RECENT OPINIONS OF THE GENERAL CLAIMS COMMISSION, UNITED STATES AND MEXICO

The latest volume of opinions of the General Claims Commission, United States and Mexico (Oct. 8–Nov. 5, 1930),[1] presents some interesting cases involving complex questions of international law. The tort claims justify a brief critical review.

Article 1 of the Convention of September 8, 1923, provides for the adjudication of "all claims for losses or damages originating from acts of officials or others acting for either government and resulting in injustice. . . ." What is meant by "resulting in injustice"? If it means "denial of justice" as that term is understood in international law, it has an interest for international lawyers. If it means merely wrong, loss, injury, prejudice, etc., it would represent a rule more extreme than any municipal system today sustains. Certainly in the United States, the state is not liable for all injuries caused by officials which result in "injustice." The cases in the present volume lead one to believe that it is interpreted as "denial of justice"; and yet the occasional suggestion that Mexico is liable "directly" for an injury caused by an administrative official, regardless of a denial of justice in local remedies, might lead to the inference that international law is not the test of Mexico's liability, but rather some vague rule of municipal law, in which the commission decides as would any municipal tribunal. This supposition is strengthened by Article 5 of the convention, which, in order to afford an "equitable settlement," giving claimants "just and adequate compensation for their losses," dispenses with 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." Yet whatever the guiding criteria of the commission, municipal or international law, the opinions of the commission, especially of Mr. Nielsen, manifest or profess high regard for the rules of international law.

Only a few of the cases involve initial wrongdoing by officers. In the Gordon case[2] two Mexican officers in a fort engaged in friendly target practice on their own account. They placed a target on a low wall, but did not notice that there was a ship beyond. Some of the shots went astray and painfully injured one of the American engineers on board. The officers were prosecuted for the shooting, but were acquitted on the ground that there was doubt as to which one fired the damaging shot. The majority of the commission disallowed the claim, on the ground that the target practice was a private unofficial enterprise and that Mexico had taken adequate steps to prosecute the officers, although no one was punished. Commissioner Nielsen, in dissenting, thought Mexico should be liable "directly" for the

[1] Opinions of Commissioners under the convention of Sept. 8, 1923. . . . Washington, G. P. O., 1931. 178 p.

[2] Opinions, 50; this JOURNAL, April, 1931 (Vol. 25), p. 380.

wrongful shooting, for the lack of "control" of the government in preventing the act, because the act was not private but official, and for the failure to punish the officers for recklessness in firing.

In the Kling case[3] Mexican soldiers fired upon and killed one of a group of boisterous young Americans who were shooting their pistols in the air. Although the Americans were examined and persuaded to sign a statement that they had provoked the disaster, the Mexican soldiers were not apparently examined and none of them was tried or punished. The commission held Mexico liable for the "indiscreet, unnecessary, and unwarranted" shooting and for the failure of Mexico to investigate the affair and fix liability.

It is, of course, often difficult to draw a line between personal and official acts. On the other hand, not every wrongful act of an official can be deemed evidence of a failure of the government to prevent, or evidence of governmental international liability. Otherwise, every wrongful act of an administrative official within the scope of his authority would automatically impose liability on the government. There is no such rule either in municipal law or in international law. It is only when the government as an administrative system is so negligently constituted as to invite such wrongs, or fails to discipline the wrongdoing officer thereafter, thus indicating connivance, approval, or indifference, that international responsibility can be said to arise. Were this not so, a government would become a guarantor of the good conduct of its officers on all occasions and would assume toward aliens a liability which few, if any, governments assume toward nationals. The alien is not extraterritorial, usually, nor is he wrapped in his national flag. In the usual case, even of delinquency by officials (except those against whom there is no form of municipal relief), the alien must expect to be obliged to adopt the same methods of recourse for redress as must nationals, and it is only when there is a denial of justice in the proceedings that international responsibility can be deemed to arise.[4] The abuses to which the erroneous view of "direct" international liability for wrongful acts of administrative officials has led was doubtless the main reason for the somewhat unjustified protest of the minority against the rules tentatively adopted by the Hague Codification Conference that a state is responsible for the wrong-

[3] Opinions, 36; this JOURNAL, April, 1931 (Vol. 25), p. 367.

[4] Baldwin (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3126; Wilson (U. S.) *v.* Mexico, March 3, 1849, *ibid.*, 3021; Medina (U. S.) *v.* Costa Rica, July 2, 1860, *ibid.*, 2317; Cinecue (Mexico) *v.* United States, July 4, 1868, *ibid.*, 3127; Danford (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.*, 3148; Oberlander and Messenger (U. S.) *v.* Mexico, Mar. 2, 1897, For. Rel. 1907, p. 370; Canadian Claims for Refund of Hay Duties (Gt. Brit.) *v.* United States, Aug. 18, 1910, Nielsen's Rep. 347, this JOURNAL, Vol. 19 (1925), p. 795; *R. T. Roy* (U. S.) *v.* Great Britain, Nielsen's Rep. 406 and this JOURNAL, *ibid.*, p. 800; De Caro (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 810; *Caroline* (U. S.) *v.* Brazil, Moore's Dig. VI, 748; Dick (Germany) *v.* United States, For. Rel. 1908, 356; Tunstall (Gt. Brit.) *v.* United States, 1885, Moore's Dig. VI, 662.

ful acts of officials within the scope of their function violating *international* law,[5] and for the more vital and disastrous refusal to sign any convention unless a rule of equality between national and alien were adopted.

It may well be that for injurious assaults by officials in the protective services, like police and army, a greater degree of liability is incurred, *i.e.*, more drastic disavowal and punishment are required than in the case of other administrative officials. Certainly those whose duty it is to prevent wrongs have here themselves committed them. Is this failure to protect an automatic breach of international law, or does it merely give rise to those same means of redress which are available to nationals, including criminal punishment of the wrong by the state? Had the officers in the Gordon case been punished for recklessness, as it is believed they should have been, there would have been no legal duty to make a money compensation; so, if the soldiers in the Kling case had been adequately prosecuted and perhaps punished for their imprudence. Mexico incurred no "direct" liability in the Gordon case, even if there were a distinction between "direct" and "indirect" liability, as Oppenheim seems to believe, but as we venture to doubt. Liability would arise in the Kling case for the total lack of any prosecution, and in the Gordon case, for a failure to prosecute on the correct charge, namely, recklessness.

The "control" theory would also seem to break down. Although the old rule that, to impose liability, officers had to accompany soldiers, was never more than a hypothesis, now openly dispensed with by the third Hague Convention, its sole purpose must have been to establish governmental approval, and that could be repudiated by appropriate disciplinary measures. The "control" theory could only be invoked, it is believed, on the argument that the special duty of protection imposed on soldiers makes their tortious assaults unimpeachable and unreviewable evidence of a governmental failure to prevent, and thus a breach of an international duty to protect—all this without a hearing to establish the true facts. There are many precedents indicating that so heavy a burden of perfection in protective services is not imposed on states, and that the breach of duty, if any, is municipal in character, to be dealt with accordingly, and under scrutiny for denials of justice. Short of that, if indemnity is paid, it must be as a matter of grace and not of law.

In the Tribolet case[6] an officer of the Mexican army took from his farm Mr. Tribolet, suspected of robbery of a stage coach and homicide, and without trial shot him within 48 hours. Mexico was held liable, apparently not because of the arbitrary act of shooting without trial, but on the better in-

[5] International liability was predicated upon the wrongful acts being "incompatible with the international obligations of the state," an important qualification indicating that municipal torts and international torts are separate and, as a rule, not at all parallel offenses; furthermore, an earlier article in the tentative convention, applicable throughout, provided that international responsibility could not be invoked until local remedies had been exhausted.

[6] Opinions, 68.

ternational ground that there was a failure by Mexico to investigate the arbitrary act and either justify it or punish the officer. The government's delinquency, not the officer's, constituted the denial of justice which imposed liability.

That the mere erroneous or improper attack upon an alien by an official of the state is not the basis of international responsibility but presents at most a violation of municipal law, which, if corrected and disavowed in accordance with municipal law, even without indemnity, satisfies every international requirement, is evident from the opinion of the commission in disallowing the claim of Joseph Farrell.[7] Farrell was arrested and tried for participating in a murder because he had lent his pistol to the man who fired the fatal shot. Farrell was convicted and for some time imprisoned, but on appeal to a higher court, the conviction was quashed and he was released. The decision of the court of last resort was deemed to have corrected all the errors of inferior officials, and this seems sound. Nor does it make any difference that it was a judicial decision which was reversed; an administrative decision or action encountering the same result would equally have relieved the government of liability. Police and prosecuting officials are, in fact, not judicial but administrative officers. If the mere allegation of legal injury by acts of an officer were to create international responsibility, as has sometimes been assumed by the "direct" responsibility school of thought, the jurisdiction of the government against which the claim is made would immediately become limited or conditional. This would involve us in the extraordinary position of asserting, prior to any local inquiry, that an international obligation has been violated, although the local inquiry may show that there has been no legal injury. It is for this reason that the local remedy rule is not a mere technicality but of the very essence of the international claim, for it is the denial of justice in the application of local remedies, assuming they are available, which transfers the claim from municipal law to international law, and not the mere fact that an alien and not a national was the object of the original attack or injury. So in the Sewell case,[8] although the murder took place on May 1, 1920, the commission was correct in saying that the basis of the international claim, the denial of justice, did not occur until after May 31, 1920, the time limit of claims before the Special Claims Commission, and hence that the claim was within the jurisdiction of the General Commission.

The delinquencies which impose international responsibility are those of a system, not necessarily of an individual officer whose errors may be disavowed and corrected. When, therefore, as in the Mead[9] and Chapman[10] cases, the commission sought to determine whether the Mexican Government had failed to furnish appropriate police protection under the circumstances, protection which would presumably normally have prevented the

[7] Opinions, 157. [8] *Ibid.*, 112. [9] *Ibid.*, 150.

[10] *Ibid.*, 121; this JOURNAL, July, 1931 (Vol. 25), p. 544.

murder or shooting in question, they were on solid ground. In the Mead case the known condition of lawlessness in the neighborhood was deemed a reason for special precautions, as was the threat of assassination in the Chapman case if Sacco and Vanzetti were executed. But in the Mead case the award of damages was put on the ground of the inadequacy of punitive measures taken against the marauders, for the pursuit was perfunctory, and while some persons were arrested, no one was prosecuted. This does not mean, it is believed, that in every case some one must be arrested and prosecuted, but only that energetic measures must be taken to discharge the government from any imputation of indifference or negligence. In the case of Chapman, an American Consul, special protection had been requested in view of the threats made. But the threat was to be carried out only in the event that Sacco and Vanzetti were executed, an event which did not take place until August, 1927, whereas the would-be assassin was premature in shooting Chapman in July. There was no evidence that the wounding of Chapman was definitely connected with the threat, and the lack of protection was invoked only because the execution was expected about July 9. It is not clear that special protection, even if required, would have prevented the invasion of a consulate at 4 a. m., a month before the execution, but the commission seemed to believe, mainly, it may be inferred, because the victim was a consul, that lack of protection had been established, a delinquency attributable to a governmental system, and that the measures for the apprehension of the criminal were also inadequate. They gave $15,000 damages.

In the Austin,[11] Sewell,[12] Gorham,[13] East,[14] Davies,[15] and Sturtevant[16] cases—all arising out of murder—the basis of the claim against Mexico was a failure to apprehend or prosecute or adequately punish the guilty private criminal. Negligence in apprehending is a denial of justice, for it indicates a want of sufficient governmental effort to do justice in the case. But failure to apprehend is not alone a basis of international responsibility, if there was adequate effort. There are many unsolved murders in cosmopolitan cities in every country. And while it is true, as in the Gorham case, that mere arrest may not be sufficient to indicate proper enforcement of the criminal law, it could hardly be asked that a government charge the wrong man with crime or try a person against whom suspicion was so slight as necessarily to result in an acquittal. Only a person plausibly guilty should be tried, and only a person really guilty should be convicted. In the Gorham and Austin cases there was a failure promptly to begin the search for the guilty, an apparent indifference on the part of governmental authorities; it is that denial of justice which founds the international claim, and not the failure to prosecute and punish subsequently arrested suspects who were released for lack of evidence. In the East case, the accused was held first for assault and later

[11] Opinions, 108. [12] *Ibid.*, 112. [13] *Ibid.*, 132.
[14] *Ibid.*, 140. [15] *Ibid.*, 146. [16] *Ibid.*, 169.

for homicide, but was tried on neither charge because the record was mislaid, and before it was found the culprit died. Mexico was held liable because the accused should at once have been held for the more serious crime and because he was not tried. The prosecution was negligent, partly because the charge was inadequate, partly because the records were lost. In the Sewell case the denial of justice consisted in the inadequacy of the penalty assessed upon the murderer.

In the Davies and Sturtevant cases damages were not awarded because, in the first case, the accused was acquitted on account of insanity, and in the second case because the accused was acquitted as innocent and because there was no lack of due diligence in seeking to apprehend the guilty man. Mexican law, correctly, was applied in both cases and it was found that negligence could not be attributed to the government. This indicates that the basis of liability in these cases is nothing but negligence or wilful failure to attempt to enforce the criminal law, whether in the matter of apprehension, prosecution, or punishment, rather than the lack of complete success of the effort.

It also indicates that the damages, when awarded, are punitive and not compensatory in character, whatever the language used to explain the assessment, for the government is held liable, not for the murder, of which it had no warning, but for its failure to take adequate steps subsequently to bring the marauders to justice. If the negligence or indifference is extreme, it is not improper to consider it the equivalent of condonation, complicity, or ratification, though the facts must be carefully examined to see whether they sustain such a theory. If they do, the full value of the life lost should be the penalty; the arbitrary sums assessed in the instant cases ($6,000 to $9,000) indicate that the value of the life lost was not accurately measured. Inasmuch as the claimant government hardly cares to appropriate the penalty thus assessed upon the delinquent government, they turn the award over to the widow of the victim as a matter of fireside equity; and it is evident that a widow is financially better off if the prosecution of the murderers is delinquent rather than efficient.

EDWIN M. BORCHARD