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SPANISH-VENEZUELAN COMMISSION

MENA CASE

GUTIERREZ-OTERO, *Umpire.*

In record No. 5, presented in the claim of the Spanish subject Domingo Gonzalez Mena, in favor of whom the payment is claimed of 34,744 bolivars

as the value of 670 head of horses and mules situated upon the ranches belonging to him, the former having been destroyed by the belligerent forces in the war beginning in May, 1899, and the latter having been entirely lost during the same time, there arose a question concerning which the commissioners did not agree, and which, as a preliminary question, has been submitted to the umpire.

The Commissioner of Venezuela, referring to the circumstances, says that there is no exact statement concerning which force said troops belonged to, nor the name of the leader who commands them; and that there is question of the losses suffered because of war; he maintains that the State is only responsible for acts of its authorities, and also that strangers ought to suffer the consequences of wars which the country undergoes, and should not claim damages on this account, because they are produced by force majeure, which in no case can render said State responsible.

From this he deduces that Venezuela is not responsible for the damages which Gonzalez Mena says he suffered by reason of the war of 1899.

The Commissioner of Spain is of opinion that the interests of the claimant have not received the protection to which the treaties in force give them a right, and he maintains that said responsibility does exist.

The question set down in this way by the commissioners, it appears in the record that:

Not being in accord upon this point, its resolution shall pass to the decision of the umpire.

In reality the two following principles are invoked by one of the commissioners, in order that they may be applied and govern the case:

Primarily, the State is responsible only for the acts done by its agents, and not for damages which insurgents cause to foreigners, and therefore Gonzalez Mena has no right, from this point of view, to claim damages which the revolutionary forces may have caused him:

In general, the State is not responsible for damages caused as a consequence of war because damages of this sort are considered as caused by force majeure, which exempts it from liability.

Do these principles in fact govern the case of Gonzalez Mena in such an absolute way, that, by reason of both, it is not permissible to take into account any other consideration in order to decide it and make it necessary to reject it summarily?

With respect to the first of these two rules which have been cited, the umpire has, upon another occasion,<sup>1</sup> already decided that although after a long discussion the theory has undoubtedly prevailed concerning the irresponsibility of states for damages which insurgents cause to the persons or property of foreigners living in their territory, and such a principle is now considered as a rule properly called one of international law, it does not govern a tribunal of the nature of this Mixed Commission, which, according to the protocol that created it, should, on the contrary, necessarily base its judgments upon absolute equity and not take into consideration objections of a technical nature which may be raised before it.

This character of a tribunal of equity, which is considered sufficient for the submission to arbitration of cases of protection, has been recognized as giving absolute liberty for a decision which is not against good conscience inspired by a true estimation of absolute justice, and which permits, finally, taking into consideration of all the circumstances of the case, conceding equitably what is

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<sup>1</sup> *Supra*, p. 741.

not a matter of obligation and can not be demanded, and, in a word, proceeding, as arbitrators proceed, that is, without regard to law.

The umpire has shown that the protocol of Washington, of April 2 of this year, by its own terms, and in accordance with the most reliable opinions which in this particular case can be produced, among them another protocol made in 1890 by the United States of Venezuela and the United States of America, places this Mixed Commission in that position.

Concerning the second principle — and even with more reason — substantially the same must be said, since if this doctrine to a certain degree did absolutely exist, that the acts of war do not give rise to the responsibility which obliges states to make arbitration, it would be modified by the theory that the distinction between these cases should be made as to those which, properly speaking, are defensible, and those which are not, therefore, of the nature of a fatal necessity.

Upon this point Fiore, cited by Tchernoff, says:

S'il est incontestable, dit un auteur, que la guerre a le caractère de nécessité fatale et de force majeure, tout ce qu'un gouvernement peut faire et entreprendre pour satisfaire aux justes exigences de la défense, en prévision d'une guerre, ou pendant la guerre, n'a pas en lui-même le caractère de nécessité fatale. La guerre imminente ou déclarée peut, sans doute, nécessiter certains faits contre la propriété privée, et autoriser les détériorations de cette propriété dans l'intérêt public de la défense militaire: mais ce que l'autorité publique peut faire dans un but stratégique revêt toujours le caractère de l'entreprise légitime dans un intérêt public, et non toujours celui de nécessité fatale, caractère qui devrait être réservé uniquement aux faits accomplis durant l'action et rendus nécessaires pour résister à l'ennemi qui s'avance pour commencer la lutte. (Tchernoff, *Protection des Nationaux Résidant à l'Étranger*, p. 309, citing Fiore, *France Judiciaire*, X, 1, p. 193.)

Tchernoff contends, that the council of state in France established the distinction with respect to the demolition of real estate in the zone of the defense of Paris from between those which constituted a measure of this nature until the disaster of Sedan, and those after this event considering the latter as an act of war, which did not give, as the first did, a right to indemnity.

That the French court of cassation has decided that the damages caused to private property by the works completed, even in case of necessity for the defense of a stronghold in a state of war, give a right to indemnity in all cases where they do not constitute a case of force majeure;

And finally that an author, cited in *La France Judiciaire*, expresses himself as follows:

Si, au lieu de s'en tenir à la forme, on va au fond des choses, qu'il s'agisse des dommages résultant de travaux de défense antérieurs à l'action, ou des dommages résultant d'opérations militaires d'attaque ou de défense durant l'action, il y a toujours, dans un cas comme dans l'autre, des citoyens qui souffrent un dommage dans l'intérêt collectif de la patrie.

Dès lors, la collectivité des citoyens, ou le gouvernement qui la représente, doit indemniser intégralement les particuliers des pertes qu'ils ont subies dans l'intérêt commun, soit avant, soit après l'action. Du reste, le système contraire est tellement injuste, que ses partisans n'osent pas le pousser jusqu'à ses dernières conséquences logiques, mais le mitigent en disant que l'équité doit conseiller à l'Etat, même lorsqu'il s'agit des dommages causés durant l'action, à faire la charité aux victimes de la défense nationale. (Tchernoff, *Protection des Nationaux Résidant à l'Étranger*, pp. 311, 312; citing a note of the translator of *La France Judiciaire*, X, 1, p. 192.)

Thus it is that although without taking into consideration that the case of Gonzalez Mena is submitted to a mixed commission, which is obliged to decide according to equity, the question of indemnity for acts of war appears, moreover, to be a question recommended in general for its decision to the same criterion

of equity, but these considerations which fix the necessity of deciding this claim upon its merits in no way prejudices the facts nor entail an opinion concerning the nature of those facts which have been the subject of the proof produced.

It is for this reason that the umpire in declaring that the rules invoked in an absolute sense with respect to damages caused by the revolution or by acts of war do not govern the case proposed, necessitating its disallowance decides expressly and exclusively:

That this record is to be returned to the commissioners in order that they may decide the claim presented on behalf of the Spanish subject Gonzalez Mena, bearing in mind that it is not subjected in this respect to any other criterion than that of absolute equity.