Review, XXIV, pp. 150—151; Eagleton „Responsibility of States" pp. 198—199; opinion of the German-American Mixed Claims Commission in War risk Insurance Premium Claims, Decisions and Opinions, at p. 58.

[3]) „Furthermore, as Bluntschli has somewhat acutely observed, all the so-called Alabama claims were indirect . . . . . The Alabama award therefore, far from serving as a precedent to the contrary, may be cited as authority for the allowance of claims for indirect damage in international law", Eagleton, op. cit. p. 199.

General Claims Commission in one of its opinions invoked this judge's statements as an argument against the allowance of a claim for a certain form of indirect damage [1]). In Decision No.2 of the German-American Commission it was said:

> „It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced link by link to Germany's act." [2])

Furthermore it is a general rule, recognized in international as well as in municipal law, that the author of an illegal act should not only repair the *loss* resulting from his act, but also the „lucrum cessans", „le gain éventuel", the gain that would have been made but for the act, i. e. what may be termed consequential damage, as distinct from the immediate, direct damage, Thus, e.g. it was stated f.i. by the Dutch arbitrator T.M.C. Asser in the *Cape Horn Pigeon* arbitration between the U.S. and Russia:

> „Considérant que le principe général du droit civil d'après lequel les dommages-intérêts doivent contenir une indemnité non seulement pour le dommage qu'on a souffert, mais aussi pour le gain dont on a été privé, est également applicable aux litiges internationaux ...." [3])

See also the reasoning of Umpire Ralston in the *Martini* case, on pages 843–844 of his work on Venezuelan claims, which results in his declaring:

> „.... if a clear measure of damages exists with relation to future business, it may be invoked."

A considerable number of precedents is mentioned by the same author in „The Law and Procedure of International Tribunals", pp. 244–249.

The fact that such reasonably certain future gain was not made can already be considered as constituting in itself one form of indirect damage [4]); hence the practice of admitting reparation for such „loss of profits" proves in itself that the law of nations does not necessarily limit liability to *direct* damages.

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[1]) Vide infra, p. 252.
[2]) Kiesselbach, Problems of the German-American Claims Commission, pp. 101 *et seq.*
[3]) p. 5. See further Salvioli, op. cit. Chapter II, „Profits Manqués".
[4]) A contrary view is held by Anzilotti, Cours de Droit International, p. 531.

On the other hand reparation has constantly been refused for gain which was not reasonable, i.e. for speculative profits. Mr. Salvioli in his treatise attacks this practice, because, as he remarks, no future gain ever is absolutely certain; the utmost that can be said is, that there was a high degree of probability that a certain profit would have been made. It seems to us however, that the practice of awarding indemnities for the loss of such *probable* profits, constitutes one more argument in favour of the view that a State may be held liable for damages which could *normally and with a reasonable degree of certainty* have been expected to result from its wrongful act. It is remarkable, by the way, that the Italian Professor concludes by giving a formula which involves in fact a complete application of this very rule to the category of cases under consideration:

> „Le coupable est tenu à indemniser les profits manqués qui se seraient normalement réalisés dans la situation concrète de temps telle qu'elle existait au moment de l'accomplissement de l'acte illicite et jusqu'à la réalisation du dommage (lucrum cessans), même si cette situation de temps est exceptionelle en comparaison avec une autre période normale de temps." [1]

Borchard, in stating this international practice, explains it in more or less the same way:

> „Nothwithstanding numerous decisions which may be found to the effect that indirect losses do not constitute recoverable elements of damage, arbitral courts have nevertheless attempted in many cases to draw a distinction between indirect losses which may fairly be considered as certain, e.g. the profits of an established business, and indirect losses which are speculative, imaginative, and incapable of computation. The allowance of the former class of claims may indeed be reconciled with the disallowance of the latter on the theory that they are proximate results of the original wrongdoing and *were presumably or constructively within the contemplation of the parties.*" [2]

The words here printed in italics seem again to constitute an indication of the unconscious recognition in international law of the rule that there may be liability imposed for indirect damage *which could reasonably have been foreseen.*

In addition to the cases and authors last cited a few more

[1] Op. cit. pp. 260—261.
[2] The Diplomatic Protection of Citizens abroad, pp. 416—417.

international awards may be referred to, in which not only was a sum allowed for remote damages, but the tribunal also in effect applied the standard of adequate causation.

In the case of *Yuille, Shortridge et Cie* between Great Britain and Portugal [1]) an amount was awarded for the prejudice caused to claimants in their credit and commerce on account of a wrongful condemnation by a Portuguese court, but only insofar as it was *„a real and natural consequence"* of the illegal proceedings.

In the case of *William Lee* [2]) the arbitrator declared that account should be taken, and had often been taken, in international arbitrations, of loss of profits, insofar as these would have constituted *a regular and normal result* [3]).

In the cases concerning the *„Colonel Lloyd Aspinwall"* and the *„Masonic"* between the United States and Spain, an indemnity was awarded for the *probable* profits which had not been made. And in the *„Costa Rica Packet"* case Mr. de Martens took into account the fact that the wrongful detention of the captain made his ship lose the best part of the whalehunting season [4]).

The decisions rendered by the Mixed Claims Commission, established in pursuance of the agreement between the United States and Germany of August 10, 1922, (Lusitania Claims) touched upon indirect damages several times, but they may be left out of consideration here, since in general they related only to the interpretation of Section 5 of the Joint Resolution of the U.S. Congress, inserted into the Treaty of Berlin of August 25, 1921, which provided that satisfaction would have to be made for all loss, damage or injury, suffered *directly or indirectly* by American nationals. However, this treaty stipulation in itself proves once more that reparation for indirect damage is not in principle excluded in the usage of nations.

A fourth set of arguments in favour of the principle of liability for indirect damage is given by the answers of several governments to the questionnaire circulated to them in preparation of the Hague Conference of 1930 for the codification of international

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[1]) Recueil des Arbitrages Internationaux, I, p. 156.

[2]) Op. cit. II, p. 109. *et seq.*

[3]) „Il en est ainsi quand il s'agit — non d'un espoir imaginaire ou d'une éventualité plus ou moins probable — mais d'une attente légitime, d'un événement régulier, normal . . . ." op. cit. p. 284.

[4]) Lafontaine, Pasicrisie Internationale, p. 511.

law. Although this conference did not succeed in drawing up a positive rule with respect to indirect damage, a consideration of the attitude adopted by the participating states is instructive. Point XIV of the questionaire put before them the question whether indirect damage ought to be taken into consideration when calculating the indemnity, and, if not, how such damage could be distinguished from direct damage. [1]) Three countries answered the first question in the negative, without any further comment. Five countries however expressly pronounced themselves in favour of liability for indirect damage. To these may be added the United States, whose answer read:

> „Governments, like individuals, are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."

As Dr. Roth has rightly pointed out, this answer does not in fact exclude *all* indirect damage, but only that which is not a *proximate and natural* consequence of the illegal act. Now it seems that *proximate* simply means that the link of causality with the illegal act must not have been too remote reasonably to justify compensation, and *natural* means that indemnity can only be allowed if the damage was a normal result of the delinquency, or, in other words, if it was a consequence which could reasonably be expected to derive from the wrongful act. This explanation of the American answer is all the more acceptable since the American Government did not deny liability for „lucrum cessans." Hence it may be urged as a strong argument that not only did six out of nine states pronounce themselves in favour of liability for indirect damage, but that the American answer even constitutes a support for the standard of „adequate causation."

Attempts have sometimes been made to establish the principle of non-liability for indirect damage upon the basis of the decisions of the Permanent Court of International Justice in the *Wimbledon* and *Mavromatis* cases. However, in both these deci-

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[1]) „Quels éléments doivent être pris en considération pour le calcul de l'indemnité? ..... Dommage indirect: si celui-ci est exclu, comment le distinguer du dommage direct?"

sions the claim for indirect damage was not rejected because the damage was indirect, but simply because no link of causality had been shown to exist at all between the illegal act and the indirect damage for which reparation was sought. [1]) In the *Wimbledon* case the indirect damage consisted of the share of the vessel in the general expenses of the company; in disallowing this demand the Court merely decided that „the expenses in question are not connected with the refusal of passage through the Kiel canal to the Wimbledon". [2]) Likewise the Court, with regard to the complaint in behalf of Mr. *Mavromatis*, decided that, even if the British Government's act complained of were to be regarded as illegal, this act

> „has not in fact either led to the expropriation or annulment of Mr. Mavromatis's concessions, or caused him anly loss which might justify a claim on his behalf for compensation in the present proceedings." [3])

On the other hand, the Court, by its definition of „reparation" given in the judgement in the *Chorzow* affair, made the impression that it does not wish to exclude indirect damages in principle:

> „reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed," [4])

In conclusion it may be stated that it follows from
the very meaning of the words „damage" and "reparation",
the requirements of fairness and equity,
the practice of international arbitral tribunals,
the rule that, with regard to reparation, reasonably certain future gain must be taken into account,
the preparatory history of the Hague Conference for the Codification of International Law, and from
three judgments of the Permanent Court of International Justice, that: *liability for indirect damage is not in principle excluded in international law. It even appeared that in many of these cases unconciously the standard was recognized and applied that a State*

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[1]) More fully on this point: Dr. Anton Roth, op. cit. pp. 61 et seq.
[2]) Publications of the Court, Series A, No. 1 p. 32.
[3]) Publications of the Court, Series A, No. 5, p. 45.
[4]) Publications of the Court, Series A, No. 17, p. 47.

must be held responsible for all damage which could reasonably and normally be expected to result from the delinquency.

Case II: Indirect damage suffered by alien of the same nationality as the direct victim (particularly by relatives).

To all these arguments one more must be added: the Commission itself, on several later occasions, imposed liability for indirect damage. These judgements were rendered in cases where the indirect damage was not suffered by the direct victim himself, but by some other subject of the same state to which the direct victim belonged. This, however, does not alter the significance of these decisions with respect to the problem of indirect damage. Up till now, it is true, we have only considered the problem in connection with cases where the indirect damage was suffered by the person who also sustained the direct damage. As stated, we did so because this is the simplest form in which the problem presents itself, and also because most of the awards in which it has till now been discussed, applied to circumstances of that kind. But this does not mean that a decision allowing a claim for indirect damage sustained by someone other than the direct victim, would have less value as a precedent. On the contrary: if liability for *such* indirect damage is not excluded in principle, there can, *a fortiori*, be still less reason for excluding it where the indirect damage has been suffered by the direct victim himself.

First of all in one case [1]) which will be dealt with more fully subsequently (vide infra, p. 258 *et seq.*), where the damage was in reality suffered not by the direct, but by the indirect victim, the Commission declared that

> „under the principle of international law and of domestic law the Commission should look to the real party in interest",

and an award was rendered in favour of the *indirect* victim.

In the other claims submitted to the Mexican-American tribunal the compatriots suffering the remote damage happened to be relatives of the direct victim. This circumstance however

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[2]) *John Mc Pherson*, I, p. 325.

does not lessen the force of the decisions as precedents recognizing by implication the principle of liability for indirect damage sustained by a compatriot of the direct victim.

A claim was made on behalf of six brothers and sisters of *John A. Connelly* [1]), who had been killed in a riot directed against a few Americans, in which Mexican troops took an active part. Mexico alleged that damages could not be recovered in behalf of the brothers and sisters *in their own right*, since they were collateral relatives not dependent upon the deceased for support.

The Commission, however, was of the opinion

> „that by the killing of John A. Conelly not only his father, but other members of his family, brothers and sisters sustained a pecuniary loss. In taking account, as we deem it proper to do, of the indignity and grief occasioned by the tragic killing of Conelly, in which Mexican troops participated, we are mindful that brothers and sisters, and not the father alone were afflicted. The Commission is aware that it has been held in an international award that collateral relatives of a deceased claimant not dependant on him for support are not to be admitted as claimants in his place; but this situation is not present in this case. And as to the right of collateral relatives of a killed man not dependent on him for support to claim for damages sustained by his death awards differ. Bearing in mind the elements of damages of which international tribunals have taken account in similar cases (see for example the discussion of this point in the *Di Caro* case, Ralston, Venezuelan Arbitrations of 1903, p. 769) we consider it proper to take cognizance of information contained in the record with respect to material support contributed by Conelly to members of his family." [2])

The right of sisters and brothers to claim in their own right compensation for their (indirect!) loss or damage, resulting from an injury done to their brother or sister, was again recognized in the cases of

Daisy Sanders and Rosetta Small [3]),

William T. Way [4]).

Mary Evangeline Arnold Munroe [5]).

Finally an argument in favour of the recognition of responsibility for indirect damage suffered by a fellow-national of the

[1]) I, p. 159.
[2]) I, p. 161.
[3]) I, p. 212.
[4]) II, p. 94.
[5]) II, p. 314.

direct victim can be drawn from the character of a claim: if a claim is considered as the demand of a State to be compensated for an injury which it has suffered itself in its citizen, then the situation is fundamentally the same as situation I: the claimant party suffering the direct and the one suffering the remote damage are one and the same: the State. Hence if liability is not excluded in case I, there is no reason to exclude it in case II either.

For the above reasons, as well as for other reasons to be explained in the following section, we consider this system to be sound and fair. The next section deals with the case that the relations between the direct and the indirect victim as a result of which the latter suffers damage, are of a contractual nature. Strictly speaking that case belongs in the present section, since it constitutes a special form of case II. However it seems preferable first of all to mention the decision in which the problem arose.

The Dickson Car Wheel Company case [1])

in which Commissioner McGregor discussed very fully and clearly certain questions relating to indirect damage, were briefly as follows:

By virtue of a contract entered into in April 1912 between the National Railways of Mexico and the Dickson Car Wheel Company the latter made several deliveries of car wheels to the former, on dates prior to December 1914. In that month the Mexican Constitutionalist Government seized the lines of the National Railways retaining possession of them until the year 1925. During that period the claimant Company on various occasions requested payment from the National Railways Company, which replied that in consequence of the seizure of the Railways, it received no revenue whatsoever from the operation of its lines, and was accordingly unable for the time being to meet its obligations.

The American Agency endeavoured to fix the Mexican Government with liability for the amount of the obligations contracted by the Railways Company, on several grounds which we need not consider here, since they were all rejected by the majority of the Commission on the *facts* of the case, inasmuch the Railways Company had not disappeared as a separate juridical entity, independent of the Government, and continued to receive in-

[1]) III, p. 175.

come from sources other than the operation of its lines. Having rejected these grounds, the majority opinion proceeded to a discussion of some general principles, which deserves to be quoted in its entirety:

„In the preceding paragraphs an endeavor was made solely and exclusively to ascertain whether the Dickson Car Wheel Company really sustained an injury imputable to the Government of Mexico as a consequence of the taking over of the Railways and the conclusion was in the negative. However, even in the supposition that the injury really existed, that, in itself, would not be sufficient to create responsibility on the part of Mexico. . . . .

Under International law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard. The above cited Convention (of September 1923) requires further the existence of damage suffered by a national of the claimant Government. It is indispensable therefore, in order that a claim may prosper before this Commission, that two elements coexist: an unlawful international act and a loss or injury suffered by a national of the claimant Government. The lack of either of these two elements must necessarily be fatal to any claim filed with this Commission.

Can it be said that these two indispensable elements exist in the claim of the Dickson Car Wheel Company?

The Agency of the United States has limited itself to alleging the existence of damage suffered by the American company. Conceding for a moment that this really exists as the result of damage suffered by the National Railways Company caused by the taking over of the lines, it would be necessary to establish further the international illegality of the original act. *The problem in this case would consist in deciding whether damage caused directly to a company of Mexican nationality and which would recoil upon a company of North American nationality, remotely causing it injury, constitutes an act violative of the Law of Nations.*

The relation of rights and obligations created between two States upon the commission by one of them of an act in violation of International Law, arises only among those States subject to the international juridical system. *There does not exist, in that system, any relation of responsibility between the transgressing State and the injured individual for the reason that the latter is not subject to international law.* The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by International Law upon each member of the Community of Nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is

united by the bond of nationality. *The only juridical relation, therefore, which authorizes a State to exact from another the performance of conduct prescribed by International Law with respect to individuals is the bond of nationality.* This is the link existing between that law and individuals and through it alone are individuals enabled to invoke the protection of a state and the latter empowered to intervene on their behalf.

A State, for example, does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury. As Oppenheim well says referring to the *heimatlose*:

„But since they do not own a nationality, the link by which they could derive benefits from International Law is missing, and thus they lack protection as far as this law is concerned. .... In practice, Stateless individuals are in most States treated more or less as though they were subjects of foreign States, but however much they are maltreated, International Law cannot aid them". (Oppenheim, International Law, Par. 312).

An act of a State against a „heimatlos" or against one of its own nationals may affect the domestic relations or the contractual relations which the latter may have with respect to the nationals of other countries. Would the loss or damage which these might suffer cause responsibility on the part of the actor State with respect to the States to which the injured individuals belonged?

The injury suffered by an individual linked by family relations to an individual of another nationality who has been the victim of an act of another State has been discussed only before the German-American Commission in the case of the Lusitania Death Claims. In that case the umpire, Judge Parker, sentenced Germany to pay indemnification for damages suffered by American citizens as a consequence of the death of individuals of another nationality. The principles of International Law, however, were not applied in this decision, as Judge Parker limited himself to making an interpretation of the Treaty of Berlin. ....

That view cannot be accepted by International Law in the absence of a specific Treaty. I am of the opinion that the following observations of Mr. Borchard in this regard are correct:

„While it is true that surviving dependents have a right of action, especially preserved to them in the Treaty of Versailles, it is a question whether International Law does not imply the condition that the decedent must have had the nationality of the claimant country. Both precedent and theory sustain the belief

that citizenship of the decedent in the claimant country is always required as a condition of an international claim. Where heirs have been admitted to the jurisdiction of international claims commissions, doubts have arisen whether the heirs as well as the decedent must have the nationality of the claimant country, some commissions dispensing with this necessity in the case of the heir but not in the case of the decedent. To be sure, practically none of these cases were actions for wrongful death of the decedent, but involved inherited claims. Yet it is not believed that this mofidies the principle. In these Lusitania cases, the Department of State appears to have entertained considerable doubt whether it could press claims of American dependents arising out of the wrongful deaths of aliens. Theory justifies the doubt. When a state espouses the claim of its citizen, it is not merely prosecuting for its „economic loss", but for the loss of prestige and moral injury it has sustained and would sustain if it permitted its citizens to be injured without redress. Diplomatic protection is the sanction which insures a standard of treatment commensurate with international law. If states permitted their citizens to be killed abroad promiscuously or without redress by other states or their officials, the „injured" state would soon lose prestige and its citizens that security which diplomatic protection is designed to afford. Rules of municipal law as to the survivorship of causes of action are likely here to confuse rather than aid It has not heretofore been deemed a cause of international complaint, if national dependents sustain injury through the killing of an alien. Other nationals may also sustain „economic loss" through such wrongful act, and if dependents, why not *creditors*, partners, and even insurers? Indeed, a state might thus have to pay damages to foreign countries for injuries inflicted upon its *own citizens*. Surely this could not be good law. The reason for the rule that the killed or injured person must be a citizen of the claimant state is that the prestige of only one state has been deemed impaired by a wrongful assault, and that is the national state of the killed or injured person. As that state alone could have interposed to prevent the injury, how can another state, whose citizen merely suffers a resultant pecuniary loss, claim damages for an „original" wrong?" (American Journal of International Law, January 1926, page 70).

This Commission without having specifically discussed the applicable theory, has already indicated in the *Costello* case that when an individual directly injured lacks North American nationality even though members of his family possess it, there is no claim. (*Opinions of Commissioners*, 1929, p. 265).

The foregoing being noted, it will now be seen whether the principle varies when those relations are of a contractual nature.

This is not the first time that this problem has been studied by arbitral tribunals. In the Spanish American Commission of 1871 there were filed several claims on behalf of American citizens, creditors of Spanish subjects, as the results of injuries to the properties of the latter caused by the Spanish Government. These claims were disallowed, it being stated that internationally the creditor could not have greater rights than the debtor. (Moore's Arbitrations, pp. 2335 and 2336).

Similarly, the Commission between the United States and Venezuela in the *Bance* case disallowed the claim of the creditors of a Venezuelan national. (Arbitrations of 1903, p. 172).

In the so-called „Life Insurance Claims" filed by American companies in the German-American Commission, Judge Parker, referring to injuries suffered as a consequence of the contractual claims existing between the claimant companies and the persons originally injured, nothwithstanding that the latter were North American nationals, resolved the problem in the following manner:

„The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any intent of disturbing or destroying such contractual relations. The ever increasing complexity of human relations resulting from the tangled network of intercontractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life. There are few deaths caused by human agency that do not pecuniarily affect those with whom the deceased had entered into contractual relations; yet through all the ages no system of jurisprudence has essayed the task, no international tribunal or municipal court has essayed the task, and law, which is always practical, will hesitate to essay the task, of tracing the consequences of the death of a human being through all of the ramifications and the tangled web of contractual relations of modern business." (Consolidated Edition of Decisions and Opinions of the Mixed Claims Commission, United States and Germany, Washington, p. 137).

Judge Parker in the preceding paragraph limited himself to applying under International Law the same standard as governs in municipal law. This rule has been concisely stated by Sutherland in his work on damages as follows:

„Where the plaintiff is injured by the defendant's conduct to a third person it is too remote if he sustains no other than a

contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, ... unless the wrongful act is wilful to that purpose" (Vol. 1, Sec. 33).

From the reasons set forth the following conclusions are reached:

I. *A State does not incur international responsibility from the fact that a subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship.*

II. *A State does not incur international responsibility from the fact that an individual, or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature".* [1])

Commissioner Nielsen disagreed with the decision of his colleagues, mainly because, in his opinion, the National Railways Co. had in fact lost its juridical existence as well as its capacity to pay. He rejects the argument quoted, because the U.S. did not complain of damage caused to a Mexican Company, causing *remote* damage to an American Company, but of *direct* damage, which in his view was justified by the facts:

„The issue is whether acts of Mexican authorities in causing directly an injury, namely, the destruction of property rights, impose responsibility on Mexico." [2])

It is evident that the American Commissioner did not attack the principles expressed in the majority opinion, but merely their application to this case, since he contended that there was *direct* damage, namely the destruction of property rights. This seems a somewhat unusual application of the word *direct*. In order that a result may be direct it is not sufficient to show that in the circumstances of the case it was *inevitable*. A result is direct if in the chain of causation there is no happening between the result and its cause. In the present case the destruction of foreign

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[1]) III, pp. 186—192.
[2]) III, p. 203.

creditor rights would have been a direct result if the Government had forbidden the Railway Company to pay its foreign debts, but not in the actual circumstances where the Government action in the first instance merely affected property of the Railways, and where the possibility was not excluded that those might nevertheless have found means to pay their debts [1]).

But although we agree with Commissioner McGregor, who wrote the majority opinion, that this was a case of indirect damage, we cannot accept the theories which he put forward.

These relate to three different matters, which unfortunately were not clearly distinguished in the opinion. The first is: Can international liability be imposed for indirect damage suffered as a result of a contractual relation between the direct and the indirect victim ? (special form of situation II). The second is: Can international liability be imposed for indirect damage suffered by an alien of a nationality different from that of the alien directly injured? (Case III). The third is: Can international liability be imposed for indirect damage suffered by an alien as a result of damage sustained by an own subject of the defendant State? (Case IV).

The facts underlying the Claim of the Dickson Car Wheel Company clearly constitute an instance of case IV: a State was alleged to have illegally and without compensation confiscated property belonging to one of its subjects, the Railway Co, thereby causing damage to a foreign company. To this situation, however, the Commission applied mainly principles, arguments and precedents pertaining to case III (e.g. the Lusitania death claims), and in addition, as we have indicated before, a particular form of case II was also involved. In order to simplify the problem we shall discuss the three issues involved separately in the next three sections.

Case IIA: Indirect damage suffered in consequence of a contractual relationship between the direct and the indirect victim.

The special circumstance of the indirect damage being suffered by reason of the existence of a contractual relationship with the direct victim, may of course present itself in the cases III and IV

[1]) To the same effect: Feller, The Mexican Claims Commissions, p. 142.

as well as in II. The reason why we propose to deal with it as a special form of II is, that there the issue appears in its purest form. Since international liability for indirect damage sustained by a fellow-national of the direct victim is not in principle excluded, the decision in a case where the other requirements for such liability are fulfilled, will depend exclusively upon the question whether a contractual relationship is sufficient to establish a chain of causation entitling the indirect victim to claim reparation. In case of the types III and IV liability will, on the contrary, depend also upon other issues, which will be discussed in the next two sections.

The conclusion at which the Mexican lawyer arrives is:

> „A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendent State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature." [1])

This conclusion we cannot accept for the following reasons:

1°. Its result would be that when there is established, on the one hand an international delinquency for which a State is responsible, causing damage to a foreigner, and on the other hand damage sustained by another foreigner of the same nationality as a corollary or result of the first damage, it would *never* be possible for the claimant State to obtain compensation for the second damage, in any case where the relationship between the direct and the indirect victim is of a contractual nature. This consequence may in some situations prove unfair und unsatisfactory, an example of which will be found in the *McPherson* case, to be mentioned under 4°.

The only arguments in Mr. McGregor's opinion upon which his conclusion is based are the dicta quoted of Judge Parker and of Mr. Sutherland. In our opinion, these do not justify the rule laid down:

2°. The essence of Mr. Parkers reasoning is that it is impossible to render a State liable for all the consequences, springing from contractual relations, of an international delinquency. This can readily be admitted, but is no reason for going to the other extreme

[1]) III, p. 192.

and concluding that liability should not be admitted for any a such consequences *at all*. The argument merely proves the necessity of applying a certain limitation.

3°. Sutherland's statement, even if fully accepted, is no stronger justification for the Commission's conclusion, which in two respects goes further than his words. In the first place Sutherland excludes liability only where „the plaintiff is injured by the defendant's conduct to a third person" and „he sustains no other than a contract relation to such third person, or is under contract obligation on his account, *and the injury consists only in impairing the alibity or inclination of such third person to perform his part*", whereas Mr. Mc.Gregor wishes to exclude it in all cases where „the relations between the former and the latter are of a contractual nature." In the second place Mr. Sutherland makes a reservation, viz. „unless the wrongful act is wilful for that purpose", and this exception is not mentioned by the Mexican judge.

4°. The strongest argument, however, against the rule laid down by the Claims Commission is to be found in the fact that the tribunal itself in one case rendered a contrary decision. *John Mc Pherson* [1]) suffered a loss by the refusal on the part of Mexican authorities to pay a postal money order presented by his agent, named Davidson. It appears from the opinion that the orders were purchased by Davidson as an Agent for McPherson, without being issued in the latter's favour, nor endorsed to him: they were made out in the name of Davidson. Consequently it was towards Davidson that the Mexican State committed an international delinquency; McPherson only suffered the loss indirectly, on account of a contractual relation with Davidson. *Nevertheless an award was rendered in favour of Mc.Pherson.* Commissioner Nielsen, in whose opinion both his colleagues concurred, expressed in a few sentences what in our opinion is a conclusive argument against rule II drawn up in the Dickson Car Wheel Co case.

> „The loss resulting from the nonpayment of the orders clearly falls on McPherson. Had payment been made to Davidson or to the bank to which the orders were endorsed, McPherson could have received his money, and the settlement between him and his agent

[1]) I, p. 325.

would of course have been a private matter between those two persons. *There would appear to be no sound reason why the Commission might not in the light of convincing evidence with respect to a legal relationship such as that explained by counsel for the United States, award compensation in favor of an American citizen who had suffered a loss in connection with a transaction conducted in his behalf by an agent.*" [1])

. . . . . .

„It is clear that an award in favor of the claimant could not result in the payment of money to any person other than the one who lost as a result of the nonpayment of the money orders. .... the evidence is convincing, and in a case of this kind *I have no doubt that under principles of international law and of domestic law* — at least Anglo-Saxon law — *the Commission should look to the real party in interest.*" [2])

The same principles were applied in the cases of
George W. Hopkins [3]), and
George W. Cook, [4]).

The italicized sentences are of far reaching importance in two respects. *By saying that an international tribunal must look to „the real party in interest" the commission in fact decided that an international tribunal may also render an award in favour of an indirect victim, to wit when the indirect victim is the real party in interest.* And the weight of the decision is augmented by the fact that in the case under consideration *the relations between the direct and the indirect victim, as a result of which the indirect damage was suffered, were of a contractual nature.*

It must be added however that the opinion wrongly invoked as a precedent the *Heny* case. In that case it was decided that the right of the claimant was more or less of a real and possesory nature, and therefore his interest was direct.

From the arguments contained in this and the preceding section two conclusions may be drawn:

I. *International law does not in principle exclude state responsibility for indirect damage suffered by a third person as a result of an internationally wrongful act of that State.*

II. *Such responsibility is not even excluded when the relations*

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[1]) I, p. 327.
[2]) I, p. 328.
[3]) I, on p. 330.
[4]) II, on p. 270.

between the direct and the indirect victim are of a contractual nature.

We might limit ourselves to this statement of the two rules applied by the Mexican-American Claims Commission. As it might serve a useful purpose, however, we venture to add briefly what, in our view, might be accepted as a more positive solution. For it is evident that a delinquent State cannot and ought not in international law to be held responsible for *all* the indirect damage that may be suffered by third parties, nor for *all* the damage sustained by reason of the existence of contractual relations. Where should the line be drawn?

We suggest that the principle applied in case I would work out equitably in this case too: *liability should only be imposed if the indirect damage of the third party could reasonably and normally* have been foreseen.

This rule finds some support in the dicta quoted both of judge Parker and Mr. Sutherland. First of all it imposes liability in the case expressly mentioned by both of them, where there is „intent of disturbing or destroying such contractual relations" (Parker), or, in other words, that „the wrongful act is wilful to that purpose" (Sutherland). It is true that the rule proposed goes slightly further, imposing liability for damage which could have been foreseen where there is mere fault or negligence. But even this may perhaps be said to be implied already in judge Parker's statement, whereas he denies responsibility for indirect damage for the reason „that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of life". This reasoning seems to imply logically that liability *can* be imposed if the damage *could* have been foreseen.

It may still be pointed out that *in practice* our rules will generally lead to the same result as that of denying all liability for what may be termed indirect contractual damage, because in most cases such damage will not be a result that could have been expected to ensue in the ordinary course of events. Nevertheless it has been thought desirable to reject expressly the rule laid down in the *Dickson Car Wheel Company* case, because, as we have endeavoured to show, it is incorrect in principle, and may lead to unfair decisions in exceptional cases, notably in those where the party to a contract is the indirect, but real victim.

Case III: *Indirect damage suffered by an alien not of the same nationality as the alien directly injured*

The subject to be dealt with in this section may with more precision be put thus : international liability for indirect damage sustained as a result of an injury directly inflicted upon a person who is a subject neither of the claimant, nor of the defendant State.

Conclusion I of the majority opinion of the Dickson Car Wheel Company case is, as will be remembered, that such liability ought not to be imposed, if the claimant is connected with the direct victim by ties of relationship. We shall first consider the question of the responsibility in case III in general, and shall then see whether this question is in any way affected by the existence of such ties.

Here again, it would seem to be unjust to exclude, as a matter of principle, liability in all cases of this type. Such a rule would enable a State to commit an international delinquency towards an alien, causing to an alien of a third nationality damage which it could have foreseen would be the result, and still all possibility to obtain redress from that State would be excluded in advance. If it be allowed to apply to this system, defended by Mr. Borchard, an expression used by himself in the opposite sense, we should say: surely this could not be good law. A rule entailing such a consequence ought to be accepted only under the compulsion of well-established and indisputable rules of international law. We do not think that these exist.

The Commission drew this argument from the observations of Borchard: The reason for the existence of the right of diplomatic protection is, that a State sustains moral injury by the wrong inflicted upon its citizen.

However true this may be it is difficult to see how this can justify the statement:

> „The reason for the rule that the killed or injured person must be a citizen of the claimant State is *that the prestige of only one State had been deemed impaired* by a wrongful assault, and that is the national State of the killed or injured person."

Why should it be assumed that only one State can be injured by an international delinquency? That is a „petitio principii".

If a wrongful act of a State, besides damaging the citizen of another State, inflicts considerable indirect injury upon the citizen of a third State, why should that third State not be injured?

But the main basis for the Commission's view seems to be that „the only juridical relation which authorizes a State to exact from another the performance of conduct prescribed by International Law with respect to individuals is the bond of nationality." The truth of this may readily be admitted: whatever one's view may be concerning the position of individuals in international law, it is evident that a State cannot claim an indemnity from another except for an injustice sustained by itself or by one of its citizens. [1]). But we do not see what bearing this rule can have upon the right of a State to claim indemnity for damage indirectly sustained by one of its subjects. The bond of nationality is required between the claimant State and the person suffering damage, on whose behalf the claim is espoused. But why should that imply that the same bond is required between the claimant State and the person who was injured in the first instance?

Such an implication can be sustained on one ground alone viz. that there has been no internationally wrongful act toward the claimant State. [2]). Therefore the question upon which the issue finally depends appears to be this: *Can an internationally wrongful act towards a foreigner, which indirectly causes damage to a foreigner of different nationality, be wrongful by reason thereof towards the second foreigner*? Only if the answer is necessarily and under all circumstances to the negative will international liability be excluded in principle in cases of type III.

Is this the case? Let us consider what this might mean in certain circumstances. What if e.g. the wrongful act was carried out intentionally for the purpose of injuring the second foreigner? There seems to be little doubt, that in such a case, as in case IIA, (see page 258), liability would attach, since it shows a treatment of a foreigner that falls below international standards. And

[1]) The problem of the standing of individuals in International Law is discussed quite unnecessarily in the opinion; it has no bearing upon the rule just stated; it can only arise in connection with the question whether an individual, e.g. a stateless person may sue a State as an individual.

[2]) For this reason liability is rejected e.g. by Decencière-Ferrandière, pp. 249 and 257.

what if, even in the absence of any such intention, the relation between the direct and the indirect victim is such that the latter must be considered the real party in interest? The answer to this second question was given by the Commission in another case, to which we have already referred in the previous section; there *John McPherson* [1]) sustained a pecuniary loss on account of the refusal of Mexican postal authorities to pay a postal money order issued to the name of, and presented by, his agent Davidson. Now a third feature of this case, of particular interest to us here, was the fact that Davidson appeared not to be an American subject. Hence the position was that an international delinquency had been committed directly against a non-American, but had caused damage which was *in reality*, be it indirectly, sustained by an American. Nevertheless the claim was allowed, and the American Commissioner, with the approval of both his colleagues, one of whom was Mr. McGregor, wrote:

> „There would appear to be no sound reason why the Commission might not in the light of convincing evidence with respect to a legal relationship such as that explained by counsel for the United States, award compensation in favor of an American citizen who had suffered a loss in connection with a transaction conducted in his behalf by an agent," [2])
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> . . . . . .
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> „The evidence is convincing, and in a case of this kind I have no doubt that under principles of international law and of domestic law — at least Anglo-Saxon law — the Commission should look to the real party in interest." [3])

Apparently the Commission took the view that the circumstances of the case showed an internationally wrongful act against McPherson, although apparently he was only an indirect victim. This means that the Commission decided that an international tribunal should look to the real party in interest, not only with respect to the question who suffered the damage, but also with regard to the question whether an international delinquency has been committed against the indirect victim.

The question then remains: When can an indirect victim be considered as the real party in interest in the sense that he is the

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[1]) I, p. 325.
[2]) I, p. 327.
[3]) I, p. 328.

person against whom the wrongful act was committed? This will have to be decided according to the circumstances of each case; it would seem that the answer must in each case depend upon the relation existing between the direct and the indirect victim. Therefore, although it seems impossible to give a precise formula capable of serving as a general test, it may perhaps be said that *if the relation between the direct and the indirect victim is of such a character that it is the latter who in reality suffers the damage, the act can fairly be considered as having been directed — whether intentionally or not — against the indirect victim. In a case of type III presenting that feature, responsibility ought not to be excluded in advance.* It may be added that the most frequent, if not the only application of this rule will be there where the direct victim, with regard to the damage, was only an agent of, or acting in behalf of, the indirect victim.

Is it permitted to go further and to hold a State responsible in case III for all indirect damage which it could normally have been foreseen would be sustained by a third person, even if he is not the main victim? Such responsibility could only exist if the mere fact of neglectfully causing indirect damage to a foreigner constitutes an act violative of the law of nations. So far as we know there is no rule justifying such a conception. [1]) And we see no other way by which the delinquency might be considered as being internationally wrongful towards the indirect victim (and his State). Therefore, however unsatisfactorily this solution may work out sometimes, it must be concluded that *a wrongful act of a state towards an alien is not wrongful towards an alien of different nationality to whom it causes indirect damage, unless if it was intended to cause such damage, or can fairly be considered to affect primarily the second foreigner.*

Returning to the basic question of this section we must still investigate whether this principle is in any way affected when the indirect damage is suffered by reason of a family-relationship with the direct victim. We cannot see any reason why it should be. Certainly it will not often happen that a State inflicts injustice upon a foreigner with the intention of damaging one of his relatives, nor that a relative is the party primarily affected. But if such a situation should present itself, it would

[1]) Thus f.i.: Anzilotti, Cours de Droit International, p. 493.

seem that the international delinquency must be treated as being wrongful towards the relative (and his State).

Borchard has denied this in a passage, which requires attention. Speaking about the right of action of surviving dependents, he says:

> „Both precedent and theory sustain the belief that citizenship of the decedent in the claimant country is always required as a condition of an international claim. Where heirs have been admitted to the jurisdiction of international claims commissions, doubts have arisen whether the heirs as well as the decedent must have the nationality of the claimant country, some commissions dispensing with this necessity in the case of the heir, but not in the case of the decedent. To be sure practically none of these cases were actions for wrongful death of the decedent, but involved inherited claims. *Yet is it not believed that this modifies the principle*".[1])

It is in the last sentence, here italicized, that the weakness of Borchard's reasoning resides. In our idea there is in fact a fundamental difference between a claim for wrongful death, *inherited* by dependents, on the one hand, and , on the other hand, a claim for injury resulting from a relative's wrongful death, espoused in behalf of dependents *in their own right*. In the first case the claim is based upon the injury done to the decedent, and thereby to his State, so that logically the link of nationality between the decedent and the claimant State should be required; even if the claim is inherited by dependents of a different nationality, it nevertheless remains based upon an injury inflicted upon the decedent's State; hence the condition of citizenship in the claimant country may perhaps be dispensed with in the case of the heirs, but it remains no less necessary with respect to the decedent. In the second case however the claim is based upon an injury sustained by the dependents themselves, independently, be it indirectly, as a result of their relative's death. This being an injury sustained by the dependent's State, it is natural that *their* citizenship in the claimant country is indispensable. It is also indispensable, as we have already pointed out, that the causing of this consequential injury must be capable of being considered as violative of the law of nations. But we can find no reason why in addition the *decedent* should be required to have had the nationality of the claimant State.

[1]) A.J.I.L., 1926,page 70.

Case IV: Indirect damage sustained by a foreigner as a result of an injury inflicted by the defendant State upon its own subject.

In this case there is less doubt than in case III that responsibility cannot be imposed upon a State for all indirect damage that was a normal result of the wrongful act. Whereas in situation III there is an internationally wrongful act towards the direct victim, and the only question is whether it is wrongful also towards the indirect victim, here there is not even an international delinquency towards the direct victim, the latter being a national of the defendant State.

The claim of the *Dickson Car Wheel Co* falls within this category. We have already attempted to show that the Commission did not consider the question sufficiently deeply and did not adequately distinguish the different forms of indirect damage. Nevertheless it follows from what we have already said that we fully agree with the Commission's ultimate decision viz. that the claim was not sustainable in law.

However in this type of case again there is good reason for introducing the same two exceptions suggested in the last section. An injustice which a State may inflict upon one of its own nationals is irrelevant in the law of nations, but as soon as such is done with the purpose of causing damage to a foreigner, it enters into the field of the law of nations. It will constitute an international delinquency when it shows treatment of a foreigner below international standards, or a wilful destruction of vested foreign rights.

It seems equally permissible to impose liability if a foreigner is the real party in interest, i.e. if his relation to the direct victim is of such a nature that he can fairly be considered as having been directly affected. This view too is supported by an opinion of the Mexican-American tribunal. In the *International Fisheries Company* case [1]), already fully dealt with in Chapters IV and VII [2]), the Mexican Government was alleged to have wrongfully cancelled a contract concluded with a Mexican stock company, called „La Pescadora S.A." An American Company, which owned nearly all the shares of the Mexican Company, claimed reparation for the damage suffered from the cancellation. The majority of

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[1]) III, p. 207.

[2]) Vide supra, pp. 58 *et seq.*; 118 et seq.

the Commission took the view, that, both on general principles and owing to the special circumstances of the case, the American Company must be considered as the real party to the contract, having acted on its own behalf *through* the Mexican Company. The Commission's final ground for taking this view was:

> „.... This is seen with greater force in the fact that the International Fisheries Company in order to present itself before this Commission as a claimant, maintained the theory that it was the real party in interest, alleging that it was the party truly injured by the cancellation decreed by the Mexican Government; and it is not seen how it could have suffered the injury of which it complains had it not, through „La Pescadora, S.A.", which was its instrument, enjoyed the privileges given by the same concession. So that the instant stipulation of Article 32 must be effective with respect to the International Fisheries Company." [1])

It has been explained before (p. 122), that, in our opinion, the only direct victim of the Mexican Government's illegal act was the juridical person called „La Pescadora S.A.", whereas the Fisheries Company only sustained a loss *indirectly*. If that view is accepted, the award implies the recognition that an international tribunal may look to the real party in interest, even if the wrongful act was formally committed against a subject of the defendant State.

Conclusions

In view of the complexity of the subject, and of the uncertainty by which it has been characterized, it may be useful to summarize here the conclusions at which we have arrived in this chapter.

Indirect, remote, or consequential damage may occur in international law in four fundamentally different forms, as enumerated on page 233.

Liability under the law of nations is not limited to direct damage. A State MAY also be held responsible for indirect damage sustained

a. by the direct victim (case I), or

b. by a fellow-national of the direct victim (case II),

but only when such damage could normally and reasonably have been expected to result from the wrongful act.

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[1]) III, p. 216.

This is also applicable when the consequential damage was suffered as a result of the existence of a contractual relation between the direct and the indirect victim.

Further under the law of nations liability for indirect damage sustained by a foreigner as a result of an injury inflicted upon

a. a foreigner of different nationality (case III), or

b. an own subject of the defendant state (case IV),

is not in principle excluded,

a. when the defendant state committed its act with the intention of causing the indirect damage,

b. when the relation between the direct and the indirect victim is such that the damage is in reality sustained by the former, so that the wrongful act can fairly be considered as having been directed against him.

This principle is equally applicable when the direct damage was sustained as a result of family relationship with the direct victim.

CHAPTER XV

DAMAGE

Moral damage

It has been explained in Chapter X, dealing with denial of justice, that Commissioners van Vollenhoven and McGregor in the *Janes* case [1]) departed from the old theory that liability for an „indirect" denial of justice is based upon a presumption of complicity on the part of the defendant state. The theory formulated in its place was that the Government is responsible in an independent way for its own delinquency, viz. the failure to punish the perpetrator of a crime against an alien. In that chapter we discussed the effects of the two theories with regard to the *elements* and the *amount* of the indemnification to be awarded. It was seen that both these issues were directly dependent upon, and hence inseparable from, the view taken of the so-called „indirect" liability for a denial of justice; for this reason we discussed them both in the chapter dealing with denial of justice.

With respect to the subject of this chapter, we need only recall that one of the grounds upon which the majority opinion in that case was based, was the view, that in international law reparation may be allowed for moral injury suffered:

> „There again, the solution in other cases of improper governmental action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a Government; and this world-wide international practice was before the Governments of the United States and Mexico when they framed the Convention concluded September 8, 1923." [2])

[1]) I, p. 108.
[2]) I, p. 118.

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„24. The Commission holds that the wording of Article I of the Convention, concluded September 8, 1923, mentioning claims for losses or damages suffered *by persons* or by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief, and other similar wrongs. The *Davy* and *Maal* cases quoted are just two among numerous international cases in which arbitrators held this view." [1])

Commissioner Nielsen, in his dissenting opinion, with respect to this point also rejected the Mexican defence ,,that even though it had been shown that the claimants in the instant case had justified a „moral" damage, this is a matter which cannot be settled in a pecuniary way". [2])

These decisions are in conformity with constant international practice. [3])

A decision of still more fundamental importance was rendered upon the claim of *Charles and Bowman Stephens* [4]), two brothers of an American citizen who was shot by a Mexican guard; it was established that at least one of them did not suffer any pecuniary loss from his brother's death. Nevertheless an award was rendered in their favour:

„When international tribunals thus far allowed *satisfaction* for indignity suffered, grief sustained and other similar wrongs, it usually was done *in addition to* reparation (compensation) for material losses. Several times awards have been granted for indignity and grief not combined with direct material losses; but then in cases in which the indignity or grief was suffered by the claimant himself, as in the *Davy* and *Maal* cases (*Ralston, Venezuelan Arbitrations of 1903*, 412, 916). The decision by the American German Mixed Claims Commission in the Vance case (*Consolidated Edition* 1925, 528) seems not to take account of damages of this type sustained by a brother whose *material* losses were ,,too remote in legal contemplation to form the basis of an award" (the claim in the *Candlish* case was disallowed on entirely different grounds; *Consolidated Edition 1925*, 544). The same Commission, however, in the *Vergne* case, awarded damages to

[1]) I, p. 118.

[2]) I, p. 131.

[3]) Cf. Anzilotti, Cours de Droit International, p.p. 524 and 529; Roth, Schadenersatz für Verletzungen Privater bei Völkerrechtlichen delikten, p. 163, particularly note 3; Base 29 of the 1930 Hague Conference for the Codification of International Law; Buder, ,,Die Lehre vom Völkerrechtlichen Schadensersatz", p. 199.

[4]) I, p. 397.

a mother of a bachelor son (not to his half-brother and half-sister), though ,,the evidence of pecuniary losses suffered by this claimant cognizable under the law is somewhat meager and unsatisfactory" (*Consolidated Edition*, 1926, at 653). It would seem, therefore, that if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of satisfaction, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages in the character of reparation (compensation)." [1])

It follows from this judgment, that in the law of nations liability can even be imposed for moral damage unaccompanied by any material loss.

We may mention as one more reason for allowing sums in international awards, for ,,moral" or ,,immaterial" damage the extreme difficulty of drawing a clear distinction between *satisfaction* for such damage and *compensation* for material damage. This may be illustrated e.g. by a paragraph of the opinion rendered in the *Mallén* case, which runs:

„14. When accepting as the basis for an award, in so far as compensatory damages are concerned, the physical injuries inflicted upon Mallén on October 13, 1907, only those damages can be considered as losses or damages caused by Franco which are direct results of the occurrence. While recognizing that an amount should be added as satisfaction for indignity suffered, for lack of protection and for denial of justice, as established heretofore, ..." [2])

It seems difficult to point to any fundamental difference justifying the distinction here made by the Commission between „compensation for physical injuries" and ,,satisfaction for indignity suffered". Perhaps the former may not constitute *„moral* damage" in the strictest sense of the word, but on the other hand it would seem to constitute an ,,immaterial damage" in so far as it does not imply any specific financial or material *loss*. To admit „reparation "for the physical injury, at the same time refusing ,,satisfaction" for the moral indignity, would therefore seem an arbitrary distinction, not justified by any fundamental difference.

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[1]) I, p. 398.
[2]) I, p. 264.

Amounts of Awards

In each of the three volumes containing the opinions of the General Claims Commission there is a complete list added, showing the actual indemnity awarded in each individual case.

Besides, a detailed enumeration of the sums awarded in the separate cases, together with a statement of the delinquencies for which they were awarded, can be found in paragraphs 466*a* to 472*b* of Ralston, Supplement to the Law and Procedure of International Tribunals, and more fully in paragraphs 265 to 270 of Feller's work on the Mexican Claims Commissions. Consequently we may refrain here from inserting a similar enumeration, which could but be a repetition of the excellent work done by these authors.

The only point of particular interest in this connection is to be found in the sums awarded for so-called indirect denial of justice on the part of one of the Governments. For such matters sums were awarded ranging from $ 1.000.— to $ 20.000.— according to the degree of seriousness of the governmental fault or faults; most of these awards were in the amount of $ 5.000.— and $ 7.000.—.

A detailed justification of the amount of the indemnity was only given in connection with the claim of *Walther H. Faulkner* [1]) who, in the eyes of the Commission, was treated during his detention in a manner which fell below international standards of civilization.

> „11. The determination of damages to be allowed in cases of this type is necessarily uncertain. In the Topaze case, the umpire held after due investigation (Ralston, Venezuelan Arbitrations of 1903, p. 331) that a sum of $ 100.— per day (or: not exceeding $ 100.— a day) „seems to be the one most usually acceptable" and „is apparently the favored allowance by arbitrators". The Commission is willing to follow these precedents, but realizing how much the value of money has changed feels bound to increase them fifty per centum." [2])

Accordingly $ 1.050.— without interest was allowed for seven days of detention.

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[1]) I, p. 86.
[2]) I, p. 92.

Finally it may be mentioned that many claims were successfully based upon several cumulative causes of action. This circumstance seems generally to have been taken into consideration when establishing the amount of the indemnity, but a lump sum was already awarded, so that no sums were ever specifically attributed to the various causes of action.

Awards in contract cases.

The claim of *George W. Hopkins* [1]) was based upon the allegation that the Mexican Government had refused the payment of six postal money orders issued by the illegal Huerta administration. This allegation was established and Mexico was held „bound to pay the claimant the postal money orders declared upon."

It may respectfully be suggested that the Commission had no right to pronounce any such condemnation. As it has been seen in Chapter VIII, before a claim is admissible there must have been an international delinquency imputable to the respondent state, causing damage to a subject of the claimant State. Only when these conditions are present, can an award adverse to the respondent State be rendered, and it will necessarily tend to the reparation of the damage. In cases in which the injury complained of results from the nonfulfilment of a contract, the amount of the damage will generally be equal to the value of the obligation due by the respondent Government. But it remains non the less true that the tribunal can only order the respondent State: *to repair the damage* caused, and not: to execute the contract. This is the rule as generally understood and applied by international tribunals, as may be seen e.g. from the collection of awards mentioned by Ralston in connection with damages in contract cases [2]), and from the decision rendered by the Permanent Court of International Justice in the *Chorzow case* [3]). It was, therefore, in contradiction, perhaps unconsciously, with a well established international practice, that the General Claims Commission condemned Mexico in the *Hopkins* case to execute a contract.

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[1]) I, p. 42.
[2]) The Law and Procedure of International Tribunals, par. 452—457.
[3]) Publications of the P. C. I. J., Series A, No. 17, p. 47.

Currency. Rate of exchange.

The General Claims Commission rendered all its awards in one single currency, viz. United States Dollars; it did so

> „having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which it appears the two Governments also had in mind in framing the first paragraph of Article IX of the Convention of September 8, 1923, with respect to the payment of the balance therein mentioned „in gold Coin or its equivalent." [1] [2]

This system inevitably entailed difficulties with respect to the rate of exchange to be applied. In the lastmentioned case the payment of postal money orders owned by the claimant had been refused by Mexican post offices in the years 1913 to 1915. The American Commissioner calculated the amount of Dollars due by applying the par value of the peso:

> „I am of the opinion that in the instant case the par value of the Mexican peso, namely $ 0.4985, may properly be taken in determining the amount to be awarded in the currency of the United States. There are several considerations which I think justify this conclusion. Mexico withheld payment of the money orders, and the claimant should be reimbursed in the full value of the orders. That payments were not made is satisfactorily shown by evidence, but the date upon which payment of each order was refused is uncertain, and it is natural that the claimant should not be able to furnish precise information in each case. There is not, in my opinion, before the Commission the proper kind of evidence on which the Commission could properly determine the rate of exchange on each of those dates or an average rate of exchange during the period within which the orders were dishonored, even if such computations might be deemed to be proper. And what is probably more to the point, Mexico has not contended that the prevailing exchange rates at the time the orders were dishonored should be applied, but has insisted that an award should be rendered in terms of the law of payments of April 13, 1918." [3]

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[1] I, p. 305, *The Peerless Motor Car Company*,

[2] The same argument was used, expressed in almost the same terms, in the cases of *George W. Cook*, at I, p. 322, and *Esther Moffit*, at II, p. 288.

[3] I, p. 323. It seems difficult to understand why this opinion, together with the subject of exchange, has been treated in the „Supplement to the Law and Procedure of international Tribunals" in the chapter „Responsibility of Government", and not in the chapter „Damage", where the amounts of awards and extent of damages are discussed.

The grounds upon which the American Commissioner apparently based his decision were 1. that the dates of refusal were uncertain; 2. that Mexico did not even ask for the application of the rates of exchange prevailing at those dates,but wanted the amounts to be calculated according to the Mexican Law of Payments, which established certain specific equivalents in gold currency of obligations contracted in paper currency. It will be evident that both these arguments had but incidental value, and that this decision cannot be used as a precedent. Therefore, when in a good many later decisions [1]) it is said that „the principles underlying the decision in the case of *George W. Cook*" are applicable, it is difficult to understand what principles of this opinion are referred to. The only statement which gives a generally applicable standard, and which must therefore be considered as having been applied in the decisions mentioned, is to be found in the separate statement made with respect to this point by Commissioner van Vollenhoven and concurred in by Commissioner McGregor:

> „Amounts which fell due to claimants in Mexico in the years 1913 to 1915 when a depreciated paper currency was in circulation throughout the country should be awarded by this Commission in strict compliance with the monetary enactments of Mexico effective in those years, unless in any specific case there might be conclusively proven that by so doing the Commission would cause the claimants an unjust enrichment." [2])

It is pointed out in the opinion of the American Commissioner, that domestic courts have applied four different principles for the conversion into national currency of sums expressed in foreign currency .These principles, which in the opinion of the Commissioner may have been relevant to the similar issue arising before international tribunals, consist in the application of the rates of exchange prevailing at the date:

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[1]) *Parsons Trading Company*, I, p. 324;
John A. Mc. Pherson, I, p. 325;
George W. Hopkins, I, p. 330;
Lee A. Craw, II, p. 1;
National Paper and Type Company, II, p. 3;
Francis J. Acosta, II, p. 12;
Singer Sewing Machine Company, II, p. 123;
George W. Cook, III, p. 162.

[2]) I, p. 323.

1. at which the judgment was rendered;
2. at which suit was brought;
3. of the breach of contract;
4. in the absence of evidence with regard to the value of a foreign coin: par value.

It was the third principle which was in effect applied on several occasions by the General Claims Commission, although it never gave a reasoned justification for adopting this course. In a case involving a refusal to pay a Mexican postal money order [1]), it was stated in a decision written by the American member of the Commission:

> „Whatever may be said of the principles underlying the decisions of domestic courts in cases in which the rates of exchange have been fixed as of the date of judgment or as of the date when suit was brought, those principles do not appear to be susceptible of logical application in a case such as that pending before the Commission. But the principle of applying the rate of exchange as of the date of the breach of an obligation appears to be one which the Commission can properly apply. The Commission has followed the practice of rendering awards in currency of the United States, having in mind the uncertainties with respect to the rate of exchange and, further, the provisions of the first paragraph of Article IX of the Convention of September 8, 1923. It is therefore proper that the award should be rendered in accordance with the rates prevailing at the time the money orders should have been paid; that was when they were presented for payment. By the application of that principle the award will be the equivalent value in gold which the claimant would have received had the orders been paid on presentation." [2])

Two years later, the same *George W. Cook*, of whom there has been question several times, claimed payment on gold basis from the Mexican Government for services rendered during a period when the gold peso was the legal tender in Mexico. [3]) Mr. Nielsen, for the Commission, decided:

> „Whatever may have been Mexican law with respect to the character of money a creditor might have refused to accept in payment of debts during the years when the items embraced by the claim became due, it seems to be clear that a debtor was not obliged to make payment in legal tender, or, in other words, was

[1]) *Esther Moffit*, II, p. 288.
[2]) II, p. 290.
[3]) III, p. 162 and 167.

not required to liquidate a debt in terms of legal tender unless a creditor demanded that form of liquidation."

. . . . . .

The award should be in the amount of the losses sustained by the claimant because of the non-fulfilment by the Mexican Government of its obligations when they arose. It seems to be clear from the evidence that when these obligations became due there was practically no gold in circulation in Mexico. Whether the claimant would have refused payments in money other than gold had they been tendered, is a matter of useless speculation. With respect to legal tender paper money, it must of course be borne in mind, as has been pointed out, that, when a claimant is awarded a sum in gold, the translation of that amount into the equivalent of what he would have received on the date an obligation was due in accordance with the evidence of rates existing at that time, does not involve a question of enforcing a payment in gold values of some paper obligations which the claimant never possessed, nor a question as to the propriety of the issuance of such money." [1])

The lucidity of these statements is a matter for the conscience of their author. Their meaning, anyhow, seems to be that the amount of the award should not be established by applying the par value on gold basis, officially in force at the moment when payment was demanded, and refused, i.e. the moment of the breach of the contract, but the rate of exchange which was *actually* applied at that moment.

It would seem that practically the same system was applied on two more occasions. In 1928, by the voice of its then Presiding Commissioner Dr. Sindballe, the Commission said:

„As in the case of *George W. Cook*, Docket No. 663, the Commission is of the opinion that no account should be taken of the Mexican law of payments of April 13, 1918, in determining the award. In the Mexican Brief, however, it has been argued with reference to the decision of the Commission in the said case, that an unjust enrichment for the claimant would ensue, if the amounts of the money orders, which were all of them payable at sight, were transferred into U.S. currency at a rate of exchange higher than that prevailing at the date of the purchase of them. The Commission considers this view as correct, and according to information about the rates of exchange furnished by Counsels for the two Governments, the Commission fixes the amount to be awarded at $ 117.08, U.S. currency." [2])

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[1]) III, p.p. 165—166.
[2]) II, p. 122, *Francis J. Acosta.*

It will be noticed that here the rate of exchange was applied which prevailed at the date of the purchase and not at the date at which payment was refused. Probably, however, this was done because, as the opinion states, there was no proof with regard to the presentation for payment of the money orders, and because these were payable at sight, i.e. immediately from the moment of issue. It may be taken, therefore that this decision, too, implied an application of the principle that the rates of exchange should be calculated according to the date of the breach of contract. This is confirmed by the fact that when the Presiding commissioner applied the same reasoning with respect to the claim of the *Singer Sewing Machine Company* [1]), Commissioner Nielsen that time disagreed on the ground that there was not sufficient evidence, in his opinion, with regard to the exchange rate prevailing „at the time when the orders should have been paid but were dishonored."

Interest.

The Convention of September 8, 1923, did not provide for the allowance of interest in the pecuniary awards. Nevertheless the tribunal took the view that interest ought to be awarded being a proper element of compensation. It was strengthened in this view by the fact that none of the opinions rendered by former international tribunals, many of which are enumerated in the opinion, appeared

> „to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation. It is the purpose of the Convention of September 8, 1923, to afford the respective nationals of the High Contracting Parties, in the language of the convention, „just and adequate compensation for their losses or damages." In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld." [2])

This decision is in accordance with the view taken before by

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[1]) II, p. 123.
[2]) *Illinois Central Railroad Company*, I, p. 189.

many other arbitral tribunals [3]) and seems thoroughly unobjectionable. If a pecuniary award is intended to give full compensation for a financial loss, it should endeavour, as far as possible, to place the victim in the same financial situation he would have been in, if he had not suffered the loss. Since it will usually be impossible to determine with certainty what profits the claimant would have drawn from the sum or value he missed, it may generally be taken that these will be covered by a reasonable interest.

It follows from this justification, that the same ground for the allowance of interest fails, when an award is rendered for an item other than a financial or material loss. [1]) That apparently was also the view taken by the Commission when in the case of *Walther H. Faulkner* [2]) who complained of ,,damages sustained in his honor, time lost, and well-being" as a result of illegal and internationally insufficient treatment suffered, while under arrest, at the hands of Mexican authorities, it decided:

> „Cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases tribunals often allowed a gross sum without interest." [3])

Neither was interest allowed upon a lump sum for injustice inflicted, the Dutch Presiding Commissioner in the *Venable* case [4]) saying:

> ,,The amount of $ 100.000.— for which Mexico is responsible on account of the destruction of the three engines is a lump sum for injustice inflicted and should bear no interest." [5])

[3]) ,,Those Commissions which have allowed interest have proceeded either under express authority of a protocol, or on the theory that ,,compensation" includes interest for the improper withholding of satisfaction, either by the failure to make prompt payment of money when due, or the wrongful detention of property." Borchard, Diplomatic Protection of Citizens Abroad, p. 428. ,,Arbitral tribunals have felt that it was not outside of their jurisdiction to award interest, even though the Convention by which they were set up made no mention of interest." Eagleton, Responsibility of States, p. 203; see also Ralston, Law and Procedure, par. 212 and cases there cited, as well as the precedents mentioned in the opinion itself.

[1]) ,,There is no basis for awarding damages in the nature of interest, where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely." U.S. and Germany Mixed Claims Commission, A.J.I.L. XVIII,p.603. Similarly it was decided that no interest, *eo nomine*, would be allowed on claims based solely upon injuries to the person in the following cases: *Christern and Co.*; *Becker and Co.*; *Max Fischbach*; *Richard Friedericy*; *Otto Kummerow*; *A. Dauman*; Ralston, Venezuelan Arbitrations of 1903, p. 520.

[2]) I, p. 86.

[3]) I, p. 92.

[4]) I, p. 331.

[5]) I, p. 348.

Earlier in the opinion the Commissioner had pointed out that, owing to the circumstances of the case, the responsibility imposed upon Mexico in this respect was not a *direct* one for the destruction of the locomotive engines, but an *indirect* one for the failure to take any steps to prevent or repress such action by individuals. [1]) It may perhaps be doubted whether such view was justified, and whether the sum awarded for this item was rightly considered as a lump sum for injustice inflicted, or whether it was, as Mr. Nielsen in his dissenting opinion held, a compensation for deprivation of property and for financial loss, amounting in fact to a fixed sum of money [2]); this, however, is of less importance; what matters is the principle recognized by the opinion.

Since the Commission had no authority to impose any financial obligations after the termination of its labours, it on several occasions limited the computation of interest in a way which in the decision on the claim of the *Illinois Central Railroad Company* was expressed in the following terms:

> ,,However, the Commission will not award interest beyond the date of the termination of the labors of the Commission in the absence of specific stipulations in the Agreement of September 8, 1923, authorizing such action. With respect to the Commission's conclusion touching this point it may be noted that some conventions have contained provisions requiring the payment of awards within a year from the date of the rendition of the final award, without interest during that period. See for example: Article 15 of the Treaty of May 8, 1871, between the United States and Great Britain, Malloy, Vol. 1, page 707. But although it has been stipulated that interest should not be paid after the date of the last award, allowances of interest on awards up to that date have been made even in the absence of any provision authorizing them. In Hale's Report, page 21, it is stated that the Commission created by Article 12 of the Treaty of May 8, 1871, between the United States and Great Britain ,,ordinarily allowed interest at the rate of 6 per centum per annum from the date of the injury to the anticipated date of the first award." [3])

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[1]) I, pp. 345—346.
[2]) I, p. 372.
[3]) I, p. 90.
This principle was also applied in the cases of
W. A. Parker, I, p. 191;
John B. Okie, I, p. 191;
J. Parker Kirlin, I, p. 192.

CHAPTER XVI

NATIONALITY

It has been stated in Chapter VIII that the fifth and last requirement for the allowance of an international claim is that the individual on whose behalf the claim is espoused should be a national of the claimant State. The Mexican-American Claims Commission, too, pointed out:

> „that the nationality of claimants is the justification in international law for the intervention of a government of one country to protect persons and property in another country, and, further, that by the jurisdictional articles of the Convention of September 8, 1923, namely, Articles I and VII, each Government is restricted to the presentation of claims in behalf of its own nationals." [1])

This principle, the observation of which was imposed upon the tribunal both by its general application in the law of nations as well as by the express wordings of the 1923 Convention, needs no further discussion here. An important question to which its application gave rise, viz. *whether in cases of indirect damage both the direct and the indirect victim must have the nationality of the claimant State,* was given ample consideration in relation to the subject of indirect damage. [2])

It will be apparent from that chapter, that a claim by an indirect victim of a different nationality from that of the direct victim involves not only the question of international responsibility for indirect damage, but also that of nationality. However in order to get a clear survey of the subject of indirect damages, it seemed preferable to deal with these questions together in the chapter on indirect damage.

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[1]) II, p. 7, *Edgar A. Hatton*).
[2]) Chapter XIV, case III).

The requirement of nationality still gave rise to a few questions of minor importance.

Thus it was contended by the Mexican Government that a claim made by the United States in behalf of the Receiver of a bankrupt American corporation should be dismissed, because the American nationality of neither the Receiver, nor the creditors of the insolvent Company had been established. The Commission however rightly held:

> „that the question as to whether the claim presented in this case comes within its jurisdiction does not depend on the nationality of Greenstreet (the receiver) or of the creditors, Greenstreet being only a representative of the insolvent corporation, and the nationality of the creditors being just as immaterial as is that of the stockholders in case of a solvent company." [1]

The same decision was twice reached with respect to the nationality of the executors or administrators of an estate of a deceased national. [2] These decisions are in accordance with the view laid down in the *Wiltz* case [3] and in the case of *Halby and Grayson*, administrators. [4]

Another time a lengthy consideration was given to the effect to be attributed to Section 2 of the American „Act in Reference to the Expatriation of Citizens and Their Protection Abroad" of March 2, 1907, 34 Stat. 1228. However, any decision with respect to this point would lack sufficient value as a precedent in international law to justify its discussion in this book. [5]

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[1] II, p. 200, *W. C. Greenstreet.*

[2] *Halifax C. Clark and Olive Clark*, jount executors of the estate of Alfred Clark, deceased, III, p. 94; *Belle N. Hendry*, III, p. 97.

[3] Moore, p. 2243.

[4] Moore, p. 2241.

[5] Case of *Lilly J. Costello* II, p. 252; the arguments on this point may be found on pages 255 to 265; the case is also briefly dealt with in Feller, The Mexican Claims Commissions, pp. 101—102.

CHAPTER XVII

LAW OF (CIVIL) WAR

It is evident that questions pertaining to the law of war could only arise before the Mexican-American tribunal in so far as that law is applicable in time of international peace, i.e. only in so far as it is applicable to civil war and revolution.

It will perhaps be remembered that the problem of responsibility of states for acts of revolutionists has already been considered in a separate chapter (VI).

The decisions there discussed all referred to the question how far a State can be rendered responsible for the acts of insurgents, but did not touch upon the problem *what* acts are *illegal* in time of revolution. It seemed desirable to deal with the former subject immediately after the chapter on „Acts imputable to a State" since this also dealt with the question of the persons for whom, and the acts of such persons for which, a State can be held responsible.

The subject of this chapter, although it also relates to revolutions, is different. It has nothing to do with State responsibility for acts of insurgents, nor with the effect of revolutionary activity upon the responsibility of a Government for its own acts; the problem here is: *which rules is a government bound to follow in times of revolution or civil war?*

Claims involving questions of this character were twice submitted.

On April 20, 1924, the American steamer „Gaston" entered the port of Frontera, Tabasco, Mexico, while this port was in the hands of insurgents. The Mexican Government had issued a decree closing the port to international trade, and it had officially informed the American Government of the closure. In reply the government of the United States of America had declared that it felt obliged to respect the rules of international law which in this

case required that a port in the hands of insurgents could be closed only by an effective blockade and, further, that it felt obliged to advise American citizens engaged in commerce with Mexico that they might deal with persons in authority in such ports with respect to all matters affecting commerce therewith. The „Gaston" was nevertheless compelled by a Mexican gunboat to leave the port before she had been able to unload all her cargo or to load any new cargo. The United States now made a claim for the loss suffered from these facts by the American company operating the ship, the *Oriental Navigation Company.* [1])

The Mexican Government based its defence on two grounds:

1. „that the belligerency of the insurgents in question had been recognized by no foreign power";
2. that the law protecting neutral commerce is not the same after the worldwar 1914–'19 as it was before."

It follows that this case implied these two issues:

1. applicability of the law of war to civil war;
2. the present-day force of the pre-war rules of blockade.

Law of war in civil war. Blockade of insurgent port.

The first Mexican ground of defence was thus expressed in the opinion:

> „The respondent Government refers to the fact that the belligerency of the insurgents in question had been recognized by no foreign power. It follows therefrom, the respondent Government contends, that the Federal Government of Mexico, notwithstanding the revolution, was vested with full and undivided sovereignty over all her territory, so that it was a question solely dependent upon domestic Mexican law whether or not the Federal Government was entitled to close a Mexican port." [2])

To this defence the Presiding Commissioner, Dr. Sindballe, with the support of Mr. McGregor, replied by deciding:

> „In the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera. In time of peace, it no doubt would be a question of domestic law only. But in time of civil war, when the control of a port has

[1]) II, p. 23.
[2]) II, p. 24.

passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war. It is clear also, that if this principle be not adopted, the conditions of neutral commerce will be worse in case of civil war than in case of war." [1])

This observation unfortunately does not contain a clear cut decision on the validity of the thesis put forward by Mexico: that in case of an uprising the full sovereignty over the country, and therewith the right to declare ports closed, without instituting an effective blockade, rests with the legal government, as long as the belligerency of the insurgents has not been recognized, either by the mother government, or by a foreign government. From the fact, however, that the Commission did not accept the Mexican defence, and from the phrasing of the opinion („in time of civil war, when the control of a port has passed into the hands of insurgents") it may probably be concluded that the majority of the Commission took the view that the law of war is applicable as soon as a port is in the hands of insurgents, it being immaterial whether the status of belligerency has been recognized or not. The American Commissioner took this view more explicitly in his elaborate dissenting opinion. His view is summed up in the following quotation:

„I am of the opinion that judicial and administrative officials who have frequently asserted the broad principle embraced by the statement of Lord John Russell, that it is not competent for a Government to close ports in the hands of insurgents except by effective blockade measures, have made no distinction between the closure of ports occupied by revolutionists to whom the status of belligerents has been accorded by some affirmative act, and ports occupied by forces not so recognized as having that status. In my judgment they have logically refrained from making such a distinction, because such a recognition of belligerency is not a sound and practical standard by which to determine the propriety or impropriety of the closing of a port." [2])

The Commissioner repeats this view many times in different words, e.g.

„To my mind no definite conclusion can be drawn from the citations in the brief of each Government as to the existence or

[1]) II, p. 24.
[2]) II, p. 29.

nonexistence of a rule of international law *specifically applicable to the case of a closure of a port occupied by insurgents who do not possess the status of belligerents.*" [1])

„If the observations which I have made with regard to considerations that may prompt recognition or non-recognition of belligerency by governments are correct, it would not seem to be logical to attempt to make any distinction between the closure of a port held by insurrectionists who by some affirmative acts have been recognized as belligerents, and a port in the hands of revolutionists to whom such a status has not in this manner been accorded. And since it would appear to be impracticable in all cases to make that distinction, there would seem to be a good reason why it has not been made, as it apparently has not." [2])

„As I have indicated, I am of the opinion that international law with regard to the exercise of the right of blockade is applicable to the situation existing at the port of Frontera when the *Gaston* was subjected to interference and consequent loss. I do not think there is any distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognized by some affirmative act and a port occupied by insurgents to whom that status has not been accorded in that manner. I therefore disagree with the contention upon which the Mexican Government's defense is based with respect to this distinction." [3])

„Insurgent ports can be closed by effective blockade measures. The pronouncements of Governments, the opinions of international tribunals and the writings of authorities, in my opinion ,all support the view that effective blockade is necessary to close an insurgent port, and that no distinction such as that for which the Mexican Government contends exists." [4])

The argument implied in all these quotations is that no governments, tribunals, or writers have ever made a distinction between ports occupied by insurgents whose state of belligerency has been recognized, and ports occupied by revolutionaries who have not received such recognition. In both cases, it is argued, the government can close a port in the hand of insurgents by effective blockade only. Although several international decisions are to

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[1]) II, p. 28.
[2]) II, p. 32.
[3]) II, p. 43.
[4]) II, p. 44.

be found in support of this statement, [1]) it must be remarked that an entirely opposite view was taken e.g. by Umpire Barge in the *Orinoco Steamship Company* case, where it was said:

> „Whereas the occupation of a belligerent party on land and on sea of all the surroundings of a fortress, a port, a roadstead, and even all the coasts *of its enemy*, in order to prevent all communication with the exterior, with the right of ,,transient occupation" until it puts itself into real possession of that port of the hostile territory, the act of forbidding, and preventing the entrance of a port or a river on its own territory in order to secure internal peace and to prevent communication with the place occupied by rebels or a revolutionary party cannot properly be named blockade, and would only be a blockade when the rebels and revolutionists were recognized as a belligerent party." [2])

Two other arguments may be drawn from the American Commissioner's reasoning. The one is this:

> „The American brief seems to treat the closing of a port held by insurgents whose belligerency has not been recognized by some government as a kind of special case to which the law of blockade is not applicable. If this view be correct, and if international law with regard to blockade is not applicable in such a case, then a parent government would seem to be impotent, if it cannot close a port by domestic enactment, to close the port at all, in the absence of some action by the parent government distinct from a blockade or following some form of recognition by other governments each of which might in behalf of its own vessels solely, or in behalf of the vessels of another country, legalize a blockade. I do not agree with such a view." [3])

The meaning, and therefore the value, of this argument is rather doubtful. It evidently holds only good when one takes for granted, as the American Commissioner does, that a port in the hands of insurgents whose belligerency has not been recognized, ,,cannot be closed by domestic enactment" of the legal government. It is not very clear, however, what the Commissioner meant by „*can* not be closed by domestic enactment". If he intended to say that

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[1]) See e.g. *Asphalt Company* cases, Ralston, Venezuelan Arbitrations of 1903, pp. 331 and 586; and quotations in the first decision, p. 337; *Chapica* case, Moore, p. 4934; and cases mentioned by Ralston, The Law and Procedure of Interational Tribunals, p. 406.

[2]) Ralston, Venezuelan Arbitrations of 1903, p. 95.

[3]) II, pp. 43—44.

it will *in practice* be impossible to close a port in the hands of rebels in the said way, then it must be remarked that such depends entirely upon the circumstances of each case, and the remark will only hold for those cases where it is *practically impossible* for the Government to close the port effectively by domestic rules. If, on the other hand, the judge meant to convey that *under the law of nations* a port cannot in these circumstances legally be closed in such a way, then the Commissioner solved by a *petitio principii* the problem raised by the Mexican defence, which was precisely that, as long as the revolutionary movement had not received recognition as a belligerent party, ,,it was a question solely dependent upon domestic Mexican law whether or not the Federal Government was entitled to close a Mexican port."

Mr. Nielsen's third reason is more convincing .He explains that the recognition of a state of belligerency, whether by the parent government or by a foreign government, is very often influenced by political considerations, and therefore cannot be adopted as a conclusive standard. Citing Dr. Oppenheim, he argues furthermore that, although there must be recognition before a new State or a new Government can become a person in international law or a de jure Government, this does not mean that *before* such recognition a state may not exist, or that a government may not be a de facto government. Similarly the character of a rebellion does not depend upon recognition of the state of belligerency — however important the consequences thereof may be under international law — but upon the facts of the case. And in the present case the serious character of the uprising had already been admitted by the Commission when in another case [1]) it had refused to hold the Mexican Government responsible for the acts of the same revolutionary forces because control over these acts was beyond the power of the Mexican authorities.

Finally the Commissioner contends that at any rate the article of the Mexican customs law which in general terms purported to close in advance all insurgent ports, without reference to any specific port, was inconsistent with international law.

Before we proceed to a consideration of the second issue raised in the case of the Oriental Navigation Company, it may be well

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[1]) *Home Insurance Company*, I, p. 51.

to mention here an analogous decison about the applicability of the law of war. *E. R. Kelley* [1]) was an American who had entered into a four year contract of employment with the National Railways of Mexico. After two years of service he was discharged by the Huerta government in the interest of the national security as well as of his personal safety, in view of the occupation of Vera Cruz by American troops. The discharge, in other words, was represented by the Mexican Agency as a defensive measure, which, although contrary to the contract, was unavoidable having regard to the expectation of imminent and of serious hostilities. By this defence Mexico, with regard to circumstances which certainly could not be termed „war", relied on a rule of international law pertaining to war, or at any rate the principle underlying such a rule. The opinion, written by Mr. Nielsen for the Commission, does not give a very clear decision upon the validity of this defence. On the one hand it says:

> „Without undertaking to classify all the incidents of 1914 at Vera Cruz in precise terms of international law pertaining to war, or measures stopping short of war, or something else, or to apply to such incidents concrete rules of that law, we are of the opinion that a proper disposition of the instant case may be found in principles of law to which proper application may be given in determining the question of international responsib lity." [2])

But on the other hand the tribunal seems to take into account the fact that

> „when the order for the discharge of the claimant was given, hostilities of some considerable duration may reasonably have been anticipated." [3])

and several times invokes rules pertaining to „non-combatants", to „belligerent nations", and to „war". (Cf. the last section of this chapter). Hence the conclusion may perhaps seem justified that the Commission took the view that, when serious hostilities may be expected, principles of the law of war may well be applied.

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[1]) III, p. 82.
Same facts:
Halifax C. Clark et Al., III, p. 94.
J. E. Dennison, III p. 96.
Belle M. Hendry, III, p. 97.
[2]) III, p. 84.
[3]) III, p. 85.

Conditions for a valid blockade.

Returning to the claim of the *Oriental Navigation Company*, the second question there discussed was whether the rule that a blockade must be effective in order to be binding upon other states, is still in force after the world war of 1914–1919. Here again the majority opinion avoids a decisive answer:

> „Now, it has been submitted by the respondent government that the law protecting neutral commerce is not the same after the world war 1914–1919 as it was before. The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.
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> If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the „Agua Prieta", consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation. The Commission is of the opinion that the action of the „Agua Prieta" can hardly be considered as a violation of the law obtaining before the world war." [1])

But here again the American Commissioner, although somewhat verbose, is at the same time more definite in his answer:

> „Of course custom, practice, and changed conditions have their effect on international law as well as on domestic law. However, it need not be observed that a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control

[1]) II, p. 25.

of the sea in a given locality to act in conformity with established rules of law does not *ipso facto* result in a change of the law or justify disregard of the law. And if we indulge in speculation, it would not be a rash conjecture, in the light of experience, that the same belligerent, should his position be changed by a loss of control of the sea, would insist strongly on the observance of established rules and principles. It seems to be probable that among those who have given serious thought to the breakdown of the system of international law with regard to the exercise of belligerent rights on the seas and to the possibility of formulating rules that will be respected, there may be some who would not complacently vision a system of promiscuous seizure of and interference with neutral merchant vessels, or the promulgation of edicts with regard to forbidden mine-planted zones in the high seas in which the nations have a common right. Indeed it may be suggested that some might find it a more proper solution of the problem that the high seas should be maintained as the common highways in time of war, as in times of peace, and that to that end, interference with neutrals might be restricted to belligerent waters only." [1])

. . . . . .

„International law is a law for the conduct of nations grounded on the general assent of the nations. It can be modified only by the same processes by which it is formulated. A belligerent cannot make law to suit his convenience. An international tribunal cannot undertake to formulate rules with respect to the exercise of belligerent rights, or to decide a case in the light of speculations with regard to future developments of the law, thought to be foreshadowed by derogations of international law which unhappily occur in times of war .... In the agony of great international conflict, resort may be had to expedients to circumvent law, but the law remains." [2])

Apart from this theoretical difference with regard to the continued validity of the rule of blockade as defined in the Paris declaration of 1856, Mr. Nielsen also disagreed with the decision of his colleagues that the action of Mexico in forcing a neutral ship away from the port was consistent with pre-war law. A blockade of ports the farthest of which are as much as 900 miles apart, which is enforced by a single gunboat cannot, he argues with much reason, be said to constitute an effective blockade, nor can a port during the visit of that gunboat after an absence of ten days be said to be entirely or even partly under its control. This,

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[1]) II, pp. 38—39.
[2]) II, p. 39.

however, is merely a matter of incidental importance, which might at the utmost serve as a precedent with regard to the meaning of „blockade of a port" or „control of a port". The important point in the American Commissioner's opinion was, as has been shown, his denial that the pre-war rule of international law concerning blockade would have lost its binding force on account of failure to observe it by some nations during the world war.

Effect of war on private rights

The claim of *E. R. Kelley*, in addition to the question mentioned earlier in this chapter, gave occasion also for the discussion of a second problem: How far can a State, once the law of war has come into operation, interfere with private rights without indemnification? To this general question Commissioner Nielsen, for the Commission, answered:

> „There are well defined rules of international law for the safeguarding of rights of non-combatants. But there are of course many ways in which non-combatants may, without being entitled to compensation, suffer losses incident to the proper conduct of hostile operations. And a government has recourse to a great many measures of self-protection distinct from actual military operations such as the segregation or internment of enemy nationals, the elimination of such persons from any positions in which they might be a source of danger, and their exclusion from prescribed locations. With respect to practices in Europe during the World War, see Oppenheim, *International Law*, Vol. II, 3rd ed., p. 149 et seq., and as to action taken in the United States, see *United States Statutes at Large*, Vol. 40, Part II, p. 1716, *et seq.*" [1])

With regard more particularly to the effect of the outbreak of war — or, rather, the effect of the coming into force of the law of war—upon contractual rights, it was stated that the abrogation of such rights may be justified in certain cases.

> „It may also be observed that extensive pecuniary losses have of course occurred in various ways when the outbreak of hostilities has brought about the interruption of contractual relations, although rights established prior to such hostilities may in some measure have been preserved.

[1]) III, p. 85.

. . . . . .

From the evidence it appears that the claimant had contractual rights and that he was prevented from the continued enjoyment of such rights. But in the light of principles which have been briefly discussed, the discharge of the claimant, an American citizen, holding a responsible position when these occurrences at Vera Cruz took place ,could not be regarded as an arbitrary invasion of contractual property rights for which compensation should be made by the Mexican Government." [1])

„The discharge of the claimant and other Americans holding responsible positions with the railroad company was justified from the standpoint of national security, or as might be said, as a measure of defence." [2])

Mr. Nielsen then embarks on a lengthy argument concerning the precise effect of the coming into force of the law of war upon existing contractual rights. Are these only suspended, as was claimed by counsel for the United States, or are they entirely annulled? Here again it cannot be said that the Commissioner's reasoning proceeds along a clear and conscious line. He begins with some very general statements of little practical value:

„When two nations are at war it may be possible for their respective nationals to carry on contractual relations, but as a general rule it is certainly not very convenient to do so, even if it be permitted by the governments. In the consideration of the legal effect of such contracts it is necessary accurately to analyze the conditions under which such agreements are made and the nature of the authority that may prohibit or regulate them. And these matters can easily be analyzed and understood, whatever statements of various kinds may have emanated from authors.

Belligerent nations at times enact laws forbidding or regulating intercourse of their nationals with the nationals of enemy countries. A nation may deem it proper to put into effect such legislation in one war in which it is engaged and to refrain from doing so during the course of some other war, and legislation may be enforced during a part of the period of hostilities. Laws of this nature enacted by governments vary in form, scope and legal effect. In the light of an analysis of international practice, it seems to be clear that there never has been any general consent among the nations of the world binding themselves by rules or principles of international law to control the acts of their respective nationals in the making of contracts with enemy nationals." [3])

[1]) III, p. 86.
[2]) III, p. 89.
[3]) III, p. 87.

These observations seem to give little hold and to be little to the point; accordingly the Commissioner himself states

> „it is clear that matters of this kind (i.e. such as he has been discussing-author) have no relevancy to the issue that is before the Commission." [1])

After a few sentences the opinion continues:

> „When all intercourse between nationals of belligerent governments is forbidden, intercourse incident to contractual relations is of course suspended. Compensation is asked in behalf of the claimant from the date when he was discharged — very shortly after the landing of American troops which gave rise to the emergency. In connection with the consideration of contentions made with respect to the suspension and annulment of contracts in time of hostilities, we are not concerned with questions relative to remedies that may or should exist with regard to the preservation of pecuniary rights that have fully accrued under a contract prior to the outbreak of hostilities.... It is not contended that a debt due prior to the emergency which arose in April 1914, has been annulled. The argument in the instant case with respect to suspension of a contract as distinct from an annulment must evidently be predicated on the theory that an emergency could not justify a suspension of contractual relations in a manner that would have the effect either of rendering impossible the renewal of such relations after the cessation of the emergency or the realization of pecuniary benefits under the contract during the period of suspension." [2])

Although the American lawyer has just stated in the preceding considerations that there was no question here of the annulment of „pecuniary rights which have fully accrued under a contract prior to the outbreak of hostilities", he nevertheless proceeds to an elaborate discussion of confiscation:

> „During the last century there has been a world wide effort to mitigate the horrors of war. The principle has been acknowledged more and more that the unarmed citizen shall be spared in person, property and honor, as much as the exigencies of war will permit. There may still be two theories with respect to this question: one that confiscation is forbidden; the other, that while the violation of private enemy property may be an obsolete practice of barbarism, the strict legal right of confiscation still exists. But it is unnecessary for us extensively to deal with this interesting subject, because the conclusion reached by the Com-

[1]) III, p. 89.
[2]) p. 89.

mission and its disposition of the issues in the instant case are not at variance with the enlightened view aptly expressed by Dr. Oppenheim that „there is now a customary rule of International Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent." *International Law*, 3rd, ed. vol. 2, p. 158.

A question with respect to the confiscation of property might have arisen had the railroad company been forbidden to pay to the claimant any salary due to him prior to the occurrences at Vera Cruz in 1914 [1]).

The Commissioner then returns to the facts of the case by saying:

„Evidently nothing of that kind took place. To be sure it is argued that property rights were destroyed or confiscated through the discharge of the claimant, as a result of which he lost what he might have earned had he been permitted to fulfill the terms of his contract. But in the argument of this case it was finally admitted in behalf of the United States that some kind of an emergency did exist in 1914 when the American troops landed at VeraCruz, and that the emergency justified a temporary retirement of the claimant from the important position with the railroad company. It was argued, however, that there was no justification for dispensing with his services except during the period of the emergency." [2])

After another digression of one page, dealing with all the possible courses that might have been followed by the railway company in order to avoid injustice, the opinion returns to the issue:

„The question before the Commission is whether the claimant, having been discharged as the result of a reasonable anticipation of a very serious emergency, should be paid the value of the unexpired term of his contract. Certainly if this admitted emergency had lasted throughout the period of the contract, the right to retire the claimant from service during that period being conceded, it is difficult to perceive the logic of an argument that he should be paid for services not rendered — services performed by some one else who was paid. Yet compensation is claimed from the date of the discharge of the claimant." [3])

The last two sentences are, in our opinion, the only statements which contain a valid argument for disallowing the claim *in part.*

[1]) III, p. 90.
[2]) III, p. 90.
[3]) III, p. 91.

In the American Agency's theory the execution of the contract should have been resumed as soon as the emergency had passed, and compensation should only have been claimed from *that* moment, and not as from the moment of the discharge of the claimant. Hence an indemnity should only have been awarded from the moment first-mentioned. It would be outside the scope of this book to discuss whether, according to the rules of international law actually in force, such an indemnity should in fact have been awarded. We need state here only that *this opinion* seems to us to contain no substantial argument against the American assertion that the emergency could only suspend and not annul the contract. Nor can we find such an argument in the following sentences which represent the Commissioner's opinion:

> „As is shown by precedents that have been cited and others that might be mentioned, there is a wide range of defensive measures in time of hostilities. .... (Follows quotation of a number of cases not opposite to the instant case-author) ....
>
> Payment must be made for property appropriated for use by belligerent forces. Unnecessary destruction is forbidden. Compensation is due for the benefits resulting from ownership or user. In dealing with the precise question under consideration by such analogous reasoning as we consider it to be proper to employ, we must take account of things which in the light of international practice have been regarded as proper, strictly defensive measures employed in the interest of the public safety. Generally speaking, international law does not require that even nationals of neutral countries be compensated for losses resulting from such measures. In giving application to principles of law it is pertinent to bear in mind that it is rights of such persons with which international tribunals have generally been concerned in the disposition of claims arising in the course of hostile operations. Rights secured to nationals of enemy governments are generally dealt with in peace arrangements in a preliminary or final way. However the existence of such rights appears to be interestingly recognized in Article III of the Convention of the Hague of 1907 respecting the law and customs of war on land. The loss sustained by the claimant is of course regrettable. The record reveals the high estimate put upon his services by the President of the railroad company. He was the victim of unfortunate occurrences, and in the light of the principles which have been discussed, the Commission is of the opinion that it cannot properly award him compensation." [1])

[1]) III, pp. 92—93.

CHAPTER XVIII

MISCELLANEOUS

Admiralty law and the law of nations

The relation between admiralty law and the law of nations was briefly discussed in the so-called „*Daylight*" case [1]). The Daylight, an American schooner, was struck by a Mexican gunboat while at anchor in a Mexican port, was wrecked and lost. One of the questions which the Commission had to consider was whether the rule which creates a presumption of fault against a ship in motion colliding with a ship at anchor was applicable to this collision which happened in Mexican waters as early as 1882. The American Agent attempted to prove the applicability of the rule by alleging that it was a rule of admiralty law, and, as such, of the law of nations. The Presiding Commissioner's opinion, concurred in by Mr. McGregor, unfortunately does not deal with this point which it seems to regard as irrelevant to the case, holding that Mexican law is applicable. Mr. Nielsen however, expresses the following view in his separate opinion:

> „It is maintained in the Brief of the United States that maritime law is a part of the general law of nations, and it is argued that an examination of maritime codes reveals that at the time of the collision between the *Daylight* and the *Independencia* there was incorporated into the law of Mexico the principle of the often-stated rule which creates a presumption of fault against a ship in motion which comes into collision with a ship at anchor. In behalf of Mexico it is contended that no such rule was recognized in Mexican law in 1882. The statement has at times been made that admiralty law is international law. *Admiralty law, although largely the product of principles and practices developed by maritime nations over a long period, can probably not be regarded as interna-*

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[1]) Claim of *Johnson, White and McFadden*, I, p. 241.

tional law from the standpoint of the fundamental characteristics of the law of nations, namely, that it is a uniform law governing the conduct of nations which cannot be altered by a single nation. It can perhaps be said that certain principles of admiralty law have been so generally assented to that they are international law to which members of the family of nations would give effect. There may be some conventional international law. What is spoken of as general maritime law is the groundwork of all maritime codes, but nations generally do not consider themselves precluded from making modifications or additions. International law recognizes the right of a nation to subject foreign vessels within its jurisdiction to its authority, and to apply to them its maritime code." [1])

Foreign vessels in territorial waters.

The question of the jurisdiction of a State over foreign vessels entering its territorial waters arose in the case of *Kate Hoff* [2]). The American schooner „Rebecca", bound for Santiago, Texas, and afterwards for Tampico, Mexico, was driven southward by a gale, and compelled to enter the port of Tampico in distress, thus departing from its intended itinerary. There the captain was arrested and heavily fined for an attempt to smuggle. As he refused, and in any case was unable, to pay the penalties, the „Rebecca" and her cargo were sold by orders of court. The United States claimed compensation for the loss suffered on the ground, ***inter alia***, „that the vessel having entered Tampico in distress, was immune from the local jurisdiction as regards the administration of local customs laws". With respect to this point Commissioner Nielsen, on behalf of the Commission, observed:

„It is of course well established that, when a merchant vessel belonging to one nation enters the territorial waters of another nation, it becomes amenable to the jurisdiction of the latter and is subject to its laws, except in so far as treaty stipulations may relieve the vessel from the operation of the local laws. On the other hand, there appears to be general recognition among the nations of the world of what may doubtless be considered to be an exception, or perhaps it may be said two exceptions, to this general fundamental rule of subjection to local jurisdiction over vessels in foreign ports.

Recognition has been given to the so-called right of „innocent passage" for vessels through the maritime belt in so far as it forms a part of the high seas for international traffic. Similarly recogni-

[1]) I, p. 250.
[2]) II, p. 174.

tion has also been given — perhaps it may be said in a more concrete and emphatic manner — to the immunity of a ship whose presence in territorial waters is due to a superior force. The principles with respect to the status of a vessel in „distress" find recognition both in domestic laws and in international law. For numerous, interesting precedents of both domestic courts and international courts, see Moore, *Digest*, Vol. II, p. 339 *et seq.*; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, p. 194 *et seq.*." [1])

. . . . . .

„The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers. It has also been asserted in defence of a charge of attempted breach of blockade. It was asserted by as early a writer as Vattel, The Law of Nations, p. 128. In the instant case we are concerned simply with distress said to have been occasioned by violent weather.

While recognizing the general principle of immunity of vessels in distress, domestic courts and international courts have frequently given consideration to the question as to the degree of necessity prompting vessels to seek refuge. It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of the people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation cannot justify a disregard of local laws."

Briefly said, it appears that Mr. Nielsen stated and reaffirmed the international rule that a vessel, upon entering foreign terri-

[1]) II, pp. 176—177.

torial waters, becomes amenable to the jurisdiction which that State exercises over those waters, except in the cases of

1. innocent passage through maritime belts open for international traffic;

2. the ship's presence being due to superior force, particularly distress. [1]) The distress must have been serious, but this requirement does not go so far as to include that the vessel must have been completely helpless or unable to enter a port under her own power.

Police power over international rivers upon which navigation is free

A question pertaining to international river law arose in connection with the claim of *James H. McMahan* [2]) The facts of this claim have been related elsewhere; it is sufficient here to recall that four Americans, drifting on the Rio Grande, were ordered to approach by an officer on the Mexican bank; before they could comply with the command, the officer fired upon them . At the place where the shooting occurred the river formed part of the frontier between Mexico and the United States, and navigation was free by virtue of a Treaty between the two countries. The Treaty, however, also contained this restriction:

> „The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits."

The question therefore arose as to how far the riparian States could, in the exercise of their sovereign rights, particularly of their police powers over their part of the river, interfere with the right of free navigation?

The tribunal, represented by its Mexican member, while naturally unable to give a precise and general definition, arrives at what seems to be a sound and common sense solution. After having stated very emphatically a general international recognition of the right for riparian states to excercise police powers on rivers where navigation is free, it states:

> „It appears that the reservation expressly made of the territorial rights of either republic, within the limits which were established, covers the right of exercising the police power, in as much

[1]) This rule was laid down e.g. in the *Creole* case, Moore, Arbitrations p. 4375, and in the *Alliance* case, Moore, Arbitrations, p. 3458.

[2]) II, p. 235.

as it is one of the rights which the sovereign exercises over its territory. .... by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them. (See Oppenheim, *International Law*, Vol 1, pp. 314–322, 3rd Ed. 1920; Fauchille, *Droit International Public*, Vol. I, 2nd Part, pp. 453 et seq., 8 th Ed. 1925; Moore, *International Law Digest*, Vol. 1, pp. 616 et seq.; J. de Louter, *Le Droit International Positif*, Vol. 1, p. 445, Oxford Ed. 1920). The Congress of Vienna of 1815 fixed the free navigation of certain rivers, *subject to police regulations*. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, Article XXVI; Treaty of June 15, 1845, Article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation on international rivers, applicable to rivers separating two States as well as those traversing several States, in which the right of the riparians to exercise police power over the stream is recognized.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is matter as yet not defined by theory or precedent. *It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.*

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, *some* police powers, at least, over the course of the Rio Grande, and it does not appear excessive or contrary to the right of free navigation, that jurisdictional action for the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defence, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts." [1])

The American Commissioner, in a dissenting opinion, recognized in principle the right to exercise police authority, but expressed the view that such right does not permit interference with passing boats unless there is good reason for it:

„Even though it be taken for granted that each Government has the right to exercise police authority on its side of the international

[1]) II, pp. 240—241; the last sentence although not quite correct English, appears in these words in the original edition of the Opinions.

> boundary, the interference with the passage of boats without good cause is to my mind inconsistent with the right of free navigation. Evidence in this case leaves uncertain the precise location of the boats — whether they were on the Mexican or on the American side of the boundary line. However, that point seems to be immaterial. I think that the use of firearms and indeed any other means to arrest the progress of travelers against whom there can be no suspicion of wrongdoing, is inconsistent with the right of free navigation. [1])

Although Mr. Nielsen appears to consider himself as dissenting on this point, the difference of opinion with his colleagues seems to be caused by a different appreciation of facts rather than of principles: Mr. Nielsen evidently did not think that, in the given circumstances, there could be a reasonable suspicion of smuggling, constituting a „good cause", whereas the majority of the Commission did. This, however, if of little importance; what matters is, that all three Commissioners recognized the principle that the existence of a right of free navigation upon a river separating two states does not exclude the right of the riparian states to exercise police power over their part of the stream. Commissioner Nielsen did not deny that such a right implies an authority to interfere with the passage of boats where such interference is necessary in order to combat smuggling. It may even be asserted that the American lawyer would have concurred fully into the opinion of his colleagues if in his eyes a reasonable suspicion ***had*** existed against the occupants of the boat.

Validity of unilateral destruction of foreign rights.

The claim of *George W. Hopkins* [2]) has already been discussed on pages 103–105 in connection with the question of the liability of a State for acts of an illegal administration. Another problem raised in this case, was that of the unilateral destruction of foreign rights .The postal money orders issued under the illegal administration were annulled by a decree of the succeeding government. The international tribunal denied that any unilateral act could under international law have this effect.

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[1]) II, p. 248.
[2]) I, p. 42.

„13. As the Commission holds that the contracts between the Government of Mexico and Hopkins, evidenced by the postal money orders which it issued to him, are unaffected by the character of the Huerta administration and are binding upon the United Mexican States as such, the question presents itself whether this binding force has from an international viewpoint been subsequently destroyed by the decrees issued by Carranza on February 19, 1913, and July 11, 1916. The Commission has no hesitancy in answering both questions in the negative. The first decree, being that of one State of the Union, Coahuila, could have no possible effect on or modify either the rights or duties of the Union itself. The second decree, even when considered as subsequently invested with the character of a law by the Mexican Congress, *could not possibly operate unilaterally to destroy an existing right vested in a foreign citizen* or foreign state or a preexisting duty owing by Mexico to a foreign citizen or a foreign state.

. . . . . .

14. From the foregoing the Commission concludes that Hopkins contracts are unaffected by the legality or illegality of the Huerta administration as such, that they bind the Government of Mexico, *that they have not been nullified by any decree* issued by Carranza, and *that they have not been and cannot be nullified by any unilateral act of the Government of Mexico.*" [1])

And the final decision of the award is that

„the Government of Mexico is bound to pay claimant the postal money orders declared upon."

An attentive consideration of this decision shows that it is of farther reaching significance than it might appear at first sight; farther even, perhaps, than the Commission itself intended or thought. From the passages quoted, and particularly from the sentences italicised here, it appears that the award does not decide that the decrees of nullity are internationally illegal, but that they lack effect under international law, and secondly, it does not order Mexico to repair the damage caused by the nullification of the postal money orders, but to fulfill the financial obligation arising from those orders.

This construction seems unacceptable for two reasons. The first is that the Commission, instead of condemning Mexico for an internationally illegal act, imposed upon it the duty to fulfill its

[1]) I, p. 49—50.

contractual obligation. This point has already been discussed in the chapter on damage. [1])

The second and main objection, of which the first was but a consequence, is that the Commission, we are afraid, lost from sight two fundamental distinctions: that between national and international law, and that between nullity and illegality of an act.

The Commission says that it had to consider „whether this binding force (i.e. of the postal money orders) has *from an international viewpoint* been subsequently destroyed by the decrees issued by Carranza". This seems very questionable. The point ultimately to be decided by the General Claims Commission was whether the case before it showed (a) damage sustained by a subject of the U.S.A., (b) as a result of an internationally illegal act imputable to Mexico. [2]) In order to determine whether *damage* was suffered it might indeed have been useful to investigate whether the decrees were valid or void, *but then according to Mexican domestic law*. The question of nullity *under international law*, which the Commission examined, only arises in connection with international juridical acts („actes juridiques internationaux") [3]) The Carranza decrees did not fall under that category. Even supposing that the destruction of vested foreign rights was null and void under international law – which is not the case, as will be shown presently – it would not follow necessarily that the same would also be the case in Mexican domestic law. Such a result would ensue only if the view adopted by some writers [4]) is accepted, that international law is per se a part of municipal law, and that when there is a conflict between the two, the former automatically overrides the latter. If this was what the Commission intended to do, it should have so stated in express terms. As long as it failed to do this, the prevailing doctrine, which takes a contrary view, should be applied, and the validity of the Carranza decrees, upon which the existence of damage sustained by Hopkins depended, should have been determined exclusively according to Mexican domestic law.

[1]) vide supra, p. 271.

[2]) Supra, Chapter VIII.

[3]) Verzijl, La validité et la nullité des actes juridiques internationaux, pp. 8 and 21—22.

[4]) Kohler, Zeitschrift für Völkerrecht, 1908, pp. 209 et seq.; Potter, A.J.I.L.. 1925, pp. 315, 326.

The second point determinative of the case should then have been whether the facts of the claim constituted a wrongful act under the law of nations. Now in that law it is generally recognized that destruction of vested foreign rights may give rise to international liability, but not that such destruction is null and void. A juridical act is only juridically void, i.e. of no legal effect, when it lacks one of its essential elements, says Anzilotti. [1]) It follows that even if the Commission *had* wanted to express by implication its agreement with the theory that the rules of international law are automatically part of, and prevailing in, municipal law, it could not base itself upon a principle of international law to reach the result that the decrees were null and void. It seems more probable, therefore, that the tribunal was not fully aware of what its dictum implied.

Standing of individuals under international law.

Deciding upon the claim of the *North American Dredging Company* of Texas, [2]) to which full consideration has been given in connection with the Calvo clause, the Commission remarked:

> „The Commission also denies that the rules of International public law apply only to nations and that individuals cannot under any circumstances have a personal standing under it. As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at the Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated." [3])

It would be beyond the scope of this book to enter into a discussion of the problem whether individuals have or do not have a standing under international law; particularly so since the Commission itself did not put forward its arguments in support of this view. But the fact that the tribunal, contrary to the majority of writers and tribunals, took the view that individuals can have international personality, should not pass unnoticed.

Summers says about this decision:

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[1]) Publications of the P.C.I.J., Series A-B, No. 53, p 94.
[2]) I, p. 21.
[3]) I, pp. 23—24.

„La question est ainsi nettement tranchée. Mais la majorité de la doctrine est contre ce point de vue. Parmi elle se trouvent des jurisconsultes aussi connus que l'ex-président de la Cour permanente de justice internationale Anzilotti. Ainsi, si une Commission future partage le point de vue majoritaire, il n'est pas invraisemblable qu'elle statue dans un autre sens. Mais ici il n'y a pas lieu de critiquer la Commission, car il est à croire que la théorie majoritaire deviendra celle de la minorité. Cette décision facilitera cette transformation car c'est la première fois qu 'une instance internationale s'est prononcé nettement en faveur de l'individu." [1])

Prescription of international claims

The Pomeroy's El Paso Transfer Company [2]), in the course of the year 1911, rendered several services to the Mexican Government for which it received no payment.

The claimant permitted several years to elapse, without either pressing the claim with the Mexican Government, or presenting it to his own Government for diplomatic action.

In 1930, at last, a claim was filed in his behalf by the United States Government with the General Claims Commission. Counsel for Mexico then based a defence upon the long period of time that had elapsed since the facts complained of. So far as appears from the opinion, he did so on account of two facts: 1. because the claimant did not actively press his rights with the Mexican authorities; 2 .because the American Government never presented the claim diplomatically. The majority of the Commission disallowed the claim for lack of evidence and dit not find it necessary to consider this plea, but the American member, in a dissenting opinion, dealt fully with both the points brought forward by Mexico:

„It was contended in behalf of the United Mexican States that the claim was barred by principles of the law of prescription. Dr. Francis Wharton, in discussing what he calls a „stale claim" says:

„While international proceedings for redress are not bound by the letter of specific statutes of limitation, they are subject to the same presumptions as to payment or abandonment as those on which the statutes of limitation are based. A government cannot any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of

[1]) Revue de Droit International (de Lapradelle), 1931, p. 577.
[2]) III, p. 1.

perpetual litigation among its own citizens. It must be remembered that statutes of limitation are simply formal expressions of a great principle of peace which is at the foundation, not only of our common law, but of all other systems of civilized jurisprudence." *Digest*, vol. 3, p. 972

. . . . . .

It seems to be clear that, without straining analogous reasoning or attempting too extensively to apply in international law principles of domestic law, evidential value may be given to facts in relation to delays in the presentation of claims. *Such delays may assuredly raise presumptions as to the non-existence of a claim based on grievances, which had they existed, would have been called to the attention of the government on which it is sought to place responsibility*. The fact that the Commission has jurisdiction over the claims of each Government against the other since 1868 would not necessarily render inappropriate the application of the principle of laches in an appropriate case. But there is clear reason why the United States cannot properly be debarred from maintaining this claim before the tribunal by any plea with respect to the principles of prescription or of laches. The situation as to claims on the part of each Government against the other during a considerable period prior to the establishment of this Commission is of course well known. Moreover, it would seem probable that the United States might never have seen fit to present the claim diplomatically even in an informal way, whatever its legal right to do so might be. There is abundant record of its general policy to consider claims based on breaches of contract as falling within a class of cases with reference to which no diplomatic action is taken, except in rare instances, save by the use of informal good offices in appropriate cases.

. . . . . It was also argued that the claimant company had been guilty of laches in pressing its claim.

Irrespective of what evidential value might properly be given to the inactivity of the claimant, it might be concluded, considering the disturbed conditions from another point of view, that it was considered futile to do more than to mail the bills. Nor is it unnatural that the claimant should not see fit to bring a small matter of this nature to the attention of the Government of the United States with a view to diplomatic action prior to the time it was learned that a tribunal had been organized to consider all outstanding claims of each Government against the other. The claimant's conduct with respect to this matter cannot debar the United States from now maintaining a claim before this Commission. It may be further observed that, in any case in which an old debt is due under a contract, it is certainly not proper to place upon the creditor all the blame for the fact that the debt has become an old one. It would seem to be at least equally as appropriate to

> attribute a long lapse in payment to the failure of a debtor to pay what he owes rather than to the fact that the creditor may not have by persistent harrassments prompted payment. Therefore so far as the claimant company is concerned the Commission cannot properly conclude that inactivity on the part of the company should preclude a recovery in its behalf." [1])

In this opinion Mr. Nielsen recognized and supported two generally accepted rules with respect to prescription of international claims. The first is that, although the law of nations has not established any definite period of limitations with regard to the prosecution of international claims, the principle underlying these municipal statutes of limitation is equally applicable in international law. This rule is stated e.g. by Borchard in these terms:

> „International Commissions have had frequent occasion to pass upon the effect of a failure to present a claim for a prolonged period of time. While they have not allowed municipal statutes or rules of limitation to bar an international claim or considered any particular length of time as constituting a period of limitation, they have, nevertheless, recognized and applied the principle of prescription so as to bar numerous claims the presentation of which was inordinately delayed." [2])

The second rule confirmed by the opinion constitutes a corollary to the first: the presumption of laches created by the long delay in presenting the claim may be rebutted by giving a reasonable excuse and explanation [3]) for so doing. In the present opinion four circumstances it would seem, were considered to afford sufficient justification for the failure to present the claim sooner:

1. the disturbed conditions prevailing in the region at the time the breach of contract occurred and for some time after;
2. the policy of the United States to refuse diplomatic action in support of claims based upon breaches of contract;
3. the fact that the claimant might not have considered it worth while to request diplomatic action in connection with a claim of so little value, until he learned that a special tribunal had been established for the settlement of claims against the Mexican Government;

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[1]) III, pp. 11—13.

[2]) Diplomatic Protection of Citizens Abroad, p. 829; the author quotes many precedents in favour of this statement, see pp. 829—832.

[3]) See Borchard, op. cit. pp. 828—829.

4. the claim being one based upon the non-fulfilment of a contract, the blame for the long lapse of time since the obligation should have been fulfilled should in the first instance fall upon the defendant, and not work to the detriment of the claimant creditor.

It may be asked whether these four circumstances sufficiently justified the Commission's view that the claim ought not to be held extinguished by lapse of time. With regard to the first it must be pointed out that it can only account for the period during which conditions were really so disturbed as to render any demand on the part of the claimant useless in advance. Whether such conditions did indeed last for nineteen years may be doubtful. With the exception of this reservation, however, it may be said that the first three grounds invoked could be considered as valid excuses for so prolonged a failure to present the claim.

The last excuse invoked may at first sight also seem justified. Nevertheless a closer consideration leads to a different conclusion. The Commissioner's reasoning seems to take as its starting-point the existence of a difference in this respect between claims based upon non-fulfilment of a contract and those based upon an illegal act, viz. that the blame for a long lapse of time since the non-fulfilment by the defendant of his obligation toward the claimant should in the first case mainly fall on the former, whereas in the second case it should rather fall on the latter. This we consider to be an apparent and not a real difference. Both contract and delinquency create a liability on the part of the defendant, they *both* alike impose an obligation upon him, and in *both* cases it is *his* fault if he has not acted in accordance with his duty; but also what the claimant is charged with in both cases alike is not that the defendant acted in breach of his duty, but that this fact has for so long not been brought to the attention of the defendant state. It is difficult, then, to agree with the statement in the opinion that ,,it is certainly not proper to place upon the creditor all the blame for the fact that the debt has become an old one."

Still, in the present case, the claimant may perhaps be said to be sufficiently excused by the first three grounds invoked for not having presented his claim sooner. But it does not necessarily follow that this should suffice to exclude entirely the operation of the principle of prescription. The application of this principle in the law of nations is based upon three *rationes*:

a. peace and security, which are as indispensable in the law of nations as they are in domestic law, require that after a certain lapse of time it should no longer be permissible to impugn a right not denied, or to set up a right not asserted during that time; [1])

b. the possibility of obtaining trustworthy evidence as to the facts will greatly have diminished, if not vanished altogether; [2])

c. the failure to make the claim known at an earlier stage creates the presumption of some dishonesty inherent in it. [3])

Only if the circumstances of a given case are such as to show that the grounds set forth were absent — for instance if timely notice of the existence of the claim was given to the defendant government, or if the defendant has not been prejudiced in his defence — the claim will not be held to have been extinguished by application of the principle. [4])

Now the reasons set forth in the opinion may perhaps have the effect of rebutting the presumption of laches (*c*), but they do not seem to eliminate the two other reasons (*a* and *b*) for rejecting a claim upon the ground of prescription. This the Commission appears to have lost from sight.

It may be concluded that *Commissioner Nielsen's opinion in the Pomeroy's el Paso Transfer Company case constitutes a support for the two rules of international law A. that the principles underlying statutes of limitation are applicable in international law as well as in domestic law, and B. that the presumption created by a long delay in presenting a claim may be rebutted when the delay is satisfactorily excused.* The opinion failed, however, to investigate whether the circumstances which it accepted as satisfactory excuses for the latter purpose were sufficient to set aside the other grounds upon which the doctrine of prescription is based.

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[1]) „La conception la plus généralement admise fonde la prescription sur l'intérêt social", de Lapradelle et Niboyet, Répertoire de Droit International, vol. 10, p. 303; „It would probably lead to a clarification of the law if the main justification of prescription were admitted, as in the Conflict of Laws, to be simply the social interest which requires *ut sit finis litium.*" King, Prescription of Claims in International Law, British Yearbook of International Law, 1934, p. 93;

[2]) Thus King, loc. cit. p. 87, and some of the precedents mentioned by this author.

[3]) See further these justifications in the *Williams* case, Moore, Arbitrations, p. 4181. and in the *Stevenson* case, Ralston, Venezuelan Arbitrations of 1903, p. 327 and King, loc. cit. pp. 87 *et seq.*

[4]) „International commissions have held that a claim is not barred by prescription when there was no laches on the part of the claimant or his government in the presentation of the claim, or where the reasons for invoking prescription do not exist." Borchard, Diplomatic Protection of Citizens Abroad, p. 829.

CHAPTER XIX

EFFECT OF UNLAWFUL OR CENSURABLE CONDUCT OF CLAIMANT

Different forms of the problem

The Commission pronounced itself upon the effect of censurable conduct on the part of the claimant in three different kinds of situations:

1. the illegal government act complained of was entirely or partly caused or preceded by illegal conduct on the part of the claimant;

2. the claim was opposed on the defence that the claimant fled from justice in the respondent State;

3. the claimant gave an untrue or exaggerated account of the facts.

In all these three types of cases the defence is based on an alleged fault on the part of claimant. But the effect of the claimant's fault is different in all three groups. In the first category it only affects the illegality of the governmental act upon which the claim is based. The question there is: does the wrongfulness of the claimant's conduct neutralize or excuse the wrongfulness of the action complained of by the claimant State, or, in other words, was the respondent State's act wrongful at all in the particular circumstances? In the second case the defence does not affect the wrongfulness of the government's behaviour; the only question there is: Does the fact that a claimant has fled from justice in the respondent State deprive him from the right to invoke his government's protection or does it deprive his government from the right to espouse a claim on his behalf? With regard to the third group again the problem has no bearing upon the wrongfulness of the governmental acts complained of; the point there is, how far will exaggeration or misrepresentation of the facts by

the claimant deprive the whole of his assertions of all value, or affect his Government's right to intervene on his behalf?

In view of the foregoing it may be said that the first group belongs to the subject of what acts are internationally wrongful, [1]) whereas the second and third relate to the question of who were admitted as claimants. [2]) In this book however they are dealt with together in one separate chapter, because in all three categories the rule *ex dolo malo non oritur actio* was invoked.

Wrongful behaviour of claimant preceding governmental action complained of

The first question which may arise in connection with this subject is whether the fact that the claimant acted illegally on the occasion which gave rise to the claim, deprives his Government of the right to present a claim on his behalf. This question was answered in the negative by the General Claims Commission in the case of *Francisco Mallén*, which has already been considered in connection with several other subjects. It will perhaps be remembered that Mallén was a Mexican Consul complaining of unwarranted maltreatment by an American deputy constable. The American Agency alleged that the consul had been carrying a pistol in violation of local law. Upon that defence even the American Commissioner admitted:

> „That the Consul violated the law of Texas was not a consideration which should have prevented the Mexican Government from putting before the Commission the claim which they have presented. .... [3])

This decision is contrary to the principle that a government has no right whatsoever to present a claim in behalf of a citizen who was acting in violation of the local law. [4])

It seems in accordance, on the other hand, with those cases in which the right has been recognized for a government to intervene

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[1]) Chapters IX—XIII.

[2]) Chapter III.

[3]) I, p. 267.

[4]) „C'est un principe indiscutable qu'aucune réclamation ne peut être faite pour un dommage subi par un individu qui s'est rendu coupable de la violation de la loi locale. Le réclamant, suivant l'expression anglo-saxonne, doit avoir „les mains propres" (clean hands)" Decencière-Ferrandière, La Responsabilité Internationale des Etats, p. 228.

on behalf of one of its citizens if the same was treated in a way not sufficiently justified by his wrongful conduct. [1])

If then the claimant's wrongful conduct does not prevent the presentation of a claim in his behalf, can it perhaps affect the amount of the indemnity? This question received the consideration of the Commission on another occasion. In answer to the claim of *Garcia and Garza*, [2]) the facts of which have already been mentioned, the United States invoked the excuse that the party of Mexicans one of whom was shot by an American officer, was crossing the frontier river in contravention of local regulations. But the Commission remarked:

> „9. The record leaves no doubt but that the claimants, at least *Teodoro Garcia*, realized their acting in contravention of laws and regulations which had been effective since about two years. Though this knowledge on their part cannot influence the answer to the question, whether the shooting was justified or not, it ought to influence the amount of damage to which they are entitled." [3])

Although the result aimed at by this decision is felt to be fair, the wordings in which it is clothed cannot be said to have been happily chosen, and are likely to create confusion. It may perhaps be conceded that in the present circumstances the claimants' knowledge that they were acting in contravention of local prescriptions could not influence the legality or illegality of the State's behaviour. It seems less obvious that such knowledge „ought to influence the amount of the damage to which they are entitled." International liability depends upon the existence of an internationally wrongful act imputable to the respondent State, causing damage to a subject of the claimant State. It is not clear why the claimant's knowledge should affect the extent of the government's liability, if it does not affect the wrongfulness of the act complained of. The question, in fact, seems to be somewhat different than is suggested in the above quotation. It is the objective *fact* of the claimant's behaving illegally, not his *knowledge thereof*, which counts. That *fact* indeed may, partly or entirely, take away the wrongfulness of the governmental action,

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[1]) See e.g. *Virginius* and *Canon* and *Groce* Cases, Borchard, Diplomatic Protection of Citizens Abroad, pp. 764 and 769.

[2]) I, p. 163.

[3]) I, p. 169.

and thereby exercise some influence upon the amount of the award. Or it may instead be argued, in view of this *fact*, that the damage suffered by the claimant was indirectly and partly caused by his own behaviour, so that the State need not repair that part of the damage. It matters little which of these two explanations is chosen; both lead to the result that the amount of the award is diminished because of the claimant's censurable conduct. This principle is generally recognized. [1])

It was again more or less explicitly recognized by the Commission in the case of *Lillie S. Kling*. [2]) A party of Americans living in Mexico, when returning late one night to their camp, fired their revolvers in the air for fun, whereupon some Mexican soldiers, who had apparently been following them, opened fire upon the party and killed one of its members, called Kling. With regard to the defence that the Americans in carrying firearms were contravening of the local law, the judgment, written by Commissioner Nielsen, contained the following passage:

> „Some of the employees of the company who were fired upon by the soldiers were carrying arms. Whether or not such action was a violation of the law in the locality in question may be uncertain. Although account may be taken of that matter in weighing the evidence with respect to the question of fault on the part of the soldiers, the point is not one from which it is proper to infer an excuse for reckless firing by soldiers. The conduct of the Americans of course justified investigation and it might warrant an arrest." [3])

The American Commissioner then mentions a great number of cases decided by his own or by former Commissions. But although all of these examples relate to reckless killing or firing by government officials, none of them bears on the particular question of the effect of the claimant's own conduct. With reason the Presiding Commissioner, then Dr. Alfaro, supported by Mr. McGregor, although approving of Mr. Nielsen's conclusions, refused to concur in his valuation of the facts underlying the claim, and of the precedents invoked.

[1]) Roth, Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten, and precedents mentioned by this writer on pp. 83—89. It has also been admitted in base of discussion no. 19 of the 1930 Conference of the Codification of International Law, which read: „La mesure de la responsabilité incombant à l'Etat dépend de toutes les circonstances de fait et notamment de la circonstance . . . . . que la victime avait pris une attitude provocatrice". S. d. N., C. 75 M. 69, 1929 V, p. 102.

[2]) III, p. 36.

[3]) III, p. 40.

„My learned colleague is of the opinion that whatever may be the excuse alleged in defence of the conduct of the Mexican soldiers, their behavior must be considered as indiscreet, unnecessary and unjustified. *Nevertheless, it is impossible not to consider that the action of the soldiers was caused by the shots fired in the air, by some of Kling's companions,* in a very imprudent manner in view of the hour and the conditions of constant alarm and insecurity which then prevailed in the theater of the events.

The cases of *José M. Portuando, Thomas H. Youmans, Dolores Guerrero vda de Falcón, Teodoro Garcia and M. A. Garza* and others cited by the Honorable Commissioner Nielsen, although growing out of acts executed by soldiers while on duty, differ from the instant case in one essential particular. In all of those cases the authors acted consciously and deliberately. In the deplorable incident under consideration, the soldiers who fired upon the group of which Kling was a member, did so in the darkness of the night, impelled by an apparent provocation or attack and in ignorance therefore whether they had to contend with individuals who were merely amusing themselves by discharging their firearms in the air or with bandits such as those who at that time infested the district.

These circumstances seem to explain — although they do not in any manner justify — the absence of any investigation subsequent to that made by the Military authorities of these events, *for which reason the responsibility of Mexico in this case is not of a more serious character.*" [1])

It is implied in this quotation, and particularly in the sentences we have italicised, that the claimant's own conduct, even when it does not entirely justify the Government's action, may very well exercise some influence upon the wrongfulness of that action and the liability resulting from it. [2])

This opinion is also interesting for another reason. The claim of *Lillie Kling* was based on the grounds 1. that it was Mexican soldiers who shot Kling; and 2. that Mexico was liable for a denial of justice for not having sufficiently prosecuted those soldiers. Hence this case presents a special aspect of the problem of the effect of the claimant's preceding conduct, viz. the question as to what that effect is in cases of so-called indirect responsibility, i.e. responsibility for a failure properly to prosecute or apprehend the perpetrator of a crime against a foreigner. It is regrettable that the Commission did not distinguish this side of the problem

[1]) III, p. 49—50.

[2]) See note on page 312.

from that relating to direct liability, since the effect of the claimant's wrongful behaviour would appear to be different in the two categories. This is illustrated by two other cases involving indirect liability which were discussed by the General Claims Commission.

In the cases of *Gertrude Parker Massey* [1]) and of *John D. Chase* [2]) it was decided that the fact that the wrongdoer's action was partly caused by claimant's own immoral or unlawful conduct, does not ***necessarily*** disentitle the latter from claiming compensation. In answer to the firstmentioned claim, which was based upon the murder of an American by a Mexican, it was alleged that the victim had made immoral advances to the wife of the murderer, and that he was generally hated. But the Commission dismissed this argument:

> „The record contains a mass of grave accusations against the character of the deceased. I am not convinced of the truth of these charges against Massey which I consider are not supported by reliable evidence. Whatever may be the facts in relation to this point, I consider them to be entirely irrelevant with respect to the pertinent legal issues in the case. In connection with the charge of immoral and illegal conduct made against Massey, the contention is made in the Mexican brief that ,,International law, justice, and equity preclude a claim from being set up, on the general maxim *ex dolo malo non oritur actio*, when the alien from whose death the claim arises by his own immoral, negligent, or unlawful conduct caused or contributed to cause his own death." I am not entirely clear with regard to the argument that was made that in a case of this kind law, justice, and equity ,,preclude" a claim from being set up. Under Article I of the Convention of September 8, 1923, the United States has the right to present this claim to the Commission. The United States invoked the rule of international law which requires a government to take proper measures to apprehend and punish nationals who have committed wrongs against aliens. The legal issue presented to the Commission is whether or not the obligations of that rule were properly discharged with respect to the apprehension and punishment of the person who killed Massey. Neither the character nor the conduct of Massey can affect the rights of the United States to invoke that rule nor can they have any bearing on the obligations of Mexico to meet the requirements of the rule or on the question whether proper steps were taken to that end. In other words, the

[1]) I, p. 228.
[2]) II, p. 17.

character and conduct of Massey have no relevancy to the merits of the instant claim under international law." [1])

John D. Chase, [2]) having been wounded in a shooting affray by one Flores, without it being established with certainty who had been the agressor, the American Agency complained of a „denial of justice" on the ground that Flores was not adequately punished and fled while under release on bond. When the Mexican Agency attempted to excuse Flores, making Chase appear as the agressor and alleging, therefore, that even if Flores did fire on Chase, he did so in the exercise of the right of self-defence, the Commission remarked:

„It is not necessary for the Commission to weigh all the evidence presented by Mexico, as it is not within its province to decide the degree of guilt attaching to Flores or to Chase. The only matter within its jurisdiction is to ascertain whether the Mexican authorities who took cognizance of the criminal acts which have been referred to administered justice pursuant to the principles of International Law." [3])

The quotations imply that in these cases, involving so-called „indirect liability", the degree of guilt attaching to the claimant would be entirely irrelevant. We believe that indeed in cases of this kind the influence of the claimant's own fault is not the same as in those of alleged *direct* liability. In cases of the first type the claimant's conduct cannot have any immediate bearing upon the wrongfulness of the governmental action complained of, viz. the failure to take adequate measures against the wrongdoer, whereas in cases of the last-mentioned type („direct" liability) the wrongfulness of the governmental action complained of, viz. some illegal treatment directly inflicted upon the claimant, may very well itself be determined by the claimant's preceding conduct. The effect, then, of such conduct is not the same in the two types of cases. But on the other hand it seems to go too far to say, as the *Massey* and *Chase* opinions do, that in cases of indirect liability the degree of fault attaching to the claimant or his aggressor is *entirely* immaterial with respect to the merits of the claim. It seems to us that the claimant's fault definitely has *some*

[1]) I, p. 230.
[2]) II, p. 17.
[3]) II, p. 19.

effect, be it only indirectly, upon the decision in cases of indirect liability, inasmuch as *there can be no denial of justice if it appears that the perpetrator's offence was excused by the claimant's own conduct to such an extent that there was no sufficient reason for the respondent state to take action against the perpetrator.* And even if this is not the case the seriousness of the government's failure to punish may be affected if the wrongdoer's fault is diminished by the claimant's fault.

In conclusion of this section the following statements can perhaps be made:

In considering the influence of wrongful acting on the part of the claimant preceding and/or causing the Governmental action complained of, it is pertinent to make a distinction between alleged so-called direct and indirect liability.

In cases of indirect liability the claimant's fault can only have the effect of excusing to a proportionate extent the perpetrator's act; it may thereby *affect the seriousness of the Government's failure to punish.*

In cases of direct liability, however, the claimant's fault may to a proportionate extent justify the Governmental action itself upon which the claim is based. But even in cases of this character wrongful conduct of the claimant, although it may be taken into account in determining the degree of wrongfulness of the respondent state's action [1]*), does not necessarily deprive the claimant of his right to the protection of his government, and it by no means excuses all measures taken against the claimant. It only justifies such measures as were necessary and reasonable to repress the claimant's illegal conduct* [2]*).*

Forfeiture of the right of protection by flight from justice

Does the fact that the claimant has fled from justice in the respondent State preclude him from presenting a claim to his Government, or does it preclude his government from espousing the claim on his behalf? The Mexican-American tribunal answered this question in the negative, at least so far as the second point is concerned. When a certain *Russell Strother* [3]) complained of

[1]) See f.i. Borchard, Diplomatic Protection, pp. 717 and 735, and precedents mentioned in note 1 on page 735.

[2]) To the same effect: *Baker* vs. Peru, Moore, Arbitrations p. 1625; *Brand* vs. Peru, eod. loco.

[3]) I, p. 392.

illegal arrest and cruel treatment during his detention by Mexican authorities, Mexico alleged

> „that the circumstance that Strother escaped from the jail where he was confined, as stated, if it does not preclude the claimant from appearing before this Commission to demand an indemnification for damages suffered, should, at least, be taken into account when awarding his damages." [1])

But Mr. McGregor, with the approval of both other judges, considered

> „that the facts set forth in the preceding paragraph should not have any effect on the solution of this case ...." [2])

Here again it was the Leyden University Professor who dealt more thoroughly with this point. In the *Chattin* case [3]) he observed with the concurrence of Mr. Nielsen:

> „Mexico contends that not only has Chattin as a fugitive from justice, lost his right to invoke as against Mexico protection by the United States, but that even the latter is bound by such forfeiture of protection and may not interpose in his behalf. If this contention be sound, the American Government would have lost the right to espouse Chattin's claim, and the claim lacking an essential element required by Article I of the Convention signed September 8, 1923, would not be within the cognizance of this Commission. The motive for the alleged limitation placed on the sovereignty of the claimant's Government would seem to be that a government by espousing such claim makes itself a party to the improper act of its national. International awards, however, establishing either the duty or the right of international tribunals to reject claims of fugitives from justice have not been found; on the contrary, the award of the *Pelletier* case (under the Convention of May 28, 1884, between the United States and Hayti) did not attach any importance to the fact that Pelletier had escaped from a Haytan jail, nor did Secretary Bayard do so in expounding the reasons why the United States Government dit not see fit to press the award rendered in its favor (Moore, at 1779, 1794, 1800). [4])

The Commission then recalls the rejection of defences based upon a fault on the part of claimant in the cases discussed in

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[1]) I, p. 393.
[2]) I, p. 393.
[3]) I, p. 422.
[4]) I, pp. 423—424.

other sections of this chapter, as well as in the *Strother* case, and continues:

> „It is true that more than once in international cases statements have been made to the effect that a fugitive from justice loses *his* right to invoke and to expect protection — either by the justice from which he fled, or by his own government — but this would seem not to imply that his government as well loses its right to espouse its subject's claim in its discretion. The present claim, therefore, ... should be accepted and examined." [1])

We have been unable, indeed, to find international awards denying a Government the right to intervene in behalf of a subject who has fled from justice in the defendant State. An example of a declaration that such a fugitive from justice has no right to invoke his governments' protection is found in a statement by Mr. Marcy, Secretary of State, in the case of *Mears and Gardiner*. [2])

In our opinion any such restriction on the right of international protection with respect to fugitives from justice is unsatisfactory. It does not seem equitable that the claimant's flight from justice should deprive him of the right to ask for his Government's protection. A criminal should perhaps not try to flee from justice, but not even the highest principle of morality requires a person not to flee from justice if he is sincerely convinced that he is being treated in an arbitrary and wilfully unjust manner. Such a requirement would mean that the victim ought resignedly to submit to ill treatment and wait until his release before complaining to his own Government. This would create great injustice where the treatment suffered by the alien was in fact undeserved. If on the other hand, the treatment *was* deserved and justified by a delinquency committed by the claimant, then the restriction on the right to protection suggested would be superfluous, since the claim will be disallowed anyhow. We may put the matter thus:

In cases of this character there are three possibilities:

1. The claimant's allegation that he was subjected to wrongful treatment by the judicial authorities of the respondent country is unfounded. The claim will then in any case be rejected, even in the absence of any rule to the effect that a fugitive from justice loses his right to protection.

[1]) I, 424.

[2]) Moore's Digest III, pp. 789—790.

2. The claimant's allegation is justified, and he did not deserve the treatment. In this case the rule suggested would have the effect of compelling the victim to submit to unjust treatment, on pain of being deprived of all means of redress!

3. The claimant's allegation is justified, but he did deserve *some* punishment. The claimant may for instance have been condemned to two years confinement, but have fled after one year from a prison where conditions were intolerable. Here again it does not seem to be necessary to deny in advance the right to invoke international intervention. If the harsh treatment has been comparatively unimportant and there remains considerable punishment to be suffered, the claim will be disallowed anyhow. If on the other hand the claimant has been treated very harshly and has served nearly the whole of his sentence, injustice might easily result from the refusal of all means of redress, all the more so since it would be possible for the international tribunal, when determining the amount of its award, to take into account the part of the punishment not yet undergone.

Misrepresentation and exaggeration of facts

It was twice decided that misrepresentation and exaggeration of the facts on the part of the claimant

1. do not destroy the value of his remaining contentions;

2. do not deprive his government of the right to present a claim on his behalf;

3. do not oblige an international tribunal to disallow the claim.

The first time these views were implicitly adopted by the Commission when, in connection with a claim, the allegations of which were admitted in the opinion to be somewhat exaggerated, the Commission merely „eliminated from the claimant's complaints everything which might be due to misinterpretation or misrepresentation on his part....'' but rendered an award for the other items of the claim.[1])

The other time Prof. van Vollenhoven expressed himself thus:

> „In paragraphs 8 and 9 of its opinion in the *Faulkner* case .... the Commission, however, indicated that exaggeration and even

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[1]) *Walter H. Faulkner*, I, p. 86, see pp. 90 and 91.

misrepresentation of facts on the part of claimants are not so uncommon as to destroy the value of their contentions." [1])

His American colleague was of the same opinion, adding however a restriction to the effect that such conduct should nevertheless have *some* influence upon the decision to be rendered:

„Neither the fact that Mr. Mallén violated the law of Texas nor the fact that he has furnished inaccurate or exaggerated statements can in any way affect the right of the Mexican Government to present against the United States a claim grounded on an assertion of responsibility under rules of international law, although obviously these matters are pertinent with respect to a determination of the merits of the claim, because account must properly be taken of them in reaching a conclusion regarding the nature and extent of the wrongs inflicted on Mr. Mallén." [2])

Several international decisions invoked by the American Agency were clearly shown by Mr. Nielsen to be either irrelevant to, or not sufficiently clear on, the question of exaggeration and misrepresentation of facts by a claimant.

Participation of foreigners in internal politics

In addition to the three different forms of censurable conduct on the part of the claimant dealt with in the preceding sections, one more question relating to the forfeiture of the right of protection on account of such conduct was raised before the Commission, without however receiving a decision.

Macedonio J. Garcia [3]) procured loans to the illegal de la Huerta government, for which he received a receipt and a promise to repay the sum, signed by de la Huerta in the name and on behalf of the United Mexican States. The Mexican Agency now contended that this act

„was a participation by him in Mexican politics as a result of which, under international law he lost the right to invoke the protection of the United States, and the latter has no right to intervene in the case." [4])

Unfortunately no decision was reached on this point, since the Commission was

[1]) *Francisco Mallén*, I, p. 254, at p. 256.
[2]) I, 273.
[3]) I, p. 146.
[4]) I, p. 148.

„of the opinion that no question of jurisdiction can properly be raised by the contentions made in behalf of the Mexican Government on this point which is one the pertinency of which could only be considered in connection with the question of the validity of the claim under international law." [1])

and because the validity of the claim was not examined on account of a lack of evidence.

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[1]) Eod. loc.

APPENDICES

APPENDIX I

GENERAL CLAIMS CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

U.S. Treaty Series No. 678

Signed at Washington, September 8, 1923.

Ratified by the President of the United States of America, February 4, 1924.

Ratified by the President of the United Mexican States, February 16, 1924.

Ratifications exchanged at Washington, March 1, 1924.

(Englisch text)

The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on July 4, 1868, of the Claims Convention entered into between the two countries (without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico, which form the basis of another and separate Convention), have decided to enter into a Convention with this object, and to this end have nominated as their Plenipotentiaries:

The President of the United States of America:

The Honorables Charles Evans Hughes, Secretary of State of the United States of America, Charles Beecher Warren, and John Barton Payne, and

The President of the United Mexican States:

Señor Don Manuel C. Téllez, Chargé d'Affaires ad interim of the United Mexican States at Washington;

Who after having communicated to each other their respective full powers found to be in due and proper form, have agreed upon the following Articles:

Article I. All claims (except those arising from acts incident to the recent revolutions) against Mexico of citizens of the United States, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America by citizens of Mexico, whether corporations, companies, associations, partnerships or

individuals, for losses or damages suffered by persons or by their properties; all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to; and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity.

Such commission shall be constituted as follows: One member shall be appointed by the President of the United States; one by the President of the United Mexican States; and the third, who shall preside over the Commission, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within two months from the exchange of ratifications of this Convention in naming such third member, then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article XLIX of the Convention for the pacific settlement of international disputes concluded at The Hague on October 18, 1907. In case of the death, absence, or incapacity of any member of the Commission, or in the event of a member omitting or ceasing to act as such, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

Article II. The commissioners so named shall meet at Washington for organisation within six months after the exchange of the ratifications of this Convention, and each member of the Commission, before entering upon his duties shall make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide, according to the best of his judgment and in accordance with the principles of international law, justice and equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the Commission.

The Commission may fix the time and place of its subsequent meetings, either in the United States or in Mexico as may be convenient, subject always to the special instructions of the two Governments.

Article III. In general the Commission shall adopt as the standard for its proceedings the rules of procedure established by the Mixed

Claims Commission created under the Claims Convention between the two Governments signed July 4, 1868, in so far as such rules are not in conflict with any provision of this Convention. The Commission, however, shall have authority by the decision of the majority of its members to establish such other rules for its proceedings as may be deemed expedient and necessary, not in conflict with any of the provisions of this Convention.

Each Government may nominate and appoint agents and counsel, who will be authorized to present to the Commission, orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories, or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

The decision of the majority of the members of the Commission shall be the decision of the Commission.

The language in which the proceedings shall be conducted and recorded shall be English or Spanish.

Article IV. The Commission shall keep an accurate record of the claims and cases submitted, and minutes of its proceedings with the dates thereof. To this end, each Government may appoint a Secretary; these Secretaries shall act as joint Secretaries of the Commission and shall be subject to its instructions. Each Government may also appoint and employ any necessary assistant secretaries and such other assistance as deemed necessary. The commission may also appoint and employ any persons necessary to assist in the performance of its duties.

Article V. The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.

Article VI. Every such claim for loss or damage accruing prior to the signing of this Convention, shall be filed with the Commission within one year from the date of its first meeting, unless in any case reasons for the delay, satisfactory to the majority of the Commissioners, shall be established, and in any such case the period for filing the claim may be extended not to exceed six additional months.

The Commission shall be bound to hear, examine, and decide, within three years from the date of its first meeting, all the claims filed, except as hereinafter provided in Article VII.

Four months after the date of the first meeting of the Commissioners and every four months thereafter, the Commission shall submit to each Government a report setting forth in detail its work to date, including a statement of the claims filed, claims heard, and claims decided. The Commission shall be bound to decide any claim heard and examined within six months after the conclusion of the hearing of such claim and to record its decision.

Article VII. The High Contracting Parties agree that any claim for loss or damage accruing after the signing of this Convention may be filed by either Government with the Commission at any time during the period fixed in Article VI for the duration of the Commission; and it is agreed between the two Governments that should any such claim or claims be filed with the Commission prior to the termination of said Commission, and not be decided as specified in Article VI, the two Governments will by agreement extend the time within which the Commission may hear, examine, and decide, such claim or claims so filed for such a period as may be required for the Commission to hear, examine, and decide such claim or claims.

Article VIII. The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect, and final settlement of every such claim upon either Government for loss or damage sustained prior to the exchange of the ratifications of the present Convention (except as to claims arising from revolutionary disturbances and referred to in the preamble hereof). And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission shall from and after the conclusion of the proceedings of the Commission be considered and treated as fully settled, barred, and thenceforth inadmissible, provided the claim filed has been heard and decided.

Article IX. The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country and the balance shall be paid at Washington or at the City of Mexico, in gold coin or its equivalent to the Government of the country in favor of whose citizens the greater amount may have been awarded.

In any case the Commission may decide that international law, justice, and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made,

as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant.

In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property or right shall be paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately.

Article X. Each Government shall pay its own Commissioner and bear its own expenses. The expenses of the Commission including the salary of the third Commissioner shall be defrayed in equal proportions by the two Governments.

Article XI. The present Convention shall be ratified by the High Contracting Parties in accordance with their respective Constitutions. Ratifications of this Convention shall be exchanged in Washington as soon as practicable and the Convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the respective Plenipotentiaries have signed and affixed their seals to this convention.

Done in duplicate at Washington this eighth day of September, 1923.

Charles Evans Hughes
(Seal.)
Charles Beecher Warren
(Seal.)
John Barton Payne
(Seal.)
Manuel C. Téllez
(Seal.)

APPENDIX II

SUPPLEMENTARY CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES OF AUGUST 16, 1927

Whereas a convention was signed on September 8, 1923, between the United States of America and the United Mexican States for the settlement and amicable adjustment of certain claims therein defined; and

Whereas under Article VI of said convention the Commission constituted pursuant thereto is bound to hear, examine and decide within three years from the date of its first meeting all the claims filed with it, except as provided in Article VII; and

Whereas it now appears that the said Commission cannot hear, examine and decide such claims within the time limit thus fixed;

The President of the United States of America and the President of the United Mexican States are desirous that the time originally fixed for the duration of the said Commission should be extended, and to this end have named as their respective plenipotentiaries, that is to say:

The President of the United States of America, Honorable Frank B. Kellogg, Secretary of State of the United States; and

The President of the United Mexican States, His Excellency Señor Don Manuel C. Téllez, Ambassador Extraordinary and Plenipotentiary of the United Mexican States at Washington;

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following articles:

Article I. The High Contracting Parties agree that the term assigned by Article VI of the Convention of September 8, 1923, for the hearing, examination and decision of claims for loss or damage accruing prior to September 8, 1923, shall be and the same hereby is extended for a time not exceeding two years from August 30, 1927, the day when, pursuant to the provisions of the said Article VI, the functions of the said Commission would terminate in respect of such claims; and that during such extended term the Commission shall also be bound to hear, examine and decide all claims for loss or damage accruing between September 8, 1923, and August 30, 1927, inclusive, and filed with the Commission not later than August 30, 1927.

It is agreed that nothing contained in the Article shall in any wise alter or extend the time originally fixed in the said Convention of September 8, 1923, for the presentation of claims to the Commission, or confer upon the Commission any jurisdiction over any claim for loss or damage accruing subsequent to August 30, 1927.

Article II. The present Convention shall be ratified and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof the abovementioned Plenipotentiaries have signed the same and affixed their respective seals.

Done in duplicate at the City of Washington, in the English and Spanish languages, this sixteenth day of August in the year one thousand nine hundred and twenty-seven.

Frank B. Kellogg
(Seal)
Manuel C. Téllez
(Seal)

APPENDIX III

SUPPLEMENTARY CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES OF SEPTEMBER 2, 1929

Whereas a convention was signed on September 8, 1923, between the United States of America and the United Mexican States for the settlement and amicable adjustment of certain claims therein defined; and

Whereas under Article VI of said Convention the Commission constituted pursuant thereto is bound to hear, examine and decide within three years from the date of its first meeting all the claims filed with it, except as provided in Article VII; and

Whereas by a convention concluded between the two Governments on August 16, 1927, the time for hearing, examining and deciding the said claims was extended for a period of two years; and

Whereas it now appears that the said Commission can not hear, examine and decide such claims within the time limit thus fixed;

The President of the United States of America and the President of the United Mexican States are desirous that the time thus fixed for the duration of the said Commission should be further extended, and to this end have named as their respective plenipotentiaries, that is to say:

The President of the United States of America, Herschel V. Johnson, Chargé d'Affaires ad interim of the United States of America in Mexico; and

The President of the United Mexican States, Señor Genaro Estrada, Under Secretary of State in charge of Foreign Affairs;

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following Articles:

Article I. The High Contracting Parties agree that the term assigned by Article VI of the convention of September 8, 1923, as extended by Article I of the convention concluded between the two Governments on August 16, 1927, for the hearing, examination and decision of claims for loss or damage accruing prior to September 8, 1923, shall be and the same hereby is further extended for a time not exceeding

two years from August 30, 1929, the day when, pursuant to the provisions of the said Article I of the convention concluded between the two Governments on August 16, 1927, the functions of the said Commission would terminate in respect of such claims; and that during such extended term the Commission shall also be bound to hear, examine and decide all claims for loss or damage accruing between September 8, 1923, and August 30, 1927, inclusive, and filed with the Commission not later than August 30, 1927.

It is agreed that nothing contained in this Article shall in any wise alter or extend the time originally fixed in the said convention of September 8, 1923, for the presentation of claims to the Commission, or confer upon the Commission any jurisdiction over any claim for loss or damage accruing subsequent to August 30, 1927.

Article II. The Present Convention shall be ratified and the ratifications shall be exchanged in the City of Mexico as soon as possible.

In witness whereof the above mentioned Plenipotentiaries have signed the same and affixed their respective seals.

Done in duplicate in the City of Mexico in the English and Spanish languages, this second day of September in the year one thousand ninehundred and twenty nine.

Herschel v. Johnson
(Seal)

G. Estrada
(Seal)

APPENDIX IV

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ABBREVIATIONS

A.J.I.L. = American Journal of International Law.

MOORE = Moore, History and Digest of the International Arbitrations to which the United States has been a party.

RECEUIL DES COURS = Receuil des Cours de l'Académie de Droit International.

APPENDIX V

TABLE OF CASES

decided by the General Claims Commission and mentioned in this book

The numbers of the first column refer to the pages of the three volumes of the opinions edited by the Government Printing Office, Washington. The numbers of the second column refer to the pages of the present book.

STELLINGEN

I

De erkenning van een internationaal recht van antwoord en correctie in de pers tegenover onjuiste en tendentieuze berichtgeving betreffende het buitenland, gewaarborgd door een internationale controle-instantie, is een essentieele voorwaarde voor het scheppen van betere internationale verhoudingen.

II

De opvatting van Scholten, dat in de artikelen 737, 741, 749 en 757 B.W. een beginsel van ondeelbaarheid van erfdienstbaarheden opgesloten zou liggen, is niet juist. (Asser-Scholten, Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht, II, 6e dr., bl. 240-243).

III

Wanpraestatie kan jegens een derde grond opleveren voor aansprakelijkheid krachtens art. 1401 B.W.

IV

De opvatting van Kosters, dat volgens het Haagsche huwelijksverdrag van 1902 een huwelijk, hetwelk voltrokken is ten overstaan van een diplomatieken of consulairen ambtenaar ondanks verzet, op grond van een vroeger huwelijk of van een huwelijksbeletsel van godsdienstigen aard, van de zijde van den Staat waar het huwelijk voltrokken is, door laatstgenoemden Staat nietig verklaard kan worden, indien het een huwelijksbeletsel van materieelrechtelijken aard betreft, vindt geen steun in het verdrag (Het Internationaal Burgerlijk Recht in Nederland, bl. 423).

V

Devaluatie zal voor een land ten aanzien van zijn buitenlandschen handel eerst voordeel opleveren indien de hoeveelheid uitgevoerde goederen daardoor toeneemt met een percentage grooter dan dat waarmede de ruilvoet met het buitenland ongunstiger wordt.

VI

In de Dow Jones theorie behoort het koersindexcijfer van spoorwegaandeelen vervangen te worden door een moderneren conjunctuurmeter.

VII

Publieke opinie en staatslieden op het Europeesche vasteland zijn doorgaans geneigd het moreele element in de politiek van de Angelsaksische landen te onderschatten.