L. F. H. NEER AND PAULINE NEER (U.S.A.) *v.* UNITED MEXICAN STATES.

(October 15, 1926, concurring opinion by American Commissioner, undated. Pages 71-80.)

1. This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, who, at the time of his death, was employed as superintendent of a mine in the vicinity of Guanaceví, State of Durango, Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife were proceeding on horseback from the village of Guanaceví to their home in the neighborhood, they were stopped by a

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number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of $100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount.

2. As to the nationality of the claim, which is challenged, the Commission refers to the principles expounded in paragraph 3 of its opinion and decision rendered in the case of William A. Parker on March 31, 1926. On the record as presented the Commission decides that the claimants were by birth, and have since remained, American nationals.

3. As to lack of diligence, or lack of intelligent investigation, on the part of the Mexican authorities, after the killing of Paul Neer had been brought to their notice, it would seem that in the early morning after the tragedy these authorities might have acted in a more vigorous and effective way than they did, and moreover, that both the special agent of the Attorney General of Durango (in his letter of November 24, 1924), and the Governor of that State, who proposed the removal of the Judge of Guanaceví, have shared this opinion. The Commission is mindful that the task of the local Mexican authorities was hampered by the fact that the only eyewitness of the murder was unable to furnish them any helpful information. There might have been reason for the higher authorities of the State to intervene in the matter, as they apparently did. 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.

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 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

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insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. 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 Guanaceví 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. No attempt is made to establish the second point. The first point is negatived by the full record of police and judicial authorities produced by the Mexican Agent, though the Commission feels bound to state once more that in its opinion better methods might have been used. From this record it appears that the local authorities, on the very night of the tragedy, November 16, went to the spot where the killing took place and examined the corpse; that on November 17 the Judge proceeded to the examination of some witnesses, among them Mrs. Neer; that investigations were continued for several days; that arrests were made of persons suspected; and that they were subsequently released for want of evidence. The American Agency in rebuttal offers nothing but affidavits stating individual impressions or suppositions. In the light of the entire record in this case the Commission is not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before this Commission.

Decision

6. The Commission accordingly decides that the claim of the United States is disallowed.

Separate opinion

While concurring in the decision disallowing this claim, I find myself unable to concur fully in the statement of reasons upon which the other two members of the Commission think the award should be grounded. Because of that fact I deem it to be advisable, having in mind particularly the importance of the rules and principles of law involved in the case, to state my own views somewhat in detail.

This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, a native American citizen, who was killed in the vicinity of the village of Guanaceví, State of Durango, Mexico, on November 16, 1924. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate measures to apprehend and punish the persons who killed Neer. An indemnity in the sum of $100,000.00 is asked in behalf of the claimants as heirs of the deceased.

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There is no dispute regarding the material facts in relation to the killing of Neer in so far as they are disclosed by evidence. Neer, at the time of his death, was employed as superintendent of a mine at Guanaceví. At about eight o'clock in the evening of the day on which he was killed, he and his wife were proceeding on horseback from Guanaceví to their home about three miles distant from the village. When they had gone approximately a third of the distance they were stopped by a number of men who engaged Neer in conversation, which Mrs. Neer did not understand. In the midst of this conversation Neer was shot and killed. An examination of the corpse revealed that three bullets had penetrated his body. Mrs. Neer was able to furnish but very little information of value in identifying the men by whom her husband was accosted.

Some question is raised in the Answer of the United Mexican States with respect to the right of the United States to maintain the claim in behalf of the claimants. However, it is merely stated in the Answer that "the American nationality of the claimants and of the deceased Paul Neer is not duly proved in the Memorial", and in the light of what I consider to be entirely convincing evidence produced on this point I have no doubt as to the right of the United States to prefer this claim in behalf of the claimants as American heirs of a deceased American citizen.

Among the annexes accompanying the Memorial of the United States are certain affidavits. Mrs. Neer, in an affidavit made by her, states that "the Mexican Government did not make an adequate or thorough investigation of the facts connected with the murder of said Paul Neer and failed and neglected to take any adequate measures to apprehend and punish the murderers of said Paul Neer" (pp. 23-24). Herman Dauth, a resident of Guanaceví at the time of Neer's death, states in an affidavit that "to his personal knowledge no effort was made by the local authorities to apprehend the murderers and assailants, either the day following the murder or the day thereafter, but that on the third day Indian trailers were sent to the scene of the murder and discovered the exploded shells behind the stone walls". The affiant further expresses the belief that had prompt and proper methods been employed by the local authorities, the identity of the murderers of the said Paul Neer could have been ascertained (p. 27). Another affiant, John N. Brooks, Jr., an employee in general charge of the Guanaceví Unit of the *Cia. Minera de Penoles, S.A.*, situated near Guanaceví, swears that "some inquiry and search was made by the authorities of the State of Durango to ascertain who were the murderers of said Paul Neer, but to his knowledge no reward was ever offered for their apprehension and no special pains or care were taken by the authorities to apprehend and punish the murderers" (p. 29).

To refute the charge that Mexican authorities failed to take proper measures to apprehend and bring to justice the persons who killed Neer, the Mexican Government filed with its Answer a record of proceedings instituted and carried on before the Judge of First Instance of the Judicial District of Guanaceví. From this record it appears that the Judge, on November 17, the day following the killing of Neer, ordered an investigation; that on the same day members of the Court went to the place where the killing took place; that they examined the corpse which had been removed to a near-by residence, and that they then proceeded to the examination of witnesses, including Mrs. Neer. It further appears that the examination of witnesses was continued for several days; that arrests were made of certain persons suspected of the killing of Neer;

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and that they were subsequently released for want of evidence implicating them in the deed.

The Agent of Mexico, in his argument before the Commission, emphasized that the Mexican authorities had complied with the forms of Mexican law in the investigation of the killing of Neer, and he asserted that the efficacy of the law had been proved in the light of experience.

The sovereign rights of a nation with regard to the enactment and execution of laws of this character within its jurisdiction is of course well understood. Vattel, in asserting a general principle in relation to these rights, adds some observations as to the respect that should be accorded to the measures employed by nations in the exercise of such rights. He says:

"The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.

"Other nations ought to respect this right. And, as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such—when once a cause in which foreigners are interested has been decided in form, the sovereign of the defendants can not hear their complaints. To undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore, ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, excepting in cases where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odius distinction made, to the prejudice of his subjects, or of foreigners in general." *Law of Nations.* (Chitty's edit. 1869, Book II, pp. 165-166.)

Although there is this clear recognition in international law of the scope of sovereign rights relating to matters that are subject of domestic regulation, it is also clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations which is international law, and that any failure to meet those requirements is a failure to perform a legal duty, and as such an international delinquency. Hence a strict conformity by authorities of a government with its domestic law is not necessarily conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point.

The functions exercised by the Judge at Guanaceví in investigating the death of the American citizen, Neer, and in taking steps to apprehend the persons who shot him were evidently not judicial acts in the sense in which the term judicial is generally used. The duties the Judge discharged may be said to be in a measure those of a police magistrate. However, the precise character of acts of the Judge is not a material point. The claim preferred 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 the government. I consider that a denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention. This view, which has often been expressed, was well stated in the opinion rendered by Sir Henry Strong and Mr. Don M. Dickinson in the so-called "El Triunfo" case in which it was said:

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"It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.

" 'There can be no doubt'—says Halleck— 'that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.' " Ralston, *International Arbitral Law and Procedure,* p. 51; *Foreign Relations of the United States,* 1902, p. 870.

The controversial questions that arise between nations from time to time with respect to complaints of denial of justice are numerous and varied. But it is probably not so very difficult to formulate a practicable and sound standard by which to test the propriety of intervention or the right of a nation to claim pecuniary reparation in any given case.

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. The thought is expressed to some extent in an opinion given by Commissioner Bertinatti in the Medina case under the Convention of July 2, 1860, between Costa Rica and the United States in which it was said:

"It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, *in all matters depending upon the judiciary power*, must confine itself to secure for them free access to the local tribunals, besides an *equality of treatment with the natives* according to the conventional law established by treaties.

"Only a formal denial of justice, the dishonesty or *prevaricatio* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*', (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection." Moore, *International Arbitrations,* Vol. 3, p. 2317.

There may of course be honest differences of opinion with respect to the character of governmental acts, but it seems to be clear that an international tribunal is guided by a reasonably certain and useful standard if it adheres to the position that in any given case involving an allegation of a denial of justice it can award damages only on the basis of convincing evidence of a pronounced degree of improper governmental administration.

In the case before the Commission no charge is made of a failure of any duty by Mexican authorities to prevent the commission of an offense. Indemnity is claimed because of the alleged neglect of the authorities to take proper measures to apprehend and punish the persons who killed Neer. It has been repeatedly asserted by international tribunals that a failure of authorities to take adequate measures of this kind renders a nation liable to respond in damages. Thus, Mr. Findlay, in the opinion written by him in the case of Amelia de Brissot, under the Convention of December 5, 1885, between the United States and Venezuela, said:

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"It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment." Moore, *International Arbitrations*, Vol. 3, p. 2969.

To the same effect Commissioner Little in the opinion written by him in that case said:

"Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one." *Op. cit.*, p. 2968.

See also the Poggioli Case before the Italian-Venezuelan Commission of 1903, Ralston, *Report*, p. 847, 869; Bovallins and Hedlund Cases, *Ibid.*, p. 952; case of Ruden & Company under the Convention of July 12, 1863, between the United States and Peru, Moore, *International Arbitrations*, Vol. 2, p. 1653.

It was argued in behalf of the United States that there was an unwarranted delay in steps taken to apprehend the persons who killed Neer; that the proceedings of investigation were of such a public character as to put persons implicated in the crime on guard and to enable them to escape; that detectives might have been employed to apprehend the offenders. I am of the opinion that better methods might have been used by the Mexican authorities, and that the action taken by them may well be adversely criticized.

But in the light of the entire record in the case before us I am not prepared to decide that a charge of a denial of justice can be maintained against the Government of Mexico conformably to the principles which according to my views as above expressed should govern the action of the Commission.

I accordingly concur in the decision that the claim of the United States is disallowed.

Fred K. Nielsen,
Commissioner.

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