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 Type: Resolution on Inadmissibility  
 Requested by: Dr. Pedro Andrés Fornos Diaz (citizen of Nicaragua)  
 Party(ies): Dr. Pedro Andrés Fornos Diaz v. The Government of the Republic of Guatemala  
 Dated: March 6<sup>th</sup>, 1909  
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Content:

Resolution on Inadmissibility	<i>in file</i> pp. 01-10	<i>in transl.</i> pp. 737-747
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[737] *Central American Court of Justice*

March 6, 1909

From an examination of the suit instituted against the government of the Republic of Guatemala, in a complaint dated December 3 last, by Dr. Pedro Andres Fornos Diaz, of age, a lawyer and citizen of Nicaragua, residing at present in this city, it is found:

I. The plaintiff relates that on December 15, 1907, he landed at San Jose, a port of said country, and went to the capital, where after holding a long and important conference with His Excellency the President, Mr. Manuel Estrade Cabrera, he decided that he would leave Guatemalan territory by the first south-bound steamer stopping at its coast; that in the afternoon of the 28th of said month, when he had just left the government palace bearing a passport which he had requested there for his voyage, he was stopped without any cause in the street by officers of the secret police, being taken immediately to the Central Penitentiary and confined in a narrow unhealthy cell, after being stripped of his money (the amount of which he does not state) as well as of the other things which he carried on his person (which he also fails to specify) ; that a few days afterwards he was called to the jailer's office, where he met "a fellow of middle age, medium stature, swarthy complexion, black eyes and keen glance, "whom he afterwards found to be Mr. Adrian Vidaurre, Judge Advocate of the Republic of Guatemala, accompanied by some one who performed the duties of amanuensis or secretary; that the former of the two individuals indicated, without stating the capacity in which he was acting, questioned him regarding matters which did not constitute either a crime or misdemeanor, as when he had left his country, what places he had visited, what he had done, with what persons he had talked about Nicaraguan politics, and to whom he had written communications; that upon signing the declaration he learned that a writ had been issued ordering a preliminary investigation, without stating the crime which gave rise to or justified it; that a little while afterwards the young Honduran Miguel Carias A., at that time also a prisoner there, was called upon to testify whether he knew the plaintiff was a [738] spy of His Excellency President Jose Santos Zelaya, which the witness denied, and he subsequently learned that Dr. Juan Padilla Matute and General Manuel Lardizabal were examined on the same matter; that after that not another word was spoken to him, he was given no notice, no warrant of arrest or imprisonment was served on him, and in this state, subject to an excessively cruel treatment, without any other variation than that he was transferred April 14 to bartolina No. 54, where his sufferings considerably increased, he being kept in this penal establishment until August 14, 1908, on which date, without the money and other things of which he had been deprived being restored to him, he was taken to the port of San Jose, where, after six days of arrest, he was put on board the steamer " Newport," being thus expelled from the country and forbidden to return under threat of being killed.

II. Mr. Fornos Diaz states that he was unable during his arrest to make any appeal against these abuses before the territorial authorities, for he was the victim of an absolute denial of justice, being strictly deprived of any means of communication in the penitentiary as well as during the period following his departure therefrom until his embarkation on the "Newport," and he also adds that he did not take any steps afterwards to obtain reparation for the hardships suffered, because in Guatemala, where the judges are incapable and unable to protect by the law anyone who is ill treated or persecuted by the government, it is impossible to find protection for one's person and rights.

III. Accompanying the complaint are the following manuscripts, adduced as proof of the assertions which the complaint contains:

1. A certificate signed at Managua, August 18, 1908, by the priest Jose Antonio Villalta, in which it is shown that the plaintiff was baptized at Managua on November 25, 1873.

2. Another certificate issued at San Jose de Costa Rica on November 6, 1908, by the Consul-General at Nicaragua, in which it is shown that said gentleman is inscribed in the proper book as a citizen of the latter republic.

3. A deposition for future use taken before the First Civil Judge of San Jose, Costa Rica, in which, under date of October 24 last, Messrs. Dr. Juan I. Toledo Lopez, of Guatemalan nationality; Salvador Toledo, of the same nationality; and Carlos Hack Prestinary Perez, of Costa Rican nationality, declared that the present government of Guatemala trumps up false suits against persons whom it is unjustly persecuting for political reasons, real or supposed, for which purpose it causes its spies and employees [739] of all kinds to make false declarations, to misrepresent the statements of other persons, to show confessions to have been made which have not been made, and to make alterations and falsifications of every nature; that it is impossible for a person persecuted and ill treated by said government to obtain justice through the courts of the country; that persons who are confined by its order in the Central Penitentiary have absolutely no power to make any legal appeal whatever, besides which they are robbed of their money, jewels, and whatever things they carry on their persons, and never receive them back.

4. Another deposition of the same character taken in the Civil Court of Puntarenas, Costa Rica, and containing the statements of Messrs. William John Russell, captain of the steamer "Newport," and Edward Owen, an officer on said vessel, made under date of November 23 last. The former affirms that, while his vessel was anchored at San Jose, Guatemala, on August 17, 1908, the harbormaster had

two persons brought on board, one of whom was Mr. Fornos Diaz, they being persons who were being expelled from that territory for political reasons; that he refused to receive them that day because the day of departure of the vessel had not arrived, and he sent them on land, whence they were again taken away on the 20th of said month, not being then rejected from the steamer. The second deponent affirms the same facts, but he says he does not know whether the gentlemen whom he mentions were leaving in pursuance to an order to leave the country or voluntarily, and he further avers that they rode third class to Acajutla and that Mr. Fornos Diaz gave him, deponent, a gold watch and chain as a pledge to let him ride first class to Amapala, where he paid the necessary fare.

5. Another deposition taken extrajudicially before the Second Civil Judge of Managua, Nicaragua, and containing declarations of Messrs. Jose Tinetti, Teodoro Tinetti, Rafael Mendez Castillo, and Juan J. Mariena. The first two state that, having been fellow prisoners with the plaintiff, they know that he was confined in the Central Penitentiary of Guatemala and treated with the greatest harshness and mistrust because he was considered a Nicaraguan spy; that he was first arrested for about eight days, at the end of which he was released; but that after a short lapse of time he was again placed in prison and remained there when the deponents left the establishment. The last two make substantially the same statements but they do not speak of the interruption in the confinement, as do the others.

6. Another manuscript dated in the same city of Puntarenas on November 23 last and subscribed by Teodoro Tinetti, whose signature is certified to by a notary public, in which it is stated that owing to the [740] rigorous confinement to which Mr. Fornos Diaz was subjected he was not able to make any appeal in his defense; that even if he had succeeded in going before the courts, justice would not have been done him, for they are incapable and unable to do justice in Guatemala against the government of His Excellency Estrada Palma, so that the result of such an effort would have been to aggravate the situation of the plaintiff and to jeopardize any one who would have lent him aid; that notwithstanding said gentleman had committed no punishable act, he was subjected in the penitentiary to extremely cruel treatment, and that it was always said that he had been imprisoned by order of the above-mentioned ruler because he was regarded as a spy of the Nicaraguan government.

7. Another manuscript from Rivas, Nicaragua, dated October 16 of last year, in which Mr. Augusto Viales, whose signature is certified to by the Chief Civil Magistrates of said Department, confirms the facts related in paragraph 4 above, referring partly to the statements of the captain and officers of the "Newport" and speaking partly from his own knowledge.

8. A document executed and certified to by the notary public Ramon Rostran in the city of Limon, Costa Rica, on October 24 last, in which it is stated that Messrs. Francisco Castrillo C., Pedro Castrillo C., Francisco A. Novoa, and F. Barquero, whose nationality, residence and qualifications are not given, uniformly declared under oath (it does not say before whom) that Mr. Fornos Diaz had a lawyer's

and notary's office at Bluefields up to September, 1907, with the best of clientages, for it yielded him sufficient income not only to live comfortably and respect-ably but also to save considerable money; that he is an owner of agricultural estates and other business enterprises; that it is logical to suppose that his imprisonment must have caused him considerable loss and damage; that said gentleman is an enemy of His Excellency President Jose Santos Zelaya and a person of well known honesty as well as recognized cleanness in politics; that he does not belong to the set of mercenaries who offer their sword or their person to the service of any cause or any government.

9. A certificate of the physicians and surgeons Drs. Eduardo Uribe R. and Inocente Moreira, dated November 29 last, in which these professional men declare to have examined Mr. Fornos Diaz in September of the same year, he being in a condition of extreme anæmia with chronic bronchitis; that he was treated by the former of the deponents and that his health, thanks to a regimen of good food and open air, has improved much. [741]

IV. By reason of the facts related, and invoking the rules of Guatemalan public law, the principles of the law of nations, and article II of the convention creating this court, Mr. Fornos Diaz institutes a suit against the government of Guatemala, asking the court to declare that said government violated, on his person, " the rights which belonged to him in that country as a foreigner and a Central American," and that the high party against whom the action is brought be compelled to indemnify him for all the losses and injuries resulting from the arbitrary imprisonment, cruel treatment and unwarranted expulsion of which he was a victim, as follows: For every month of deprivation of liberty, one thousand pounds sterling; for the expulsion, 2,500 pounds sterling; five hundred for every month the plaintiff is deprived of the professional titles which he was unable to obtain on leaving there owing to the fault of the Guatemalan authorities, and two thousand for the costs of the suit begun.

V. The plaintiff states that, in view of his inability before and now to obtain reparation before the Guatemalan authorities, for the reasons he has set forth and which he deems warranted by the evidence adduced, this court ought to admit the suit as far as the last of the requirements enumerated in article II of the convention is concerned.

VI. The court deliberated on this matter in the sessions held January 13 and 16 and February 3 and 10, and in the last of these sessions, when the time had come to decide, the Honorable Presiding Magistrate submitted the question to the court as to whether the suit under consideration fulfills all the requirements of said article II and consequently whether the court has jurisdiction in the case. Judges Madriz and Ucles voted in the affirmative and Judges Bocanegra, Martinez Suarez, and Astua Aguilar in the negative.

VII. The plaintiff, in a writing dated the following day, challenged Judge Bocanegra, invoking as his grounds the circumstance that this official had furnished a copy of his complaint to a representative of

Guatemala, a fact which he characterizes as sufficient to demonstrate his partiality in the matter.

VIII. The challenge having been acted upon in accordance with a resolution of this court, the judges, who passed upon the question in the capacity of arbitrators, adopted a resolution, by a majority of votes, at noon of March 5 instant, declaring that the challenge could not be allowed.

And whereas: [742]

Article II of the convention creating this court gives it cognizance of claims which the individuals of one Central American country file against the government of another of the signatory nations, when these claims arise from a violation of treaties, or, this not being the case, when they are based on legal injuries of an international character, provided the remedies afforded by the laws of the nation against the violation have been exhausted, or a denial of justice is demonstrated.

And whereas:

In order to decide whether the present case fulfills all the restrictive conditions under which the said law establishes the jurisdiction of this Court in such matters, we must bear in mind: (a) That article XXII *ibidem* confers upon it the power to determine its competency " by interpreting the treaties and conventions relating to the subject in controversy and by applying the principles of the law of nations," which means that it must subject its judgment in each case to the rules established by compacts, and in default thereof, to the precepts of the law of nations, for to do otherwise would be to suppose the Central American Court of Justice invested with an authority superior to its own organic law; (b) that inasmuch as the said rule of the convention affects the sovereignty of the judicial branch of governments, because it confers on said court the power to judge matters under the jurisdiction of the territorial authorities, its bearings should be thoroughly scrutinized in applying it, for, as More says, every limitation of autonomy must be regarded "as an exceptional right and be construed in its narrowest sense, in the manner most suitable to the nation on which it has been imposed and causing the least detriment to its natural liberty." *Codified International Law, No. 150.* (c) That under the hypothesis that the purport of said article II is deficient or doubtful as to the question whether the court has or has not jurisdiction in the aforementioned claim, we must resort, as an especially authoritative source, to the discussions and votes recorded in respect to the matter in the proceedings of the Washington Peace Conference, in which are shown the weight and purport which the Central American plenipotentiaries intended and wished to give to this part of the treaty.

And whereas:

In order to judge the case under consideration along these lines we must examine separately the four questions involved, namely: (1) Whether the legal injuries complained of shall be classed by their nature in the group of matters which, in spite of the individual character of [743] the injury, the law of nations places under its protection; (2) whether the plaintiff has instituted suit demanding just reparation

for these injuries before the authorities of Guatemala, and his efforts to obtain reparation have failed; (3) whether, in the absence of this latter condition, the court can, without violating the principles governing the subject, admit, by way of substitute, the allegation and proof of the impossibility or uselessness of bringing action before the territorial courts, based on the assertion that these courts are enslaved or corrupted by the domination of a despotic government; and (4) whether the convention confers upon it or denies it authority for this purpose.

And whereas:

With respect to the first question, inasmuch as the Nicaraguan nationality of Mr. Fornos Diaz is proven, the court considers that the case comes under its jurisdiction if we look at it exclusively from the standpoint of the nature of the charges, for the fundamental rights and powers of the human individual in civil life are placed under the protection of the principles governing the commonwealth of nations, as international rights of man, and it is evident that the facts charged in the complaint constitute an infringement of liberty, an injury to health, and a trespass against the property of the plaintiff, being consequently one of the cases contemplated by the convention. *Bluntschli, Codified International Law, No. 468. Fiore, Codified International Law, No. 522 et seq.*

And whereas:

With regard to the second point it must be observed that the plaintiff himself admits having refrained from taking any steps before the said courts, under which circumstances the court could not take cognizance of the suit without violating the strict and positive provision which the convention makes out of consideration and respect for the sovereignty of nations. This provision is in accordance with the principles of international law, for in reality an offense committed against an individual foreigner does not warrant a diplomatic claim, nor, therefore, within the sphere of the relations among the Central American Republics, does it authorize the aggrieved party to exercise his rights before this court of justice, assuming in a certain way the representation of his country with respect to the claim, until after it is proven that the nation concerned has espoused the charge because of a total or partial denial of justice, and this theory is not affected by the argument that the diplomatic action of powerful nations has been made felt more than [744] once in the political history of Central America before the matters which gave rise to it had been subjected to a judicial investigation before the local authorities, for the enactment of an irregular procedure can never be rightfully invoked in order to justify tendencies or habits which are contrary to law. The republic of Nicaragua maintained this doctrine in 1878, at the time of the Eisenstuck claim, and in the note of protest signed by His Excellency Mr. A. H. Rivas, Minister of Foreign Relations, under date of May 15 of said year, the following significant ideas are expressed:

Your Excellency is already aware, from the documents which I have had the honor to transmit to you, of the cause of the difference with the German government; how the Messrs. Eisenstuck, without having made use of all the legal remedies in order to obtain reparation of the injuries of which they complained, presented their claim to the government through the diplomatic representative of their nation; how this representative, relying on the declaration of his consul, which he considered as legally true in spite of the fact that it was made in his own cause and was contrary to other evidence, demanded the immediate punishment of the supposed guilty parties and an international satisfaction, alleging that the republic was responsible for the denial of justice to the subjects of his nation and for an offense to the imperial flag in the person of its consular officers; how the government rejected both claims, on the ground that a denial of justice could only be alleged after a final judgment had been rendered by the courts, and by demonstrating that the judgment was notoriously unjust in the light of the laws of the country and of universally recognized principles.

\* \* \*

Nevertheless, in the German question the principles which establish the independence of nations and the practices which the latter have adopted in international intercourse seem to have been deliberately disregarded with respect to Nicaragua. Otherwise a complaint of insults would not have been raised to the category of a diplomatic question without the interested parties first availing themselves of the ordinary and extraordinary remedies afforded by the laws to natives and foreigners in order to obtain reparation for wrongs done them; the statement of the consul in his own behalf would not have been regarded as infallible in the face of contrary evidence of a more impartial and trustworthy character; the republic would not have been held responsible for a delay in its judicial procedures when they were in conformity with the laws of the country and common to both natives and foreigners; still less would it have been held responsible for a denial of justice, even before a final judgment was rendered by the competent authority, and before it was possible, therefore, to prove that the judgment was contrary to the laws of the country and to generally recognized principles, which is the only case in which, according to international law, a nation is responsible for the acts of its courts.

The Chilean treaty writer Cruchaga, in summarizing the precepts which prevail in this respect throughout the domain of the international [745] commonwealth and which are unanimously proclaimed by established doctrines, says:

Governments, which should earnestly endeavor to maintain international relations on the best possible footing, should not grant their support to any but those claims of their citizens which are

presented to them with their grounds fully justified, which have been refused to be heard without reason, which are instituted after the remedies afforded by the internal legislation of the country where the grievance occurred have been exhausted, and which are also sustained by the principles and practices of international law. *Cruchaga, Notions of International Law, No. 172; Marques de Olivart, Treaty and Notes on International Law, Vol. 1, No. J/9; Heffter, International Public Law of Europe, No. 35; Martens, Treatise on International Law, Vol. 1, page 445; Bluntschli, Codified International Law, Nos. 378, 466, 467; Fiore, ditto ditto, Nos. 172, 221, 461.*

The remark which has been made in the course of this discussion against the application of the aforesaid doctrine, alleging that the aggrieved party can not exercise his rights before the territorial courts because the author of the legal injuries complained of is the chief magistrate of the nation; can not be given consideration; in the first place, because there is no evidence to prove the assertion that it was said ruler and not his agents who directly contracted the responsibility arising from such acts, and the judges can not consider any fact to be established a priori unless there is legal presumptive evidence; in the second place, because in Guatemala, the chief executive as well as all the officials of the administration are responsible for their acts before the courts of the nation.

And whereas:

As far the third reason is concerned we must remember that, if we should make the substitution mentioned, it would have to be done as the result of a decision defamatory to the nation concerned, declaring its political organization to be barbarous and corrupt and affirming the consequent impossibility or futility of seeking just reparations of wrongs in its courts. Such a decision, notwithstanding its extreme gravity, would, if the theory of the plaintiff were accepted, be rendered " outside the controversy" (*fuera de controversia*), without even giving the interested government a hearing, it being thus placed beyond the pale of the law of nations by this stigma, and the court lacks authority to pronounce such a decision, even though it were feasible to prove the grounds for it. In spite of the fact that, in view of the foregoing, it is unnecessary to examine the merits of the extrajudicial evidence [746] adduced in the complaint, it is proper to remark that it was gathered without the actual or pretended participations of the party whom it affects and therefore has a substantial defect which renders it null and void, for it would be absurd to claim that the summoning or presence of the Costa Rican or Nicaraguan public prosecutor satisfied, with respect to the government of Guatemala, the necessity of the supplementary representation in such acts as demanded by law, and it would likewise be absurd to admit as evidence the private statements which the plaintiff adduces. It is not too much to declare, at the same time, that the testimony contained in these depositions is not sufficient to lead to the conviction intended in the complaint, for although the

deponents relate acts and measures performed and taken by the authorities of Guatemala, some of them dating several years back, which they consider unlawful, and though they express their personal opinion regarding the mode of government of said country, the court could not, without violating the fundamental principles governing proof by witnesses, espouse these opinions before possessing all the circumstances of the case and all the indubitable facts which may have prompted the qualifying statements of each of the informants. A witness is only a narrator, and it is the exclusive duty of the judge to determine the moral and legal weight or significance of the acts or events related. Therefore, in face of the actual fact, legally and politically speaking, of there existing in Guatemala laws and institutions which guarantee the individual rights of natives and foreigners, the opinions expressed in the manuscripts adduced by the plaintiff can not prevail, nor has the court the authority to institute an inquiry to ascertain the truth of the matter.

And whereas:

Upon examining into the admissibility of the aforementioned substitution, not from the standpoint of the juridical reasons deduced from the principles of international law, but with respect to the actual purport of the written rule, that is, with regard to what is really prescribed by article II of the convention, as invoked by the plaintiff, it appears that in the Washington Peace Conference the point was made the subject of special discussion, which terminated in the rejection of the idea that an allegation of impossibility could be effectively made in order to relieve the plaintiff from the obligation of instituting action before the territorial authorities, as is explicitly provided in articles VI and VII of the 11th session of the conference, in which account is given of the discussion on the subject, the articles reading literally as follows: [747]

Art. VI. Dr. Bonilla proposed that there be added to the article the phrase: "unless it has been impossible for them to do so." After a debate participated in by Messrs. Madriz, Ugarte, Rodriguez, Batres Jauregui, Gallegos, and Anderson, the session was suspended at 11.50 A. M.

Art. II. The session having been resumed at 12.15 P. M., article II was put to a vote, with the addition proposed by Dr. Bonilla. The delegations from Nicaragua and Honduras voted for the article as thus amended, while those from Costa Rica, El Salvador, and Guatemala voted to approve the article without the addition.

And whereas:

By virtue of the vote taken on the case on February 10 last, it was decided by the court that the complaint in this suit could not be admitted because it did not fulfill the final condition provided in article II of the aforementioned convention.

Therefore:

The Central American Court of Justice, in accordance with the doctrines set forth and applying the rule contained in article II of the Washington Convention, as referred to,

Decides:

First. The said complaint is declared inadmissible because this court lacks jurisdiction in the case as it has been presented.

Second. Let this decision be communicated to the governments of Central America.

Jose Astua Aguilar.

Alberto Ucles.

Jose Madriz.

Angel M. Bocanegra.

Francisco Martinez S.

Ernesto Martin, Sec.