I.LAURA M. B. JANES *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 16, 1925, separate statement regarding damages by American Commissioner, November 16, 1926. Pages 108-131.)

1. Claim is made by the United States of America in this case for losses and damages amounting to $25,000.00, which it is alleged in the Memorial were "suffered on account of the murder, on or about July 10, 1918, at a mine near El Tigre, Sonora, Mexico, of Byron Everett Janes," an American citizen. The claim is presented, as stated in the Memorial, "on behalf of Laura May Buffington Janes, individually, and as guardian of her two minor children, Byron Everett Janes, Jr.; and Addison M. Janes; and Elizabeth Janes and Catherine Janes."

2. Briefly summarized, the allegations in the Memorial upon which the claim is based are as follows:

3. Byron Everett Janes, for some time prior to and until the time of his death on July 10, 1918, was Superintendent of Mines for the El Tigre Mining Company at El Tigre. On or about July 10, 1918, he was deliberately shot and killed at this place by Pedro Carbajal, a former employee of the Mining Company who had been discharged. The killing took place in the view of many persons resident in the vicinity of the company's office. The local police *Comisario* was informed of Janes' death within five minutes of the commission of the crime and arrived soon thereafter at the place where the shooting occurred. He delayed for half an hour in assembling his policemen and insisted that they should be mounted. The El Tigre Mining Company furnished the necessary animals and the posse, after the lapse of more than an hour from the time of the shooting, started in pursuit of Carbajal who had departed on foot. The posse failed to apprehend the fugitive. Carbajal remained at a ranch six miles south of El Tigre for a week following the shooting, and it was rumored at El Tigre that he came to that place on two occasions during his stay at the ranch. Subsequently information was received that Carbajal was at a mescal plant near Carrizal, about seventy-five miles south of El Tigre. This information was communicated to Mexican civil and military authorities, who failed to take any steps to apprehend Carbajal, until the El Tigre Mining Company offered a reward, whereupon a local military commander was induced to send a small detachment to Carrizal, which, upon its return, reported that Carbajal had been in this locality but had left before the arrival of the detachment, and that it was therefore impossible to apprehend him.

4. It is alleged in the Memorial that the Mexican authorities took no proper steps to apprehend and punish Carbajal; that such efforts as were made were lax and inadequate; that if prompt and immediate action had been taken on one occasion there is reason to believe that the authorities would have been successful; that it was only after a money reward for the capture of Carbajal had been offered that some dilatory steps were taken to apprehend him in a nearby town where he was staying.

5. The Memorial contains allegations with respect to the earning capacity of Janes, the loss suffered by his wife and children because of his death, and their want of means of support.

6. To substantiate the allegations of fact in the Memorial of the United States and the charge that Mexican authorities failed to take effective steps to apprehend the man who shot Janes, there were filed with the Memorial certain affidavits, statements, and copies of reports of the American Consul at Tampico to the Department of State from which it appears that the consul addressed the Governor of Sonora, pointing out that the killing of other Americans in mining camps in Sonora in the past had gone unpunished and urging that the Mexican authorities take steps to apprehend Carbajal.

7. In the Answer filed by the Mexican Government it is denied, that the Mexican authorities failed to take appropriate steps to arrest and punish Carbajal. Accompanying the Answer is a certified copy of judicial proceedings showing the action taken to investigate the killing of Janes and the orders given with respect to his apprehension. Attention is also called to the use of an armed force to capture the fugitive concerning which information is given in evidence accompanying the Memorial of the United States.

8. An affidavit made by the widow of the deceased under date of February 1, 1926 (Annex 11 to the Memorial), contains information regarding the circumstances attending the killing of her husband. The details furnished are doubtless substantially correct, but like other matters contained in the affidavit are naturally based on information which she had received from others.

9. An affidavit (Annex 12 to the Memorial) was furnished by L. R. Budrow, the General Manager of the Lucky Tiger Combination Gold Mining Company, an American corporation, owners of the stock of the Tigre Mining Company. In this affidavit Mr. Budrow states that on a visit he made to El Tigre shortly after Janes' death, he obtained the impression that very limited efforts had been made by the authorities at the time to capture Carbajal and that there was a general rumor in El Tigre that Carbajal was seen at that place a few nights after the murder. The affiant attached to his affidavit a report made by R. T. Mishler, Manager of the El Tigre Mining Company on April 11, 1925, with respect to the killing of Janes. The following extract from that report doubtless states in a substantially accurate way the facts with respect to the killing of Janes and the steps taken shortly thereafter by Mexican authorities to apprehend Carbajal:

"Mr. Janes had been Mine Superintendent of the Tigre Mine for six months preceding the tragedy.

"He had had trouble with a trammer named Pedro Carbajal and had given orders for his discharge.

"Mr. Janes and his Assistant, Mr. W. H. Williams, were accustomed to hire new men at the mine office, near the entrance to No. 4 Level which is situated about a hundred yards from the American quarters in the town of El Tigre. Carbajal had requested that he be reinstated in his work on two or three evenings before the tragedy and had been refused.

"On the evening of July 10 (1918) at about 3 : 30 P. M. he again requested work and was again refused.

"After Mr. Janes and Mr. Williams had left the office and were about half way up the path leading to their quarters, Carbajal started running after them brandishing a revolver. The Americans heard him when he had almost reached them. Mr. Janes dodged by him and started to run back toward the office. Mr. Williams stood still and said 'don't shoot'. Carbajal snapped his pistol, point blank at Mr. Williams, but it failed to go off. He then turned and fired at Mr. Janes as he was running down the path. The bullet entered the back near the spine causing Mr. Janes to fall. Carbajal ran up, placed his pistol at Mr. Janes' head and fired a second shot through the brain.

"Carbajal then went down the path, threatening with his pistol, a half dozen Mexicans gathered around the office, and disappeared up the canyon.

"The Comisario was advised within five minutes after the murder and was on the spot five minutes later. He lost a half hour in getting his policemen together and insisted that they should be mounted. The Company furnished the animals and the posse left Camp about 4 : 30 P. M. They returned about 7 : 00 P.M. and reported that they had not seen Carbajal. They were also out the following day, but without results.

"It is current talk that Carbajal stayed at a ranch 6 miles south of Tigre, for a week following the murder, and that he came into Tigre on two nights during the week, but it is most difficult to prove this story.

"Later word was received that Carbajal was at a mescal (native liquor) plant near Carrizal, 75 miles south of Tigre. Both the civil and military authorities were advised of this report. Finally the Major in charge of the District was persuaded to send a small detachment to Carrizal to investigate, with the promise by the Company of a substantial reward should Carbajal be captured. On their return the detachment reported that the man had left before they arrived."

10. Doubtless the evidence accompanying the Memorial of the United States furnishes accurate information with regard to the killing of Janes, and with regard to the preliminary steps taken looking to the apprehension of Carbajal. The evidence on this firstmentioned point is substantially the same as that given by witnesses whose statements are recorded in the record of judicial proceedings accompanying the Answer. With respect to these preliminary steps, we feel justified in reaching the conclusion that they were inefficient and dilatory. From an examination of the evidence on this point accompanying the Memorial, and more particularly from an examination of the records produced by the Mexican Government, we are constrained to reach the conclusion that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity. The grounds for such a conclusion can be shown by a brief statement of what those records reveal as to the action taken by the authorities.

11. It is shown that in the afternoon of July 10, 1918, the killing of Janes was brought to the notice of the local Judge, at El Tigre, and he appointed two men as experts to examine the body of the deceased. On the following day the Judge took the testimony of two persons employed by the El Tigre Mining Company. These men, who were not eyewitnesses of the murder, identified the corpse but gave no testimony concerning the facts of the killing. On July 12, the Judge took the statement of Guillermo A. Williams, an eyewitness of the killing. On July 13, the Judge took the statement of another eyewitness. On July 14, the statement of another eyewitness was taken.

12. On July 15, five days after the killing of Janes, when statements had been obtained from five men, the Judge, reciting that there had resulted from the proceedings up to that time sufficient merit for the prosecution of the person who killed Janes, issued an order to the *Comisario* to proceed to the capture of Carbajal.

13. On July 16, the Judge took the statement of another eyewitness to the murder. The *Comisario*, in reply to the order directing him to proceed to capture Carbajal, stated that, following immediate steps looking to the capture of Carbajal, which were unsuccessful, orders were given by means of warrants to different authorities where it was thought the accused might take refuge. On July 17, all papers in the case were forwarded by the local Judge to the Judge of First Instance of the District. The papers were received by the latter on July 22.

14. On July 30, the Judge of First Instance directed the arrest of Carbajal and on August 5, a communication in the nature of a circular was sent to the Judges of First Instance in the State of Sonora with the apparent purpose of enlisting their cooperation in the apprehension of the fugitive. This communication recited the facts with regard to the killing of Janes and the

preliminary investigations which had been conducted, and requested that the communication be returned to the Judge who transmitted it.

15. The circular was received by the Judge of First Instance at Arizpe on August 13, and by him brought to the notice of the Municipal President on August 14. On August 16, the Municipal President felt himself to be in a position to report that Carbajal was not found "in this section." The circular was evidently not received by the next Judge of First Instance on the route of transmission (the Judge at Sahuaripa) until October 14, about two months after it had reached the Judge of First Instance to whom it was originally transmitted. On October 15, it was sent to the Municipal President. On November 15, the communication was received by the Judge at Cananea and transmitted to the Municipal President on November 16. On December 3, the communication was forwarded to the Judge of First Instance at Nogales, Sonora. It thus is shown that from August 5, the date when the circular was first dispatched, until December 3, a period of about four months, the circular had reached but three judges.

16. In this manner, as shown by the record, the circular proceeded to Judges at Magdelena, Altar, Hermosillo, Ures, Guaymas, and Alamos, being received on February 12, 1919, seven months after the killing of Janes, by the Judge of First Instance at this last mentioned place. Thereupon it was returned to the Judge of First Instance at Moctezuma who had initiated its dispatch.

17. Carbajal, the person who killed Janes, was well known in the community where the killing took place. Numerous persons witnessed the deed. The slayer, after killing his victim, left on foot. There is evidence that a Mexican police magistrate was informed of the shooting within five minutes after it took place. The official records with regard to the action taken to apprehend and punish the slayer speak for themselves. Eight years have elapsed since the murder, and it does not appear from the records that Carbajal has been apprehended at this time. Our conclusions to the effect that the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes is based on the record before us consisting of evidence produced by both Governments.

18. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Sonora may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

Measure of damages for failure of apprehension and punishment

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. Opinions to this effect are to be found in the international awards in the Ruden & Company case (Moore 1655; under the Convention of December 4, 1868), in the Cotesworth & Powell case (Moore, 2053, 2082, 2085; under the Convention of December 14, 1872) and in the Bovallins and Hedlund cases (Ralston, Venezuelan Arbitrations of 1903, p. 953), separate opinions of seemingly the same tendency being expressed in the cases of De Brissot *et al.* (Moore, 2986, 2969; under the

Convention of December 5, 1885). 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.

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 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 can not 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 non-punishment 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 non-punishment 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. 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 the 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 did *not* measure up to its international duty of providing justice, because in such a case the 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.

21. It can not surprise, therefore, that both international tribunals and Governments more than once took a different view, or at least abstained from

sustaining the first view. The Commission is not aware of an international award in which the distinction has been set forth with clearness. But the Commission is aware of more than one award and governmental interposition which, in allowing or claiming damages in connection with nonpunishment of a wrongdoer, abstained from linking up the amount of these damages with the loss caused by the act of the individual. In the Glenn case (Moore 3138; under the Convention of July 4, 1868) the amount of damages was not connected with any assumption of complicity. In the Lenz case the Government of the United States, on account of nonpunishment of the culprits, only claimed "a reasonable indemnity" (March 25, 1899; Moore, Digest VI 794). In the Renton case the same Government for the same reason at the same date pleaded "gross negligence, if not complicity"—therefore leaving the assumption of complicity doubtful—and claimed a lump sum "for the murder of Renton and the failure promptly to apprehend and adequately punish the offenders," a position indicating that the Government did not consider the nonpunishment to be identical with the murder (Moore, Digest VI 794). Mr. Hyde, interpreting the policy in this respect of the Government of the United States, says: "The amount of the indemnity requested and obtained appears, at times, to have been out of proportion to the pecuniary loss sustained by the victims or their dependents *in consequence of the laches of the territorial sovereign*" (Hyde I, p. 515). And how dangerous inferences from awards which are silent on presumed complicity are is shown by the fact that, whereas the American Agency quoted the correspondence in the case of the Mexican shepherds as testimony in favor of the older doctrine, a German author quotes it as a striking example of the new one. (Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, 1917, p. 38)

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 to be 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 again 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, never were given. One reason doubtless lies in the well-known tendency of Governments (Hyde, I, p. 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 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. 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. 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 (Ralston, *Venezuelan Arbitrations of 1903*, p. 412) 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 (Ralston, *Venezuelan Arbitrations of 1903*, p. 916): "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 if 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 in which 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.

25. 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. The two delinquencies being different in their origin, character, and effect, the measure of 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 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. 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.

26. Giving careful consideration to all elements involved, the Commission holds that an amount of $12,000, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the nonapprehension and nonpunishment of the murderer of Janes.

Decision

27. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America $12,000.00 (twelve thousand dollars), without interest, on behalf of Laura May Buffington Janes, widow of Byron Everett Janes, and Elizabeth Janes, Catherine Janes, Byron E. Janes, Jr., and Addison M. Janes, their children.

Separate statement regarding damages

All members of the Commission are in entire accord with respect to the analysis of the facts of the case from which we have drawn the conclusion, as has been stated, that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer of Janes as to warrant an award of indemnity. However, I think it is advisable to indicate in a separate statement my views relative to the contentions advanced before the Commission as to the principles that should govern us in determining the amount of a pecuniary award.

The subject of the measure of damages in a claim like the instant case, involving a charge of neglect in the apprehending and punishing an offender, was discussed in briefs filed by the two Agents and in oral arguments.

The position of the Agency of the United States with reference to this question is that in such a case a State is responsible in damages sufficient to compensate the claimant for the injuries flowing from the wrongful act of the individual, and that this responsibility rests upon the offending State because by its failure to act it condones and ratifies the wrongful act, thereby making the act its own. (American Brief, p. 3.)

The position of the Mexican Agency with regard to the question at issue may be indicated by the following extract from its Brief (p. 12):

"III. In that case responsibility can only be demanded by a foreign State when negligence is so serious and so frequent as to endanger the safety of foreigners and the guaranties to which they are entitled.

"IV. This responsibility can not be heard by the Commission because it has no jurisdiction.

"V. The same act may motivate a responsibility towards the victim of the crime or its next of kin, but only in so far as it can be shown that this negligence and not the crime itself has directly caused the damage which can be ascertained in money.

"VI. The measure of damages whenever this responsibility is involved, must be exclusively ascertained with reference to the law of the place where the act took place. The Mexican laws do not recognize moral damage and therefore, even though it had been shown that the claimants in the instant claim had justified a moral damage, this can not be a matter which can be ascertained in a pecuniary way.

"VII. These moral damages in no wise can be assessed, since they are in essence exclusively punitive."

International law imposes on a nation the obligation to take appropriate steps to prevent the infliction of wrongs upon aliens and to employ prompt and effective measures to apprehend and punish persons who have committed such wrongs. There is no dispute between the two Agencies with regard to these requirements of the law. In the instant case indemnity is asked for on the ground of the neglect of authorities to take proper measures to arrest and bring to justice the person who killed Janes. The contention of the Mexican Agency advanced in this particular case, to the effect that the Commission is without power to redress by a pecuniary award an international delinquency growing out of a failure of a Government to live up to solemn obligations of this kind, I consider to be a remarkable contention, supported by no authority. It is interesting to note that it appears that this contention has been advanced in no other case among the large number of similar cases filed by both Agencies. And it is a particularly pertinent fact that numerous cases have been brought to the attention of the Commission in which the Mexican Government has alleged liability on the part of the United States in substantial amounts for the failure to apprehend and punish persons who have committed wrongful acts against Mexicans in the United States. For example, in the Diaz claim (Docket No. 293) it is stated on pages 1 and 2 of the Memorial:

"The lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, constitutes a true denial of justice, which is a justification of the right of Cataline Balderas de Diaz, the mother of the man slain, and injured by the loss of her son, to demand compensation, and she was dependent on him for a living and such injury has not been made good to her. She grounds her petition on Article I of the Convention concluded between Mexico and the United States on September 8 1923.

"Taking into account the probable life expectancy of Mauricio Diaz, the claimant estimates the damage suffered by her at $50,000.00 Mexican Gold, or the equivalent thereof in dollars."

The subject of damages is always a difficult one in international arbitrations. It seems to be clear that international tribunals can not apply rules by which to assess damages as definite as the rules by which domestic tribunals are governed in civil cases. A contention that an international tribunal such as that created by the Convention of September 8, 1923, has no power to award damages in cases like the present one prompts a consideration of the functions of international tribunals and of international practice, particularly as it is revealed by the decisions of arbitral tribunals in the disposition of claims similar to the instant case.

International controversies which diplomacy fails to solve may be settled by resort to force or by judicial methods. This Commission is charged with the judicial determination of all claims of the nationals of each Government against the other arising since July 4, 1868, excepting certain claims incident to recent revolutions in Mexico. It is the function of the Commission to pass

upon these cases in accordance with rules and principles of international law imposing like obligations on the two countries and securing rights that inure to the benefit of their respective nationals. I do not consider that this Commission is impotent to afford redress of a substantial character in cases like the present one in which there has been a failure to carry out a solemn obligation imposed by international law. This view is convincingly supported by the declarations of foreign offices in diplomatic exchanges, the writings of authorities on international law, and the rules and principles repeatedly stated and applied by international tribunals. In dealing with the question raised by the Mexican Agency in the pending case, I consider the decisions of arbitral tribunals to be of especial importance. The action taken by such tribunals reveals what I regard as sound reasoning upon which from time to time appropriate disposition of international controversies has been grounded. I deem it to be proper that weight should be attached to rules and principles that have often been formulated and applied in the light of experience, and not to reject them, unless, of course, we are convinced that they are unsound or that they have been given a wrongful application.

Rules and principles of law are not formulated in terms of pure logic. All rules are in a measure arbitrary, and the criterion of the value of any rule is the extent to which its advantages outweigh its disadvantages. 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 offenses 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 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. There are further considerations pertinent to the question of the responsibility to which a nation may be held for failure to punish crime. International law recognizes the right of a nation to intervene to protect the interests of its nationals in foreign countries, through diplomatic representations, and through instrumentalities such as those afforded by international tribunals. It seems to be clear that the recognition of this right is fundamentally

grounded on the often asserted theory that an injury to a national is an injury to the State to which the national belongs. If this theory were not sound it is difficult to perceive why the existence of this right of intervention should be recognized with regard to a limited number of persons within the territorial jurisdiction of a sovereign nation which is broadly described by Mr. Chief Justice Marshall in the opinion written by him in the case of The Exchange (7 Cranch, 116, 136) in which he said:

"The jurisdiction of the Nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

A nation has a right to insist upon the observance of obligations of international law which in a certain sense, undoubtedly qualify so far as aliens are concerned, those plenary sovereign rights which, as described by Chief Justice Marshall, a nation may exercise with regard to the persons and property of its own nationals. An alien has a right to rely upon an observance of rights which are secured to nations by international law and which inure to his benefit. Persons dependent upon him have that right, and international tribunals have the power to award redress for the disregard of such rights. These elementary principles are referred to in the extracts from Dr. Anzilloti's discussion of the responsibility of the State under international law quoted in the Mexican Agency's Brief. These extracts do not appear to support the contention of nonresponsibility advanced in the Brief. Dr. Anzilloti distinguishes between the obligations of a State to private individuals under domestic law and the responsibility of a State to another State under international law. He points out that individuals can not commit acts in contravention of international law. He argues that therefore the commission of such acts can not in itself be a violation of that law. But, of course, he does not deny, but expressly emphasizes, the duty of the State to vindicate rights that are secured by international law and that inure to the benefit of private individuals.

When questions are raised with respect to the failure to observe obligations of international law relative to punishment of wrongdoers, and when redress is sought for the delinquency growing out of such failure, the use of the term "punitive" with respect to the nature of the redress that may be afforded seems to be somewhat inapt. If the view is taken that a wrong to a national is a wrong to the State, it may perhaps be said that measures of redress for such wrongs are always in a sense punitive. But international tribunals in making pecuniary awards in cases like the present one do not appear to have considered that they were distinctly concerned in such cases as distinguished from other cases with the infliction of a penalty of what has sometimes been called "smart money". They have obviously considered that they were affording proper compensatory redress in satisfaction of wrongs.

Without any detailed discussion of the particular facts of numerous international precedents, international practice with regard to the rules and principles which have governed international tribunals in assessing damages in cases like the present one may be briefly indicated.

A single passage from the writings of a distinguished French author may be cited as illustrative of the views expressed by numerous well-known writers on international law with respect to the obligations of the law involved in a case of this character and the responsibility of a nation for their observance. Pradiér-Fodéré, in discussing this subject, says:

"En somme, les actes privés des nationaux n'engagent pas en principe la responsabilité de l'État auquel ces nationaux appartiennent, mais l'État dont le gouvernement approuve et ratifie les actes de ses ressortissants, ou qui refuse de réparer le dommage causé par un de ses sujets, de châtier lui-même le coupable, de le livrer pour être puni, devient en quelque sorte l'auteur de l'injure commise, se rend comme complice de l'offense, et autorise pleinement la partie offensée à faire remonter la responsabilité des actes offensants ou dommageables à celui qui se les est volontairement et sciemment comme appropriés." (Traité de Droit International Public, 1885, Vol. I, p. 336.)

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"Mais, d'un autre côté, la nation ou le souverain ne doit point souffrir, que les citoyens fassent injure aux sujets d'un autre État, moins encore qu'ils offensent cet État lui-même * * * parce que les nations doivent se respecter mutuellement, s'abstenir de toute offense, de toute lésion, de toute injure, en un mot de tout ce qui peut faire tort aux autres. Si un souverain, qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffre qu'ils maltraitent une nation étrangère dans son corps ou dans ses membres, il ne fait pas moins de tort à toute la nation que s'il la maltraitait lui-même * * * Cependant, comme il est impossible à l'État le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéissance, il serait injuste d'imputer à la nation ou au souverain toutes les fautes des citoyens * * * Mais si la nation ou son conducteur approuve et ratifie le fait du citoyen, elle en fait sa propre affaire; l'offensé doit alors regarder la nation comme le véritable auteur de l'injure, dont peut-être le citoyen n'a été que l'instrument. Si l'État offensé tient en sa main le coupable, il peut sans difficulté en faire justice et le punir. Si le coupable est échappé et retourné dans sa patrie, on doit demander justice à son souverain. Et puisque celui-ci ne doit point souffrir que ses sujets molestent les sujets d'autrui, ou leur fassent injure, beaucoup moins qu'ils offensent audacieusement les Puissances étrangères, il doit obliger le coupable à réparer le dommage ou l'injure, si cela se peut, ou le punir exemplairement, ou enfin, selon les circonstances, le livrer à l'État offensé pour en faire justice * * * Le Souverain qui refuse de faire réparer le dommage causé par son sujet ou de punir le coupable, ou enfin de le livrer, se rend en quelque façon complice de l'injure et en devient responsable." (Ibid. pp. 615-616 [1])

[1] Translation: In short, the private acts of citizens do not in principle bind the responsibility of the State to which these citizens belong, but the State whose government approves and ratifies the acts of its nationals, or that refuses to repair the damage caused by one of its subjects, or itself to punish the guilty person or to deliver him up for punishment, becomes in a certain measure the author of the injury committed, renders itself an accomplice to the crime, and fully justifies the offended party in placing the responsibility for the offensive or injurious acts upon the party which has, as it were, voluntarily and consciously assumed responsibility therefor.

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"But on the other hand the nation or sovereign must not allow their citizens to do injury to the subjects of another state, much less to offend that state itself * * * because nations must respect one another, refrain from doing anything that may offend, hurt, or injure, in a word anything that may wrong others. If a sovereign who should be able to hold his subjects on the paths of justice and peace should allow them to ill treat a foreign nation as a body, or in the person of its members, the injury he does to that nation is no less than if the illtreatment was at his own hands * * *. Yet, since the state, even though the best regulated, the sovereign, even though the most vigilant and absolute, can not restrain at will all the acts of a subject, or to hold him on every occasion to the most exact obedience, it would be unfair to charge the nation or the sovereign with all the misdoings of the citizen * * * But if the nation or its head

See to the same effect Vattel, *Law of Nations* (1758) Book II, pp. 161-162; Twiss, *The Law of Nations*, 2d edt. (1875), Part 2, Par. II, p. 20; Martens, *Traité de Droit International* (1883), Vol. I, p. 563.

The position heretofore taken by the two Governments, parties to the arbitration under the Convention of September 8, 1923, with respect to the issue now raised may be shown, apart from what is revealed through Memorials that have been filed with this Commission by each, by a brief reference to diplomatic correspondence of a kind that might be quoted at length with respect to varying situations. The correspondence reveals that both have in the past entertained views in harmony with those expressed by the authors above cited.

Thus, Secretary of State Fish, in an instruction of August 15, 1873, to the American Minister to Mexico, said:

"The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor." (Moore, *International Law Digest*, Vol. VI, p. 655.)

From the correspondence between Secretary of State Fish and Mr. Mariscal, Mexican Minister to the United States, concerning the murder of seven Mexican shepherds in Texas in 1873, it seems to be clear that the Mexican Government predicated its demand for substantial damages on the ground of a denial of justice growing out of the failure of American authorities to apprehend and punish the wrongdoers. In a note addressed to Mr. Fish under date of January 30, 1875, Mr. Mariscal said:

"In my opinion, it is also proved that there has been such denial of justice not only because during the two years that have elapsed the criminals have not been punished, nor have any decided measures been taken for their detection, but because the prevalence of lawlessness and the inertness or powerlessness of the authorities near the scene of the crime are plainly shown by a multitude of facts and have been recognized by the executive of the State."

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"As to the indemnity for the families of the shepherds which is likewise solicited by Lozano, he being duly authorized to do so, I think it should be fixed at twenty thousand dollars for each one; and for this there would be no lack of precedents, to which I think it now unnecessary to refer." (Foreign Relations of the United States, (1875), Part II, p. 957.)

In the *Poggioli* case before the Italian-Venezuelan Commission of 1903, the Commission considered a number of complaints on the part of the

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approves and ratifies the act of the citizen, it makes it its own act; the offended party must then regard the nation as the true principal of the injury of which the citizen perhaps was but the tool. If the offended state has in hand the offender there is no difficulty about his doing justice and punishing him. If the offender has escaped and returned to his mother country, the sovereign must be asked to do justice, and since that sovereign must not allow his subjects to molest or wrong the subjects of another sovereign and, much less, boldly offend the foreign powers, he must compel the offender to make amends for the damage or insult, if it can be done, or subject him to exemplary punishment, or, according to circumstances deliver him up to the offended state for the proper administration of justice * * *. The sovereign who should refuse to cause the damage done by his subject to be repaired or to punish the offender or surrender him is in a manner making himself an accessory to the injury and becomes responsible therefor."

claimant against the Venezuelan Government, one of them relating to the failure of Venezuelan authorities to apprehend and punish four persons who had made an attempt upon the life of the claimant in 1891. In discussing this matter, Umpire Ralston said in part:

"Reviewing the authorities, it seems to the umpire that this case differs from those cited from Moore's *Arbitrations*, in that it is sustained by the clearest proof following distinct allegations and that there has been in fact a denial of justice by the administrative authorities of the State; that the considerations herein narrated come within the language of Calvo, who finds responsibility 'in case of complicity or of manifest denial of justice.' for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the State of Los Andes, during the years in question in the language of Creasy, was 'habitually and grossly careless and disorderly in the management of its own affairs'; that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes, rendered itself 'in some measure an accomplice in the injury' and has become 'responsible for it,' and that according to Hall, the acts complained of being 'undisguisedly open and of common notoriety' and being of importance, the State 'is obviously responsible for not using proper means to repress them,' and has not inflicted 'punishment to the extent of its legal powers.' " (Ralston, *Report*, p. 869.)

In the case of *Cotesworth and Powell* under the Convention concluded between Great Britain and Colombia on December 14, 1872, there is an extended discussion in the elaborate opinion written by the Commissioners of illegal official acts resulting in damages to the claimants. But it is clear from the opinion that the responsibility of Colombia and the award of damages in this case for property losses resulting from illegal acts, in the amount of $50,000.00, were predicated, not upon the abuses of judicial authorities, but upon an amnesty by which the offending officials were relieved of liability for their wrongful acts. This is shown by the following excerpts from the opinion;

"One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress. * * *

"He (the Commissioner) places this responsibility of Colombia solely upon the consequences of the amnesty, thus adhering, as he conceives, to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts." (Moore, *International Arbitrations*, Vol. II, pp. 2082, 2085.)

Volume III of Moore's *International Arbitrations* contains the following account of the *Glenn* case under the Convention of July 4, 1868, between the United States and Mexico, decided by Sir Edward Thornton, the Umpire:

"Margaret Glenn made a claim for herself and her minor children for the murder of her husband and son, and the robbery of their bodies. This incident took place on November 1, 1858, about 2 o'clock, p. m., within two leagues of the city of Saltillo, on the road to Monterey. The murder and robbery were committed by a squad of soldiers under a sergeant and corporal. It was alleged that these persons were under the orders of a person who was a lawyer in Saltillo

and a deputy in the National Congress, but the participation of this person the umpire did not consider sufficiently proved. But the umpire found that there was a denial of justice in the failure to bring to trial those who committed the act of violence, by which means their guilt or innocence might have been established. On the ground of this lack of action on the part of the judicial authorities, the umpire made an award in favor of the claimants for $20,000 in Mexican gold" (p. 3138).

The *Piedras Negras* claims under the same Convention furnish an interesting illustration of a case in which an arbitral commission, in assessing damages because of the failure of the United States to punish a band of persons who invaded Mexico from Texas, predicated its award on the damages caused by the wrongful acts of the culprits. The Commission pointed out that authorities of the United States had made no effort to arrest the offenders, which it was stated could easily have been done, and explained that the Commission arrived at its award of $50,000.00 as stated by Dr. Moore, "by making what seemed to be just and equitable allowances to such claimants as appeared to have suffered by the burning and pillaging of the town."

In the *Davy* case before the British-Venezuela Commission of 1903, in which it seems clear that liability on the part of Venezuela was predicated on the failure to prosecute persons who had injured the claimant, the Umpire, in making an award mentioned several elements of damage of which he considered that account might properly be taken. He said in part:

"It was also the opinion of the honorable Commissioner for Venezuela that the crime was fully atoned when the guilty parties had been prosecuted and punished—a fact which he confidently believed had occurred and of which he felt sure he could give satisfactory evidence before the tribunal. It appeared that preliminary steps had been taken looking to that end, and the evidence adduced at each preliminary inquiry is a part of the testimony used in this case. These preliminary steps had given the President of Venezuela knowledge of the wrong committed, the necessity of punishment commensurate to the offense, and the names of the offenders. The Umpire has no question that the honorable Commissioner for Venezuela has been diligent in his efforts to obtain record evidence that there had been both prosecution and punishment of the guilty ones, but it has been without avail, and there is left to the respondent Government only one way to signify its regard for individual freedom, its abhorrence of such proceedings as are detailed in this case, and its desire to remove the stain which rests upon its department of criminal jurisprudence through the untoward and wicked practices of those who engaged in this conspiracy against the person and liberty of the claimant and the honor of their country. Too great regard can not be paid to the inviolability of the one and the sacred qualities of the other. The measure of damages placed upon such a crime must not be small. It must be of a degree adequate to the injury inflicted upon the claimant and the reproach thus unkindly brought upon the respondent Government. These invaded rights were in truth priceless, and no pecuniary compensation can atone for the indignities practiced upon the claimant; but a rightful award received in ready acquiescence is all that can be done to compensate the injuries, atone for the wrong, and remove the national stain." (Ralston, *Report*, p. 412).

(See also with respect to this subject of elements of damage the opinion of Ralston, Umpire, in the *Di Caro* Case, Ralston, *Report*, pp. 769-770.)

The international precedents to which reference has been made above are typical of the very considerable number cited in the American Brief. By decisions of international tribunals substantial damages have repeatedly been awarded because of the neglect of authorities to employ prompt and efficient measures to apprehend and punish offenders. No case was cited in the Mexican Government's Brief in which an award of a different kind had

been made. As has been observed above, demands for indemnities in substantial sums have been made in cases of this kind filed by both parties to this pending arbitration. I do not consider that the Commission is powerless to award damages of a substantial nature in cases of this character which often involve odious features of discrimination prompted by prejudice against aliens.

It is asserted in the Mexican Government's Brief that the measure of damages in such cases must be exclusively ascertained with reference to the law of the place where the acts underlying a claim in a given case were committed; that Mexican laws do not recognize "moral" damage and that even though it had been shown that the claimants in the instant case had justified a "moral" damage, this is a matter which can not be settled in a pecuniary way. International law is a law for the conduct of nations grounded on the general assent of the nations of the world. The law is therefore, of course, the same for all members of the family of nations. Obviously it can only be modified by the same processes by which it is formulated, namely, by general assent of the nations. It does not seem possible to conceive of a situation in which a single nation could by a municipal enactment denying a right of redress, relieve itself from making compensation for failure to observe a rule of international law.

In the light of the reasons stated above, I concur in the award requiring that the United Mexican States pay to the United States of America the sum of $12,000 (twelve thousand dollars) without interest.

Fred K. NIELSEN,
Commissioner.